CITATION: Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2011 ONCA 32
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COURT OF APPEAL FOR ONTARIO

Moldaver, Simmons and Gillese JJ.A.

BETWEEN

Ministry of Community Safety and Correctional Services

Applicant (Appellant)

and

Information and Privacy Commissioner and John Doe, requester

Respondents (Respondent in appeal)

Sara Blake, for the Ministry of Community Safety and Correctional Services
Stephen McCammon and Allison Knight, for the Information and Privacy Commissioner
No one appearing for the requester

Heard: October 20, 2010

On appeal from the order of the Divisional Court (J. Douglas Cunningham A.C.J.S.C.J., Edward F. Then R.S.J., and James D. Carnwath J.[1]), dated December 8, 2009, with reasons reported at [2009] O.J. No. 5455, dismissing the application for judicial review of Order PO-2456 of the Information and Privacy Commissioner, dated March 2, 2006, with reasons reported at 2006 CanLII 50799 (ON I.P.C.).

Moldaver J.A.:

Introduction

[1] The appellant, the Ministry of Community Safety and Correctional Services (the "Ministry"), sought and obtained leave to appeal from the order of the Divisional Court dismissing its application

[1] Carnwath J. retired from the court and did not participate in the judgment.

for judicial review of the order of the Information and Privacy Commissioner ("Commissioner") made on March 2, 2006. The Commissioner ordered the Ministry to disclose to an individual referred to as "John Doe" (the "requester") certain records held by two correctional facilities operated by the Ministry.

[2] The requester, a former inmate of the Toronto West Detention Centre and the Toronto Jail, applied to the Ministry pursuant to s. 47(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") for access to his medical, personal and institutional files. Section 47(1) provides a right of access to an individual's own personal information held by an institution. The files sought by the requester related to three separate periods of time when he was detained on outstanding criminal charges at either the Toronto West Detention Centre or the Toronto Jail.

[3] The Ministry granted the requester complete access to his medical files, but withheld parts of the institutional records pursuant to exemptions provided in s. 49 of *FIPPA*, including s. 49(e), which reads as follows:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> ...
>
> (e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence.

[4] On the requester's appeal to the Commissioner of the Ministry's refusal to release some of the records, the adjudicator, Mr. John Swaigen, determined that the Ministry could not avail itself of the exemption under s. 49(e) because the records that it sought to withhold on that basis were not "correctional" records within the meaning of the provision. According to the adjudicator, "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" (p. 17) (emphasis added). Thus, in his view, "[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 ... not a 'correctional record'" (p. 18).

[5] The adjudicator further noted that even if the records did constitute "correctional" records under s. 49(e), he was not satisfied that the Ministry had established that the records contained information supplied in confidence.

[6] The Ministry applied to the Divisional Court for judicial review of the adjudicator's decision and sought to set aside his order, primarily on the basis that he misconstrued the word "correctional" in s. 49(e) and gave it a meaning that was unreasonable. The Divisional Court disagreed with the Ministry and upheld the adjudicator's decision.

[7] On appeal to this court, the Ministry has narrowed the scope of the records it seeks to withhold. Before the adjudicator and the Divisional Court, the Ministry had sought to withhold from disclosure based on s. 49(e) records that were created either by a correctional facility or by the Ministry, as well as a warrant issued by a Justice of the Peace, and documents prepared by the police, including records of arrest, supplementary records of arrest, prisoner transfer forms, and the results of a criminal record check (reasons of the adjudicator, at p. 13). The Ministry now requests an exemption based on s. 49(e) only for those records in its possession that were generated by the police or that contain information supplied by the police ("police records"). In light of this change in position by the Ministry, it shall forthwith comply with the adjudicator's order to the extent that it requires disclosure of "other" records, subject to any issue as to fees that may remain outstanding.

[8] The parties accept the Divisional Court's ruling that the applicable standard of review of the adjudicator's decision is reasonableness. The focus of the appeal centres on the adjudicator's interpretation of the word "correctional" in s. 49(e) and in particular, whether he interpreted the provision in a way that satisfies the reasonableness standard of review.

[9] For the reasons that follow, I am respectfully of the view that the adjudicator's interpretation of the word "correctional" in s. 49(e) is unreasonable. His narrow reading of the term creates an

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

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

Reasons of the Adjudicator

[11] The Ministry took the position before the adjudicator that records contained in the requester's files that are maintained by the Ministry are correctional records for the purposes of s. 49(e).

[12] In assessing the Ministry's position, the adjudicator began his analysis of the word "correctional" in s. 49(e) by observing that the term "correctional records" is not a defined term in *FIPPA*. He consulted three widely-used dictionaries and found that the word "correction" connotes the punishment and treatment of a person through programs of imprisonment, parole and probation "after a person has been found guilty of or otherwise responsible for an offence or wrong-doing" (p. 14). He observed that, although there were other dictionary definitions of the words "correct" or "correction", none of these definitions suggested "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."

[13] The adjudicator next addressed the written submissions of the Ministry in which the Ministry described the "correctional services component" of its mandate (as distinct from its community safety and police and emergency services mandates) 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. [Emphasis added.]

[14] In regard to the first paragraph of the Ministry's description of the "correctional services component" of its mandate, the adjudicator was of the opinion that only the responsibilities described in the first and third sentences qualify as "correctional" because they relate to "events after conviction and sentencing" or "matters arising from an individual's conviction and sentence". In his view, however, the function described in the second sentence did not qualify 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.

[15] The adjudicator next considered the Ministry's submission that the definition of "correctional service" in the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 ("*MCSA*") supported its

proposed definition of the word "correctional" in s. 49(e). Under s. 1 of the *MCSA*, "correctional service" is defined 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 the *MCSA* provides that one of the functions of the Ministry is "to supervise the detention and release of inmates" and, under s. 5(a), one of the objects of the Ministry is to "provide for the custody of persons *awaiting trial* or convicted of offences" (emphasis added).

[16] I pause here to note that, although the adjudicator did not mention it, the word "inmate" is defined in s. 1 of the *MCSA* to mean "a person confined in a correctional institution or otherwise detained in lawful custody under a court order". The definition of inmate is consistent with the object of the Ministry identified in s. 5(a), which is to provide "for the custody of persons awaiting trial". I note as well that the term "correctional institution" is a defined term under the *MCSA*. No issue is taken with the fact that the Toronto West Detention Centre and the Toronto Jail are correctional institutions. Nor is it disputed that many, if not most, of the inmates in those institutions are offenders who have been detained in custody and are awaiting trial.

[17] Having considered some of the pertinent provisions in the *MCSA*, the adjudicator posed the following question:

> 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*.

[18] The adjudicator then provided six reasons, set out below, for concluding that "the correct or most reasonable approach is to interpret 'correctional' according to its usual meaning":

(1) Giving the word "correctional" in s. 49(e) the meaning it has been given 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 ... to many other institutions under [*FIPPA*] that carry out different functions than the Ministry."

(2) If the Legislature had wanted the word "correctional" in s. 49(e) to have the same meaning it has in the phrase "correctional service" in the *MCSA*, it could have accomplished this by the use of appropriate language.

(3) Where the Legislature has "intended in [*FIPPA*] 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) [of *FIPPA*]."[2]

(4) The adjudicator's preferred interpretation of "correctional" is "consistent with the comparable provision" in s. 24(1) of the federal *Privacy Act*, R.S.C. 1985, c. P.21, which refers to requests for personal information "that was collected or obtained ... while the individual who made the request was under sentence for an offence against any Act of Parliament".

(5) Statutory exemptions are to be strictly construed. To give "correctional" the meaning it has in the *MCSA* "would have the effect of broadening the exemption and narrowing rights of access, which is contrary to the purposes of [*FIPPA*] and to principles of statutory construction."

(6) Having regard to previous orders of this office, a record created by the police or a court does not become a "correctional record" merely because it is provided to the Ministry. Records found to come within s. 49(e) were "records created and maintained by the Ministry's probation and parole staff".

[19] The adjudicator concluded that the records that the Ministry sought to withhold "all appear to relate to pre-trial matters", and thus do not constitute "correctional records" under s. 49(e). He therefore found it "unnecessary to consider [if] they meet the requirement that disclosure could

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[2] These provisions are set out and discussed below at para. 38ff.

reasonably be expected to reveal information supplied to the Ministry in confidence." Nonetheless, he went on to reject the Ministry's explanation that the information in question should be treated as confidential in order "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." As a result, he was not satisfied that the Ministry's explanation satisfied the requirement that the records originated "in confidence", within the meaning of s. 49(e).

Reasons of the Divisional Court

[20] Having regard to the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Divisional Court correctly held that the applicable standard of review of the adjudicator's interpretation of s. 49(e) of *FIPPA* is reasonableness. As noted by the court, the approach to assessing the reasonableness of an administrative decision is described in *Dunsmuir*, at para. 47, as follows:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] After summarizing the adjudicator's decision, the Divisional Court set out the positions of the parties. The Commissioner defended the adjudicator's use of the dictionary definition of the word "correctional" in s. 49(e), while the Ministry submitted that his interpretation was unduly narrow. According to the Ministry, the adjudicator should have interpreted this term in accordance with the language of the MCSA. The court correctly noted, at para. 35, that it was not the court's function "to determine which of two plausible interpretations is correct or more reasonable … but merely to determine whether the interpretation proffered by the Adjudicator is reasonable within the test outlined by *Dunsmuir*". With this in mind, the court considered the six reasons given by the adjudicator for interpreting the word "correctional" as he did and found that three of his reasons were valid and three were not.

[22] The court rejected the first reason given by the adjudicator, namely that s. 49(e) applies to many institutions with different functions and is not restricted to records created and maintained by the Ministry. The court noted, at para. 37, that the records in question were "records of the Ministry and not those of another institution." Moreover, neither the adjudicator in his reasons nor the Commission in its submissions to the court referred to "any institution not subject to the authority of the Ministry (or indeed the *MCSA*) to which [s. 49(e)] might apply."

[23] The court also rejected the fourth reason advanced by the adjudicator. As the court observed, at para. 48, the federal *Privacy Act* is not a useful comparator for interpreting "correctional" in *FIPPA*, because federal penitentiaries house *only* sentenced inmates. In contrast, "the *majority* of inmates in provincial correctional institutions are accused persons on remand who have not been convicted or sentenced" (emphasis in original).

[24] The court also rejected as unhelpful the sixth reason given by the adjudicator. The adjudicator's reliance on previous orders of the Commission in which adjudicators had found that "records created and maintained by the Ministry's probation and parole staff" were "correctional records" within the meaning of s. 49(e) cannot be taken to mean "that records generated prior to sentence that bear on the issue of future supervision and safety and security of inmates and staff" are not also exempt (at para. 51).

[25] The court concluded that the remaining three reasons provided by the adjudicator supported the reasonableness of his interpretation of s. 49(e). The court read the second and third reasons of the adjudicator in conjunction with each other and accepted the proposition that if the Legislature had wanted to give the word "correctional" in s. 49(e) the same meaning as "correctional service" in the *MCSA*, it could have used appropriate language to do so (at para. 39).

[26] The court also observed, at para. 44, that there was "much force" in the argument advanced by the Commissioner that the adjudicator's narrow interpretation of s. 49(e) would not hamper the Ministry's ability to provide a safe and secure custodial environment for inmates and staff. According to the court, the Legislature fully addressed these concerns in the "law enforcement

exemptions [from access to records] in s. 49(a) by means of the inclusion of s. 14 *and in particular s. 14(2)(d)*"[3] (emphasis added). In the court's view, at para. 45, the narrow interpretation given to the word "correctional" by the adjudicator could "reasonably be seen to fill the gap to provide exemption in respect of records which are strictly correctional in nature." On the other hand, the Ministry's interpretation of s. 49(e) would render "largely redundant" the exemptions provided in s. 14 of *FIPPA*.[4]

[27] In this regard, the court considered the adjudicator's interpretation of the word "correctional" in s. 49(e) against the provision's legislative history and particularly, a segment of the Report of the Commission on Freedom of Information and Individual Privacy 1980, Vol. 3 (Toronto: Queen's Printer of Ontario, 1980) ("*Williams Report*")[5], at pp. 560-62, where the author "expressed a concern that protection be afforded to psychological reports and parole reports because of a fear of retribution or a possible chilling effect regarding voluntary opinions by friends and family." The court concluded this aspect of its analysis as follows, at para. 47:

> The Commissioner submits that it is reasonable to infer that s. 49(e) was enacted to obtain protection for confidential sources of probation and parole reports because s. 49(a) was enacted for different purposes. In my view, these submissions support the reasonableness of the Adjudicator's interpretation of s. 49(e) and in particular whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[28] The court also found that the fifth reason advanced by the adjudicator – that the interpretation proposed by the Ministry would broaden the exemption in s. 49(e) and narrow the right of access

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[3] Section 49(a) of FIPPA states:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

[4] The relevant provisions of s. 14 are set out and discussed below at para. 38ff.

[5] The *Williams Report* describes record-keeping practices in the Ontario Government regarding the gathering, maintenance, and dissemination of personal information in six specific areas, one being "Corrections".

contrary to the purposes of *FIPPA* – was a legitimate factor that he could take into account in accordance with the principles of statutory interpretation. At the same time, the court observed, at para. 50, that "a strict interpretation by itself with respect to exemptions in privacy statutes" does not "endow… the interpretation with reasonableness." However, in this case, the strict construction approach of the adjudicator was "a factor to consider in circumstances where there is wording to suggest an interpretation in terms of ordinary usage which is plausible" and "a consideration of the interplay between s. 49(a) and 49(e) in the context of exemptions provided by s. 49 to the disclosure of personal information to individuals."

[29] The court concluded, at paras. 56-59, that the adjudicator was entitled to assign to the word "correctional" its plain, ordinary meaning and that there was a justifiable, intelligible and transparent reasoning path to his conclusion, notwithstanding that other conclusions were possible or even more compelling. The court was also satisfied that, even though the adjudicator advanced some unhelpful reasons for his interpretation, his conclusion was within the range of acceptable outcomes as required by the reasonableness standard of review.

Analysis

[30] I accept that the adjudicator was entitled to look at dictionary definitions of the word "correctional" to try to discern its ordinary meaning. However, while dictionary definitions may provide a useful starting point in interpreting a statutory provision, "definitions found in dictionaries say very little about the meaning of a word as used in a particular context": R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at p. 27. As Gonthier J. said in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 67:

> A review of these cases indicates that courts have generally looked to dictionary definitions of the word … as a starting point in the interpretive process. *However, the proper legal interpretation ... is context- and fact-specific, and this may require a refinement of the definition in a particular circumstance.* [Emphasis added.]

[31] In my view, this is a case where refinement of the dictionary definition of the word "correctional" was required in order to reach a reasonable interpretation of s. 49(e). With respect to the adjudicator, after consulting the dictionary definition of the word "correction", the next place to look would have been the legislation in Ontario that governs corrections. Instead, the adjudicator simply assumed that s. 49(e) applies to "many institutions under the Act that carry out different functions than the Ministry". The Divisional Court disagreed with the adjudicator on this point. The court observed, at para. 37, that the records "at issue on this application are records of the Ministry and not those of another institution." Moreover, the court noted that neither the adjudicator nor the Commission had identified "any institution not subject to the authority of the Ministry (or indeed the *MCSA*) to which the provision might apply."

[32] In this court, presumably in an effort to fill that gap, the Commissioner referred to the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("*CFSA*") and directed us to provisions that relate to the detention of young persons in places of open and secure custody. The Ministry of Children and Youth Services has as part of its mandate the operation of open and secure custodial facilities for young persons.

[33] Be that as it may, I find the Commissioner's reference to the *CFSA* unpersuasive. The *CFSA*, like the *MCSA*, contains provisions that deal with young persons who are detained in custody pending trial: see ss. 93 and 94 of the *CFSA*. To that extent, this legislation supports the Ministry's contention that the word "correctional" in *FIPPA* has a broader meaning than the adjudicator was prepared to give it, considering that the correctional services mandate of the respective Ministries relates to both pre- and post-sentence detention of adults and youth alike.

[34] Indeed, under the *MCSA*, the term "correctional services" encompasses a much wider range of services than the punitive/reformative measures referred to in the dictionaries consulted by the adjudicator. Manifestly, the term captures inmates in custody awaiting trial. Under s. 5 of the Act, the Ministry is responsible for supervising "the detention and release of inmates", as well as parolees and probationers. As mentioned, an "inmate" includes someone who is "otherwise detained in lawful custody under a court order". The Ministry points out that, under this definition, an inmate would

include persons who have been denied bail and are in custody awaiting trial, as well as persons who are being held for immigration or extradition hearings. On the adjudicator's interpretation of the word "correctional" in s. 49(e), records relating to those inmates would not come within the purview of the provision since they would not relate to "the punishment and rehabilitation of offenders after a finding of wrongdoing."

[35] In concluding that the dictionary meaning of the word "correctional" represents a plausible interpretation of the word "correctional" in s. 49(e), the Divisional Court relied on the second and third reasons given by the adjudicator for interpreting the word "correctional" in s. 49(e) as he did. The adjudicator was of the view that the law enforcement exemptions in ss. 14(1) and (2) of *FIPPA* were specifically meant to "encompass functions such as investigation, enforcement, court proceedings, or pre-trial detention." The Divisional Court observed, at para. 45, that giving effect to the Ministry's suggested interpretation of s. 49(e) would render those provisions largely redundant.

[36] As indicated, the Divisional Court accepted the adjudicator's determination that the exemptions in s. 14 of *FIPPA*, and particularly the exemption in s. 14(2)(d), are meant to apply to pre-trial records in the custody of the Ministry. Indeed, as I read the reasons of the Divisional Court, it was primarily this aspect of the adjudicator's analysis that led the court to conclude that his proposed interpretation of the word "correctional" in s. 49(e) fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[37] With respect, I do not agree with the Divisional Court on this point. Specifically, I do not accept that the exemptions in s. 14 of *FIPPA* were meant to address the records in the Ministry's possession, now limited to police records, which the Ministry is seeking to protect. Nor do I share the Divisional Court's view that the Ministry's proposed interpretation of the word "correctional" in s. 49(e) would render the s. 14 exemptions redundant.

[38] I first explain why, in my view, s. 14(2)(d) of *FIPPA* does not apply to the records that the Ministry seeks to withhold. Section 14(2)(d) reads as follows:

> 14. (2) A head may refuse to disclose a record,
>
> …
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority. [Emphasis added.]

[39] There are two reasons why the Ministry could not rely on that exemption. First, s. 14(2)(d) refers to records relating to a person "under the control or supervision of a *correctional* authority" (emphasis added). On the adjudicator's interpretation of the word "correctional" in s. 49(e), if he is to be consistent, the records in issue would not be covered by s. 14(2)(d) since they were created while the requester was in pre-trial custody and therefore not under the control or supervision of a "correctional" authority. Of course, if "correctional" is read in a way that reflects the wider range of correctional services that the Ministry provides, then this first reason would not be an impediment to the application of the s. 14(2)(d) exemption.

[40] The second, and more compelling, reason for concluding that s. 14(2)(d) can have no application to the records in question stems from previous orders of the Commission in which the Commission has maintained that s. 14(2)(d) only applies to cases where the requester is *presently* under the control or supervision of a correctional authority. The decision of the Commission in *Re Ontario (Solicitor General)*, 1994 CanLII 6597 (ON I.P.C.) illustrates the point. At pp. 2 and 3 of his reasons, Assistant Commissioner Irwin Glasberg stated:

> In Order 98, former Commissioner Sidney B. Linden interpreted the wording of section 14(2)(d) in the following fashion:
>
> > In my view, the purpose of subsection 14(2)(d) is to allow an appropriate level of security with respect to the records of individuals in custody. I am not prepared to extend the application of this provision so far as to allow it to be used to deny access to information simply on the basis that the requester, no longer in custody, is seeking information about himself.
>
> I agree with this interpretation and adopt it for the purposes of this appeal.

> In its representations, the Ministry indicates that, when the appellant filed his access request, he was on probation after having served a prison sentence. On March 11, 1994, however, the probation order expired. *Since the appellant is no longer under the control or supervision of a correctional authority, I find that the section 14(2)(d) exemption does not apply to the information at issue.* [Emphasis added.]

[41] Applying Commissioner Glasberg's reasons to this case, s. 14(2)(d) can have no application since the requester was out of custody and not under the control or supervision of a correctional authority when he requested the records in issue. Thus, if s. 14 of *FIPPA* is to apply, resort must be had to the "less specific" exemptions to which the Commissioner refers, namely, ss. 14(1)(e), (i), (j), (k) and (l).

[42] The relevant provisions of s. 14(1), found under the heading "Law enforcement", are as follows:

> 14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> . . .
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> . . .
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[43] In my respectful view, those provisions were not meant to apply to the police records that the Ministry is seeking to protect. As noted, the exemptions in s. 14 are found under the heading "Law enforcement". That term is defined term in s. 2(1) of *FIPPA* as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b);

[44] On their face, the s. 14(1) exemptions appear to be directed at records generated by the police and/or records containing information supplied by the police. To that extent, they would seem to capture the police records that the Ministry is seeking to protect. However, in my view, the s. 14(1) exemptions are not meant to apply to such records because the exemptions are all harm-based. In other words, as pointed out by counsel for the Commissioner in written argument, the exemptions in s. 14(1) will be granted "where an institution is able to demonstrate that disclosure could reasonably be expected to result in one of the harms specified ... under section 14".

[45] The adjudicator was of the view that the harm requirement that forms an essential part of the exemptions in s. 14 is also a requirement of s. 49(e). At p. 13 of his reasons, he stated:

> 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.)]. [Emphasis added.]

[46] In *Ontario (Workers' Compensation Board)*, cited by the adjudicator, the issue before this court turned on the Commissioner's interpretation of ss. 17(1)(a) and (c) of *FIPPA* and his finding that the exemptions contemplated by those provisions had not been made out on the evidence. Sections 17(1)(a) and (c) read as follows:

> 17. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

> confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; ...

[47] In determining whether the exemptions in s. 17(1)(a) and (c) applied, the Commissioner stated that the following three-part test had to be satisfied:

> (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> (2) the information must have been supplied to the Board in confidence, either implicitly or explicitly; and
>
> (3) *the prospect of disclosure must give rise to a reasonable expectation that one of the types of injuries specified in ss. 17(1)(a) and/or (c) will occur.* [Emphasis added.]

[48] In relation to part three of the test, the Commissioner concluded that "detailed and convincing" evidence was needed to establish a reasonable expectation of harm. Evidence amounting to speculation about possible harm would not suffice. In reviewing the Commissioner's decision, our court held that his conclusion in this regard was not unreasonable and it rejected the argument that the Commissioner had modified the interpretation of the exemptions and changed the standard of proof needed to make them out. In the court's opinion, the words "detailed and convincing" simply "describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm" (at para. 26).

[49] In my view, the decision in *Ontario (Workers' Compensation Board)* exposes a very real problem that would be presented to the Ministry if it were required to bring itself within one of the

s. 14(1) exemptions. This decision also exposes a significant error made by the adjudicator in his interpretation of the requirements of s. 49(e).

[50] The problem that would be created for the Ministry if it were required to bring itself within one of the s. 14(1) exemptions is that it would need to be able to assess whether the release of a particular "correctional record", including police records, would result in one of the harms specified in the s. 14(1) exemptions. Yet how could the Ministry be expected to marshal the "detailed and convincing" evidence needed to establish a particular harm when, in most instances, it will have received limited pieces of information about the requester from the police? Surely, the Ministry cannot be expected to be fully apprised of investigations that police may be conducting in relation to an inmate, much less the adverse consequences that may result if the records being requested are disclosed.

[51] Viewed that way, it seems doubtful that the Legislature intended to put the Ministry to the task of establishing one of the s. 14(1) exemptions in respect of "correctional records" given that, unbeknownst to the Ministry, such records, including police records, might well contain sensitive information relating to ongoing police investigations, or reveal the identity of a police informer, or more generally, provide a window into law enforcement techniques.

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

[53] It follows, in my view, that interpreting s. 49(e) as the Ministry proposes would not render the s. 14 exemptions redundant. It would instead provide the Ministry with a workable means of protecting "correctional records" so long as the Ministry could show that the information contained in them was supplied in confidence. This interpretation would not put the Ministry to the difficult,

if not insurmountable, task of having to demonstrate that disclosure of the records would likely lead to a particular harm.

[54] The Commissioner claims that the *Williams Report* supports the adjudicator's conclusion that s. 49(e) was enacted to protect sensitive information that family members and friends of the inmate/offender might be willing to provide to probation and parole officers on a promise of confidentiality. Having reviewed the relevant sections of the *Williams Report*, I do not doubt that s. 49(e) was enacted in part to protect sensitive information provided on a confidential basis by family members and friends to parole and probation officers. However, I do not accept that s. 49(e) was enacted exclusively for that reason. I see no principled reason why the less stringent s. 49(e) test should only apply to information supplied by family members and friends to parole and probation officers at the post-sentence stage but not to information supplied by the police to corrections at the pre-trial/pre-sentence stage. Surely sensitive information provided by the police or anyone else for that matter should receive the same protection.

[55] The Williams Commission was concerned with privacy issues at all stages of the correctional process, including the pre-trial custodial stage. The Report recognizes, at p. 561, that inmate files may contain information that is used in making decisions "about the kind of institution he [an inmate] is to be assigned to, any special treatment he is to receive, and whether he will be granted a temporary absence permit." The Report notes that while an inmate may be aware of "much of the information leading to these decisions, the inmate is not normally permitted to see the actual file." Likewise, the Report adverts to the fact that inmates may not see "the inmate record card (which may indicate, for example, that the inmate is assaultive, a sexual deviate, or an arsonist) nor generally know the contents of the progress reports or psychiatric assessments."

[56] Bearing in mind the obvious – that at every stage of the process, be it at the pre-trial custodial stage or the post-sentence supervisory stage, correctional authorities are liable to be exposed to sensitive information about an inmate that has been provided on a confidential basis – there is, in my view, no good reason to treat the various stages of the custodial process as water-tight compartments.

[57] And that, I believe, is where the adjudicator made a significant error in his analysis and rendered an interpretation of "correctional records" that is outside the range of possible, acceptable outcomes that are defensible in respect of the facts and law. In deciding whether records are "correctional" records within the meaning of s. 49(e), the adjudicator created an artificial and in my view, unworkable distinction between pre- and post-sentencing records.

[58] The correctional system does not operate in water-tight compartments. An inmate serving an 18-month sentence could very well be detained at the Toronto Jail awaiting trial on additional charges. In that situation, on the adjudicator's interpretation of "correctional records", it would be necessary to try to discern whether the records maintained by the correctional authorities are "correctional records" under s. 49(e) because the inmate is serving an 18-month sentence, or if they are not "correctional records" because the inmate is in pre-trial custody on other matters.

[59] Other difficulties would arise in respect of maintaining records related to offenders who have been convicted but not yet sentenced. The adjudicator's interpretation of "correctional" is such that the word does not apply "to matters such as investigation, prosecution, court proceedings, and *pre-trial and pre-sentence detention*" (emphasis added) (p. 17). However, s. 719(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 allows the sentencing judge to take pre-sentence custody into account in fixing the appropriate sentence. In so doing, the sentencing judge may properly consider the inmate's behaviour during the period of pre-trial or pre-sentence custody. On the adjudicator's definition of "correctional", any records in respect of an inmate that are generated before sentencing, would not qualify as correctional records. Indeed, his definition suggests that, for purposes of vetting requests under s. 49(e), the correctional authorities should maintain two sets of files, one for records that pertain to sentencing matters, and the other for records that pertain to pre-sentencing matters. This requirement is at odds with the functioning of the sentencing process under the *Criminal Code*.

[60] Further concerns arise from the adjudicator's interpretation in connection with inmates who are being held for immigration hearings or extradition proceedings. According to the adjudicator, records kept by corrections officials in relation to those inmates could never be "correctional

records" within the meaning of s. 49(e), regardless of the fact that they may contain sensitive information supplied in confidence by a third party.

[61] In construing the word "correctional" in s. 49(e) to mean post-sentence records, the adjudicator was clearly influenced by the principle of statutory construction that exemptions should be construed narrowly. He was also guided by the twin purposes in ss. 1(a) and (b) of *FIPPA* to the effect that rights of access should be liberally construed and exemptions should be limited and specific. I have no difficulty with the adjudicator wanting to narrow the ambit of the exemption in s. 49(e). My problem lies with the way he went about it.

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

[63] In oral argument, counsel for the Ministry indicated that the Ministry is seeking blanket protection for all police records on the basis that the information contained in such records is supplied in confidence. I make no comment on the validity of that submission. It will be for the new adjudicator to determine, on the basis of the evidence presented, whether such a blanket protection is warranted.

[64] Although the adjudicator in the present matter referred briefly to the issue of confidentiality, it played a minor role in his reasons. That was understandable given his interpretation of the word "correctional" in s. 49(e). As he observed, having found that the records in issue were not "correctional" records, it was "unnecessary to consider" if they met the confidentiality requirement of s. 49(e). While it is true that the adjudicator nonetheless provided brief reasons for concluding that the records in issue did not meet the confidentiality requirement, his analysis did not fully address what I consider to be the critical issue of confidentiality. Because of that, I have concluded that the matter should be remitted to the Commission for reconsideration by a different adjudicator.

Conclusion

[65] In the result, I would allow the appeal, set aside the order of the adjudicator and remit the matter to the Commission to be considered afresh.

Costs

[66] The parties are not seeking costs. Accordingly, there will be no order as to costs.

Moldaver J.A.

I agree. Simmons J.A.

I agree. Gillese J.A.

RELEASED: JANUARY 17, 2011