Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2363

Appeal PA-040181-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the records of a completed Ontario Provincial Police (OPP) investigation relating to the requester and another individual (the affected person).

The Ministry identified sixteen pages of records, consisting of a police officer's notes and summary incident reports relating to an investigation of an alleged sexual assault by the appellant, as responsive to the request. In its decision, the Ministry granted partial access to the requested records. The Ministry stated that it was denying access to parts of the responsive information, relying on the following exemptions: section 49(a) in conjunction with section 14(2)(a) (law enforcement), section 49(b) (invasion of privacy) in conjunction with the factor in section 21(2)(f) (highly sensitive information) and the presumption in section 21(3)(b) (investigation into possible violation of law).

The Ministry denied access to information in the records about other matters on the grounds that it was not related to the request and, therefore, was non-responsive.

The requester (now the appellant) appealed part of the Ministry's decision, namely:

(a) the denial of access to the appellant's own statement(s) to OPP investigators regarding the sexual assault incident allegedly committed against a named individual;
(b) the denial of access to the reasons why the OPP closed the file; and
(c) the denial of the existence of evidence gathered during the investigation in the form of electronic recordings.

In his appeal, the appellant raised the possible application of section 23 (public interest override) of the *Act* to the disclosure of the records.

During the course of mediation, the appellant's representative clarified the request. He explained that the appellant was seeking access to a statement that he gave to the OPP during their investigation into an alleged sexual assault and any evidence that consisted of electronic recordings. The appellant also wanted to know why the OPP closed their file.

The Mediator had discussions with the Ministry, which confirmed that a statement from the appellant was never obtained. The Ministry also confirmed that no evidence with electronic recordings exists. Finally, the Ministry noted that access to all remaining records was denied pursuant to the sections of the *Act* listed in its decision letter, which I have set out above.

During mediation, the appellant accepted the Ministry's position that no statement from him to the OPP exists and that there are no electronic recordings.

The Mediator reviewed the portions of the records that the Ministry claims are non-responsive and advised the appellant's representative that in her opinion, they are in fact non-responsive. The appellant's representative accepted the Mediator's opinion and the responsiveness of these records is not at issue.

The appellant, however, told the Mediator that he wishes to pursue his request for records that would indicate why the OPP closed their file.

No further mediation was possible. In the inquiry stage of the appeal, this office first sent to the Ministry a Notice of Inquiry setting out the facts and issues in the appeal and inviting the Ministry to provide representations. The Ministry did provide representations. I provided the appellant's representative with a copy of the Notice of Inquiry and the Ministry's representations in their entirety and invited him to provide representations in response to those of the Ministry. In his representations, the appellant's representative stated that the disclosure or non-disclosure of the information in question will affect the outcome of the appellant's upcoming parole hearing. As a result, I invited the Ministry's response to this allegation and asked whether it took this consideration into account in exercising its discretion not to disclose the information. The Ministry's reply addressed this issue.

In his representations the appellant's representative made an argument that section 7 of the *Canadian Charter of Rights and Freedoms* overrides the statutory exemption in section 14(2)(a) of the *Act* in these circumstances. This argument appeared to raise a constitutional question; that is, it raises a question about the constitutional validity or applicability of legislation or claims a remedy under section 24 of the *Charter*. Section 109 of the *Courts of Justice Act* requires that notice be given to the Attorneys General of Canada and Ontario when a party raises a constitutional question. The method for doing this in inquiries under the *Act* is set out in this office's *Code of Procedure* and in a practice direction on constitutional questions. The *Code of Procedure* also requires an appellant to raise a constitutional question within 35 days after initiating the appeal.

In light of these requirements, I asked the appellant's representative to provide representations as to whether he is raising a "constitutional question", and if so whether I should consider the question at this time in light of the time limits in the *Code of Procedure*. I also advised him of the proper procedure to follow when raising a constitutional question, which involves sending a notice to this office containing certain information. I provided a deadline for response. When no response was received, staff of this office contacted the appellant's representative by telephone. He stated that he did not intend to respond to my letter.

I find that the issue raised by the appellant's representative is a "constitutional question".

Accordingly, in light of the appellant's non-compliance with the requirements of the *Courts of Justice Act* and the procedures in the *Code of Procedure* for raising constitutional questions and the absence of any explanation for this non-compliance, I decline to consider whether section 7 of the *Charter* overrides section 14(2)(a) of the *Act*.

DISCUSSION:

The records still in issue consist of an investigating officer's notes and incident summary reports, withheld in whole or in part. As indicated above, during mediation, the appellant stipulated that he was limiting the scope of the appeal to records that would indicate why the OPP closed their

file. In his representations at the inquiry stage of the appeal, the appellant's representative stated that, "At this stage, we have narrowed the original request to item (b) [in the appeal letter], 'the exclusion of the reasons why the OPP closed the file'."

The Ministry has identified sixteen pages of records as responsive to the original request. I have reviewed the records, and I find that pages 1, 3, 13, and 16 contain no information about why the OPP closed its file on the investigation of the appellant. Accordingly, these pages are no longer in issue in this appeal.

None of the remaining records contains any explicit statement by the OPP as to why it closed its file. However, pages 4 to 10, as well as pages 14 and 15, contain information that, in my view, was likely considered by the OPP in deciding whether to close its file. The Ministry's representations do not state whether the information on pages 2, 11 and 12 played a role in the OPP's decision to close its file and I cannot draw any inferences about this from the records themselves. I leave open the possibility that they could shed some light on the reasons for closing the file. The records remaining in issue, therefore, are pages 2, 4 to 12, 14 and 15.

The Ministry claims the following exemptions for these records: section 49(a) in conjunction with section 14(2)(a) (law enforcement) and section 49(b) (invasion of privacy) in conjunction with section 21(2)(f) (highly sensitive information), and section 21(3)(b) (investigation into possible violation of law).

The appellant claims that these exemptions do not apply, and in the alternative, if they do apply, there is a compelling public interest in disclosure that overrides these exemptions under section 23 of the *Act*.

I will deal below with whether the records contain the personal information of the appellant and/or the affected person.

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe,* [2002] O.J. No. 4300 (C.A.)].

The records in question contain the name, date of birth, and marital status of the appellant, what appears to be an identifying number for him, and information about his criminal history, as well as the views or opinions of another individual about the appellant. Therefore, I find that the records contain the personal information of the appellant.

On my review of the records, I find that they also contain the name, address, telephone number, sex, marital status and date of birth of the affected person, as well as that person's views or opinions about the appellant. I find, therefore, that the records contain the personal information of the affected person.

As the records contain the personal information of the appellant as well as of another individual, I will consider whether they are exempt from disclosure under section 49(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF PERSONAL PRIVACY

General principles

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 21(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 49(b) is met. Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. The list of factors under section 21(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 21(2) [Order P-99].

Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Ministry claims that the presumption in paragraph (b) of section 21(3) applies. Section 21(3)(b) states:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Even if no proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242]. Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086]

The information in the records was compiled by a law enforcement agency, the Ontario Provincial Police, as part of an investigation into a possible violation of the *Criminal Code* (the *Code*). Investigations undertaken pursuant to the *Code* are law enforcement matters that fall within section 21(3)(b). Therefore, the disclosure of the personal information to the appellant is presumed to be an unjustified invasion of the privacy of the affected person except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation. There is no evidence that disclosure is necessary for these purposes. There is evidence to the contrary, as the investigation has been closed and no charges were laid.

I find that the personal information of the affected person in the records was compiled and is identifiable as part of an investigation into a possible violation of law and does not fall within the exception in section 21(3)(b). Therefore, disclosure of the affected party's personal information would be presumed to be an unjustified invasion of the personal privacy of the affected person, unless the information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies.

I find that section 21(4) does not apply.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The Ministry claims that section 21(2)(f) applies as a factor favouring privacy protection.

In this case, I have found that the presumed unjustified invasion of privacy at section 21(3)(b) applies, and it has not been rebutted by section 21(4). Therefore, section 21(2)(f) need not be considered.

Absurd result

The appellant claims that applying the section 49(b) exemption would lead to an absurd result. The appellant's representative states:

> The other general objections [by the Ministry to disclosure] fall under the claims of privacy as asserted by the Ministry – not [an individual identified by the

> representative]. Here, we have an absurd result. We know the identity of the alleged victim. We have a one-line summary of the allegation (sexual assault). We have a rough approximation of time and place, but otherwise we lack specifics.

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

There is no evidence that the requester originally supplied the information in question, namely, the information revealing reasons the OPP closed its file, or that the requester is otherwise aware of this information. In my view, disclosure of this information would be inconsistent with the purpose of section 49(b) taking into account the sensitivity of the information. I find that non-disclosure of the information sought by the appellant would not create an absurd result.

Therefore, I find the information at issue to be exempt under section 49(b).

Public Interest Override

The appellant claims that there is a compelling public interest under section 23 that overrides the presumption of unjustified invasion of personal privacy in section 21(3)(b).

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

In his representations, the appellant's representative states among other things:

> When an issue of unfair disclosure applies to similarly situated inmates as a class, as in the particulars here, it becomes a matter of "public interest", interpreted liberally. Clearly, the integrity of the criminal justice system is being called into question, and there is no pending court proceeding through which we would ordinarily be entitled to the information.

If I understand the appellant's argument, it is that the ability of officials to adduce in evidence at his parole hearing the same information that is recorded in the records without the records being disclosed to the appellant, is unfair to him, and since this would also be possible in other parole hearings, the application of the exemptions adversely affects the ability of inmates as a class to protect their interests in parole hearings. Thus, the availability of this exemption to institutions is not merely a matter of private interest to the appellant, but is a matter of public interest.

If, indeed, the parole process were to allow the use of evidence to deny an inmate liberty without that evidence or other available evidence that contradicts it being disclosed to the inmate, that would be potentially unfair in some circumstances. Addressing this unfairness could well be a matter of public interest. However, the public interest in ensuring that the parole hearing considers all relevant evidence does not necessarily mean that there is a public interest in disclosure of these records under the *Act*.

The representations of the appellant's representative indicate that the parole hearings in question are held under the federal *Corrections and Conditional Release Act* (the *CCRA*). Section 141 of the *CCRA* provides, in part:

> (1) At least fifteen days before the day set for the review of the case of an offender, the [National Parole] Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.
>
> (4) Where the Board has reasonable grounds to believe
>
> a. that any information should not be disclosed on the grounds of public interest, or
>
> b. that its disclosure would jeopardize
>
> (i) the safety of any person,
> (ii) the security of a correctional institution, or
> (iii) the conduct of any lawful investigation,
>
> the Board may withhold from the offender as much information as is strictly necessary in order to protect the interest identified in paragraph (a) or (b).

Thus, independent of any right of access to records that an inmate may have under the *Act*, the National Parole Board has a duty under the *CCRA* to ensure disclosure to inmates of information relevant to their proceedings. If the information sought is relevant, the *CCRA* provides for its disclosure through the Board except in limited circumstances. In addition, under section 24(1) of the *CCRA*, the Correctional Service of Canada has a duty to take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible. If the Service has information in its possession that will be helpful to an inmate at a parole hearing, it has a statutory duty under s. 25(1) of the *CCRA* to make that information available to the National Parole Board. [See *Walsh v. Canada (Attorney General)* 2003 F.C. 1200, a decision provided by the appellant's representative, for a discussion of remedies for breach of these duties]. Previous orders of this office have found a compelling public interest not to exist where another public process or forum has been established to address public interest considerations. [Orders P-123/124, P-391, M-539]

I am not satisfied that failure to disclose the information sought will result in any relevant evidence being withheld at the appellant's parole hearing. If these records are relevant, the provisions of the *CCRA* provide safeguards to ensure fair treatment of the appellant in relation to the information in the records. The public interest in disclosure of these records is addressed by the provisions of the *CCRA* and therefore no such public interest arises under the *Act*. Therefore, no compelling public interest in the disclosure of the records has been shown, and I find that s. 23 does not apply.

EXERCISE OF DISCRETION

The section 49 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry provided the following representations, among others, about its exercise of discretion:

> The Ministry carefully weighed the appellant's right of access to records that contain his personal information against the affected party's rights to privacy protection. In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant should the withheld information be disclosed.
>
> …The Ministry has released a substantial portion of the requested records to the appellant.
>
> Given the highly sensitive nature of the sexual assault investigation involving the appellant, the Ministry was satisfied that release of additional information from the records at issue would cause personal distress to another identifiable individual.
>
> The Ministry considered whether the release of the confidential information provided by individuals other than the appellant could generally discourage members of the public from reporting potential violations of law to the police… .

In response, the appellant's representative points out certain facts on page 2 of his letter, including the statement that, "We know the identity of the alleged victim". He then states:

> Based on the above knowledge, the information in question cannot be "highly sensitive" because there is no evidence in the record that it would cause

> "excessive personal distress" or that it is an "unjustified invasion" of [a named individual's] privacy. Here, the Ministry simply failed to exercise its discretion to properly "weigh" the balance between disclosure to an inmate facing a parole hearing and the privacy of the known subject [the named individual]. More egregious, the Ministry simply ignored [the appellant's] liberty interests under the Charter of Rights and Freedoms.

As a result of the representations of the appellant's representative, I asked the Ministry to address the question of whether non-disclosure of the information might affect the appellant's parole hearing, and, if so, whether the Ministry had considered this in exercising its discretion.

The Ministry replied, in part:

> The Ministry has taken into consideration the appellant's belief that access to the exempt information is necessary for the purposes of his January 2005 NPB hearing. The Ministry has considered releasing the exempt information to the appellant in view of this circumstance. However, the Ministry is also cognizant that section 141 of the CCRA provides that the NPB is normally required to disclose information considered as part of its review.

I am satisfied that the Ministry took into account the appellant's upcoming parole hearing.

I have considered the fact that the Ministry did not seek the views of the affected person as to whether the affected person's personal information should be disclosed before exercising its discretion against disclosure. In my view, the wishes of an affected person will often be a relevant consideration in determining whether to apply the section 49(b) exemption. However, I am satisfied that in this case it was reasonable for the Ministry to exercise its discretion against disclosure without first canvassing the views of the affected person, taking into account the representations of the Ministry and the contents of the records themselves, particularly the information on page 14 of the records.

I am satisfied that the Ministry has exercised its discretion properly.

ORDER:

I uphold the decision of the Ministry.

Original Signed By: January 24, 2005
John Swaigen
Adjudicator