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

Reconsideration Order PO-2602-R

Appeal PA-050192-1

Interim Order PO-2561-I

Ministry of Community Safety and Correctional Services

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BACKGROUND:

This is my decision on a reconsideration request made by the appellant in relation to Interim Order PO-2561-I. The appeal leading to that order dealt with a decision of the Ministry of Community Safety and Correctional Services (the Ministry) in response to an access to information request made pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant had made a request for access to a letter dated September 24, 2003 (the letter) sent to a named probation officer who was, at the time of the request, the probation officer for the appellant's former spouse.

As I did in Interim Order PO-2561-I, 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 appellant 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 appellant and affected person #2 expressed a desire to attend an out of province Church function, affected person #2's probation officer communicated with affected person #1 regarding plans and precautions to ensure the appellant's safety before deciding on whether to permit affected person #2 to attend. The 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 letter could affect his interests. Affected person #1 responded and indicated that he did not consent to the disclosure of the information at issue. The Ministry elected to not notify affected person #2.

The Ministry then issued a decision in which it denied access to the letter, 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 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 for 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. I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Ministry's representations. The affected parties' representations were withheld due to confidentiality concerns. The appellant submitted representations in response and I shared the non-confidential portions with the Ministry and the affected parties, inviting them to respond by way of reply. The Ministry and the affected parties provided reply representations.

Based on the representations received from the parties and the contents of the letter, I issued Interim Order PO-2561-I, finding that section 49(e) applied to exempt the contents of the letter from disclosure. In reaching this conclusion, I found the absurd result principle did not apply based on the evidence before me. However, in finding that section 49(e) did apply, I questioned

whether the Ministry had properly exercised its discretion under section 49(e). I ordered the Ministry to re-exercise its discretion under section 49(e).

The Ministry provided representations on the re-exercise of discretion and the appellant provided representations in response.

Unrelated to the re-exercise of discretion issue, the appellant requested that I reconsider my decision in regard to the application of the absurd result principle.

The appellant's position is that I erred in my decision on the application of the absurd result principle by not giving her an opportunity to respond to the Ministry's reply representations on this issue. In support of her position, the appellant asserts that the letter was read to her over the telephone during a conversation on November 26, 2003 with the probation officer and provides evidence to support that assertion. The appellant feels it would be absurd to withhold the letter from her since she is aware of its contents. She feels that she did not get a fair opportunity to address the Ministry's position on this issue, as set out in its reply.

After considering the basis for the appellant's request, I formed a preliminary view that there was a fundamental procedural defect in the adjudication process, in that I ought to have provided the appellant with an opportunity to respond to the Ministry's reply submissions. As a result, I made a preliminary decision that I would reopen the appeal and consider the submissions made by the appellant in her reconsideration request with respect to the application of the absurd result principle and to reconsider my finding on this issue. With regard to the re-exercise of discretion issue, I decided that I would hold this issue in abeyance pending the outcome of the reconsideration request.

In light of my preliminary decision, I invited the Ministry and the two affected parties to make submissions on the following issues:

1. Was there a fundamental procedural defect in the adjudication process that led to Interim Order PO-2561-I? If not, why not?

2. Assuming the answer to question 1 is "yes", did the probation officer communicate the contents of the letter, or any part, to the appellant in a telephone conversation? If the Ministry continues to maintain its position that the letter was not read to the appellant, I request the Ministry to provide direct evidence, in the form of an affidavit from the probation officer, on this factual issue.

3. Assuming the answers to questions 1 and 2 are "yes", does the absurd result principle apply in the circumstances?

Was there a fundamental procedural defect in the adjudication process that led to Interim Order PO-2561-I?

Code of Procedure

The reconsideration procedures of the Information and Privacy Commissioner/Ontario (the IPC) are set out in section 18 of the *Code of Procedure* (the *Code*). In particular, sections 18.01 and 18.02 of the *Code* state:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

In the circumstances of this case, the basis for the appellant's reconsideration request is paragraph (a) of section 18.01, that is, in failing to provide the appellant with an opportunity to respond to the Ministry's reply there was a fundamental defect in the adjudication process.

Representations

As set out above, the appellant's position is that she should have been given an opportunity to respond to the Ministry's reply representations on the application of the absurd result principle. The appellant feels that had she been given an opportunity to do so she would have provided evidence that responds to the Ministry's position and, in turn, impacted my analysis of this issue. Accordingly, the appellant contends that I erred in not seeking her response to the Ministry's reply and that the discussion regarding the application of the absurd result principle should be reopened.

The Ministry's position is that it addressed the application of the absurd result principle in its initial representations and that the appellant had an opportunity to respond to them. The Ministry states that its reply representations did not address the application of the absurd result principle. The Ministry submits that its reply representations were specifically prepared in response to my letter dated September 22, 2006, in which I invited the Ministry to respond, in particular, "…to the appellant's representations on the interpretation of the term 'personal information' and factors weighing in favour of disclosure of the information at issue", as raised by the appellant in her initial representations dated June 26, 2006.

Neither affected party provided representations on this issue.

Analysis and findings

In the absence of a statutory provision in the *Act* to govern reconsiderations, the *Code* reflects the common law as to when a decision may be reconsidered and when the adjudicator is *functus officio*.

The application of section 18.01(a) of the *Code* as a basis for reconsideration necessitates the existence of a fundamental defect in the adjudication process.

In this case, the issue is whether my decision to not seek sur-reply representations from the appellant in response to the Ministry's reply constitutes a fundamental defect in the adjudication process. By their nature, reply submissions (including sur-reply submissions) are restricted to responding to the other party's case, and new issues or arguments cannot be raised in reply. As a result, reply representations are sought only in those instances where a party raises new issues or provides new evidence, to which the other party ought to be given an opportunity to respond. [see PO-2590-R]

Based on the evidence before me, I find that my decision to not allow the appellant an opportunity to respond to the Ministry's reply constitutes a fundamental defect in the adjudication process.

I acknowledge that the Ministry did address the application of the absurd result principle in its initial representations and that the appellant had an opportunity to address them in her representations. I also acknowledge that I did not specifically ask the Ministry to respond to the application of the absurd result principle by way of reply.

However, in my view, these points are not determinative of the process issue. What is more relevant and central to this issue is the following statement made by the Ministry in reply: "[t]he probation officer's case notes from this date do not indicate that the letter was read to the [appellant]." I reproduced the Ministry's statement in Order PO-2561-I and it came to the appellant's attention for the first time when she read the order. Irrespective of the Ministry's intentions, this statement constitutes new evidence that puts into question the application of the absurd result principle. Accordingly, in my view, the appellant should have been given an opportunity to respond to it and my decision to not seek sur-reply from the appellant constitutes a fundamental defect in the adjudication process.

Did the probation officer communicate the contents of the letter, or any part, to the appellant in a telephone conversation?

To assist me in my analysis of this question, I asked the Ministry to provide an affidavit from the probation officer, if it continued to maintain its position that the contents of the letter were not communicated to the appellant in a telephone conversation. The Ministry maintains its position and, accordingly, provided an affidavit from the probation officer.

With regard to whether the probation officer read the contents of the letter to the appellant, he states as follows in paragraph 6 of his affidavit:

> I do not recall reading the letter in question to the appellant. The probation file case notes relating to my telephone conversation with the appellant on November 26, 2003 do not reflect that the letter was read to the appellant.

The affected parties also weighed in with submissions on this issue. Affected person #1 submits that the probation officer "erred in revealing the letter to [the appellant]." He also states that it was not the probation officer's "business to reveal the contents of that letter as this was a personal letter to him…" Affected person #2 submits that the probation officer carried out his duties in a professional and forthright manner. He feels that asking the probation officer to provide an affidavit puts into question his integrity and that of the office he holds. He states that the appellant was made aware of the existence of the letter but not of its contents.

The appellant provides evidence that the letter was read to her over the telephone, including her recollection of the contents of it as a result of her conversation with the probation officer.

In my view, the evidence of the appellant is persuasive. Despite the passage of more than three years since the date the conversation is alleged to have taken place (November 26, 2003), the appellant's representations regarding her recollection of the contents of the letter bear a strong resemblance to what the letter actually says. In my view, this is compelling evidence that all significant parts of the letter were, in fact, read to the appellant. As well, and significantly, the appellant's evidence is bolstered by statements made to the Mediator by Ministry staff regarding the alleged November 26th conversation.

I am, moreover, not persuaded by the Ministry's evidence. The probation officer was given an opportunity to make a clear statement as to whether or not he read the letter to the appellant over the telephone. However, his evidence on this issue is that he does not recall reading the letter to the appellant and that his case notes do not reflect that the letter was read to her. I do not find the probation officer's evidence persuasive because it does not directly address the issue, it is ambiguous and it contradicts earlier statements made by Ministry staff.

Finally, the evidence of the affected parties does not offer any meaningful insight into this issue.

In conclusion, on the strength of the evidence provided by the appellant, supported by the statements made by Ministry staff to the Mediator during mediation, I am satisfied that all significant contents of the letter were read to the appellant by the probation officer.

Does the absurd result principle apply in the circumstances?

Having found that there was a fundamental defect in the adjudication process and that the probation officer read all significant contents of the letter to the appellant, the final question to be determined is whether it would be absurd, in the circumstances, to withhold the letter from the appellant.

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

However, 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].

Turning to the circumstances of this case, I found in Order PO-2561-I that the letter technically qualifies as a correctional record within the meaning of section 49(e) by virtue of its existence in affected person #2's correctional file. However, in my view, on the evidence before me, the letter is not of central importance to affected person #2's correctional file. The letter does not deal with the probation officer's supervision of affected person #2; rather, it addresses directly and specifically issues relating to the appellant's relationship with the Church. In fact, the appellant is the focus of the letter and, as I found in Order PO-2561-I, for the most part it contains her personal information. I also found in my interim order that the letter, to a very minor extent, contains the personal information of affected person #2 and that it does not contain affected person #1's personal information.

By operation of the absurd result principle, in my view, in the circumstances of this case, it would be absurd not to disclose the contents of the letter to the appellant, as she has provided clear evidence that she knows the significant contents of this record. Accordingly, I will order its disclosure in full to the appellant.

Remaining issues

Personal privacy exemption

As set out in Order PO-2561-I, the Ministry also raised the application of section 49(b) (discretion to refuse requester's own information), read in conjunction with section 21(1) (personal privacy) to the contents of the letter. In support of this exemption claim, the Ministry sited the application of the factors in sections 21(2)(f) (highly sensitive) and 21(2)(h) (supplied in confidence). Having found the contents of the letter exempt in Order PO-2561-I pursuant to section 49(e), I did not consider the application of the section 49(b) exemption in my interim order. However, having now found that the absurd result principle applies to override the application of the section 49(e) exemption, I am now required to address the application of section 49(b).

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.

In Order PO-2561-I, I made a finding that the letter contains the personal information of both the appellant and affected person #2, but that the record does not contain affected person #1's personal information. In making this finding, I concluded that the letter, for the most part, contains the appellant's personal information and, to a very minor extent, affected person #2's personal information. Only affected person # 2's personal information could be exempt under section 49(b). It is not an unjustified invasion of privacy to disclose the appellant's personal information to her.

In its initial representations on the application of the factor in section 21(2)(f), the Ministry states that the personal information in the letter is "inherently sensitive" and that disclosure of its contents would cause "excessive personal distress" to identifiable individuals. With regard to the application of section 21(2)(h), the Ministry submits that the letter was delivered "implicitly in confidence" to it.

I acknowledge the Ministry's position regarding the application of these factors. However, on my review of the letter, this record is essentially about the appellant, as noted previously. Moreover, I disagree with the Ministry's position that the information about affected person # 2 is highly sensitive, and the assertion that it was provided in confidence. It is clearly information that the appellant is already aware of, even if the letter had not been read to her, and could not possibly be considered sensitive or confidential. In this context, it would be absurd, and inconsistent with the privacy protection purpose of section 49(b), to withhold the information about affected person # 2 from the appellant. Accordingly, I find that the section 49(b) exemption does not apply in the circumstances of this case.

Ministry's re-exercise of discretion

In light of my decision to order the disclosure of the letter to the appellant, I do not need to address the re-exercise of discretion issue.

ORDER:

I order the Ministry to release the record at issue to the appellant in its entirety by **September 6, 2007** but not before **August 31, 2007**.

Original signed by: July 31, 2007
Bernard Morrow
Adjudicator

POSTSCRIPT:

I have found above that all significant contents of the letter were read to the appellant by the probation officer. The discrepancy in the Ministry's position regarding this issue came to light after I received the probation officer's affidavit during this reconsideration. At that point I

learned that Ministry staff had confirmed to the Mediator that the probation officer had read the letter to the appellant. The Ministry staff member provided additional confidential information that supports the credibility of this statement.

There was subsequent discussion with the Mediator of the extent to which the letter was read to the appellant. However, in retrospect, I find it surprising that the Ministry's representations prior to Order PO-2561-I never acknowledged the contents of these discussions. Instead, the Ministry attempted to steer me in the opposite direction by stating that the probation officer's case notes did not indicate that he had read the letter to the appellant (as later repeated in the probation officer's affidavit). This evidence was pivotal to the outcome of the appeal.

The Ministry's approach to this factual question had the effect of misleading me on a critical issue in this appeal. We will be in contact with the Ministry to address this conduct.