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

INTERIM ORDER PO-2561- I

Appeal PA-050192-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

This appeal concerns a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the Ministry) for access to a letter dated September 24, 2003 to a named probation officer who was, at the time of the request, the probation officer for the requester's former spouse.

In this order, I will refer to the author of the letter as affected person # 1 and the requester's former spouse as affected person # 2.

By way of background, the requester and the affected parties are members of an identified Church (the Church). In or about 2003 affected person #2 was convicted of assaulting the requester. Affected person #2 was placed on probation with restrictions on contact with the requester and travel outside Ontario. When both the requester and affected person #2 expressed a desire to attend an out of province Church function (the Church function), affected person #2 communicated with affected person #1 regarding plans and precautions to ensure the requester's safety before deciding on whether to permit affected person #2 to attend. The September 24th letter was written by affected person #1 in response to the probation officer's query.

The Ministry notified affected person #1 after determining that disclosure of the responsive record could affect his interests. This affected person responded and indicated that he did not consent to the disclosure of the information at issue. The Ministry elected not to notify affected person #2.

Subsequently, the Ministry issued a decision in which it denied access to the responsive record, pursuant to section 49(b) (discretion to refuse requester's own information), read in conjunction with section 21(1) (personal privacy), and section 49(e) (correctional records) of the *Act*. In support of its section 49(b)/21(1) exemption claim, the Ministry cited the application of the criteria in section 21(2)(f) (highly sensitive) and 21(2)(h) (supplied in confidence).

The requester (now the appellant) appealed the Ministry's decision to deny access.

The parties were unable to resolve the appeal during mediation and the file was transferred to me to conduct an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the Ministry and the two affected parties. The Ministry and the two affected parties submitted representations in response. The Ministry agreed to share its representations with the appellant in their entirety. The affected parties requested that their representations not be shared with the appellant due to confidentiality concerns.

I then sought representations from the appellant. I included the Notice of Inquiry and a complete copy of the Ministry's representations. The affected parties' representations were withheld as a result of confidentiality concerns. The appellant submitted representations in response and asked that portions of her representations not be shared, also owing to confidentiality considerations.

I then shared the appellant's non-confidential representations with the Ministry and the affected parties and sought and received reply representations from them.

RECORDS:

There is one record at issue, consisting of a one-page letter dated September 24, 2003 (the record).

DISCUSSION:

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,
>
> …
>
> (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; [Emphases added.]

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, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

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.)].

On a careful review of the record, I am satisfied that it contains the personal information of the appellant and affected person #2. In particular, the record contains the appellant's name and a considerable amount of other personal information about her, and it also contains information relating to affected person #2's marital relationship with the appellant.

Regarding affected person # 1, the Ministry argues that the tone and substance of the appellant's request confirm that this matter is "highly sensitive and inherently personal to all three involved parties." The representations submitted by affected person #1 also point to the personal nature of the information in the record to that individual. However, owing to confidentiality concerns expressed by affected person #1, I have chosen to not reference affected person #1's representations in this order. On the other hand, the appellant submits that the record does not contain affected person #1's personal information since it was written in his "official capacity as Elder of the [Church]."

Past decisions of this office have found that even where an affected person's information is about them professionally, where that person's conduct has been called into question, the information about them will be considered to be personal in nature (see, for example, my decisions in MO-1563 and PO-2340).

Having carefully considered all of the evidence, including the parties' representations and the contents of the record, I find that the circumstances in this case do not support a conclusion that the information about affected person #1 in the record as his personal information, for the following reasons.

First, the information about affected person #1 is very limited, comprised of his name, title and signature. Second, it is clear that affected person #1 authored the record in his professional or official capacity as Elder of the Church with full knowledge that he was doing so in that role and that it would be used and relied on by the probation officer. While changed circumstances may also change the character of information about an individual from professional to personal, I do not believe this is such a case. The record consists primarily of affected person # 1's opinions concerning the appellant, which is her personal information *only* (see sections (e) and (g) of the definition of "personal information, above). To a very minor extent, it also includes information about affected person # 2. Affected person #1's identity as the author of the letter, and his professional title and signature, have no bearing on the alleged sensitivity of the record, which affected person # 1 originally purported to sign in his professional or official capacity.

In the circumstances of this appeal, I am not persuaded that the record reveals anything personal about affected person # 1. Accordingly, I find that the record does not contain personal information about affected person #1.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

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.

Section 49(e)

The Ministry seeks to apply the section 49(e) discretionary exemption to the record at issue.

Section 49(e) reads:

> A head may refuse to disclose to the individual to whom the personal information relates personal information,
>
> > that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence

For section 49(e) to apply, the institution must demonstrate that disclosure of the information "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The term "correctional record" is not defined in the *Act*.

The *Oxford Concise Dictionary*, 7th edition, defines "correction" as including "punishment".

Webster's Third New International Dictionary defines "correction" as "the treatment of offenders through a program involving penal custody, parole, and probation".

Black's Law Dictionary, 8th edition, similarly defines "correction" as "the punishment and treatment of a criminal offender through a program of imprisonment, parole, and probation".

Webster's also defines "correct" as "to rebuke or punish or discipline for some fault or lapse" and defines "correctional" as "of or relating to correction; esp: dealing with or charged with the administration of corrections".

Commenting on these definitions, Adjudicator John Swaigen made the following statement in Order PO-2456:

> These definitions have in common that they relate to punishment or rehabilitation after a person has been found guilty of or otherwise responsible for an offence or wrong-doing.

Parties' representations

The Ministry states that the record was prepared by affected person #1 and sent to affected person #2's probation officer in response to a query made by the probation officer regarding the Church function that both the appellant and affected person #2 wished to attend. The Ministry submits that the record was prepared and submitted for the purpose of enabling the probation officer to discharge his "correctional supervision responsibilities" in regard to affected person #2.

The Ministry states that between August 12, 2003 and August 11, 2004 the probation officer supervised affected party #2 as a result of a conviction for assault on the appellant by affected person #2. The Ministry submits that one of the conditions of affected person #2's probation was that he remains in Ontario unless he obtains written permission from the court or his probation officer to leave the province. Another condition was that he not knowingly approach or remain within 50 metres of the appellant except when attending public worship. The Ministry states that affected person #2 approached the probation officer for permission to attend the Church function. The Ministry states that the probation officer then sent a letter to affected person #1 seeking assurances that plans and precautions were in place to ensure the safety of the appellant during the Church function. The Ministry submits that discussions between the probation officer and affected person #1 ensued, after which affected person #1 prepared and delivered the letter to the probation officer that is the focus of this appeal.

The Ministry states that the record was located in the Probation and Parole Office probation case file of affected person #2. The Ministry considers the case file, in its entirety, to be a "correctional record" within section 49(e).

The Ministry submits that the information contained in the record was provided in confidence by affected person #1 to the probation officer as a result of inquiries undertaken by the probation officer relating directly to the supervision of affected person #2.

In support of its position that the record at issue is exempt under section 49(e), the Ministry also makes reference to Orders P-64 and P-748.

The appellant's representations do not directly address the application of section 49(e). She does address related issues, including her interpretation of events surrounding the creation of the record, the manner in which affected person #2 obtained permission to attend the Church function, and her decision to not attend the function. However, the appellant had asked that I not share these portions of her representations, which are confidential, and I will therefore not provide further detail concerning them.

The appellant states that she needs the record to help restore her reputation within her community. She states that not having a copy of the record has continued to cause her severe mental anguish and stress with a resulting adverse impact on her reputation.

Analysis and findings

The Ministry has made reference to Order P-748 in support of its position that the records at issue qualify for exemption under section 49(e). In that case, Adjudicator Anita Fineberg examined the application of section 49(e) to information contained in a case file maintained by an appellant's probation and parole officers for the period during which the appellant was on probation and was required to report to a probation and parole officer. She found as follows:

> A review of the record indicates that the information withheld from the appellant consists of information received in confidence from other parties by Ministry employees (the probation and parole officers) who supervised the appellant during his probation. The record was thus created during the Ministry's discharge of its responsibilities described above.
>
> Having considered the nature of the record and the Ministry's representations with respect to the circumstances of the receipt of the information, I am satisfied that the personal information is a correctional record. I am also of the view that disclosure of this record could reasonably be expected to reveal information that was supplied to the Ministry in confidence. Accordingly, I find that the record at issue in this appeal qualifies for exemption under section 49(e) of the *Act* and should not be disclosed.

In applying section 49(e), past decisions of this office have not distinguished between correctional records that were created and maintained by the Ministry and those that were maintained by the Ministry but created by another source, which is the case in this appeal. In my view, to meet the section 49(e) test the record must meet the definition of "correctional record" and have been supplied to the Ministry in confidence. However, the record need not have been created by the Ministry.

In Order PO-2334, Adjudicator Frank Devries applied the section 49(e) exemption to correction records maintained by the Ministry's probation and parole staff relating to the supervision of the requester's parole, including records created by the Ministry and those "supplied to the Ministry's staff in confidence from a number of sources" but maintained by the Ministry.

In my recent Order PO-2462, I also found that section 49(e) applied to several probation records, including records created by the Ministry and others that had been supplied by other sources. I concluded that section 49(e) applied to these records, with the exception of records I considered to be "purely stand-alone administrative records", finding that disclosure of these records could reasonably be expected to reveal information that was supplied to the Ministry in confidence.

I find that the approach and analysis followed in Orders P-748, PO-2334 and PO-2462 applies to the record at issue in this case. I am satisfied that this record was created and supplied in confidence to affected person #2's probation officer in response to his request for information from affected person #1. I am also satisfied that the probation officer made this request and received the record in the course of performing his correctional role as a probation officer and discharging his supervisory responsibilities in relation to affected person #2. Accordingly, I find the record exempt pursuant to section 49(e), subject to the analysis set out below of the absurd result principle and the Ministry's exercise of discretion in applying this exemption in the circumstances of this case.

Having found that the section 49(e) exemption applies in the circumstances of this case, I do not need to consider the application of section 49(b).

Absurd result principle

The appellant asserts in both her original request and her representations that the record that is the subject of this appeal was read to her over the phone by the probation officer for affected person #2. This allegation raises the possible application of the absurd result principle.

Where a requester originally supplied the information at issue or is otherwise aware of it, the information may be found not exempt under the *Act*, because to find otherwise would be absurd and inconsistent with the purpose of the exemption applied by the institution [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]
- the requester was present when the information was provided to the institution [Orders M-444, 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 within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

As indicated above, the appellant takes the position that the probation officer read the record to her during a telephone conversation on November 26, 2003. The appellant states that at that time she asked for and was denied a copy of it.

In reply, the Ministry states that the "probation officer's case notes from this date do not indicate that the letter was read to [the appellant]."

While I acknowledge the appellant's position, there is nothing in her request or representations, other than her word, that leads me to conclude with some measure of certainty that the contents of the record was shared with the appellant. In the particular circumstances of this appeal, without some corroborating evidence, I am not satisfied that the contents of the record at issue are clearly within the appellant's knowledge. Accordingly, I find that the absurd result principle does not apply in the circumstances of this case.

Exercise of discretion

The section 49(e) exemption is discretionary, and permits 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)].

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

- the purposes 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 interests 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

In regard to this issue, the Ministry states that the record contains information about the history and supervision of affected person #2. The Ministry states that in deciding to withhold the entire record from the appellant it took into consideration the relationship between the appellant, affected person #1 and affected person #2. The Ministry adds that it is "aware that the appellant, a victim, appears to be of the view that she has a compelling need to receive the information at issue". The Ministry submits that it took this circumstance into account in exercising its discretion. The Ministry concludes that "in view of the particular circumstances of the appellant's request, [it] in its exercise of discretion concluded that it would be inappropriate to release the requested letter to the appellant."

The appellant does not directly address the Ministry's exercise of discretion in her representations. The appellant states that the record contains her personal information and to some extent information relating to her relationship with affected person #2. The appellant submits that not having this record has continued to cause her stress and harm to her reputation. She feels that this record is crucial to her efforts to restore her reputation.

Turning to my analysis, the record at issue contains predominantly the appellant's personal information and minimal personal information about affected person #2. The personal information about affected person #2 is incidental to the information about the appellant and is known to the appellant. In addition, I have found above that the record does not contain affected person #1's personal information. Therefore, in my view, the Ministry has placed too much weight on the relationship between the appellant and the affected parties and insufficient weight on the fact that the appellant seeks access to a record that, for the most part, contains her own personal information. In addition, the record does not speak directly to the probation officer's supervision of affected party # 2, and so I fail to see what corrections purpose would be served by withholding this record from the appellant. This raises the question of why the discretionary exemption in section 49(e), which addresses that interest, should be relied on in this case.

Accordingly, I am sending this matter back to the Ministry for a re-exercise of discretion based on proper considerations.

ORDER:

1. I order the Ministry to re-exercise its discretion with regard to the record that I have found exempt under section 49(e), and to advise the appellant and myself of the result of this re-exercise of discretion, in writing. If the Ministry continues to withhold all or part of the record, I also order it to provide the appellant and myself with an explanation of the basis for exercising its discretion. The Ministry is required to provide the results of its re-exercise of discretion, and its explanation, no later than **April 16, 2007**. If the appellant wishes to respond to the Ministry's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 14 days of the date of the Ministry's correspondence, by providing me with written representations.

2. I remain seized of this matter pending the resolution of the issues set out in provision 1of this order.

Original signed by: March 29, 2007
Bernard Morrow
Adjudicator