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

ORDER PO-2603

Appeal PA06-303

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Any and all memoranda, studies or reports prepared since 2000 by or for the Ministry of the Attorney General, including its Facilities Branch, regarding courthouse security in the Province of Ontario.

The Ministry issued an interim access and fee estimate decision in which it provided a fee estimate of $1,590.00, which was subject to revision for photocopying costs and preparation fees, once determined. The decision also indicated that some of the records may be exempt from disclosure under one or more of the exemptions contained in the *Act*.

In response to the interim access and fee estimate decision, the requester revised the request for access to include only the following documents:

1. The Report prepared in January 2003 by a committee consisting of senior management in the Court Services Division in connection with the Division's court security project (that was initiated in March 2001).

2. The Report(s) prepared by the outside security consulting firm company engaged (at a cost of approximately $148,000) in 2001 or 2002 to review security risks at 90 larger court sites.

3. The Report(s) produced following the annual review by the Court Services Division (initiated in February 2005) of 23 key court security elements identified in the January 2003 report.

The Ministry located a single record that, according to the Ministry, was responsive to Item 1 of the request and denied access to it pursuant to sections 14(1)(e) (danger to health or safety), 14(1)(i) (security of a building), 14(1)(j) (escape from lawful custody), 14(1)(k) (security of a centre for lawful detention) and 14(1)(l) (commission of an unlawful act or control of crime) of the *Act*. The Ministry clarified that there is no such report responsive to Item 2 of the request, but that "the extent of the consulting firm's involvement is rolled into the record responsive to Item 1" of the request. The Ministry indicated that it had previously provided the appellant with a copy of the record responsive to Item 3.

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

During the course of mediation, the Ministry raised the possible application of an additional discretionary exemption, claiming the application of section 20 (threat to safety or health) of the *Act*, to deny access to the responsive record it had located. The appellant also advised the mediator that it was of the view that additional records exist, particularly with respect to Item 2 of the request. The Ministry again clarified that with respect to Item 2 of the request, there is no such report, and that "the extent of the consulting firm's involvement is rolled into the record responsive to Item 1" of the request. The Ministry also provided the appellant with another copy

of the record responsive to Item 3 of the request. The existence of additional responsive records is, therefore, not an issue in this appeal.

As it was not possible to fully resolve the appeal by mediation, the file was transferred to me for adjudication, which takes the form of an inquiry under the *Act*. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry, initially. I received representations from the Ministry. I then sent a copy of the Ministry's representations, along with the Notice of Inquiry, to the appellant seeking its representations. Portions of the Ministry's representations were not disclosed to the appellant for reasons of confidentiality. I received representations from the appellant in response. I then sought reply representations from the Ministry, as the appellant had raised the possible application of the "public interest override" in section 23 of the *Act*. I received reply representations from the Ministry.

RECORD:

The record at issue in this appeal is the record responsive to Item 1 of the request. This record consists of a 78-page report entitled "Court Security Project Final Report" dated January 16, 2003.

DISCUSSION:

LAW ENFORCEMENT

The Ministry relies on sections 14(1)(e), (i), (j), (k) and (l), which state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", 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 [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

14(1)(e): life or physical safety

A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

Representations

In its representations, the Ministry refers to Order P-1499, in which former Assistant Commissioner Tom Mitchinson discussed the requirements for the application of this exemption as follows:

> These sections stipulate that the Ministry may refuse to disclose a record where doing so **could reasonably be expected to** result in a specified type of harm. This harm must not be fanciful, imaginary or contrived but rather one which is based on reason and the Ministry must offer sufficient evidence to support the position that disclosure could reasonably be expected to result in the harms contemplated by these sections.

The Ministry submits in its representations concerning the application of section 14(1)(e) to the record, that it has met these requirements for the following reasons:

(i) Reasonably Expected Harm

In Ontario (*Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor*) (1999), 46 O.R. (3d) (C.A.) at 395, affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.) the Court of Appeal distinguished between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at pp. 403-404):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety.
>
> Disclosure of the record to the appellant's organization must be viewed as disclosure to the public generally. (Order P-169)

Disclosure of the record or any portion thereof would be disclosure to all as the record would be in the public domain and available to all that would wish to make use of it to vandalize property or to bring harm to someone. Disclosure of the record could reasonably be expected to endanger the life or physical safety of individuals associated with court facilities.

The Ministry submits that it is reasonable to conclude that the release of the Report to the public will make the Report available to those that wish to exploit it to the detriment of the safety of law enforcement officers, court personnel, counsel, the judiciary and the public. The public release of the part of the Report setting out the formula for evaluating risk in the security systems in the courts and the vulnerabilities in the actual systems will exacerbate existing security issues and facilitate the commission of breaches of security in the courthouses thus endangering staff and the public.

The concerns relating to public safety in the courthouses are not frivolous or exaggerated. Evidence of the need for security measures is based not only on common sense, but can also be found in the 2003 Annual Report of the Office of the Provincial Auditor of Ontario. That report revealed that in one courthouse alone, in one year, the police had charged more than 100 people for various violations to the security measures in place in that courthouse. If this Report becomes widely available it is reasonable to conclude that the incidents will increase and be targeted at locations that are most vulnerable to security breaches.

(ii) Based on Reason

> Order P-948 defined the term "based on reason" as a logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption.
>
> The Ministry submits that there is a logical connection between the disclosure of the information and the potential harm that may come from it. Revealing the systems used to evaluate security measures in place as well as the results of the analysis identifying areas of vulnerability within the security systems undermines the effectiveness of the security system and compromises the safety of the public.

(iii) Evidence

> Order PO-1812 citing Order PO-1747 stated:
>
> > In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure, or in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.
>
> Further evidence that the harm caused by a breach of security in courthouses is a significant concern is provided by the recent efforts of the provincial government to identify deficiencies and improve security at court facilities. On January 25, 2007 the provincial government announced that it would spend $2.3 million for "holding cell upgrades" in courthouses in six Ontario communities. The Attorney General said: "The Ministry continues to re-evaluate the needs of existing court facilities to ensure that we maintain an efficient, effective and secure justice system." *McGuinty Government Making Courthouses Safe for Ontarians*, Government of Ontario, News Release, January 25, 2007.
>
> The [Ministry] submits that pursuant to section 14(1)(e) there is a reasonable basis for believing that endangerment will result from disclosure. Such endangerment is a bar to disclosing the Report or any part thereof. The [Ministry] submits that the reasons for resisting disclosure are not frivolous or exaggerated but based in the objective analysis of court security presented in the report.

The appellant made general representations, as follows:

> The Ministry cites numerous statutory exemptions and pleads that the release of the Report sought by [the appellant] will endanger the safety or security of

> individuals and will facilitate the commission of unlawful acts. Of course, without seeing these documents, it is impossible for us to accept that the claimed exemption has any merit...
>
> The safety and security of courthouse workers is not protected by hiding information...
>
> Any actual risk of harm is the result of measures that the [Ministry] has put in place (or has failed to put in place). No measurable additional risk is caused by exposing the failures (or successes) of the [Ministry]. We note that [the Ministry] acknowledges that there must be an *evidentiary basis* for its claim and it then relies on a press release. With respect, the press release provides no evidentiary basis for the asserted claim whatsoever. The [Ministry's] submission is riddled with speculation and fear-mongering. We think it most unlikely that the Report amounts to a "tool kit" for wrongdoers. But in the end, we are content to have the Adjudicator- with actual access to the Report itself- make the required judgment.

Analysis/Findings

Based upon my review of the record, I am satisfied that its disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or some other person. Specifically, the record provides detailed information about the potential presence of security risks at various courthouses. It also discloses the methodology of how the information was gathered concerning these risks, thereby revealing any potential gaps in this security review of the courthouses. I agree with the Ministry that:

> The public release of the part of the Report setting out the formula for evaluating risk in the security systems in the courts and the vulnerabilities in the actual systems will exacerbate existing security issues and facilitate the commission of breaches of security in the courthouses thus endangering staff and the public.

In my view, disclosing this information could reasonably be expected to put law enforcement officials and the general public at risk of physical harm by revealing the nature and extent of various security systems which exist in Ontario courthouses. Therefore, I find the record exempt under section 14(1)(e).

This conclusion is consistent with other decisions of this office regarding the application of section 14(1)(e). For example, in Order MO-2207, Adjudicator Bernard Morrow upheld the application of this exemption (section 8(1)(e) of the municipal *Act*) to two training documents that dealt with a security-related policy. In that case, Adjudicator Morrow found exempt the portions of the record at issue that contained detailed information about the appropriate use of force, the use of handcuffs and empty hand tactics for controlling dangerous individuals.

Although the Ministry's *Annual Report for 2003* summarizes some of the security gaps identified in the record, the actual locations of the security gaps were not identified in the Annual Report. Nor did it reveal the actual results of the survey or the methodology employed by the surveyors in obtaining the data. I find that disclosure of the survey and related information would specifically identify various security risks. As a result, I find that the entire record is exempt under section 14(1)(e). Having made this finding, it is not necessary for me to determine whether the record is also exempt under sections 14(1)(i),(j),(k),(l) and 20.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under section 14(1)(e) in a proper manner.

The section 14(1)(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

Representations

The Ministry submits that it exercised its discretion in good faith. It refers to a letter sent to the appellant from the Assistant Deputy Attorney General, Court Services Division which discloses some of the information of interest to the appellant in a way that prevents the information from being made available to the public at large, but still addresses the security interests of employees of court facilities.

The Ministry relies on Order PO-2332, in which Adjudicator John Swaigen stated:

> The Ministry also considered whether release of the security audit would enhance public confidence in the operation of the detention centre. It concluded that the possibility of harm from disclosure outweighs any possible benefit in this regard. Given the possibility that disclosure of this kind of information might reduce rather than increase public confidence, I cannot fault the Ministry's treatment of this consideration.

The appellant did not provide representations on this issue.

I agree with the Ministry that it exercised its discretion in good faith, taking into account only relevant considerations and not irrelevant considerations. As a result, I will uphold the Ministry's exercise of discretion.

PUBLIC INTEREST OVERRIDE

I will now determine whether there is a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 14(1)(e) exemption.

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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, [2007] O.J. No. 2038, the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

The appellant submits that section 23 applies, and as I have upheld the applicability of section 14(1)(e), I will consider that exemption in the context of section 23 pursuant to the Court of Appeal judgment in *Criminal Lawyers' Association*.

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.

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].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

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

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant submits the record identifies workplace hazards and the availability of reasonable precautions with respect to addressing those hazards. Therefore, the appellant submits that disclosure of the information in the record is necessary in the public interest.

The Ministry provided confidential representations on this issue. In support of its representations against the disclosure of the record, it relies on Order PO-2332, where Adjudicator Swaigen found that:

> In my view, much of the information in the security audit would be obvious to most people. It is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures described in the OSAW would be routine. However, the Ministry points out that "to a knowledgeable individual, the absence of a particular topic, identified deficiencies, or the unavailability of certain security enhancing measures at a given correctional facility could suggest a potential security vulnerability".
>
> I accept that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security. Knowledge of the matters dealt with in the security audit could permit a person to draw accurate inferences about the possible absence of other security precautions. Such inferences could reasonably be expected to jeopardize the security of the institution by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance within the detention centre. As the Ministry states, disclosure of the contents of the security audit to a requester can result in its dissemination to other members of the public as well.

I agree with and adopt this reasoning of Adjudicator Swaigen with respect to the record at issue in this appeal. Knowledge of the matters dealt with in the review of the security systems at courthouses in the province could permit a person to draw accurate inferences about the possible absence of other security precautions. Such inferences could reasonably be expected to jeopardize the security of the courthouses. In my view, this is a highly significant public interest in *non*-disclosure that outweighs any public interest in disclosure identified by the appellant (See *Ontario Hydro v. Mitchinson*, cited above). For this reason, I am not satisfied that there is a compelling public interest in disclosure of the record that would clearly outweigh the purpose of the law enforcement exemption in section 14(1)(e). Accordingly, I conclude that section 23 has no application in this case.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 10, 2007
Diane Smith
Adjudicator