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

ORDER PO-2988-R

Appeal PA-040268-2

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

BACKGROUND:

This order is issued pursuant to a remission back to this office by the Ontario Court of Appeal in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2011 ONCA 32 ("*MCSCS*"). In that decision, the Court allowed an application for judicial review of Order PO-2456, issued by Adjudicator John Swaigen, which had found that the records at issue were not "correctional records" within the meaning of the exemption for confidential correctional records found at section 49(e) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). As discussed in more detail below, the Court adopted a different interpretation of "correctional records" than the one adopted by the Adjudicator, and remitted the appeal back to this office to determine whether they were correctional records within the meaning ascribed to that term by the Court, and if so, whether they were provided in confidence as required by that exemption.

The matter began with a request made by the appellant in August 2004 to the Ministry of Community Safety and Correctional Services (the Ministry) for access to his complete medical, personal and institutional files from the Toronto West Detention Centre and the Toronto Jail in relation to three specified time periods.

After it received the request, the Ministry identified 335 pages of responsive records and granted complete access to 274 pages. Access was denied to 61 pages, in whole or in part, pursuant to the discretionary exemption in section 49(a) in conjunction with sections 14(2)(d) (correctional record) and 15(b) (relations with other governments); section 49(b) (personal privacy), and section 49(e) (confidential correctional record)of the *Act*.

During mediation, the Ministry withdrew its reliance on section 49(a) in conjunction with section 14(2)(d) with respect to all of the records. It also agreed that additional records could be disclosed to the appellant. As a result, 51 pages or portions of pages remained at issue at the time of Order PO-2456.

In response to his request, and prior to the issuance of Order PO-2456, the appellant was granted full access to his medical file. The 51 pages of records that the Ministry continued to withhold in whole or in part from his institutional file included Client Profile Reports, Occurrence Reports, Warrant Remanding Prisoner forms, Statement by Inmate Forms, an Accident/Injury Report, Record of Arrest and Supplementary Records of Arrest forms, an Inmate Information Sheet, and a Clothing Change Form. The Ministry claimed the exemption in section 49(a) in conjunction with the exemption in section 15(b) for three of the records. For all the records, it claimed one or more of the exemptions in sections 49(b) and (e).

In Order PO-2456 Adjudicator Swaigen found that some of the records qualified for exemption under section 49(b), and that none of the records qualified for exemption under section 49(a) in conjunction with section 15(b). Furthermore, with respect to the application of section 49(e), Adjudicator Swaigen reviewed the meaning of phrase "correctional record" referred to in that section and found that it did not include records prepared before the appellant was sentenced to a term of imprisonment following a finding of guilt against him. After reviewing the records

remaining at issue, he determined that none of them qualified for exemption under that section. As a result, Adjudicator Swaigen ordered that certain records be disclosed to the appellant.

The Ministry brought an application for judicial review of the decision to the Superior Court of Justice (Divisional Court) which was dismissed on December 8, 2009, with reasons reported at [2009] O.J. No. 5455. The Ministry appealed the decision of the Divisional Court to the Court of Appeal for Ontario. The appeal was allowed by the Court of Appeal in *MCSCS* (cited above).

The Decision of the Court of Appeal in MCSCS

The Court of Appeal decision focused on the application of the exemption in section 49(e), which reads:

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

The Court began by identifying that the Ministry was no longer relying on the exemption in section 49(e) for certain records. As a result, the Court ordered the Ministry to disclose the records for which section 49(e) was no longer claimed. In paragraph 7 of its reasons, the Court stated:

> The Ministry now requests an exemption based on s. 49(e) only for those records in its possession that were generated by the police or that contain information supplied by the police ("police records"). In light of this change in position by the Ministry, it shall forthwith comply with the adjudicator's order to the extent that it requires disclosure of "other" records, subject to any issue as to fees that may remain outstanding.

The Court then proceeded to examine the issue of the application of section 49(e). It reviewed the reasoning in Order PO-2456, as well as the subsequent decision of the Divisional Court upholding that order. In making its determination as to the scope of the term "correctional" as used in section 49(e), the Court of Appeal rejected the adjudicator's use of a dictionary definition in Order PO-2456 in favour of the adoption of the language used in section 5 of the *Ministry of Correctional Services Act*, which describes the responsibilities of the Ministry with respect to the supervision of inmates in its correctional facilities who have been convicted, as well as those who have not. The Court then found that both pre- and post-sentence matters could be considered "correctional," rejecting the distinction that had been made on that basis in Order PO-2456.

The Court then articulated the evidentiary standard to be used in determining whether section 49(e) applies:

> To qualify for a s. 49(e) exemption, the Ministry need only show that the records it seeks to protect are "correctional" records, the disclosure of which "could reasonably be expected to reveal information supplied in confidence". It does not have to go further and demonstrate, on detailed and convincing evidence, that a particular harm would result if the information were to be disclosed. [para 52]

As a result, the Court instructed this office to conduct a further determination of the application of the exemption in section 49(e) to certain records. The Court stated:

> Accordingly, I would allow the appeal and set aside the order in question. As for the appropriate remedy, for reasons that will be provided, I believe the matter should be remitted to the Commissioner and considered afresh by a different adjudicator. The new adjudicator will determine, in accordance with these reasons, whether the police records that the Ministry seeks to protect fall within the definition of "correctional records" in s. 49(e) and if so, whether their disclosure could reasonably be expected to reveal information supplied in confidence. [para 10]

To this end, I was appointed as the adjudicator for this matter and I sought the representations of the Ministry of Community Safety and Correctional Services on the application of the exemption in section 49(e) to the records identified as being at issue in Order PO-2456, bearing in mind the interpretation placed on the exemption by the Court of Appeal in its recent decision. In the Notice of Inquiry sent to the parties, I asked the following questions with reference to the reasons of the Court of Appeal:

1. Are the records "correctional records" for the purposes of section 49(e)?

2. If so, could the disclosure of the records reasonably be expected to reveal information supplied in confidence? Who was the source of the information contained in the records? On what basis does the institution claim that it was supplied to it in confidence? How will the disclosure of the records reveal information that was supplied in confidence?

I received representations from the Ministry and shared them, in their entirety, with the appellant, inviting him to provide me with representations on the issues. The appellant also submitted representations in response to my correspondence.

RECORDS:

I have carefully reviewed the contents of Order PO-2456, including an amendment to that order issued by the adjudicator on July 11, 2006, the decision of the Court of Appeal and the representations provided to me by the parties. The Ministry continues to claim that section 49(e)

applies to the records listed below, on the basis that they were either obtained by the Ministry directly from the police or contain information received from the police:

- the undisclosed portions of Records 16, 21, 26 and 108; and
- all of Records 178, 184 and Records 237 to 251, inclusive.

I will now determine whether these records, and parts of records, are properly exempt from disclosure under the discretionary exemption in section 49(e).

DISCUSSION:

CORRECTIONAL RECORDS

Are the records "correctional records" for the purposes of section 49(e)?

In support of its position that the records at issue are "correctional records" under section 49(e), the Ministry argues that the records are comprised of two categories, records received from the police and those "created by the Ministry as a result of discussions between members of the [police] and members of the Ministry." The Ministry submits that the records are within the custody and control of its correctional services and contain information that pertains to the appellant, a former inmate of two Ministry-operated correctional institutions, the Toronto West Detention Centre and the Toronto Jail.

The Ministry goes on to indicate that it gathered or created the records and used them "for the purpose of supervising the inmate." In an affidavit submitted with its representations in this redetermination that was sworn by the Ministry's Assistant Director, Management and Operational Support Branch, the deponent states:

> These records are gathered . . . to provide correctional professionals with a comprehensive understanding of the client. . . [t]he information contained within the record will determine the security classification, placement within the correctional facility, associations and non-associations, psycho-social alerts and behavioural history.

It goes on to summarize its response to this question by stating that "the records are critical to the Ministry's mandate, as defined in section 5 of the *Ministry of Correctional Services Act*, which includes supervising the detention of inmates, and providing for the custody of persons awaiting trial."

The appellant's representations filed in connection with this remission back by the Court do not address this question.

In its decision, the Court of Appeal stated at paragraph 9 that:

> . . . the adjudicator's interpretation of the word 'correctional' in section 49(e) is unreasonable. His narrow reading of the term creates an artificial distinction

> between pre-and post-sentence custodial records that is not consonant with the governing legislation and that would prove difficult, if not impossible, to apply in practice.

At paragraph 62, the Court reinforces its view by stating:

> Rather than defining the word 'correctional' in s. 49(e) in a way that creates an artificial and in my view, unworkable distinction between pre- and post-sentencing records, he should have focused on the confidentiality aspect of the provision to narrow its reach.

In my view, the Court has provided clear guidance as to how it would approach the question of whether or not records provided to the Ministry by the police or records which reflect the information provided qualify as correctional records. I find that records relating to the custody of an inmate, whether before or after sentencing, qualify as "correctional records" for the purposes of section 49(e). I have reviewed the contents of all of the records which are subject to the section 49(e) exemption claim and find that they relate to the Ministry's management of the appellant while he was an inmate at one of its correctional facilities. In my view, they all have a correctional purpose and were created or maintained as part of the Ministry's supervision of the appellant during his pre-sentencing incarceration. As such, I find that the undisclosed information in Records 16, 21, 26 and 108 and all of Records 178, 184 and Records 237 to 251 inclusive, qualify as "correctional records" for the purposes of section 49(e).

I will now turn to the question of whether the information contained in these records and parts of records was supplied to the Ministry by the police in confidence.

Supplied in confidence

I must first determine whether the disclosure of the records "could reasonably be expected to reveal information supplied in confidence" for the purposes of section 49(e). In order to meet its onus under section 49(e), the Ministry must demonstrate that disclosure could reasonably be expected to reveal specific information actually supplied in confidence and that the expectation of confidentiality is reasonable. This approach is consistent with that taken by the Ontario Court of Appeal and the Superior Court of Justice (Divisional Court) when applying the "supplied in confidence" test found elsewhere in the *Act* in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. 4047 at para 41 and *Canadian Medical Protective Association v. John Doe*, [2008] O.J. 3475 at para 62, respectively.

The Ministry submits that the disclosure of the information contained in the records "could be expected to reveal information supplied in confidence" by the police. Referring to the records as a whole, the Ministry asserts that the information is "inherently sensitive, as it includes discussions between Ministry staff and police officers about law enforcement matters, the opinions of police officers, personal information about victims and police codes."

Along with its representations, the Ministry provided a letter written by the Freedom of Information and Protection of Privacy Coordinator for the Toronto Police Service in which she

describes the circumstances which gave rise to the information in the records being shared with the Ministry. In a similarly general way, her letter supports the Ministry's contention that the information was provided to the Ministry by the police with an expectation of confidentiality.

In the affidavit referred to above, the Ministry provided me with an explanation of how information about inmates in correctional facilities operated by the Ministry is gathered and communicated to the persons who are responsible for ensuring that proper safeguards are in place for their own safety, as well as that of their victims, other inmates and correctional staff. This information is used to determine the appropriate level of security and rehabilitative programming that is provided to the inmate. The affiant states that:

> These records are gathered during a person's incarceration to provide correctional professionals with a comprehensive understanding of the client both from a security and a personal basis. The information contained within the record will determine the security classification, placement within the correctional facility, associations and non-associations, psycho-social alerts and behavioural history.

With respect to the records at issue in this appeal, the affiant suggests that the information pertaining to the appellant's alleged victims contained in the record would have been used to ensure that the appellant was limited in his ability to communicate with them by telephone and post.

The appellant's representations do not address this aspect of the exemption.

Turning to the actual records that are the subject of the section 49(e) claim, Record 16 is an internal Ministry record entitled "Unit Notification Card". The undisclosed information refers to the appellant and describes the observations of an unknown person about the appellant's behaviour. The Ministry has not provided me with any information as to the source of this information or whether it was received from the police. On its face, Record 16 does not contain information that was supplied to it "in confidence" and I find that section 49(e) cannot, therefore, apply to it.

The Ministry also claimed the application of section 49(e) to the undisclosed information contained in paragraph 5 of Record 21. This portion of Record 21 describes certain information provided during a telephone conversation between a Toronto Police Service Staff Sergeant and the General Duties Operational Manager at the Toronto West Detention Centre on February 28, 2004. Based on my review of the nature of the information and its sensitivity, I find that its disclosure would reveal information that was supplied to the jail staff by the police sergeant with a reasonable expectation that it would be treated confidentially. As a result, I find that the undisclosed portion of paragraph 5 of Record 21 is properly exempt from disclosure under section 49(e).

A portion of paragraph 6 of Record 26 has also been claimed to be exempt from disclosure under section 49(e) by the Ministry. This excerpt from Record 26 describes certain information provided by two police officers to the General Duties Operational Manager of a Ministry-operated correctional facility who had earlier met with the appellant following his complaints

about being assaulted by jail staff on February 27, 2004. Again, based on my review of the nature of the information I find that its disclosure would reveal information supplied to the jail staff by the police officers with a reasonable expectation of confidentiality. Therefore, I find that this information also qualifies for exemption under section 49(e).

A portion of Record 108 also contains information that was provided by a Toronto Police officer to staff at the jail where the appellant was incarcerated in 1998. Again, looking at the type of information that was provided by the officer to the Ministry jail staff, it is clear that it was given with a reasonable expectation that it would be treated in a confidential fashion. Accordingly, I find that section 49(e) also applies to the undisclosed portion of Record 108.

Records 178 and 184 are two copies of the same Ministry-generated occurrence report dated October 25, 1997. This record also describes a telephone conversation between a corrections officer employed at the Toronto West Detention Centre and a police officer with the Toronto Police Service regarding the appellant. I find that the information conveyed by the police officer to the jail staff person respecting the appellant was also provided with a reasonable expectation of confidentiality. The contents of Records 178 and 184 are, therefore, also exempt under section 49(e).

Finally, the Ministry has also applied the exemption in section 49(e) to Records 237 to 251, inclusive. These records consist of the following:

- a two-page Toronto Police Service Record of Arrest and Supplementary Record of Arrest dated February 26, 2004,
- a second three-page Supplementary Record of Arrest also dated February 26, 2004,
- two Toronto Police Service Prisoner Transportation Forms dated February 26, 2004 and October 13, 2003,
- a two-page CPIC printout describing the appellant,
- a document entitled "Prisoner Slip" dated February 19, 1998,
- A Metropolitan Toronto Police Prisoner Transportation Form dated September 5, 1997,
- A three-page Metropolitan Toronto Police Record of Arrest and Supplementary Record of Arrest dated September 5, 1997, and
- A one-page CPIC printout describing the appellant.

Based on my review of all of these documents and the representations of the Ministry, I am satisfied that they originated with the Toronto Police and were prepared by that agency, or its predecessor, the Metropolitan Toronto Police. I am also satisfied that each of these documents was provided by the police to the Ministry's jail staff on a confidential basis for the purpose of ensuring that the appellant was effectively managed during his pre-sentencing incarceration and to better inform jail staff of the police's experiences and views about the appellant. Again, based on the contents of the records, I find that they were provided to the jail staff with a reasonable expectation that they would be treated confidentially, as is required by section 49(e). For this reason, I conclude that Records 237 to 251 are exempt from disclosure under section 49(e).

In summary, I find that, with the exception of Record 16, an internal Ministry record entitled "Unit Notification Card", all of the other records qualify for exemption under section 49(e) and I will therefore uphold the Ministry's claim in that regard.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed information in paragraph 5 of Record 21, paragraph 6 of Record 26 and a portion of Record 108, as well as Records 178, 184 and 237 to 251, in their entirety.

2. I order the Ministry to disclose Record 16 to the appellant by providing him with a copy by **September 21, 2011** but not before **September 14, 2011.**

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant.

Original signed by: August 16, 2011
Donald Hale
Adjudicator