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

ORDER PO-2682

Appeal PA07-19

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 multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a requester for access to "true copies" of the following records:

1. a letter dated March 13, 1999 [later corrected to March 16, 1999] written by an identified Coroner (the Coroner) to the requester ;

2. a letter dated June 17, 1996 from an identified individual to the requester;

3. a letter dated August 12, 1997 from the Coroner to an identified individual;

4. a Memorandum dated August 11, 1995 from the Coroner to "police chief, etc", a copy of which the requester says she also received;

5. an answer to a question posed by the requester.

After extending the period of time to respond to the request under section 27(1) of the *Act*, the Ministry issued a decision letter. The Ministry advised that it was unable to locate records responsive to item one of the request and that it had no records that were responsive to item five. The Ministry invited the requester to contact the Archives of Ontario regarding records responsive to items two and three of the request and to ask an identified organization (which is not an institution under the *Act*) for records responsive to item five. The Ministry also asked the requester to forward her copy of the memorandum that was referred to in item four of the request, before it provided its final decision on that part.

In response, the requester forwarded a letter to the Ministry enclosing a torn copy of the memorandum pertaining to item four of her request. Her letter also advised the Ministry that the correct date of the correspondence in item one of her request was March 16, 1999, and not March 13, 1999, as she originally indicated. The Ministry then issued a supplementary decision letter to the appellant, enclosing a copy of the letter dated March 16, 1999 that was responsive to item one of the request, and advising that the Ministry was relying on the discretionary exemptions in sections 14(1)(e) (endanger life or safety) and 20 (danger to safety or health) of the *Act*, to deny access to an electronic version of the memorandum responsive to item 4 of the request.

The requester (now the appellant) appealed the Ministry's decision. One of the grounds for her appeal was that the copy of the letter dated March 16, 1999 the Ministry provided was unsigned.

At mediation, the appellant clarified that she is seeking access to copies of the actual signed letter dated March 16, 1999 and the memorandum dated August 11, 1995, that are responsive to items one and four of the request, respectively. The Ministry advised that it only had unsigned copies of the letter and memorandum. The appellant was of the view that an original signed copy of both responsive records should exist. This raised the reasonableness of the Ministry's search for responsive records as an issue in the appeal.

Mediation did not resolve the appeal and the matter moved to the adjudication stage of the appeal process.

A Notice of Inquiry setting out the issues in the appeal was sent to the Ministry and an organization whose interests may be affected by disclosure (the affected party). Both the Ministry and the affected party provided representations in response to the Notice. The Ministry asked that a portion of its representations be withheld due to confidentiality concerns. In the non-confidential portion of the Ministry's representations, it advises that after conducting an additional extensive search it had located a signed copy of the March 16, 1999 letter. The Ministry then provided the appellant with a supplementary decision letter and disclosed this record to her. The affected party objected to disclosure of the memorandum dated August 11, 1995 and did not consent to share any of its representations with the appellant, save and except for its submission that there are court orders against the appellant, including a permanent injunction against her "with respect to any grievance with [the affected party]."

Although given the opportunity to do so, the appellant did not file any representations in response to the Notice.

RECORDS:

The only record remaining at issue in this appeal is a copy of a two-page memorandum dated August 11, 1995. The Ministry withheld the record, in full.

DISCUSSION:

ADEQUACY OF THE SEARCH FOR RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
> >
> > .....
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records within its custody or control. [Orders P-85, P-221, PO-1954-I]

Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

The appellant's position, as expressed during the mediation stage of the appeal, is that the Ministry should have a signed original copy of the Memorandum dated August 11, 1995.

In support of its submission that no such signed copy exists, the Ministry refers to the contents of an affidavit enclosed with its representations that describes in detail its records management processes and the multiple searches which it undertook to locate responsive records. These resulted in the Ministry locating a signed copy of the letter dated March 16, 1999, which the Ministry then provided to the appellant. A signed copy of the memorandum dated August 11, 1995 was not found.

The Ministry has provided me with extensive evidence of the multiple searches it conducted for responsive records, culminating in its locating a signed copy of the letter dated March 16, 1999. In my opinion, these searches were extensive and wide-ranging. Unfortunately, a signed copy of the memorandum dated August 11, 1995 was not found. The appellant chose not to file representations to refute the Ministry's position that it has now conducted a reasonable search for responsive records. In the absence of any submissions from the appellant that might provide a basis to challenge that position, I find that the Ministry has provided sufficient evidence to establish that it has now conducted a reasonable search for records within its custody or control, including records responsive to part four of the request. Therefore, I dismiss this part of the appellant's appeal.

LAW ENFORCEMENT

Section 14(1)(e) reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

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. However, while the expectation of harm must be reasonable, it need not be probable [*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.) (*Ontario Ministry of Labour*)].

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 on section 14(1)(e)

The Ministry takes the position that disclosure of the available electronic copy of the two-page August 11, 1995 memorandum could reasonably be expected to endanger the life or physical safety of an individual. In the confidential portion of its representations, which I am unable to reproduce in this order, the Ministry explains the foundation for its concerns. The affected party also objected to disclosure of the responsive record. Its reasons are also set out in its confidential representations, which I similarly cannot reproduce. One of the reasons given, which it consented to share, is the existence of court orders that the affected party has obtained against the appellant,

including a permanent injunction against her "with respect to any grievance with [the affected party]." In response to an inquiry from an Adjudication Review Officer, the affected party provided this office with a copy of the orders for injunctive relief. In a covering letter accompanying the orders the affected party further asserts that in light of the remedies granted by the Court, the appellant should not be permitted to pursue her access request and appeal.

The appellant provided no representations in the appeal. However, as set out in her appeal letter, her position is that the Ministry has not provided the requisite evidence to demonstrate that the release of the requested information would endanger the life or physical safety of a law enforcement officer or any other person as contemplated by section 14(1)(e). She submits that any such fear is both subjective and unfounded because otherwise they would not have previously sent the letter and memorandum to her. In further support of her position she submits that the August 11, 1995 memorandum relates to the same issue as the March 16, 1999 letter that the Ministry already disclosed. In addition, she questions why the Ministry did not have the same concerns when it originally sent the letter and memorandum to her and why the receipt of an exact copy of the second memorandum would now "send [her] over the deep end." In a letter the appellant sent to this office after the conclusion of mediation, she states that she is simply seeking a replacement of a torn copy of the memorandum with an exact copy of the original.

Analysis and findings on section 14(1)(e)

Under section 14(1)(e) the Ministry may refuse to disclose a record where there is a reasonable basis for believing that endangerment to the life or physical safety of a law enforcement officer or any other person will result from *disclosure of the record* [emphasis added].

What distinguishes this case from others involving the application of section 14(1)(e) (and for that matter, section 20) is that the appellant is asserting that she already has a copy of the record that she seeks. The Ministry does not deny that it originally sent the record to the appellant. In their representations on the exercise of discretion the Ministry submits that "it is mindful of the fact that the appellant currently has in her possession a torn one page document that contains content that bears a strong resemblance to the content of the two page responsive record." The Ministry also acknowledges that the record is now almost thirteen years old.

In my view, the orders provided by the affected party address behaviour of the appellant that is potentially disruptive and troublesome as opposed to "an endangerment to the life or physical safety of a law enforcement officer or any other person." Furthermore, the orders for injunctive relief are, according to the affected party, continuing, and provide some measure of comfort that the conduct of concern will not recur. I also note in passing that nothing in those orders prohibits the appellant from pursuing her access request or this appeal.

In the current appeal, based on the confidential and non-confidential representations submitted by the Ministry and the affected party, I accept that the affected party has concerns about the appellant's behaviour and the manner in which she conducted herself during litigation. Having said that, I do not view it as meeting the threshold in section 14(1)(e), even with the evidentiary

standard established in *Ontario (Ministry of Labour)*, and the great difficulty in predicting future events in the law enforcement context (as established in *Ontario (Attorney General) v. Fineberg*, cited above, and followed in PO-2040). Section 14(1)(e) allows a head the discretion to refuse to disclose a record where the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. However, in this case, in light of the age of the record, the continuing nature of the injunction to prevent a recurrence of the behaviour that gave rise to the application for injunctive relief, and the appellant possessing a document that as acknowledged by the Ministry "bears a strong resemblance to the content of the two page responsive record," I am not satisfied that the Ministry has provided sufficient evidence to establish that disclosure of the record could reasonable be expected to endanger the life or physical safety of a law enforcement officer or any other person.

Accordingly, I find that the Ministry has not satisfied its onus under the discretionary exemption under section 14(1)(e). As a result I find that the discretionary exemption at section 14(1)(e) does not apply.

Section 20: threat to health and safety

Section 20 reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

As with section 14(1)(e), for this exemption to apply, 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. Also, while the expectation of harm must be reasonable, it need not be probable [*Ontario (Ministry of Labour)*].

Representations on section 20

The Ministry relies on its submissions under section 14(1)(e) in support of its position that the Memorandum is also exempt under the discretionary exemption in section 20 of the *Act*. The affected party's submissions did not address the exemptions separately, and I am treating them as if they applied to both. The appellant provided no representations, but her position has been set out above.

Analysis and findings on section 20

In Order PO-1940, Adjudicator Laurel Cropley found that section 20 applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order she stated:

> [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

I agree with the reasoning of Adjudicator Cropley and find it applicable to the current appeal.

In the current appeal, based on the confidential and non-confidential representations submitted by the Ministry and the affected party, I accept that the affected party has concerns about the appellant's behaviour and the manner in which she conducted herself during litigation. However, I am not satisfied that the threshold of seriously threatening the safety or health of an individual under section 20 has been met.

For essentially the same reasons I have set out above, even with the evidentiary standard established in *Ontario (Ministry of Labour)*, I am not satisfied that the Ministry has provided me with sufficient evidence to establish the application of this discretionary exemption. In light of the age of the record, the continuing nature of the injunction to prevent a recurrence of the behaviour that gave rise to the application for injunctive relief, and the appellant possessing a document that, as acknowledged by the Ministry, "bears a strong resemblance to the content of the two page responsive record," I am not satisfied that the Ministry has provided sufficient evidence to establish that disclosure of the record could reasonably be expected to seriously threaten the safety or health of an individual.

As a result I find that the discretionary exemption at section 20 of the *Act* does not apply.

Accordingly, I will order that a copy of the two-page memorandum dated August 11, 1995 be disclosed to the appellant.

ORDER:

1. I find that the Ministry's search for responsive records is reasonable.

2. I order the Ministry to disclose to the appellant a copy of the two-page memorandum dated August 11, 1995 by sending it to the appellant by July 14, 2008 but not before July 9, 2008.

3. In order to verify compliance with provision two of this order, I reserve the right to require the Ministry to provide me with a copy of the records as disclosed to the appellant.

Original signed by: June 9, 2008
Steven Faughnan
Adjudicator