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

ORDER PO-2670

Appeal PA07-55

Ministry of Community Safety and Correctional Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the requester's representative:

> We request the institutional records of our client from [a named provincial correctional facility], including any written records pertaining to his transfer to the segregation unit on or about May 28, 2006. We would also like all records pertaining to an incident on May 31, 2006 during [our client's] transfer to [a named federal correctional facility]. Please also provide all medical and dental records for our client.
>
> … [W]e require copies of any and all records, statements taken and all other documents produced from witnesses, reports, correspondence, memoranda, forms, directives, drawings, diagrams, photographs, visual recordings, audio recordings and any other documentary materials regardless of physical form or characteristics concerning the above.

The Ministry issued a decision letter granting partial access to the records identified as responsive to the request. Access to some records, or parts of records, was denied pursuant to the discretionary exemption in section 49(a), together with sections 14(1)(j), (k), and (l), 14(2)(d) (law enforcement), and 15(b) (relations with other governments), section 49(b) (personal privacy), with the factor in section 21(2)(f), and section 49(e) (correctional record).

The requester, now the appellant, appealed the Ministry's decision to this office. Any reference in this order to the "appellant" is intended to include both the appellant and his representative.

A mediator was appointed by this office to try to resolve the issues between the parties. During mediation, the appellant advised that she would not pursue access to the severed portions of records already disclosed, which contained only the names or identifying information of other individuals. Several records were thereby removed from the scope of this appeal. No further resolution was possible through mediation. Accordingly, the appeal was transferred to the adjudication stage of the appeal process where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry to the Ministry, initially, asking it to address the issues identified therein. In addition to seeking representations on the possible application of the exemptions relied upon by the Ministry, I also invited submissions on the adequacy of the search conducted for records related to the alleged May 31, 2006 incident. Upon receipt of the Notice of Inquiry, Ministry staff contacted this office to clarify the search issue. Following discussion with staff from this office and, later, with the appellant, the Ministry indicated a willingness to conduct an additional search for records responsive to this part of the original request. Consequently, I placed this appeal on hold for a short time in order to allow the Ministry an opportunity to carry out the search and incorporate the decision about any new records located into its representations for the existing appeal.

The Ministry identified two additional records as a result of its second search, granting full access to one and partial access to the other, a record confirming the appellant's May 31, 2006

transfer to the federal correctional facility. Concurrently, the Ministry reconsidered its original decision and granted the appellant full access to some of the originally identified records and additional access to information contained in others. Access to the newly identified record was denied under section 49(a), in conjunction with sections 14(1)(i), (j) and (k), section 14(2)(d), and 49(b). A copy of the revised decision was sent to me along with the Ministry's representations. In the representations, the Ministry indicated that it was no longer relying on section 49(a), with sections 14(1)(l) or 15(b), or section 49(e) to deny access to any of the records.

Next, I sent a modified Notice of Inquiry to the appellant along with a copy of the Ministry's representations in their entirety, including an index of records prepared by the Ministry. The appellant chose not to submit representations.

RECORDS:

Record Number **[Ministry's page #'s]**	**Description of Record and Decision**	**Exemptions Applied**
1 [1]	Occurrence Report dated May 28, 2006 (1 page) *Partial access*	Section 49(a) with 14(1)(j) & (k), and 14(2)(d) Section 49(b), with 21(2)(f)
2 [2]	Occurrence Report dated May 28, 2006 (1 page) *Partial access*	Section 49(a) with 14(1)(j) & (k), and 14(2)(d) Section 49(b), with 21(2)(f)
3 [3&4]	Occurrence Report dated May 31, 2006 (2 pages) *Denied in full*	Section 49(a) with 14(1)(j) & (k), and 14(2)(d) Section 49(b), with 21(2)(f)
4 [6-8]	Cell Location Sheets dated May 2006 (3 pages) *Partial access*	Section 49(a) with 14(1)(j) & (k), and 14(2)(d) Section 49(b), with 21(2)(f)
5 [9]	Occurrence Report dated May 31, 2006 (1 page) *Denied in full*	Section 49(a) with 14(1)(i), (j) & (k), and 14(2)(d)
6 [10]	Occurrence Report dated May 31, 2006 (1 page) *Denied in full*	Section 49(a) with 14(1)(j) & (k), and 14(2)(d)
7 [18]	Client Profile dated January 2006 (1 page) *Partial access*	Section 49(a) with 14(1)(j) & (k), and 14(2)(d)
8 [19]	Occurrence Report dated January 5, 2006 (1 page) *Partial access*	Section 49(a), with 14(2)(d)
9 [20-21]	Misconduct Report dated January 5 & 6, 2006 (2 pages) *Partial access*	Section 49(a), with 14(2)(d)
11 [22] ***NEW***	Central Region Bailiffs' Log, dated May 31, 2006 *Partial Access*	Section 49(a) with 14(1)(i), (j) & (k), and 14(2)(d) Section 49(b), with 21(2)(f)

DISCUSSION:

PERSONAL INFORMATION

For the purpose of deciding whether or not the disclosure of the record would constitute an unjustified invasion of personal privacy under section 49(a) or 49(b) of the *Act*, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs. 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,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type 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 if 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;

The list of examples of personal information under section 2(1) is not exhaustive. 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]. However, 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].

Representations

The Ministry submits that the records at issue contain the types of personal information described in paragraphs (a) to (e), (g) and (h) of the definition in section 2(1) of the *Act* with respect to the appellant and other identifiable individuals.

Analysis and Findings

I have reviewed the records to determine whether they contain personal information and, if so, to whom the information relates. I find that the records contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition in section 2(1) of the *Act*.

In addition, I find that the records contain information relating to 62 other individuals that satisfies the definition of personal information under, variously, paragraphs (a), (b), (c), (e), (g) & (h) of section 2(1).

As noted, the appellant indicated during the mediation stage of the appeal that access would not be pursued in relation to the severed portions of records already disclosed that contained only the names or identifying information of other individuals. I note that the Ministry's revised decision on Records 8 and 9 leaves only that type of information about one other individual at issue. Accordingly, I find that the undisclosed information relating to that one individual in Records 8 and 9 falls outside the scope of this appeal, and I will not be considering these records further in this order.

The Ministry has claimed section 49(b), as well as section 49(a) with respect to Record 3. However, my review of Record 3 reveals that it contains the appellant's personal information, but no personal information about any other identifiable individual. It is, therefore, unnecessary for me to consider whether the appellant's own personal information qualifies for exemption under section 49(b) since its disclosure to him cannot be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I need only review Record 3 under section 49(a), together with section 14, as is the case with Records 5, 6 and 7.

Even with the removal of Records 8 and 9 from the scope of this appeal, the personal information of 61 individuals, as well as the appellant, appears in Records 1, 2, 4 and 11. Therefore, before I review the Ministry's law enforcement exemption claim in relation to all of the records, I will first consider whether the personal information of the other identifiable individuals in Records 1, 2, 4 and 11 is exempt under section 49(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL, LAW ENFORCEMENT

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. In circumstances where a record contains both the personal information of the appellant and other individuals, the request falls under Part III of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b). Similarly, where the record contains mixed personal information, the relevant exemption for section 14, as claimed in this appeal, is 49(a). These exemptions are mandatory under Part II of the *Act* but discretionary under Part III and thus, in the latter case, an institution may exercise its discretion to disclose information that it could not disclose if Part II were applied [Order MO-1757-I].

SECTION 49(b) - PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Under this section, an institution may refuse to disclose information to a requester where it appears in a record containing 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. However, as previously stated, the institution may choose to disclose this information upon weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met. In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. None of the presumptions against disclosure in section 21(3) have been cited by the Ministry, and none would appear to apply. Similarly, none of the section 21(4) exceptions apply in the circumstances of this appeal.

Therefore, the issue of whether the disclosure of the severed portions of Records 1, 2, 4 and 11 would constitute an unjustified invasion of the personal privacy of the other identifiable individuals must be determined by a consideration of the factors in section 21(2). The list of

factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

Representations

In this appeal, the Ministry submits that the factor in section 21(2)(f) (highly sensitive) of the *Act* weighs in favour of non-disclosure of the personal information of others that remains at issue. The Ministry takes the position that disclosure of this information would cause other individuals significant personal distress given the fact that these records are correctional records.

The Ministry adds that,

> …upon reflection of the unique sensitivities inherent in the environment of a correctional institution, the Ministry is of the view that disclosure of the personal information at issue would be inconsistent with the application of the discretionary exemption from disclosure contained in section 49(b).

The balance of the Ministry's representations on the personal privacy exemption relate to concerns about disclosure leading to a breach of security. As these arguments are more aptly characterized as submissions on the law enforcement exemption, I will not canvas them further under this heading.

Analysis and Findings

None of the presumptions against disclosure under section 21(3) of the *Act* apply. Similarly, the exceptions in section 21(4) and the public interest override in section 23 have not been raised and are not, in any event, applicable in the circumstances of this appeal. Accordingly, my analysis relies upon the factors in section 21(2).

The factors in section 21(2) exist to guide the balancing of the appellant's right to access with the privacy interests of other individuals whose personal information appears in the records. Section 21(2)(f), relied upon by the Ministry, is a factor that weighs in favour of the protection of privacy. However, to establish what, if any, weight it bears in an appeal, I must be satisfied that its disclosure could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518].

I have considered the representations provided to me by the Ministry. Based on the nature of the personal information and the context in which the information was gathered, I am persuaded that disclosure of the personal information remaining at issue could cause significant personal distress to the other individuals whose personal information appears in Records 1, 2, 4 and 11. I find that the factor at section 14(2)(f) is relevant in the circumstances of this appeal and carries moderate weight.

Furthermore, in my view, the appellant's position on the personal information of other individuals is also a relevant circumstance. While I received no representations during adjudication, I note that the appellant indicated that the name and identifying information of other individuals was not of interest. This resulted in the removal of Records 8 and 9 from the scope of the appeal earlier in this order. The personal information of other individuals remaining in Records 1, 2, 4 and 11 resembles the removed personal information from Records 8 and 9, and is distinguishable only for its scope, or the number of segments of identifying information about each of these individuals. Accordingly, I find that this circumstance is applicable to the task of balancing, and weighs in favour of protecting the privacy of these individuals.

Subject to my discussion of the Ministry's exercise of discretion below, I find that the factor in section 21(2)(f) and the circumstance relating to the appellant's expressed interests are relevant factors weighing against the disclosure of the personal information of other individuals. Having considered the factors favouring privacy protection against the right of access, I conclude that disclosure of the personal information of the 61 other identifiable individuals in Records 1, 2, 4 and 11 would constitute an unjustified invasion of their personal privacy. Accordingly, I find that this information qualifies for exemption under section 49(b) of the *Act*.

SECTION 49(a) - LAW ENFORCEMENT

As noted, the Ministry relies on section 49(a), read in conjunction with section 14(1)(i), (j), (k) and 14(2)(d), to withhold all of the records, either partially or in their entirety. I will consider whether the records qualify for exemption under these sections as a preliminary step in determining whether they are exempt under section 49(a).

The relevant portions of section 14 state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (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; …
>
> (2) A head may refuse to disclose a record,
>
> …

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

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.)].

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.)].

Representations

Seeking to offer context to the creation of the records at issue, the Ministry's representations contain an outline of provisions from the *Ministry of Correctional Services Act*, which confers upon the Ministry the authority to administer correctional facilities.

The Ministry's index of records, sent with its revised decision letter, indicates that it relies on section 14(1)(i) for Records 5 and 11; however, the Ministry offered submissions on the application of this exemption only in relation to the latter. Specifically, the Ministry submits:

> [Record 11] is a record dated May 31, 2006, that contains information relating to the transfer of inmates by Provincial Bailiffs between correctional facilities. Release of the exempt information would reveal processes and procedures, routes, numbers of inmates transferred and related information that may reasonably be expected to compromise the security of the Provincial Bailiffs' vehicles and the safety of Provincial Bailiffs, inmates being transferred and members of the public. The Manager of the Offender Transfer Operations Unit has been consulted in regard to [Record 11]. The Manager confirmed that this information is treated as highly confidential and should not be disclosed for reasons of security. Disclosure of the severed information may reasonably be expected to jeopardize the security of the provincial bailiffs' vehicles by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance in the vehicle while en-route. Public dissemination of this information may reasonably be expected to compromise the security of transfer procedures essential for the delivery of correctional services by the Ministry and the safety of staff, inmates and members of the public.

With respect to sections 14(1)(j) and (k), the Ministry submits that disclosure of the records may reasonably be expected to "help facilitate the escape from custody of individuals" and jeopardize the security of the named provincial correctional facility.

The Ministry submits that,

> [t]he withheld correctional records contain detailed information relating to security policies and procedures in place at the [named provincial correctional facility]. The Ministry submits that correctional institutions by their very nature give rise to a reasonable basis for expectation of endangerment should information revealing detailed security issues be publicly released.
>
> … Should the records at issue be released to the appellant, it is quite possible they would also be subject to disclosure to other members of the public, including inmates or ex-inmates of the [named provincial correctional facility].

The Ministry cites Order 187 to support its reliance upon section 14(1)(j). In that order, former Commissioner Tom Wright upheld the application of section 14(1)(j) to exempt certain records relating to the construction plans, including drawings, for new windows, locks and bars, and a general description of the facility's grounds and surrounding area. The Ministry also relies on Order PO-2332 in which Adjudicator John Swaigen upheld the application of section 14(1)(k) in relation to undisclosed portions of a "security audit document." The Ministry submits that in Order PO-2332, the adjudicator accepted the Ministry's argument 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."

The Ministry states that the Manager of Security for the provincial correctional facility was consulted with regard to the specific information the Ministry seeks to withhold. According to the Ministry, this manager's opinion is that releasing the withheld information,

> … would reveal policies and procedures that have the serious potential of compromising the security of the institution, as well as the security of other correctional institutions that follow similar policies and procedures relating to the management of incidents. … Knowledge of such information could be used to exploit perceived vulnerabilities in relation to policies and procedures currently in place at maximum security correctional institutions.

The Ministry relies on a decision of the U.S. Supreme Court, as well as several Canadian provincial and federal cases, in support of its submission that my decision on the law enforcement exemption requires deference to correctional institutional officials. The Ministry submits that correctional facilities, as "unique place[s] fraught with security dangers," necessitate a greater degree of deference to institutional officials and administrators in their design of measures, policies and procedures required to maintain institutional security [*Bell v. Wolfish* 441

U.S. 520 (1979)]. The Ministry concludes its representations on sections 14(1)(i), (j), and (k) by stating,

> A correctional institution presents particular security dangers that do not present with a facility of any other kind, and the importance of the preservation of that security and the expertise and judgment of those charged with preserving that security requires careful consideration.

As I understand it, the Ministry is arguing that correctional officials are entitled to deference on issues relating to maintaining institutional order and security, and that such deference ought to be shown by decision-makers from this office in considering the application of the law enforcement exemption to records that relate to "correctional security issues."

Regarding the application of section 14(2)(d), the Ministry submits that the records at issue were:

> … prepared, collected and/or used by Ministry staff for purposes relating to the history and supervision of the [appellant] and other inmates. …
>
> As can be generally determined from the content of all of the correctional records remaining at issue, and in particular, from the information exempted on [page 2 of Record 7], there are correctional supervision issues relating to the appellant's client. The appellant is presently under the supervision of Correctional Services Canada… Release of the exempted information may reasonably be expected to make the day to day supervision of the [appellant] in a correctional institution environment more difficult.

As previously noted, the appellant did not submit representations. However, during mediation, the appellant's representative questioned the Ministry's claim of section 14(1)(j). The appellant's representative stated that the appellant was no longer incarcerated.

Analysis and Findings

I have reviewed the Ministry's submissions on the law enforcement exemptions, and I have carefully considered the need for sensitivity in the law enforcement context. In the circumstances of this appeal, however, I find that the Ministry has failed to provide the necessary "detailed and convincing" evidence to support its claim that disclosure of the specific information it still seeks to withhold under section 49(a), with sections 14(1)(i), (j) or (k), leads to a "reasonable expectation of harm." I also find that the Ministry's claim for exemption of the material under section 49(a), with section 14(2)(d), fails.

Section 14(1)(i)

I will first address the Ministry's claim that section 14(1)(i) applies to Record 11, the Bailiffs' Log for May 31, 2006. I reject the Ministry's assertion that disclosure of the severed information

could "reasonably be expected to jeopardize the security of the provincial bailiffs' vehicles by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance in the vehicle while en-route." Based on the actual content of this record, I find that it cannot reasonably be argued that this record carries with it any potential for assisting plans to escape, take hostages or even cause a disturbance.

Moreover, it should be noted that because I have upheld the Ministry's personal privacy exemption claim in relation to the other listed individuals and their identifying information in Record 11, most of the remaining information consists solely of headings. In my view, it is not reasonable to expect that release of the remaining withheld information would reveal transfer processes, procedures, routes, or any information that could reasonably be expected to endanger the security of a building, vehicle, system or procedure, as section 14(1)(i) requires. In the result, I find that the claim of section 14(1)(i) for Record 11 fails.

Sections 14(1)(j) and (k)

The Ministry also relies on sections 14(1)(j) and (k) to deny access to all of the records, either in whole or in part. I note that the appellant's representative objected to the claim for section 14(1)(j), in view of her assertion that the appellant was no longer incarcerated or detained. However, I see that the Ministry has claimed in its representations that the appellant was, at that time, in custody. However, notwithstanding the lack of certainty as to the appellant's custodial status at the time the Ministry made its decision, I am of the view that the Ministry's exemption claim of section 14(1)(j) and (k) fails for other reasons.

Firstly, I accept the general proposition that the unique nature of law enforcement and correctional institutions demands close scrutiny of access to information requests. However, I note that the Ministry suggests that decision-makers from this office, in reviewing a claim of the law enforcement exemption over records created in a correctional institution, should defer to the judgment of correctional officials regarding disclosure. The Ministry appears to suggest that this is important for the purpose of maintaining institutional order, security and discipline. I also note that the Ministry seeks to bolster its argument through reference to *Woflish*, *supra*, and certain Canadian cases that followed that line of reasoning with respect to the deference to be accorded to the decision-making of correctional officials.

In my view, however, the cases relied on by the Ministry feature fact situations that are distinguishable from those extant in the present appeal and its context. These cases all involve challenges to prison conditions, policies, or measures on the basis that they infringed the Charter rights of inmates. The courts in those cases were charged with determining whether the impugned conditions or measures were properly within the purview of correctional officials. With respect, no such issue is raised by an access to information appeal.

I am charged with deciding whether, based on the representations and the records themselves, the information at issue warrants the protection of the exemption claimed. In my view, what this

means in the law enforcement context is that it is the actual content of the record that may trigger the deference, not the mere fact of its creation by a correctional institution.

The question to be answered is whether disclosure of these specific records, or portions of records, would either facilitate the escape from custody of a person for the purposes of section 14(1)(j) or jeopardize the security of this provincial correctional facility, as contemplated by section 14(1)(k). In my view, the answer is no.

The nature of records at issue in the orders cited by the Ministry merits further elucidation. In Order 187, an inmate of a correctional facility sought access to information related to replacement windows at that facility. As I understand it, the detailed nature of the information about the design and security of those windows, as well as the fact that the requester remained in custody at that facility, led former Commissioner Tom Wright to uphold the section 14(1)(j) exemption claim in relation to it.

Similarly, in Order PO-2332, the record at issue was a "security audit" withheld under section 14(1)(k). As Adjudicator Swaigen observed, the audit contained details about the facility's security processes, practices and measures, the revelation of which might permit conclusions about the facility's vulnerabilities *by deduction* and, in turn, exploitation of those perceived vulnerabilities.

In the appeal before me, however, the information cannot be said to constitute an exhaustive, or even detailed, description of security processes or practices at the facility. The Ministry's representations contain an excerpt from the reasons of Adjudicator Swaigen in Order PO-2332 that is relevant to the information actually at issue in this appeal:

> 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 [security audit] would be routine.

As I understand it, Adjudicator Swaigen held the view that information of the described type would not be eligible for exemption under section 14(1)(k). I agree. In my view, the information which the Ministry seeks to withhold under these exemptions is either unrelated to security, or even if related, does not contain detailed descriptions of security measures. Rather, they simply describe standard practices or procedures that would be expected to be in place in a correctional facility. In my view, this type of information is not exempt under sections 14(1)(j) or (k).

In the absence of detailed and convincing evidence to establish that disclosure of this specific information would lead to the security harms contemplated by section 14(1)(i), (j) or (k), I find that the Ministry's claim under 49(a), in conjunction with these exemptions, fails.

Section 14(2)(d)

In order for records to qualify for exemption under section 14(2)(d), they must contain information about the history, supervision or release of a person under the control or supervision of a correctional authority. I note that this exemption cannot apply to the record of an individual whose term of correctional supervision has expired [Order P-352]. As I am not certain as to the appellant's present custodial status, I will proceed by making a determination respecting the application of section 14(2)(d) to the records.

In considering the claim of section 14(2)(d), the analysis of Adjudicator Holly Big Canoe in Order P-460 is helpful. Adjudicator Big Canoe wrote:

> In Order 98, former Commissioner Sidney B. Linden considered the interpretation of section 14(2)(d) as follows:
>
> > In my view, the purpose of subsection 14(2)(d) is to allow an **appropriate level of security with respect to the records of individuals in custody**.
>
> I agree with former Commissioner Linden. At its broadest, the wording of section 14(2)(d) could be interpreted to deny an individual in custody access to virtually all of his or her own personal information. In my view, the overall purposes of the *Act* should be considered in interpreting this exemption. Section 1(a) of the *Act* provides the right of access to information under the control of institutions in accordance with the principle that information should be available to the public and that necessary exemptions from this general right of access should be limited and specific. **When an individual is seeking access to his or her own personal information, this principle is particularly important.** [emphasis added]
>
> The Ministry has referred to "procedures, techniques and security issues" which it claims are contained in the records at issue. Pages 486 and 510 refer to items which were confiscated. The procedures and techniques referred to are the execution of a search warrant and a search and seizure of contraband within a correctional facility. The records themselves do not describe in any detail how these searches were conducted and, in my view, disclosure of these records would not hinder or compromise effective execution of search warrants, or utilization of search procedures or techniques within correctional facilities.
>
> Page 561 is a record of an interview with the appellant following an allegation that he had committed a misconduct. The Ministry has not identified how disclosure of this record could affect the security of the Whitby Jail and, in my view, the records do not contain reference to an investigative or security procedure.

> In my view, the records do not contain sufficient detail regarding the history, supervision or release of the appellant or any other individual under the control or supervision of a correctional authority to attract the application of the exemption. Accordingly, I find that section 14(2)(d) does not apply.

The information remaining at issue in the present appeal bears a striking similarity to the records described by Adjudicator Big Canoe in Order P-460, and I adopt her analysis for the purposes of this order.

Based on the nature and content of the records, I am not satisfied that disclosure of the information at issue could "reasonably be expected to make the day to day supervision of the [appellant] in a correctional institution environment more difficult." The Ministry has not satisfied me that a logical connection exists between the appellant's access to these specific records and the harm forecasted with its disclosure in relation to the alleged "correctional supervision issues."

Accordingly, I find that the information is not exempt under section 49(a), taken in conjunction with section 14(2)(d).

EXERCISE OF DISCRETION

As described above, I have upheld the Ministry's decision to deny access to certain personal information in Records 1, 2, 4 and 11 under section 49(b). The Ministry had the discretion under section 49(b) of the *Act* to disclose the information contained in the records found to qualify for exemption, including the personal information of other identifiable individuals.

On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. I may find that the Ministry erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations (Order MO-1573). However, I may not substitute my own discretion for that of the Ministry.

Relevant considerations

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
- 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 historic practice of the institution with respect to similar information

Representations

The Ministry maintains that it properly exercised its discretion in this case. In support of this assertion, the Ministry refers to the release of information through two separate decision letters, which included "a substantial number of the requested correctional and health care records relating to [the appellant]." The Ministry alludes to its re-exercise of discretion, which resulted in the disclosure of additional information through the revised decision letter issued during the adjudication stage of the appeal.

The Ministry states that it took into consideration the fact that the appellant was requesting access to his own personal information contained in the records, and that it considered releasing the remaining information in spite of there being discretionary exemptions that apply to it. However, the Ministry submits that it concluded that the release of this remaining information "would be injurious to the supervision process" and exercised its discretion to deny access accordingly.

Referring to the revised decision partially releasing the appellant's personal information in Record 4, the Ministry indicates that this disclosure was discussed with the Security Manager of the correctional facility, who felt that greater disclosure would be inconsistent with the intent of section 49(b).

As previously acknowledged, the appellant did not submit representations on the Ministry's exercise of discretion.

Findings

I accept that the Ministry considered the circumstances surrounding the request and the purposes of the *Act* in choosing to exercise its discretion not to disclose the information at issue. I note that the Ministry in fact re-exercised its discretion during the adjudication stage of the appeal and granted additional access to the information in the records. In my view, the Ministry considered relevant factors and did not consider irrelevant ones.

I am satisfied that in the circumstances of this appeal, the Ministry has exercised its discretion within broadly acceptable parameters in applying section 49(b) and I will not disturb it on appeal.

SEARCH FOR RESPONSIVE RECORDS

Where a requester 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 as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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 [Order P-624]. Although a requester 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.

Representations

The Ministry states that it only learned that the reasonableness of its search for responsive records was at issue through the issuance of the Notice of Inquiry. The Ministry indicates that after communicating with this office about the issue, it contacted the appellant's representative to discuss the matter and learned that records sought related to an alleged assault of the appellant while being placed in the bailiff's vehicle for transportation to the federal correctional institution. The Ministry notes that the appellant's representative claimed that the appellant required dental treatment as a result of the incident, and that there should be records regarding that treatment.

The Ministry states that upon learning of the alleged incident, it contacted the Offender Transfer Operations Unit (Provincial Bailiffs) and the provincial correctional facility and requested that a search for records specific to the alleged assault be carried out. As a result of these searches, the Offender Transfer Operations Unit identified two additional pages of records. One of these

records was released in full and the other was partially disclosed. The second page has been identified as Record 11 in this appeal.

In the Ministry's revised decision letter, it stated:

> The Offender Transfer Operations Unit records search activities included a review of occurrence reports prepared by provincial bailiffs for Central Region during the relevant time period. Occurrence reports must be prepared by bailiffs in regard to incidents that occur during the transfer process. No responsive occurrence reports were located. The records search activities also included a review of the log book for the specific vehicle that transported your client to [the federal correctional facility] on May 31, 2006. There are no entries in the log book reflecting any incidents on the date in question involving your client and other individuals (staff or other inmates being transported in the vehicle).
>
> In addition, … the Manager of Health Services … [for the facility] confirmed that no dental records were located. … [The] Deputy Superintendant of Operations [for the facility] conducted a comprehensive review of all institution, security, health care and clinical records in the possession of the institution relating to your client. The review failed to reveal any documents pertaining to an alleged assault/use of force associated with the transfer of your client on May 31, 2006. No records exist.

During the inquiry into this appeal, I sought confirmation from the appellant, who had received the Ministry's supplementary decision letter, as to whether or not the adequacy of the Ministry's search remained at issue. I did not receive submissions, or confirmation of this issue, from the appellant.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records or information responsive to a request exist, the issue to be decided is whether an institution has conducted a reasonable search for these as required by section 24 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records or information might exist must still be provided. This brings a measure of balance to the task of reviewing an institution's search for responsive records.

Having considered the representations of the Ministry, I am satisfied that the Ministry made a reasonable effort to identify and locate records responsive to the appellant's request.

I note that the Ministry conducted two separate searches. Moreover, I accept that the Ministry engaged experienced employees on both occasions in order to locate the specific records. Accordingly, based on the information provided by the Ministry, and having considered the

circumstances of this appeal, I find that the Ministry's search for records and information responsive to the request was reasonable in the circumstances.

ORDER:

1. I uphold the Ministry's search for responsive records.

2. I order the Ministry to disclose to the appellant all of the information highlighted in green in Records 1, 2, 4, 7 and 11 and to disclose Records 3, 5 and 6 in their entirety by sending him a copy of these records by **June 5, 2008**.

3. I uphold the Ministry's decision not to disclose the remaining records or portions of records not covered by provision 2 and which contain the personal information of other individuals. This information is identified by orange highlighting on the copy of the records I am sending to the Ministry, and it is not to be disclosed.

4. In order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, upon my request.

Original signed by: May 7, 2008
Daphne Loukidelis
Adjudicator