



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1414

Appeal P_9600328

Ministry of the Solicitor General and Correctional Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for 1) all Ontario Provincial Police (the OPP) occurrence reports related to the requester and a number of named individuals, 2) Amherstview detachment of the OPP occurrence reports concerning the requester and her common law husband, and 3) two reports from the Correctional Services Inspection Branch.

The Ministry located records responsive to the request and, pursuant to section 28(1), notified 12 individuals who might have an interest in the records. The Ministry received nine replies to this notification in which four individuals consented to the disclosure of their personal information. One individual consented to disclosure of any information provided by him pertaining to the requester. The remaining four individuals objected to the disclosure of any information.

The Ministry subsequently granted partial access to some of the records. The Ministry denied access to the remaining information pursuant to the exemptions found in sections 14(1)(a), (b) and (f); 19; 21(2)(e), (f) and (h); 21(3)(b), (d) and (g); 49(a), (b) and (c); and section 67 with reference to the Young Offenders Act (the YOA).

During mediation, the Ministry disclosed additional information. As a result of this disclosure, section 14(1)(f) is no longer at issue.

As further mediation was not successful, the matter has moved into the inquiry stage. A Notice of Inquiry was sent to the requester (now the appellant), the Ministry and eight individuals who may have an interest in the information at issue (the affected persons). These individuals include seven of the thirteen originally notified by the Ministry plus one other individual who was not previously notified.

Representations were received from the appellant, the Ministry and five affected persons. Of these five, three individuals objected to disclosure of any information. Two individuals, however, consented to the disclosure of those parts of their statements which pertain directly to the appellant. I will discuss the implications of such consent below in my discussion of "Invasion of Privacy".

EXEMPTIONS ABANDONED/ADDITIONAL EXEMPTIONS CLAIMED

Under section 49(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

In its representations the Ministry does not make any submissions on the application of section 19 (solicitor client privilege) or section 14 (law enforcement). As both these exemptions are discretionary, I find that the Ministry has abandoned its claim that these exemptions apply to the records. Accordingly, the Ministry has also abandoned its claim under section 49(a).

RECORDS:

The records at issue consist of the withheld portions of the following:

Pages 1-19	Occurrence Reports
Pages 22-39	Quinte Detention Centre, investigation report
Page 40	Memo re: Hamilton-Wentworth Detention Centre
Pages 42-54	Hamilton-Wentworth Detention Centre, investigation report
Pages 101-102	Hamilton-Wentworth Detention Centre, investigation report
Pages 55-100	Witness statements

PRELIMINARY ISSUE:

SCOPE OF THE APPEAL

Sections 40 to 43 of the YOA permit the courts, the police, the government and private organizations to keep records relating to young persons and their activities within the criminal justice system.

In Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner) (1993), 102 D.L.R. (4th) 602 (Div. Ct.), reversed on other grounds (1993), 107 D.L.R. (4th) 454 (CA), leave to appeal refused (1994). 112 D.L.R. (4th) viii, (S.C.C.), the Divisional Court stated at pages 605 - 606):

The archivist seeks to quash that part of the order of the Assistant Commissioner which required certain portions of the record to be disclosed (the severed record). The report in question was prepared between February and March, 1976, by the Inspection and Standards Branch of the ministry as a result of its investigation into the alleged mistreatment of wards at the Grandview Training School for Girls.

...

It was argued by the applicant that the record was a record under the *Young Offenders Act*, R.S.C. 1985, c. Y-1 ("Y.O.A."). If it was, the paramountcy doctrine would oust the provincial jurisdiction of the provincial statute. The record was created in the 1970's prior to the Y.O.A. being enacted in 1984. Further, the record is not a record relating to the offence of delinquency under the predecessor, the *Juvenile Delinquents Act*, R.S.C. 1970, C. J-3. The record concerns an internal investigation into the operation of a training school and the conduct of its employees. The record was not created for the purpose of investigating an offence alleged to have been committed by a young person. We conclude that the record in question is not a Y.O.A. record.

Because some of the records at issue in this appeal relate to internal investigations, a supplementary notice of inquiry was sent to the parties asking them to comment on the Divisional Court's decision in addition to any representations made on the application of the YOA generally in response to the original Notice of Inquiry.

In her representations, the appellant states that she is not seeking access to any record that speaks to a “young person” himself, such as charges committed by a young offender, personal social histories of young offenders or assessment and programming results that relate to a young offender. She clarifies that she is seeking only statements provided by correctional staff and “young persons” to the Inspections Branch of the Ministry. Therefore, I have reviewed the records at issue and determined that the information which I have highlighted in green on the copies of the records which are being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator with a copy of this order falls outside the scope of the appeal by virtue of the clarification provided by the appellant.

Sections 40 to 43 of the YOA permit the courts, the police, the government and private organizations to keep records relating to young persons and their activities within the criminal justice system. In my view, of these provisions, only section 43(1) could be applicable to the keeping of records such as those at issue. Section 43(1) is entitled “GOVERNMENT RECORDS - Private Records” and reads:

A department or agency of any government in Canada may keep records containing information obtained by the department or agency

- (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
- (b) for use in proceedings against a young person under this Act;
- (c) for the purpose of administering a disposition;
- (d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under the Act against a young person, to use alternative measures to deal with the young person; or
- (e) as a result of the use of alternative measures to deal with a young person.

Section 46(1) of the Young Offenders Act (YOA) generally prohibits disclosure of YOA records except as authorized or required by the YOA. This section provides:

Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person **where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.** [my emphasis]

Section 46(4) makes it an offence to fail to comply with section 46(1).

Sections 44.1, 44.2, 45.1 and 45.2 of the YOA set out several exceptions to the general prohibition against disclosure, including disclosure to the young person to whom the record relates and counsel acting on behalf of the young person.

After removing from the scope of the appeal any portions of the records that speak to charges committed by a young offender, personal social histories of young offenders or assessment and programming results that relate to a young offender, as requested by the appellant, I will now examine the portions of the records which remain to determine if they are outside the scope of the Act by virtue of the YOA.

In my view, the remaining portions are not a "record kept pursuant to sections 40 to 43" of the YOA. As a result, they are not YOA records and fall under the scope of the Act.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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.

I find that the records contain the personal information of the appellant and other individuals.

Consent to disclosure

As I indicated above, five individuals provided consents to the disclosure of their personal information in response to the Ministry's notification. Of those five, four gave full consent to the disclosure of their personal information. The other individual consented to disclosure of any information he provided which is directly related to the appellant. The Ministry disclosed portions of these records, but withheld the remainder on the basis that disclosure would be an unjustified invasion of another individual's personal privacy. I will consider these portions of the records below.

In response to the Notice of Inquiry, two additional individuals provided partial consents to the disclosure of information which pertains directly to the appellant. This information is found on pages 86 - 89, 90 - 94 and 95 - 100. This information should be disclosed to the appellant in accordance with the consents provided by these two affected persons. I will consider the remaining information in the following discussion.

Appellant's right of access

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Section 49(c)

The Ministry originally claimed the application of section 49(c) to the records, however, it does not refer to or make submissions on this section in its representations. Despite the absence of representations on this issue, I have reviewed the records and considered the application of section 49(c) to them.

For a record to qualify for exemption under subsection 49(c), the institution must satisfy each part of the following three-part test:

1. the personal information itself must be evaluative or opinion material;
2. the personal information must be compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. disclosure of the personal information would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

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In my view, the records at issue in this appeal were not compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits. Rather, the records were compiled in relation to an investigation into complaints regarding the appellant or as a result of complaints to the OPP. Accordingly, this section has no application with respect to the records at issue in this appeal.

Section 49(b)

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In this situation, sections 21(2) and (3) 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(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

Although the Ministry has claimed that sections 21(3)(d) and (g) apply to the records, it has not made representations on their application. I have reviewed the records and find that the information which has been withheld from pages 56, 76, 77 and 101 pertains to the employment history of the individual providing the statement and thus qualifies for exemption under section

21(3)(d). For clarity, I have highlighted this information in yellow on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

In my view, section 21(3)(d) does not pertain to any other portions of the records, nor does section 21(3)(g) have any application in the circumstances of this appeal.

The Ministry submits that the personal information in pages 1 - 19 of the record (occurrence reports) was compiled and is identifiable as part of an OPP investigation into a possible violation of law (section 21(3)(b)).

Several previous orders of this office which have considered whether information that an appellant was previously aware of, or which was provided to or received from an appellant by an institution, should be subject to a presumption against non-disclosure (Orders M-384, M-444, M_613, M-847 and P-1263). All of these orders deal with fact situations analogous to the present case in that the information at issue was the personal information of both the appellant and other individuals.

These orders found that non_disclosure of personal information which was originally provided to the institution by an appellant would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result.

In my view, in the circumstances of this appeal, this reasoning is equally applicable to information which was provided by others, or was obtained by the OPP, in the presence of the appellant.

In these circumstances, I am of the view that to apply the presumption in section 21(3)(b) to these portions of pages 1 - 19 of the records would lead to an absurd result. Accordingly, I find that this presumption does not apply to the information provided by the appellant, or which was provided in her presence, in these pages.

With respect to the remaining personal information which was not provided by the appellant in pages 1 - 19 (which is found on pages 3, 7, 8, 9, 10, 11, 12, 15 and 17), I am satisfied that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, namely, the Criminal Code. Accordingly, I find that the presumed unjustified invasion of personal privacy in section 21(3)(b) applies to this information. I have highlighted this information in yellow on the copies of these pages which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

Balancing under Section 21(2)

The Ministry indicates that the remaining records deal with internal investigations conducted by the Ministry, and claims that the following factors which favour privacy protection apply to the personal information contained therein:

- unfair exposure to harm - section 21(2)(e)
- highly sensitive - section 21(2)(f)
- supplied in confidence - section 21(2)(h).

The affected persons who objected to disclosure of their personal information also raise the application of the factor in section 21(2)(h).

The appellant argues that the records relate to allegations made against her. She indicates further that she requires this information to prepare a defence against a law suit which has been brought against her by her former common law husband (section 21(2)(d)).

I have reviewed the records and I agree with the Ministry that information pertaining to an investigation into the conduct of an employee is highly sensitive. Moreover, I agree that the employees responded to the investigator in confidence. Accordingly, I find that the factors in sections 21(2)(f) and (h) are relevant in the circumstances.

The Ministry submits that, as a result of the allegations and comments made throughout the investigation, disclosure of the information in the records could damage the reputation of certain individuals at the management level. I am not persuaded by the Ministry's arguments that any individual will be exposed **unfairly** to pecuniary and other harm. Therefore, I find that this section is not relevant.

In respect of the allegations which led to the investigations into the appellant's conduct at the two detention centres, however, I find that one other factor which favours disclosure is relevant in the circumstances. The factor has been identified in previous orders as "adequate degree of disclosure" (Orders P-1014) and relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.

In the circumstances of this appeal, I find that the factor requiring adequate disclosure applies to the personal information in the records which is directly related to the subject matter of the investigation at the two detention centres.

Finally, with respect to the litigation in which the appellant is a named defendant, I find that section 21(2)(d) is relevant in the circumstances. However, in this case, the appellant has already received a considerable amount of information and I find that this section has little weight.

I have weighed the interests of the appellant in disclosure against the factors favouring privacy protection. In the circumstances of this appeal, I find that the consideration favouring disclosure is more compelling with respect to information pertaining directly to the allegations, and disclosure of this information would not be an unjustified invasion of personal privacy. Further, similar to my findings above regarding section 21(3)(b), I find that to withhold information which was provided by the appellant would lead to an absurd result in the circumstances of this appeal.

Accordingly, these portions of the records are not exempt under section 49(b).

I find that the factors which favour privacy protection are more compelling with respect to the remaining information in the records. Accordingly, these portions of the records are exempt under section 49(b). I have highlighted in yellow the portions of the records which are exempt under section 49(b) on the copy of the records being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

I find that neither section 21(4) nor section 23 are applicable to the information which is highlighted in yellow in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to withhold the information which is highlighted in yellow and green on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant the remaining information by sending the appellant a copy of the severed records by **July 29, 1997** but not earlier than **July 24, 1997**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ June 24, 1997