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

ORDER PO-2395

Appeal PA-040133-1

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 access to the correctional and probation file of a named individual. The Ministry located the responsive records and granted partial access to the records. The requester is the father of three children whose mother is now the partner of the named individual. In his request, he cites his concern for the "safety and security" of his children.

The Ministry denied access to part of the responsive information under sections 14(2)(d) (correctional record), 19 (solicitor-client privilege), 21(1) in conjunction with 21(2)(f), 21(2)(h), 21(3) and 49(b) (invasion of privacy), and 49(a) (discretion to refuse requester's own information) of the *Act*. The Ministry also denied some of the information on the grounds that it was not responsive to the request.

The requester, now the appellant, appealed the Ministry's decision.

During mediation of the appeal, the Ministry specified that the portion of the records that it had withheld as non-responsive pertained only to the processing of the request. The appellant agreed to withdraw his appeal with respect to the non-responsive information. Also during mediation, the appellant confirmed that that he had received the document "Reasons for Sentence" and agreed to withdraw his appeal with respect to this document.

Further mediation was not possible and the appeal was moved forward to the adjudication stage, in which the adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the Ministry. The Ministry responded with representations. I then sent a copy of the Notice of Inquiry to the appellant, enclosing a copy of the Ministry's representations in their entirety. The appellant also provided representations, which consist of twelve faxed letters (some of which are copies of correspondence addressed to others) which I received at various times during the inquiry.

RECORDS:

There are 87 pages of records at issue in this appeal. Pages 1-21 comprise a single record and consist of the named individual's probation case notes. Pages 22-87 consist of other records from the named individual's probation file, including the named individual's Referral Intake for Probation, his Probation Order, the Ministry's risk/need assessment, the named individual's pre-sentence report, the Crown brief synopsis, other materials from the prosecution of the named individual including character references, and other correspondence and records relating to the named individual's probation.

The Ministry claims that all of the undisclosed parts of the records are exempt under section 14(2)(d) (correctional records), either on its own or in conjunction with section 49(a). The Ministry also claims that all of the undisclosed parts of the records are exempt under either section 21(1) or 49(b) (invasion of privacy). In addition, the Ministry claims that the following records or parts are exempt under section 19 (solicitor-client privilege): page 7, 1st entry; page 8, 2nd entry; page 9, 4th entry; page 10, 1st entry; page 13, 4th entry; pages 38, 39, 40 and 41 (Crown

Brief Synopsis); page 52, email to the Crown; page 55, 3rd paragraph, 1st sentence; page 61, email to the Crown; page 65, email to the Crown; page 70.

DISCUSSION:

PERSONAL INFORMATION

Under the *Act*, different sections may apply depending on whether a record at issue contains or does not contain the personal information of the requester (in this case, the appellant) [see Order M-352]. Where records contain the appellant's own information, access to the records is addressed under Part III of the *Act*, and the exemptions found in section 49 may apply. In this case, the Ministry relies on sections 49(a) and (b). On the other hand, where records do not contain the appellant's personal information, access is addressed under Part II of the *Act*, and in this case, the Ministry relies on sections 14(2)(d), 19 and 21(1).

In order to decide this appeal, it is therefore necessary to begin by determining whether the records contain personal information, and if so, to whom it relates.

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the race, age, sex, marital or family status of the individual [paragraph (a)], to the education or the medical psychiatric, psychological, or criminal history of the individual [paragraph (b)], any identifying number symbol or other particular assigned to the individual [paragraph (c)], the address or telephone number of the individual [paragraph (d)], the personal opinions or views of the individual except where they relate to another individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)], and 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 [paragraph (h)].

The Ministry submits:

> [T]he information remaining at issue contains the types of personal information listed above with respect to the appellant, the named offender and other identifiable individuals.

The appellant's representations appear to confuse the definition of personal information with an exemption from disclosure, referring to the "recorded information about *'an identifiable individual'* exclusion", which he suggests is overbroad, and he questions why this should form the basis of non-disclosure of information about him. In fact, the "personal information" determination is a preliminary matter that determines which exemptions might be considered under the circumstances.

Based on my review of the records at issue, I find that because they relate to the supervision of the named individual's probation they generally comprise that individual's personal information.

The records also contain personal information about other identifiable individuals with whom the named individual has come into contact. This personal information includes such things as:

- Names
- Addresses
- Telephone numbers
- Personal opinions and views
- Information related to criminal histories.

I also find that portions of the records contain the appellant's personal information. This applies to the case notes (pages 1-21), as well as the records comprising pages 86 and 87.

Accordingly, section 49(a) (in conjunction with section 14(2)(d) and, where claimed, section 19), and section 49(b), may apply to the undisclosed parts of pages 1-21, 86 and 87.

Sections 21(1) and 14(2)(d) may apply to pages 22-85, and section 19 may apply to the parts of those pages for which it has been claimed.

DISCRETION TO DENY ACCESS TO REQUESTER'S OWN INFORMATION /CORRECTIONAL RECORD

Section 47(1) 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.

Section 49(a) of the *Act* states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

In this case, the Ministry relies on section 14(2)(d), either on its own, or in conjunction with section 49(a), for all of the undisclosed information.

If section 14(2)(d) would apply to records that contain the personal information of the appellant, or to portions of those records, the Ministry has the discretion to deny access to the information under section 49(a) in conjunction with section 14(2)(d). If section 14(2)(d) applies to records that do not contain the personal information of the appellant, or to portions of those records, the Ministry has the discretion to deny access to the exempt information under section 14(2)(d).

Accordingly, I must determine whether section 14(2)(d) applies to all of the records. This section states:

A head may refuse to disclose a record,

> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

In Order P-460, Adjudicator Holly Big Canoe commented on the interpretation of section 14(2)(d):

> In Order 98, former Commissioner Sidney B. Linden considered the interpretation of section 14(2)(d) as follows:
>
> > In my view, the purpose of subsection 14(2)(d) is to allow an **appropriate level of security** with respect to the records of individuals in custody. [emphasis added]
>
> I agree with former Commissioner Linden. At its broadest, the wording of section 14(2)(d) could be interpreted to deny an individual in custody access to virtually all of his or her own personal information. In my view, the overall purposes of the *Act* should be considered in interpreting this exemption. Section 1(a) of the *Act* provides the right of access to information under the control of institutions in accordance with the principle that information should be available to the public and that necessary exemptions from this general right of access should be limited and specific. When an individual is seeking access to his or her own personal information, this principle is particularly important.

In its representations, the Ministry describes its role with respect to individuals who are on probation:

> The Ministry is responsible for the supervision of adults in Ontario who have been convicted of an offence and are subsequently placed on probation. Probation services are delivered by staff working out of approximately 125 Ministry Probation and Parole Offices.
>
> Adult probation is a court disposition that authorizes an offender to remain at large in the community subject to conditions prescribed in a probation order. Section 731(1) of the *Criminal Code* provides the authority for courts to place convicted offenders on probation. In this regard, section 731(1) states:
>
> > Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

> (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
>
> (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

Section 732(2) of the *Criminal Code* outlines the standard (e.g. keep the peace and be of good behaviour) and additional (e.g. report to a probation officer) conditions that a court may prescribe in a probation order.

The responsibilities of Ministry Probation and Parole Officers include preparing reports for courts and other correctional decision makers; enforcing the conditions of probation orders; and comprehensively assessing offenders to determine effective case management and rehabilitative interventions.

Addressing specifically the application of the discretionary exemption at section 14(2)(d), the Ministry submits:

> The Ministry is a correctional authority for the purposes of section 14(2)(d). The named individual whose probation case file has been requested by the appellant is an offender being supervised by a Ministry Probation and Parole Officer. The Ministry submits that the record at issue contains information about the history and supervision of this individual.
>
> > The Ministry notes that probation and parole records were included among the records at issue in the appeal that was resolved by the issuing of Order PO-1935. In the circumstances of that appeal, Adjudicator Donald Hale concluded that the exemption provided by section 14(2)(d) applied to a probation and parole record.
>
> …
>
> The Ministry submits that the information at issue in its entirety contains information about the history and supervision of the offender named in the appellant's … request. The Ministry refers to the content of the probation case file in this regard.

The appellant's representations in this matter indicate a strong concern for the safety of his children. He also criticizes, among others, Canada's criminal justice system and the Ministry for

not, in his view, paying enough attention to child protection concerns. In an earlier letter to this office that was provided to me at the appellant's request, the appellant states that the records at issue "*appear to be exactly what one would need in order to demonstrate the seriousness of an offender's past actions, his cooperation with probation, and his compliance with the Judge's severe and sweeping court order*". [emphasis in original]

The following additional statements appear at various points in his representations:

> I can't help reminding you and the Ministry that my vulnerable children's safety, security and survival seem more important than [the named individual]'s right to privacy]. Surely the facts of his situation should be made more easily transferable to impartial and responsible hands.
>
> No mention of child safety in the Ministry of Community Safety and Correctional Services response to my concerns. It was entirely directed to a wife batterer's need of privacy and protection! …
>
> [The] Ministry of Community Safety and Correctional Services should have an overriding duty to disclose a convicted batterer's Ministry file if responsible and informed potential child endangerment issues are raised by a knowledgeable and concerned parent. Efforts to sidestep this duty should be recognized as compounding systemic contributors to ever increasing family violence. …
>
> The Ministry, in its zeal to protect a probationer's rights, seems to have forgotten that he attacked a helpless young woman with a butcher knife in the presence of young children! …
>
> Any suggestion that I would like proof of the offender's compliance with the court orders, the Probation and Parole Officer's direction, medical or other treatment is treated as an unwarranted intrusion into his personal affairs. … There is no mention of their probationer's proven dangerousness nor the children's vulnerability, just the unending rules that shelter him and the Ministry from personal and institutional responsibility. There is absolutely no proof that the felon's Probation and Parole Officer has "*enforced the probation orders and comprehensively assessed the offender to determine effective case management and rehabilitative interventions*"….
>
> Section 14(2)(d) … seemingly asserts that any request for information about a probationer's Probation and Parole Officer's assessment and supervision is beyond public scrutiny. Absolutely amazing!
>
> Adjudicator Donald Hale's Order PO-1935 suggests a spurious comparison of circumstances without greater explanation being offered….

> Obviously, medical, psychiatric and psychological information should be accessible in cases like this, but only to be reviewed by trusted, knowledgeable, competent, outside authority acceptable to the appellant. *In matters of spouse and spouse child battery the Ministry should have no exclusive right to this authority*. …
>
> The Ministry has made absolutely no effort to address my need to receive the information at issue and should derive no solace from my efforts to involve the child protection authorities. [emphsases in originals]

The appellant also refers to court proceedings, specifically an appeal from a lower court decision in which he seeks to keep the children away from the named individual. In that regard, he has provided me with an extract from the Family Law rules. The appellant refers to section 20(3) of the rules, which pertain to child protection proceedings. I am not aware of such proceedings taking place with respect to the appellant's children. However, in other family law litigation, these rules provide for obtaining information from "any other party" (section 20(4)), or from a non-party (section 20(5)). The appellant seeks access to the probation information under the *Act* rather than using the family law rules, which he describes as "futile", and "obviously a complex, costly, unworkable process to obtain information about a convicted wife-batterer's compliance with court ordered treatment and compliance with other orders."

The appellant's genuine concern for the safety and well-being of his children is evident. Unfortunately, most of his representations do not address the central focus of my inquiry, namely, whether the requirements for applying section 14(2)(d), or the other exemptions claimed by the Ministry, are present in this case. One of the submissions I have reproduced above does directly reference section 14(2)(d), namely the statement that Order PO-1935 "suggests a spurious comparison of circumstances". In my view, Order PO-1935 appropriately provides a brief analysis in support of its conclusion that section 14(2)(d) applies to a computer printout that "… contains information about the supervision of the appellant by the Ministry's probation and parole staff."

In order for records to qualify for exemption under section 14(2)(d), they must contain information about the history, supervision or release of a person under the control or supervision of a correctional authority. I have carefully reviewed the information for which the Ministry has claimed section 14(2)(d), either on its own, or in conjunction with section 49(a).

I find that the records at issue relate directly to the named individual who is currently on probation and who is required to report regularly to a probation officer employed by the Ministry. The records consist of detailed information about this individual's supervision by Ministry probation staff. Many are case notes that contain information recorded after meetings between Ministry staff and the individual, or other individuals who have had contact with him, that describe and discuss matters related to the individual's supervision. The other records also pertain to the Ministry's supervision of this individual. Clearly, given the Ministry's mandate as described in its representations, the Ministry is a correctional authority. Accordingly, subject to a small number of exceptions, explained in more detail below, I find that these records contain

information about the history and supervision of a person under the supervision of a correctional authority, and meet the requirements of section 14(2)(d).

I therefore find that, subject to the exceptions set out below, the undisclosed portions of pages 1-21 inclusive, and of pages 86 and 87, are exempt under section 49(a) in conjunction with section 14(2)(d), and the undisclosed portions of the remaining pages are exempt under section 14(2)(d).

Exceptions to the Finding: Information that is Not Exempt/Absurd Result

Page 15 contains a phrase in parentheses that relates entirely to the appellant and does not describe anything about the supervision of the named individual. I find that this phrase does not qualify for exemption under section 14(2)(d) and is not exempt under section 49(a) on that basis. As regards the other exemptions claimed by the Ministry, this phrase contains the personal information of the appellant *only* and therefore could not be exempt under section 21(1) or 49(b) as an unjustified invasion of someone else's privacy, and the Ministry does not claim section 19 for this information. As none of the claimed exemptions applies, I will order this phrase disclosed.

Similarly, part of the final paragraph on page 86 contains information that does not relate to the supervision of the named individual by the Ministry, and I also find that this part of the final paragraph on page 86 is not exempt under section 49(a) in conjunction with section 14(2)(d). Like the information on page 15, section 19 is also not claimed for the final paragraph of page 86.

However, this passage from the final paragraph on page 86 contains the name of another individual, which raises the question of whether the name would be exempt under section 49(b) as an unjustified invasion of that individual's privacy. Page 86 is an e-mail that pertains to conversations between Ministry staff and the appellant, and the passage in question refers to the appellant's relationship with the other individual. Similarly, the names of other individuals, in the context of communications between the appellant and the Ministry, have been severed from the remainder of page 86, as well as pages 15, 16, 17, 20 and 87, and in addition to sections 49(a)/14(2)(d), this information could also be exempt under section 49(b). Section 19 is not claimed for this information.

In the circumstances of this appeal, I have decided that it would be an "absurd result" to refuse to disclose the names of these individuals. The appellant originally supplied this information, or is well aware of it, and previous orders indicate that in this situation, 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 same analysis applies where this information would otherwise be exempt under section 49(a) in conjunction with section 14(2)(d).

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 principle 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].

In my view, disclosure of this information is not inconsistent with the purposes of these exemptions in the circumstances of this appeal. Based on the absurd result principle, I find that certain individuals' names on pages 15, 16, 17, 20, 86 and 87 are not exempt under either section 49(b), nor under section 49(a) in conjunction with section 14(2)(d). As no other exemptions apply, I will order disclosure of this information.

EXERCISE OF DISCRETION

General Principles

The exemptions in sections 49(a) and 14(2)(d) are discretionary and permit the Ministry to disclose information, despite the fact that it could withhold it. The Ministry is required to exercise its discretion. This office may find that the Ministry 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

If any of these circumstances are present, the matter may be sent 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)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted consideration may be relevant [Orders P-344, MO-1573]:

- The purpose of the *Act*, including the principles that

  - Information should be available to the public;
  - Individuals should have a right of access to their own personal information
  - Exemptions from the right of access should be limited and specific
  - The privacy of individuals should be protected

- The wording of the exemption and the interest it seeks to protect
- Whether the requester is seeking his or her own personal information
- Whether the requester has a sympathetic or compelling need to receive the information
- Whether the requester is an individual or an organization
- The relationship between the requester and any affected persons
- Whether disclosure will increase public confidence in the operation of the institution
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- The age of the information
- The historic practice of the institution with respect to similar information

The Ministry submits:

> Section 47(1) of the [*Act*] gives individuals a general right of access to personal information about themselves that is in the custody or under the control of an Ontario Government ministry or agency. This right, however, is not absolute. The Ministry considers each and every access request on an individual basis.
>
> The Ministry applied the discretionary exemptions contained in sections 14(2)(d), 19, 49(a) and 49(b) to the withheld information. The Ministry took into consideration the fact that the appellant was requesting access to a record that contains his own personal information. The Ministry considered releasing the withheld information to the appellant, notwithstanding that discretionary exemptions from disclosure apply to the information remaining at issue.
>
> With reference to sections 49(a) and 14(2)(d), the undisclosed parts of the probation case file contain information about the history and supervision of a named offender. The Ministry carefully considered the possibility that release of such information in the circumstances of the appellant's request could hamper the ability of the responsible Probation and Parole Officer to carry out his supervision responsibilities in relation to the named offender.

…

> The Ministry is aware that the appellant is of the view that he has a compelling need to receive the information at issue. The Ministry took this circumstance into account. The Ministry also took into consideration the fact that the appellant has brought his concerns for the well being of his children to the attention of appropriate child protection authorities.
>
> In view of the particular circumstances of the appellant's request, the Ministry in its exercise of discretion concluded that it would be inappropriate to release the information remaining at issue to the appellant.

Other than commenting that the Ministry should take no solace from his efforts to involve child protection authorities, the appellant makes no specific submissions on the exercise of discretion. I have generally considered his comments and submissions in evaluating the Ministry's representations on this issue.

I accept that the Ministry considered the circumstances surrounding the request and the purposes of the *Act* in choosing to exercise its discretion not to disclose the information at issue. In my view, the Ministry considered relevant factors and did not consider irrelevant ones. Accordingly, I am satisfied that in the circumstances of this appeal, the Ministry has exercised its discretion property in the application of sections 14(2)(d) and 49(a) and would not disturb it on appeal.

OTHER ISSUES:

As discussed earlier in this order, the appellant's submissions are concerned with the protection of his children and his view that the criminal justice and correctional systems do not deal adequately with child protection issues. As I have already noted, the main thrust of these submissions does not directly address sections 49(a) and 14(2)(d). However, seeking to properly address the appellant's concerns within the context of the *Act*, I observe that they suggest the possible application of the "public interest override" at section 23 of the *Act*, despite the fact that the appellant does not expressly refer to it.

Section 23 indicates that where a compelling public interest in disclosure clearly outweighs the purpose of certain exemptions, including section 14, the exemption does not apply. Section 23 does not usually apply to purely private matters, and despite the public interest in the well-being of children, I am not satisfied that the interest under discussion in this case is of a "public" nature. The public interest in the well-being of children in this case is protected by the Ministry, in its role as a correctional authority, and by the courts. This case involves private litigation between the requester and his former spouse. I find that the appellant's interest in disclosure is of a private nature.

Even if I found the "interest" to be of a public nature, I would not apply the public interest override based on the evidence before me. The appellant's representations suggest that he wants the information to evaluate the named individual's "compliance with the court orders, the Probation and Parole officer's direction…". But the appellant does not specify how he would use the withheld information to accomplish the objective of protecting his children, nor is this apparent to me from reviewing the records. I also note that the appellant has emphatically stated his concerns about the named individual to the Ministry, the very correctional authority responsible for that individual's supervision. As already stated, the Ministry, as a correctional authority, exists to protect the public interest. In addition, it is significant in my view that although the appellant is already engaged in proceedings aimed at keeping the named offender away from his children, he chooses not to use the access mechanisms in the Family Law rules to obtain relevant information in that regard.

I find that section 23 does not apply.

ORDER:

1. I order the Ministry to disclose portions of pages 15, 16, 17, 20 and 86, and page 87 in its entirety, to the appellant by sending a copy to the appellant on or before **June 17, 2005**. I have enclosed, with the Ministry's copy of this order, a highlighted copy of the pages that are being partly withheld. The highlighted portions are **not** to be disclosed.

2. I uphold the Ministry's decision not to disclose the remaining records or portions of records not covered by provision 1.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the Records disclosed to the appellant in accordance with provision 1.

Original signed by: May 26, 2005
John Higgins
Senior Adjudicator