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

ORDER PO-2456

Appeal PA-040268-2

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The requester made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) 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.

The Ministry identified 335 pages of responsive records. It granted access to 274 pages and denied access to 61 pages wholly or in part pursuant to the exemption in section 49(a), in conjunction with sections 14(2)(d) and 15(b), section 49(b) in conjunction with section 21(2)(f), and section 49(e) of the *Act*.

During mediation, the Ministry withdrew its claim that the section 49(a) exemption in conjunction with section 14(2)(d) applies to the records at issue. It also withdrew its claim that the section 49(a) exemption in conjunction with section 15(b) applies to page 206, leaving only section 49(b) in conjunction with section 21 at issue for this record. The Ministry also agreed that pages 53, 63, 65, 67, 179, 197, 205, and 207 can be disclosed to the appellant. Therefore, 53 pages or portions of pages remained at issue at the close of mediation.

As mediation did not resolve all the issues, this inquiry entered the adjudication stage. I initially sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry and invited it to provide representations.

After receiving the Notice of Inquiry, the Ministry granted the appellant access to pages 8 and 34 in their entirety and to additional information from page 21 (the second severance), page 26 (the first three severances), page 201 (the second, third and fourth severances), and page 206 (the second severance). This leaves 51 pages at issue in whole or in part.

The Ministry provided representations. I sent a copy of the Ministry's representations in their entirety to the appellant, together with an index of the records at issue describing them and indicating the exemption or exemptions claimed for each of them, as well as a Notice of Inquiry, and invited the appellant to provide representations. The appellant advised this office that he did not intend to make written representations.

The appellant was granted full access to his medical file. The 51 pages of records that the Ministry continues to withhold in whole or in part from his institutional file include 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 claims 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 claims one or more of the exemptions in sections 49(b) and (e).

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. 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 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;

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

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].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis and findings

All the records contain the name of the appellant together with other information about him such as his date of birth, home address, home telephone number, photograph, sex, dietary preferences, criminal history, and the views or opinions of other individuals about him. I find therefore that all the records contain the personal information of the appellant.

All the records for which the Police claim the section 49(b) exemption also contain the personal information of one or more other individuals, with the following exceptions. Page 26 is entitled "Occurrence Report". The Police claim section 49(b) but have not highlighted any portion of the page to show the information they consider to fall into this category and it is not clear from reading the record that any of it constitutes the personal information of another individual or individuals. Nor do their representations assist. The information on page 52, identified by the Ministry as personal information, appears to be a handwritten combination of symbols and abbreviations. I cannot determine from the record itself that this is information about an identifiable individual and the Ministry's representations provide no additional assistance. Accordingly, I find that the Ministry has not established that this record contains the personal information of any individual other than the appellant. Pages 178 and 184 contain information about public officials relating to them purely in their professional capacity. The information reveals nothing of a personal nature about these individuals and is therefore not their personal information. However, the information that I have highlighted on these pages is of a personal nature and constitutes the personal information of individuals other than these public officials.

In summary, I find that pages 26 and 52 do not contain the personal information of any individual other than the appellant. As well as the appellant's personal information, the remaining pages contain the personal information of other individuals.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/RELATIONS WITH OTHER GOVERNMENTS

Introduction

Section 47(1) 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.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, **15**, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the institution relies on section 49(a) in conjunction with section 15(b).

Section 15(b): information received from another government

General principles

Section 15(b) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Analysis, representations, and findings

The Ministry claims the section 15(b) exemption for pages 178, 184, and 237-251. Pages 178 and 184 are copies of the same document with different hand-written notations at the top. This is a document prepared by the Ministry that contains information received from a municipal police officer. It is clear on the face of most of the records in pages 237 to 251 that they are records prepared by a municipal police service. I accept the representations of the Ministry that each of pages 237 to 251 contains information received by the Ministry from this municipal police service.

As all the information that the Ministry refuses to disclose under section 15(b) was supplied by a municipal police service, this raises the question of whether a municipality is a "government" for the purpose of section 15(b) and therefore a municipal police service is a "government agency" for the purpose of this section.

In Order 69, former Commissioner Sidney B. Linden found that a municipality is not a government for the purpose of section 15(b). If this is correct, a municipal police service is not a government agency for the purpose of this section. However, the Ministry argues that this interpretation should be changed in light of a new provision in the *Municipal Act, 2001*, S.O. 2001, c. 25, which replaced the *Municipal Act*, R.S.O. 1990, c. M.45 (the former *Municipal Act*).

In Order 69, Commissioner Linden stated:

> In my view, for an exemption under either subsection 15(a) or (b) to apply, I must first determine if a municipality is a government for *the purposes of section 15 of this Act*. An examination of the meaning of the word "municipality" in the context of the *Act* itself is a necessary starting point to making this determination.
>
> In subsection 2(1) of the *Act*, the definition of "institution" encompasses a municipality. In subsection 15(b), the pertinent phrase used is "another government". If a municipality is an institution for the purposes of the *Act*, it would be contrary to the wording of the *Act* to extend the meaning of "another government" to include "municipality" without specific statutory direction. A plain reading of subsection 15(b), taking into consideration the context of the *Act*, leads me to the conclusion that "another government" means the federal government, another provincial government, or a foreign government.
>
> The institution [the Ministry of Municipal Affairs] relies on several court decisions as authority for the proposition that a municipality is a government. Specific reference is made in the institution's submissions to *McCutcheon v. Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.) and *McKinney v. University of Guelph* (1987), 46 D.L.R. (4th) 193 (Ont. C.A.).
>
> In my view, reliance on these decisions to determine the meaning of the word "government" in the context of this *Act* is problematic. I have an obligation to rely on the *Act*'s written expression in ascertaining legislative intent in the first

instance. As Pierre A. Cote points out in *The Interpretation of Legislation in Canada* (1984 Les Editions Yvon Blais Inc., at p. 443), "there is a danger in taking the meaning given by one judge to a word in a specific context, and transposing it to another enactment for which a different context may suggest a different meaning for the same word."

With this in mind, I note that the legal authorities relied upon by the institution deal with entirely different statutory contexts. In *McCutcheon v. Toronto* and *McKinney v. University of Guelph*, the courts' comments with respect to the status of a "municipality" were made in the context of the application of the *Canadian Charter of Rights and Freedoms*.

The interpretation that a municipality is not a "government" for purposes of the *Freedom of Information and Protection of Privacy Act, 1987* is supported by the legislative history of section 15. Section 15 of the *Act* had its genesis in the recommendations contained in the Report of the Williams Commission - *Public Government for Private People* (The Report of the Commission on Freedom of Information and Individual Privacy/1980 – Queen's Printer of Ontario). It is clear from a review of the Commission's discussion leading to the recommendation of a provision very similar to the present section 15 that the intent of such a provision was to exempt sensitive information that may be generated by "international relations or the relations of the province of Ontario with the governments of other jurisdictions". (See pages 304 to 307, Volume 2, *The Report of the Commission on Freedom of Information and Individual Privacy/1980*).

In the clause-by-clause review of Bill 34 by the Standing Committee on the Legislative Assembly, the comments of the Attorney General with respect to the purpose of the section 15 exemption were unequivocal. The Attorney General stated that the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations". The Attorney General explicitly stated that a municipality was not intended to be a "government" for the purposes of section 15. (March 23, 1987, Comments made after second reading of the Bill.)

Finally, if a municipality was considered to be a government for the purposes of section 15 of the *Act*, a letter from a local library board, for example, could be placed on the same footing, and qualify for the same exemption as a document received from the government of another nation. This would greatly expand the number of records that could be withheld from the public indefinitely, not just for the duration of a period of negotiations. In my view, this result would be contrary to the spirit and right of access to information as set forth in the *Act*. Clear statutory direction would be necessary to justify such a position, and as I have indicated, I see no such direction in the *Act*.

> In view of the above, I am not able to accept the institution's position that a municipality is a government for the purposes of the *Freedom of Information and Protection of Privacy Act, 1987*.

The Ministry relies on section 2 of the *Municipal Act, 2001*, which came into force on January 1, 2003. The former *Municipal Act* contained no equivalent to section 2. The new section 2 reads:

> Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for purposes which include,
>
> (a) providing the services and other things that the municipality considers are necessary or desirable for the municipality;
>
> (b) managing and preserving the public assets of the municipality;
>
> (c) fostering the current and future economic, social and environmental well-being of the municipality; and
>
> (d) delivering and participating in provincial programs and initiatives.

The Ministry does not explain why it believes section 2 should form the basis for a change in the interpretation of section 15. I note that the section refers to municipalities as "governments". However, the fact that municipalities are referred to as "governments" in section 2 of the *Municipal Act, 2001* is not necessarily a significant departure from the previous *Municipal Act*. Sections 25.1, 70, 72, and 100 of the former *Municipal Act* also referred to municipalities as governments.

Section 2 of the new act does not address the issues of access to information or protection of personal privacy. There is nothing in this section that purports to change the *Freedom of Information and Protection of Privacy Act* in any way. I agree with Commissioner Linden's conclusion that the intent of the Legislature, as evidenced by the Williams Report and the statements of the Attorney General during legislative debates on the *Act*, was that municipalities are not "governments" for the purpose of section 15 of the *Act*. In particular, the statements of the Attorney General make it clear that the Legislature turned its mind to the question of whether municipalities are governments for the purpose of section 15.

When the Legislature passed the *Municipal Freedom of Information and Protection of Privacy Act* in 1991, it included a parallel provision to section 15 of the *Act.* Section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* provides:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

Under the *Municipal Freedom of Information and Protection of Privacy Act*, it is clear that a municipality cannot claim the "relations with governments" exemption for information it receives from another municipality or municipal board. That is, section 9 does not apply to information received from another municipality.

It would be inconsistent with the overall scheme of the two freedom of information statutes if a provincial institution could claim the "relations with other governments" exemption for information received from a municipality when a municipality cannot.

Therefore, the Legislature implicitly reaffirmed its intention that information received from municipalities is not covered by this statutory regime when it passed the *Municipal Freedom of Information and Protection of Privacy Act*, incorporating section 9.

Accordingly, I find that the municipal police service that provided these records to the Ministry is not an agency of another government for the purposes of section 15 of the *Act*. Therefore, I find that the exemption claimed under section 49(a) in conjunction with section 15(b) does not apply to these records.

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

General principles

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.

Under section 49(b), where a record contains 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, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a 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.

As indicated earlier, I have found that pages 26, 52, 178 and 184 do not contain the personal information of any individual other than the appellant. Therefore, the section 49(b) exemption does not apply to these records.

I will therefore consider whether section 49(b) applies to the remaining records.

Do any of the exceptions in paragraphs (a) to (e) of section 21(1) apply?

If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 49(b). Having reviewed each of the records and the representations of the parties, I find that none of the exceptions listed in paragraphs (a) to (e) of section 21(1) applies in this case.

Do any of paragraphs (a) to (c) of section 21(4) apply?

If any of paragraphs (a) to (c) of section 21(4) apply, disclosure is not an unjustified invasion of privacy under section 49(b). Having reviewed each of the records and the representations of the parties, I find that section 21(4) does not apply in this case. Therefore, I will turn to section 21(3).

Do any of the presumptions in paragraphs (a) to (h) of section 21(3) apply?

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure is presumed to be an unjustified invasion of privacy under section 49(b), subject only to sections 21(4) and 23 (the public interest override) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Having reviewed each of the records and the representations of the Ministry, I find that none of the section 21(3) presumptions applies in this case. Therefore, I will turn to section 21(2).

Do any of the section 21(2) factors apply?

Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b) [Order P-239].

Section 21(2) provides:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The Ministry submits that the section 21(2)(f) factor applies. This factor weighs against disclosure. The Ministry submits:

> . . . [T]he undisclosed personal information may be viewed as highly sensitive personal information within the meaning of section 21(2)(f) of the [*Act*] . . . [R]elease of the undisclosed information has the potential to cause other

> individuals, including other offenders and individuals in their personal capacity, personal distress. In this regard, the Ministry is mindful of inherent sensitivities relating to the incarceration of individuals in correctional facilities.

For personal information to be regarded as highly sensitive, it must be established that its release would cause excessive personal distress to the individuals affected [Order P-434].

Pages 132, 139, 196, 198, 199, 200, 201, 202, 203, 204, 206, and 210 relate to an adversarial or potentially adversarial relationship between the appellant and other individuals and/or reveal the incarceration of those individuals. I find that the personal information that the Ministry has withheld in these pages, as well as the information I have highlighted on a copy of page 21 provided to the Ministry with this order, if disclosed, would likely cause excessive personal distress to the affected individuals. Therefore, this information is highly sensitive within the meaning of section 21(2)(f). In the circumstances of this case, and bearing in mind the Ministry's submissions on this point, I find that this factor carries significant weight.

As indicated earlier, the appellant provided no written representations; however, the appellant's appeal letter is of some use in determining whether any factors that favour disclosure apply in this case. Having reviewed the records in light of the appellant's appeal letter, it does not appear to me that there are any applicable listed or unlisted factors that favour disclosure of the personal information in this case.

As I have found that the above personal information is highly sensitive, a factor that strongly favours non-disclosure in this case, and I have not found that any factors that favour disclosure apply, I find that disclosure of this information would constitute an unjustified invasion of the personal privacy of the individuals to whom this personal information relates. Therefore, I find that this information is exempt from disclosure under section 49(b).

The Ministry has not explained why it considers the personal information that it has withheld on pages 2, 7, 20, 51, 62, 64, 66, 71, 75, 77, 88, 104, 105, 146, 160, 208, or 212 to be highly sensitive, and it is not apparent to me from reading the records at question or the appeal letter of the appellant that this personal information is highly sensitive. Therefore, I find that the Ministry has not met its onus of establishing that disclosure of this information would be an unjustified invasion of the personal privacy of the individuals to whom this information relates.

Nevertheless, it would be unfair to these individuals to make a finding as to whether this personal information is exempt under section 49(b) without first notifying them, if possible, and obtaining their representations on this issue.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Page 146 is an application made and signed by the appellant. Although it contains another individual's personal information, this information was clearly provided by the appellant himself. Disclosure of this information to the appellant would not be inconsistent with the purpose of the exemption, and it would be absurd to refuse the appellant this information, which is known to him, as he provided it to the Ministry. Therefore, I find that the personal information on page 146 is not exempt from disclosure under section 49(b).

Pages 7, 20, 51, 75, 77, 104, 105, 160, 208, and 212 contain the name of an individual and his relationship to the appellant. It is manifestly obvious that this information is already known to the appellant, and in my view it would also be absurd to refuse to disclose this information to him.

In summary, I find that the information I have highlighted on pages 21, 178 and 184, and the information highlighted by the Ministry on pages 132, 139, 196, 198, 199, 200, 201, 202, 203, 204, 206, and 210 is exempt under section 49(b). I find that the information highlighted by the Ministry on pages 7, 20, 26, 51, 52, 75, 77, 104, 105, 146, 160, 178 and 184 (other than the portions of pages 178 and 184 that I have highlighted), 208, and 212 is not exempt under section 49(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/CORRECTIONAL RECORDS

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.

Under section 49(e), the institution may refuse to disclose a correctional record in certain circumstances. That section 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

For section 49(e) to apply, the institution must demonstrate that disclosure of the information "could reasonably be expected to" lead to the specified result. To meet this test, 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry claims this exemption for pages 16, 21, 26, 108, 178, 184, 199, 202, 203, 210, and 237 to 251. As I have found that pages 199, 202, 203, and 210 are exempt under section 49(b), I will consider section 49(e) only in relation to pages 16, 21, 26, 108, 178, 184, and 237 to 251.

Pages 16, 26, 178, and 184, appear to be records either created by a correctional facility, or created by the Ministry, which is responsible for the operation of correctional facilities. Page 108 is a document issued by a court - a warrant issued by a Justice of the Peace remanding a prisoner. It instructs police officers to take a prisoner to a correctional facility and instructs the operator of the correctional facility to take the prisoner into custody. Pages 237 to 241 and 248 to 250 are record of arrest and supplementary record of arrest forms prepared by the municipal police service. Pages 242, 243, 247 and 251 are prisoner transfer forms prepared by the police, documenting the transfer of a prisoner from police stations to a courthouse. Pages 244 and 245 have no title. From their contents, they appear to be the results of a criminal record check. As they state that the information is not to be disclosed without the consent of the Commissioner of the Ontario Provincial Police, these pages appear to have been created by a police service rather than by any correctional agency. Page 246 is a document entitled "Prisoner Slip" and there is no indication on its face as to who prepared it or its purpose.

These records all appear to relate to matters such as investigation, prosecution, court proceedings, and pre-trial and/or pre-sentence detention. I see no evidence that they relate to post-conviction events. To establish that section 49(e) applies, the Ministry must demonstrate that the record in question is a "correctional record", and that disclosure "could reasonably be expected to reveal information supplied in confidence."

Correctional record

The Ministry claims that all the records listed above, as well as certain other court and police records that I have found to be exempt under section 49(b) are "correctional records". In relation to this issue, the Ministry submits that:

> The records at issue are contained [in] the appellant's health care and correctional files. The Ministry considers such records to be correctional records for the purposes of section 49(e).

The term "correctional record" is not defined in the *Act*.

The *Oxford Concise Dictionary*, 7th edition, defines "correction" as including "punishment".

Webster's Third New International Dictionary defines "correction" as "the treatment of offenders through a program involving penal custody, parole, and probation".

Black's Law Dictionary, 8th edition, similarly defines "correction" as "the punishment and treatment of a criminal offender through a program of imprisonment, parole, and probation".

Webster's also defines "correct" as "to rebuke or punish or discipline for some fault or lapse" and defines "correctional" as "of or relating to correction; esp: dealing with or charged with the administration of corrections".

These definitions have in common that they relate to punishment or rehabilitation after a person has been found guilty of or otherwise responsible for an offence or wrong-doing. These dictionaries contain other definitions of "correct" and "correction", but none that suggest that the term encompasses steps in the justice system prior to any finding of wrong-doing, such as investigation, prosecution, court proceedings, or pre-trial or pre-sentence detention.

The Ministry's only submission that directly addresses the question of whether the records are "correctional records" is that they are contained in two files maintained by the Ministry, whose functions, according to its representations, include "a correctional services component".

The Ministry describes this "correctional services component" as follows:

> The correctional services component of the Ministry provides treatment and rehabilitation programmes for adult offenders, 18 years of age and over, who are convicted by the courts and sentenced to terms of imprisonment of up to two years less one day. Additionally, the Ministry is also responsible for the supervision of individuals awaiting trial, sentencing, transfer, deportation or other judicial proceedings. This Ministry is also responsible for the supervision of adults in Ontario who have been convicted of an offence and subsequently placed on probation.
>
> Jails and detention centres serve as the point of entry into the institutional system. They hold:
>
> - persons on remand (awaiting trial, sentencing or other proceedings);
> - offenders sentenced to short terms (approximately 60 days or less); and
> - offenders awaiting transfer to a federal or provincial correctional facility.

The Ministry distinguishes its correctional services mandate from two other mandates: community safety and police and emergency services.

In my view, careful analysis of the Ministry's description of its "correctional services component" reveals that only parts of it should be viewed as "correctional". In the first sentence, the Ministry describes this mandate as relating to treatment and rehabilitation of offenders who

have been convicted and sentenced. Because this aspect of the Ministry's mandate relates to events after conviction and sentencing, it clearly relates to the Ministry's "correctional" mandate. The third sentence also relates to matters arising from an individual's conviction and sentence and also qualifies as "correctional". But the phraseology and subject matter of the second sentence, "Additionally, the Ministry is also responsible for the supervision of individuals awaiting trial …" is different. The Ministry does not overtly describe this area of its mandate as "correctional", and it is difficult to see how supervision prior to a finding of wrong-doing qualifies as "correctional."

The Ministry's use of the word "correctional" in relation to its mandate, if it includes the second sentence of the passage reproduced above, is broader than the ordinary dictionary meanings of the word. While the term usually refers to punishment and rehabilitation of offenders through incarceration, parole and probation, the Ministry's description of its "correctional service" mandate also includes detention before trial and sentencing, before a court has determined whether any form of correction is warranted. I do not accept this view.

It could be argued that the Ministry's interpretation of "correctional" as including events prior to conviction and sentencing finds support in the use of the phrases "correctional service" and "correctional institution" in the *Ministry of Correctional Services Act* (the *MCSA*). That Act defines "correctional service" as "a service provided for the purpose of carrying out the function or objects of the Ministry, including the operation and maintenance of correctional institutions".

Section 5 of that *MCSA* states:

> It is the function of the Ministry to supervise the detention and release of inmates, parolees, probationers and young persons and to create for them a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment in the community, and, without limiting the generality of the foregoing, the objects of the Ministry are to,
>
> (a) provide for the custody of persons awaiting trial or convicted of offences;
>
> (b) establish, maintain and operate correctional institutions;
>
> (c) provide for the open custody, secure custody and temporary detention of young persons awaiting trial, found guilty or convicted of offences;
>
> (d) establish, maintain and operate places of open custody, secure custody and temporary detention;
>
> (e) provide programs and facilities designed to assist in the rehabilitation of inmates and young persons;

(f) establish and operate a system of parole;

(g) provide probation services;

(h) provide supervision of non-custodial dispositions, where appropriate; and

(i) provide programs for prevention of crime.

In my view, this does not mean that everything the Ministry does in carrying out its function is necessarily a "correctional service". However, even if section 5 of the *MCSA* is taken to give "correctional service" an expanded meaning for the purpose of that Act, the question is still whether "correctional" in section 49(e) of the *Freedom of Information and Protection of Privacy Act* should be given its ordinary meaning or given an expanded meaning consistent with the phrase "correctional service" in the *Ministry of Correctional Services Act*.

In my view, the correct or most reasonable approach is to interpret "correctional" according to its usual meaning, for the following reasons:

First, to give "correctional" the meaning given to it in the phrase "correctional service" in the *MCSA* might be appropriate in the context of records created and maintained by that Ministry, but section 49(e) applies not only to that Ministry, but to many other institutions under the *Act* that carry out different functions than the Ministry.

Second, when the Ontario Legislature intends a term to have the same meaning as the same term in another act, it often explicitly states this (for example, the definition of "correctional institution" in the *Health Protection and Promotion Act*). If the Legislature wanted "correctional" to have the same meaning as in the phrase "correctional service" or "correctional institution" in the *MCSA*, it could have said so. Alternatively, it could have used the phrase "correctional service records" or "correctional institution records" or "records in the files of the Ministry of Correctional Services" instead of "correctional records".

Third, where the Legislature has intended in the *Act* that exemptions encompass functions such as investigation, enforcement, court proceedings, or pre-trial detention, it has made this clear through language such as that used in sections 14(1) and (2).

Fourth, this interpretation of "correctional" is consistent with the comparable provision in the federal *Privacy Act*. Section 24(1) of that Act provides:

> The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that was collected or obtained by the Correctional Service of Canada or the National Parole Board while the individual who made the request was *under sentence* for an offence against any Act of Parliament, if the disclosure could reasonably be expected to

> (a) lead to a serious disruption of the individual's institutional, parole or statutory release program; or
>
> (b) reveal information about the individual originally obtained on a promise of confidentiality, express or implied. [Emphasis added.]

Section 12(1) of the *Privacy Act* states, in part:

> Subject to this Act, every individual…has a right to and shall, on request, be given access to
>
> (b) any … personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the institutions as to render it reasonably retrievable by the government institution.

Finally, to give "correctional" the meaning given to it in the phrase "correctional service" in the *MCSA* would have the effect of broadening the exemption and narrowing rights of access, which is contrary to the purposes of the *Act* and to principles of statutory construction. In my view, the overall purposes of the *Act* should be considered in interpreting the phrase "correctional record". 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. More particularly, section 1(b) states the further purpose of the *Act* is "to protect the privacy of individuals with respect to personal information about themselves held by institutions *and to provide individuals with a right of access to that information*" (my emphasis). As previous orders have said, when an individual is seeking access to his or her own personal information, the right of access is particularly important and should not be denied unless there are compelling reasons to do so [Orders P-460, PO-2395, MO-1323,MO-1855, MO-1896].

Statutory exemptions are to be strictly construed and persons seeking the benefit of such an exemption must establish clearly that they come within its terms: *Sullivan and Driedger on the Construction of Statutes* (4th ed., Toronto: Butterworths, 2002), at 396-7. In addition, there is a presumption that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation designed to curtail rights is strictly construed: *Sullivan and Driedger*, above, at 399-400.

Therefore, in my view, taking into account both the Ministry's explanation of its organization and functions and dictionary definitions as well as the purpose of the *Act*, I conclude that the word "correctional" in section 49(e) refers to the punishment and rehabilitation of offenders after a finding of wrong-doing, through programs such as imprisonment, parole and probation, and not to matters such as investigation, prosecution, court proceedings, and pre-trial and pre-sentence detention. The Ministry carries out some functions that fit within the usual meaning of

"correctional", and in my view, for records to be "correctional records", they must relate to those functions.

A record created by the Ministry before any finding of wrong-doing, in the course of a function such as investigation, prosecution, court proceedings, and pre-trial and pre-sentence detention is, therefore, not a "correctional record".

In addition, previous orders of this office suggest that a record created by an institution such as a police service or an agency such as a court that is not a correctional authority does not become a "correctional record" merely because it is provided to the Ministry. Records have been found to qualify as "correctional records" because they "in their entirety, are records created and maintained by the Ministry's probation and parole staff which relate to the supervision of the appellant's parole" [Orders PO-1935, PO-2334, P-748].

Further, not every record created by the Ministry that is found in a Ministry file relating to a correctional function is a "correctional record". Some records are purely administrative, and are therefore not "correctional records". In Order PO-2334, Adjudicator Frank DeVries found that portions of the records that the Ministry claimed to be "correctional records" in that case qualified, but other records in the same file were not "correctional records". Adjudicator DeVries rejected the Ministry's position that because transmittal forms and covering pages are used in relation to records that qualify for the exemption under section 49(e), they too qualify for exemption under that section. He found that "(t)hese documents cannot be described as 'correctional records'".

The origin and purpose of a record must be considered in determining whether it is a "correctional record". To treat every record in a correctional authority's files as a "correctional record" regardless of source or purpose would broaden the section 49(e) exemption unacceptably and would not be consistent with the purposes of the *Act*.

In summary, "correctional records" may include records created and maintained by institutions with correctional functions in the course of and for the purpose of these functions, but will not generally include purely administrative records. Correctional functions include the punishment and rehabilitation of offenders after a finding of wrong-doing, through programs such as imprisonment, parole and probation, but not matters such as investigation, prosecution, court proceedings, and pre-trial and pre-sentence detention. Nor do "correctional records" include standard documents routinely created and maintained by other organizations just because those documents have been supplied to an institution with correctional functions and have been placed in a file relating to these functions.

The records for which the Ministry claims the section 49(e) exemption in this case all appear to relate to pre-trial matters such as detention while awaiting trial, bail eligibility, and transportation to court, rather than "correctional" matters such as punishment or rehabilitation of an offender, with the exception of page 246. For that reason, I find that, except for page 246, they are not "correctional records".

I note that the Ministry cites order PO-1492 in support of its claim that these records are correctional records. However, I found no description of the two records that Adjudicator Donald Hale found to be correctional records in that case that would assist in determining the issues in this appeal.

In addition, as stated earlier, some of the records were created by the Ministry, but others are routine forms or documents created and used by the police and/or the courts for their own purposes. Of those records, pages 242, 243, 246, and 247 appear to be purely administrative, documenting matters such as transportation of a detainee between a police station and a court and the release of a detainee from custody, and therefore, for this reason as well, they are not "correctional records".

As I have found that the Ministry has not established that any of the records in question are "correctional records", it is unnecessary to consider they meet the requirement that disclosure could reasonably be expected to reveal information supplied to the Ministry in confidence. However, I note that the Ministry's underlying rationale for applying two sections relating to protection of confidential information, sections 15(b) and 49(e), relate to the need to maintain good relationships with other agencies, to effectively supervise those in detention, for community safety, protection of the public, and the security of correctional institutions. In that regard, I am not satisfied that this explanation, in and of itself, meets the "in confidence" requirement. For example, the information about disposition of a charge on page 246 is information normally available to the public. I also note that there are other discretionary exemptions in the *Act* specifically directed at prevention of these harms, including sections 14(1)(i), (k) and (l), 14(2)(d), and 20, none of which have been claimed in this case.

In conclusion, I find that none of these records are exempt from disclosure under section 49(e).

EXERCISE OF DISCRETION

General principles

The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution 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
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry states that its practice in regard to requests by offenders for their personal information is to release as much information as possible. In this case, they have disclosed most of the information requested.

However, they say that release of the information remaining at issue would hamper the ability of correctional staff to carry out any necessary future supervision responsibilities in relation to the appellant. They say that they also took into account community safety and protection of the public, the security of correctional institutions, the safety of their staff, and the fact that information provided to correctional authorities by police is provided on a confidential basis.

In regard to section 49(b), the Ministry states that release of the undisclosed information has the potential to cause other individuals, including other offenders and individuals in their personal capacity personal distress.

In regard to the information that I have found to be exempt, I find that the Ministry exercised its discretion appropriately.

ORDER:

1. I uphold the decision of the Ministry not to disclose the portions of pages 2, 62, 64, 66, 71, 88, 132, 139, 196, 198, 199, 200, 201, 204, 206, and 210 that the Ministry has highlighted, the portions of pages 21, 178 and 184 that I have highlighted, and the whole of pages 202 and 203.

2. I order the Ministry to disclose to the appellant pages 7, 16, 20, 21 (other than the portions of page 21 that I have highlighted), 26, 51, 52, 75, 77, 104, 105, 108, 146, 160, 178 and 184 (other than the portion of pages 178 and 184 that I have highlighted), 208, 212, and 237 to 251 by sending the appellant a copy by **April 4, 2006**.

3. 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.

Original Signed By: March 2, 2006
John Swaigen
Adjudicator