

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4269-I

Appeals PA18-267 & MA17-716

Ministry of the Solicitor General

June 23, 2022

Summary: In these two appeals, the family of an inmate who died at Central East Correctional Centre after an altercation with correctional staff is seeking records relating to his death. Many of the records at issue contain information not just about the inmate but also about correctional staff and other inmates. The adjudicator decided that these latter individuals are affected parties in these two appeals and that procedural fairness requires that they be given an opportunity to make submissions to him as to whether the records should be disclosed to the family of the deceased inmate. He asked the Ministry of the Solicitor General (the ministry) to provide him with updated contact information for these affected parties. The ministry initially agreed but then changed its position and refused to provide the adjudicator with such information. In this interim order, the adjudicator orders the ministry to provide him with updated contact information for those correctional staff and inmates who are affected parties in the two appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 50(3) and 52(4).

Orders Considered: Interim Order PO-3718-I.

Cases Considered: *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, 2014 ONSC 3295 (CanLII); *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2956 (CanLII).

OVERVIEW:

[1] The purpose of this order is to address the refusal of the Ministry of the Solicitor General (the ministry) to provide me with the contact information for those correctional staff and inmates who are affected parties in Appeals PA18-267 and MA17-716. These individuals are affected parties in those appeals because there is information relating to them in the records at issue and I have determined that they have an interest in the issues before me.

[2] In both appeals, the family of an inmate who died at Central East Correctional Centre after an altercation with correctional staff is seeking records relating to his death. They filed an access request for such records with the City of Kawartha Lakes Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and later with the ministry under the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

[3] In Appeal MA17-716, the family is appealing the police's access decision to withhold a number of records relating to the inmate's death. The records at issue created by the police themselves include transcripts and video interviews with correctional staff and inmates. The ministry is an affected party in this appeal because the records at issue also include ministry records (e.g., inmate incident reports, occurrence reports, ICIT/CET activation reports, use of force occurrence reports, surveillance videos, etc.) that the police obtained from the Central East Correctional Centre.

[4] The adjudicator initially assigned to Appeal MA17-716 sought representations on the issues to be resolved from the police, the appellant, the ministry and more than 80 affected parties, including correctional staff and inmates. In response, he received representations from the police, the appellant, the ministry, two correctional managers, one medical staff member and a lawyer representing 18 correctional staff. He did not receive representations from any of the inmates.

[5] In Appeal PA18-267, the family is appealing the ministry's decision to withhold a number of records and parts of records relating to the inmate's death. The records at issue include various health care records, a staff memo, an AED event form, employee/other information reports, occurrence reports, inmate incident reports, use of force occurrence reports, emails, correctional officer notes and surveillance videos. Some of these records are also at issue in Appeal MA17-716.

[6] The adjudicator initially assigned to Appeal PA18-267 sought representations on the issues to be resolved from the ministry and the appellant, but not from any affected parties. As with Appeal MA17-716, there is information in the records at issue relating to a number of other parties, mostly correctional staff.

[7] Both Appeals MA17-716 and PA18-267 were re-assigned to me to complete the

inquiries into whether the records at issue should be disclosed to the family of the deceased inmate. I decided to continue the inquiries in both appeals by, amongst other things, seeking reply representations from the affected parties (correctional staff and inmates) in Appeal MA17-716 and initial representations from the affected parties (mostly correctional staff) in Appeal PA18-267. However, I also determined that I first needed updated contact information, including any email addresses, for these affected parties.

[8] In its initial representations in Appeal PA18-267, the ministry made the following comments about the requirement to notify affected parties:

The third party individuals whose personal information is subject to disclosure do not appear to have been notified of this appeal. These third party individuals would have no expectation that this appeal is occurring, or that their personal information is subject to disclosure as a result of it. The Ministry submits that in the circumstances, disclosure could be expected to cause significant distress. The Ministry submits that due to procedural fairness considerations, the affected third party individuals have a right to receive prior notification of the proposed disclosure of their personal information, as well as an opportunity to be heard.

[9] In its supplementary representations, the ministry further stated:

The Ministry maintains that disclosing the records containing [employees'] personal information without employees being provided with an opportunity to be heard during the adjudication process is contrary to the duty of procedural fairness enshrined in jurisprudence, such as *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2956. We submit that this decision stands for the principle that affected employees who may be identified in the records subject to this appeal, must be notified of the adjudication, and offered an opportunity to provide representations, prior to a decision being rendered about the disclosure of their personal information.

[10] Any determination as to whether, in the interests of procedural fairness, parties should be notified rests with the adjudicator and not the parties. In this case, I agree with the ministry that procedural fairness requires that I notify the affected parties. Accordingly, I wrote a letter to the ministry that stated, in part:

In my view, procedural fairness requires that a number of individuals whose information appears in the records at issue in Appeal PA18-267, particularly correctional staff, be given an opportunity to provide their views on whether the information relating to them should be disclosed. For most of these records, I intend to send a Notice of Inquiry to each of

these individuals directly that invites them to submit representations to me.

[11] In this letter and subsequent correspondence, I also advised the ministry that many of the ministry-created records are at issue in both Appeals MA17-716 and PA18-267. As a result, the same correctional staff would likely be affected parties in both appeals.

[12] I requested the ministry's assistance in identifying and notifying the correctional staff who appear in the surveillance videos that are at issue in both appeals and provided some options for doing so. I also provided the ministry with a list of the names of the correctional staff and inmates who were notified and given an opportunity to submit representations by the previous adjudicator in Appeal MA17-716 and requested that the ministry provide me with any updated contact information that it may have for each of these individuals, including email addresses, if available.

[13] In response, the ministry stated the following with respect to identifying the correctional staff in the surveillance videos:

It is the Ministry's intent that notification of staff who may be identifiable in responsive correctional videos be as comprehensive and as fair as possible, in accordance with the principles of procedural fairness that notification is intended to serve. As a result, we strongly favor the first option you identified in your correspondence, which is that the Ministry review the videos, and that we provide you with the names and contact information of staff who we can identify in the videos, so that you can send them Notices of Inquiry.

[14] The ministry stated in a further email that it would like to be provided with the full names of all correctional staff, because in some cases, it has just been provided with last names, or else the last names with the initial of the first name. It also stated that it would like to be provided with a date of birth for each of the inmates, because in some cases, its search indicates it has multiple listings for an inmate.

[15] Moreover, the ministry stated it is wary about disclosing the personal contact information of six specific correctional staff for notification purposes, citing reasons that I have decided not to repeat in this public order,¹ and asked for any direction that I have may have in respect of this concern.

[16] In response, I provided the ministry with updated lists containing the names of correctional staff and inmates who are affected parties in Appeal MA17-716. In response to the ministry's concern about the six correctional staff, I provided it with the following response and direction:

¹ Because to do so could reveal personal information of the correctional officers, who have not yet been notified.

I appreciate the concern raised by the ministry However, procedural fairness in the appeals before me requires that I provide correctional staff with an opportunity to submit representations to me on whether the records containing their information should be disclosed to the appellant. If the ministry does not provide me with the personal contact information of the six staff . . . these individuals may be deprived of the opportunity to make their views known to me.

. . .

In these circumstances, I would ask that the ministry proceed with providing me with the personal contact information of the six correctional staff. . . .

[17] I then received a response from the ministry in which it changed its position and refused to provide me with contact information for any of the correctional staff and inmates who are affected parties in the two appeals. It stated:

The Ministry of the Solicitor General has carefully considered the Adjudicator's request to be provided with Ministry staff and inmate contact information so that the Adjudicator can notify these affected third party individuals, whose personal information is contained in the responsive records, to provide them with an opportunity to respond to the appeal. While the Ministry appreciates the interest in providing notification to these affected third party individuals, we do not believe that such notification is required because the personal information at issue is clearly exempted or excluded from the *Act* . . .

The Ministry believes that notification is only required if disclosure is actually being contemplated. It is our position that our decision can be upheld on the basis of the representations we have provided, and in particular the exemptions and exclusions we claimed. The Ministry believes that in the circumstances notification is not required and that providing it may cause unnecessary distress to these affected third party individuals, in addition to placing the Ministry in an unnecessarily challenging position.

[18] I advised the ministry in writing that I intended to order it to provide me with the contact information for the affected parties in the two appeals. I also invited the ministry to provide me with further submissions or comments on this notification issue and my impending order, but I did not receive any further representations from the ministry.

[19] In this interim order, I direct the ministry to provide me with the requested contact information.

DISCUSSION:

[20] For the reasons that follow, I have decided to order the ministry to provide me with updated contact information for the correctional staff and inmates who are affected parties in Appeals MA17-716 and PA18-267.

[21] Under section 10(1)(a) of *FIPPA*, every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22. The right of access also does not apply to records that are excluded from *FIPPA* altogether, under various provisions, such as section 65(6). In denying access to the records at issue in Appeal PA18-267, the ministry has relied on these provisions.²

[22] In accordance with section 50(1), a person who makes an access request for records under *FIPPA* to an institution may appeal any decision of the head of that institution to the IPC. Section 50(3) gives the IPC the discretion to inform other parties that an appeal has been received if those parties have “an interest” in that appeal. This provision states:

Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and *may also inform any other institution or person with an interest in the appeal*, including an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, of the notice of appeal.

[Emphasis added]

[23] Although the IPC has discretion under section 50(3) as to whether to notify a person with an interest in an appeal, such discretion must be informed by the principles of natural justice.³ In some circumstances, the duty of procedural fairness requires that the IPC notify persons whose interests might be affected by the possible disclosure of the records in order to give them an opportunity to submit representations as to whether those records should be disclosed.⁴

[24] In its initial and supplementary representations, the ministry emphasized the importance of giving these affected parties the opportunity to be heard during the adjudication stage of the appeal process. In addition, it agreed to assist me in notifying these affected parties by providing me with updated contact information for these individuals. However, it then reversed its position and argued that notification of these affected parties is not required because the information relating to them is exempt from

² Similarly, in Appeal MA17-716, the police are relying on a number of exemptions in *MFIPPA* to deny access to the records at issue.

³ *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, 2014 ONSC 3295 (CanLII).

⁴ *Ibid.* See also *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2956

disclosure or is in records that are excluded from the scope of *FIPPA*. In addition, it argued that notification may cause these individuals “unnecessary distress.”

[25] I do not find these latter arguments to be persuasive. One purpose of *FIPPA* is that decisions on the disclosure of government information should be reviewed independently of government.⁵ In Appeal PA18-267, I am conducting an inquiry to independently review the ministry’s decision to deny the appellant access to a number of records and parts of records on the basis that they are excluded from *FIPPA* or exempt from disclosure under various provisions. I will also be determining whether the public interest override in section 23 of *FIPPA* applies to any records. I am conducting a similar inquiry in Appeal MA17-716, in which the police denied access to a number of records.

[26] I have not yet decided whether the records in these two appeals should be disclosed to the appellant. I will only do so after I thoroughly review the records, consider the evidence submitted by all of the parties, and analyze the relevant statutory provisions. However, one possible outcome of these appeals, as with any appeal before the IPC, is that I may order that records be disclosed to the appellant.

[27] In the two appeals before me, there is information in the records not just about the individual who died at Central East Correctional Centre but also about correctional staff and inmates. Having reviewed the information in the records, I have formed the view that the correctional staff and inmates whose information appears in the records are clearly affected parties in these two appeals because their interests could be affected by the possible disclosure of those records. I find that procedural fairness requires that these affected parties be given an opportunity to provide their views to me as to whether the information relating to them should be disclosed.

[28] I am mindful of not triggering “unnecessary distress” for those correctional officers and inmates who will be notified, and am also mindful of the additional issue the ministry raised.⁶ In my view, however, these concerns are significantly outweighed by the procedural fairness requirement that these affected parties be given the opportunity to be heard during the adjudication stage of the appeal process with respect to the possible disclosure of records that contain information about them.

[29] Section 52(4) of *FIPPA* states, in part:

In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege . . .

[30] The IPC has previously found that section 52(4) gives it the authority to require

⁵ Section 1(a)(iii).

⁶ As noted above, I have decided not to specify the nature of that concern in this public order.

an institution to produce to the IPC the contact information of affected parties that are found in records that are in the custody or under the control of an institution.⁷ I agree with that previous finding, and its application to the circumstances in this matter.

[31] The ministry's refusal to provide me with the contact information for the correctional officers and inmates who are affected parties in the two appeals is hampering my ability to proceed with my inquiries into whether the records at issue should be disclosed to the family of the inmate who died at Central East Correctional Centre. I have decided, therefore, to order the ministry to provide me with updated contact information for those correctional staff and inmates who are affected parties in Appeals MA17-716 and PA18-267.

ORDER:

1. I order the ministry to provide me with:
 - a. contact information, including email addresses, for those correctional staff identified in the list that I provided to the ministry on January 31, 2022;
 - b. contact information for those inmates identified in the list that I provided to the ministry on January 31, 2022;
 - c. contact information for any correctional staff that the ministry can reasonably identify in the surveillance videos and who are not included in the list mentioned in order provision 1(a); and
 - d. contact information for any other correctional staff or inmates that I may subsequently decide to notify during the remainder of my inquiries for Appeals PA18-267 and MA17-716.

2. I order the ministry to provide me with the contact information set out in order provisions 1(a), (b) and (c) by **July 15, 2022**.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ June 23, 2022

⁷ Interim Order PO-3718-I.