ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-006

July 9, 1996

DEPARTMENT OF JUSTICE

REVIEW NUMBER 1034

BACKGROUND

On November 30, 1995, the Applicant requested written transcripts of the investigation and final findings into an attempted escape from the Edmonton Remand Centre. The Applicant's request was partly denied by the public body, Alberta Justice ("Alberta Justice") on December 8, 1995.

On December 20, 1995, the Applicant requested that my office review the decision of the head of Alberta Justice.

Under section 65 of the *Freedom of Information and Protection of Privacy Act* ("the Act"), mediation was authorized. As a result of mediation, Alberta Justice released to the Applicant the Findings and Recommendations relating to the investigation. Mediation regarding other records was not successful.

The Applicant and Alberta Justice were advised on April 29, 1996, that an inquiry would be conducted on this matter. Written representations were to be made to my office by 12:00 noon on May 28, 1996. The Applicant's submission was received on May 16 and Alberta Justice's submission was received on May 28.

RECORDS AT ISSUE

The records at issue in this request, as set out in Alberta Justice's submission, are as follows:

1. Tapes of staff statements.

2. Transcripts of proceedings.

3. Incident reports completed by staff and managers.

4. Correspondence containing advice to senior officials regarding policy changes and other action to be taken, including staff disciplinary action.

5. Information regarding employees involved.

6. Information regarding other staff members and offenders.

Initially, my office received a summary of the incident reports and correspondence (items 3 and 4), rather than the original records. This summary was an internal investigation report about the incident in question. The report was a separate record which Alberta Justice had provided, but not listed in its submission.

Alberta Justice subsequently provided the original incident reports and correspondence, and also clarified two further matters regarding the records. First, it confirmed that transcripts of proceedings were, in fact, verbatim transcripts of the tapes of staff statements. I asked for and received a statutory declaration regarding the verbatim transcripts. Tapes would then be requested only if needed. Second, Alberta Justice confirmed that the information regarding employees, staff members and offenders (items 5 and 6) was included in the records submitted, and was not a separate document or documents.

Once these matters were clarified, I renumbered the records to include the internal investigation report; elected to deal with the transcripts of staff statements in place of the tapes, to avoid duplication; and did not treat the information relating to employees, staff members and offenders as being separate documents.

As a result, for the purposes of this inquiry, the records consist of the following:

1. Tapes of staff statements
2. Transcripts of staff statements (referred to as Record 2)
3. Incident reports completed by staff and managers (Record 3)
4. Correspondence containing advice to senior officials regarding policy changes and other action to be taken, including staff disciplinary action (Record 4)

4.1. Internal investigation report (Record 4.1)

ISSUES

The issues arising on this inquiry are as follows:

Issue A:

Does any information contained in the Records qualify as "personal information", as provided in section 16(1) of the Act and as defined in section 1(1)(n) of the Act?

If the answer to that question is "Yes", did Alberta Justice correctly apply the mandatory exemption provided by section 16 ("personal information") of the Act to any of the Records?

If the answer to this question is "yes", and the records contain personal information of identifiable individuals other than the Applicant, did Alberta Justice properly refuse to disclose the personal information because disclosure would be an unreasonable invasion of a third party's personal privacy, as provided for in section 16(1)?

Issue B:

Did Alberta Justice correctly apply the discretionary exemption provided by section 19(1) ("law enforcement") of the Act to any of the records? This requires an answer to the preliminary question of whether this is a "law enforcement" matter, as defined in section 1(1)(h)(ii) of the Act.

Issue C:

Did Alberta Justice correctly apply the discretionary exemption in section 23(1)(a) ("advice, proposals, recommendations, analyses or policy options") or section 23(1)(b)(i) ("consultations or deliberations") of the Act to any of the records?

DISCUSSION

Issue A:

Do any of the records in question contain "personal information"? Section 1(1)(n) defines "personal information" as follows:

> section 1(1)(n) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, home or business address or home or business telephone number
>
> (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations
>
> (iii) the individual's age, sex, marital status or family status
>
> (iv) an identifying number, symbol or other particular assigned to the individual

(v) the individual's fingerprints, blood type or inheritable characteristics

(vi) information about the individual's health and health care history, including information about a physical or mental disability

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given

(viii) anyone else's opinions about the individual

(ix) the individual's personal views or opinions, except if they are about someone else

I have carefully reviewed Record 2 (transcripts of staff statements), Record 3 (incident reports) and Record 4 (correspondence), as well as Record 4.1 (internal investigation report). I will refer to Records 2-4 and 4.1 collectively as "the Records".

The Records do contain personal information about the Applicant, who is entitled under section 6(1) of the Act to any record containing personal information about himself, including anyone else's opinions about him.

However, the Records also contain the personal information of other identifiable individuals, such as names and employment history.

Under section 16(1) of the Act, the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Alberta Justice claims that it properly refused to disclose the Records under this provision.

It is my view that the entirety of Record 3 (incident reports) itself cannot be personal information as defined in section 1(1)(n), since corrections staff and management prepared the incident reports in the course of their employment and as part of their employment responsibilities, rather than in their personal capacity. (This issue has been canvassed in Ontario Order P-597.) Therefore, the entire record cannot be exempt from disclosure on this basis. However, the names of other identifiable individuals is those individual's personal information. This personal information was properly withheld by the head and should be severed from the incident reports.

Alberta Justice submits that section 16(2)(b), (d) and (g) are relevant to the Records. Under section 16(2), a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that

disclosure is necessary to prosecute the violation or to continue the investigation

(d) the personal information relates to employment or educational history

(g) the personal information consists of the third party's name when
(i) it appears with other personal information about the third party, or
(ii) the disclosure of the name itself would reveal personal information about the third party

Section 16(2)(b) speaks of "a possible violation of the law". In applying section 16(2)(b) I believe that I should interpret "law" in the same way as "law" in the definition of "law enforcement", contained in section 1(1)(h)(ii) and applied in section 19(1). Both "law" and "law enforcement" should encompass the notion of a violation of a statute or regulation, and a penalty or sanction imposed under that same statute or regulation.

In the present case, I acknowledge that the case of an inmate attempting to escape from a correctional institution may be a violation of the law. Such an act could be a violation of the regulations under the Corrections Act and the result could be a Disciplinary Board imposing a punishment on an inmate who attempts to escape. The penalty or sanction for that violation of the law is clearly set out in the regulations.

However, the present case and the Records relating to it do not concern action against inmates who violate the law. Instead, the Records result from a proceeding to determine the responsibility of corrections officers relative to an escape attempt, the actions of the Applicant as a corrections officer, and possible disciplinary action against the Applicant. The Applicant's actions, if wrong, would be a breach of employment duties and ultimately render the Applicant subject to disciplinary action. They would not be a violation of the "law" because those duties are not set out by a law which provides for penalties or sanctions if the duties are breached. A penalty or sanction in this case would be imposed pursuant to conditions of employment rather than a "law".

Since this was not an investigation into a possible violation of the "law", section 16(2)(b) is not applicable to the Records, and Alberta Justice incorrectly applied this provision when refusing to allow the Applicant access to the Records.

As to section 16(2)(d) ("employment history"), Record 4.1 (internal investigation report) clearly contains personal information relating to the employment history of persons other than the Applicant. Therefore, Alberta Justice correctly applied section 16(2)(d) in part when refusing access to the employment history contained in Record 4.1. However, section 16(2)(d) is not relevant to the remainder of Record 4.1 nor to Records 2-4.

Section 16(2)(g) ("third party's name") could be applied to Records 2, 4 and 4.1 to sever names and other identifying information, in order to conceal the identity of those individuals.

Alberta Justice also applied section 16(3)(f) to personal information in Records 2, 4 and 4.1. That section tells the head of a public body to consider whether personal information was supplied in confidence in determining whether it would be an unreasonable invasion of a third party's privacy to release it. Alberta Justice states that it is the long-standing practice that Correctional Services Division keeps information confidential if gathered for the purpose of internal investigations. Nevertheless, under section 16(3)(f), I am not prepared to say that all information provided in confidence may be withheld. Confidentiality is but one of several factors which must be considered under that subsection.

It is significant that section 16(3)(f) exempts only personal information supplied in confidence, such as names. It would not apply to the body of Records 2, 4 and 4.1 because the body of those records is not personal information as defined in section 1(1)(n). Therefore, in Records 2, 4 and 4.1, Alberta Justice may sever the names of those individuals who gave the information, and may sever the information that could be used to identify those individuals, but must give the Applicant access to the remainder of Records 2, 4 and 4.1 pursuant to section 6(2).

Conclusions:

Record 2 (staff statements):
section 16(2)(b), (d) - not applicable
section 16(2)(g), (3) - applicable as to names and other identifying information

Record 3 (incident reports):
section 16(1) - applicable as to names and other identifying information
section 16(2)(b), (d), (g), (3) - not applicable

Record 4 (correspondence):
section 16(2)(b), (d) - not applicable
section 16(2)(g), (3) - applicable as to names and other identifying information

Record 4.1 (internal investigation report):
section 16(2)(b) - not applicable
section 16(2)(d) - applicable as to employment history
section 16(2)(g), (3) - applicable as to names and other identifying information

Alberta Justice must release the Records, subject to severance of employment history, names and other identifying information, as indicated.

Issue B:

Did the head of the public body correctly apply the discretionary exemption provided by section 19(1) of the Act ("law enforcement") to any of the Records? The following provisions of section 19(1) are relevant to this issue:

> section 19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement
>
> (d) reveal the identity of a confidential source of law enforcement information
>
> (g) facilitate the escape from custody of an individual who is being lawfully detained
>
> (j) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system

Alberta Justice claimed that the disclosure of information could reasonably be expected to harm a law enforcement matter: section 19(1)(a).

The initial issue is whether this a "law enforcement" matter, as defined in section 1(1)(h)(ii) of the Act.

Section 1(1)(h)(ii) provides that "law enforcement" means investigations that lead or could lead to a penalty or sanction being imposed.

This part of the definition of law enforcement includes, but is not limited to, activities by public bodies to enforce compliance or remedy non-compliance with standards, duties and responsibilities imposed by statutes and regulations, including enforcement by regulatory agencies that may impose penalties and sanctions. The definition is limited by the phrase "penalty or sanction". To fall within this part of the definition of law enforcement, I am of the opinion that investigations must have the potential to result in a penalty or sanction being imposed under statutes or regulations, such as imprisonment or a fine, the revocation of a licence or an order requiring a person to cease an activity The Government of Alberta Freedom of Information and Protection of Privacy Policy Manual (p. 73) supports this opinion.

Again, the investigation of a corrections officer's performance of his job does not fall within the definition of law enforcement. To put it another way, a corrections officer's duties are not imposed by law such that a breach of those duties is a violation of law which could result

in the imposition of a sanction or penalty. While a penalty or sanction may be imposed, it is not imposed by the enforcement of a law. The investigator recommended disciplinary action; disciplinary action against a corrections officer is not a penalty or sanction imposed under either the Corrections Act or the regulations to the Act. The Corrections Act makes no references to breaches of standards, duties and responsibilities by corrections officers or to sanctions for such breaches.

Conclusions:

I do not find that the Records concern a law enforcement matter as defined in the Act. Therefore, Alberta Justice must release the Records, subject to severing as required under section 16.

Issue C:

Did Alberta Justice correctly apply the discretionary exemption in section 23(1)(a) ("advice, proposals, recommendations, analyses or policy options") or section 23(1)(b)(i) ("consultations or deliberations") of the Act to any of the Records? Those sections provide that:

> section 23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council
>
> (b) consultations or deliberations involving
>
> (i) officers or employees of a public body

Ontario Order M-457 discusses a section of the Ontario legislation that is similar to Alberta's section 23(1)(a). The objective of Ontario's section, which speaks of "advice and recommendations", is "to protect the free flow of advice and recommendations within the deliberative process of government decision- or policy-making". Ontario Order M-457 also states that an action plan and a formalised manner of proceeding are usually the hallmarks of this decision- or policy-making process. In interpreting a similar section in British Columbia, the Commissioner there has stated that advice and recommendations must contain more than mere information, and "must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process" (British Columbia Order P-597). I adopt this reasoning.

However, Alberta's section 23(1)(a) is broader than the provisions in either Ontario or British Columbia, and includes not only "advice and recommendations", but also "proposals, analyses and policy options". Therefore, I must apply criteria that reflect the uniqueness of section 23(1)(a).

Accordingly, in determining whether section 23(1)(a) will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.

The advice should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,

2. be directed toward taking an action,

3. be made to someone who can take or implement the action.

I do not need to decide whether section 23(1)(a) applies to the Findings and Recommendations contained in Record 4.1 (internal investigation report), as those findings and recommendations have already been given to the Applicant; names and information likely to identify individuals appear to have already been severed.

Record 4 (correspondence containing advice to senior officials regarding policy changes and other action to be taken, including staff disciplinary action) and the remainder of Record 4.1 (except for two lines on page 10, as discussed below) are primarily summaries of information relating to the escape attempt and the subsequent investigation, and do not meet the tests for "advice...developed by or for a public body". What this record lacks is the element of being directed towards an action. The persons who gave evidence were simply narrating events which occurred. They were not advising anyone as to what should be done to prevent future occurrences nor were they asked to advise the investigator on what went wrong. Moreover, to find that Record 4 and the remainder of Record 4.1 are exempted under section 23(1)(a) would be to extend that exemption beyond the purpose and intent of protecting the government decision- or policy-making process.

The last line in each of the two paragraphs on page 10 of Record 4.1 are disciplinary recommendations. The disciplinary recommendation as it relates to the Applicant has already been released in summary form to the Applicant, but in any event would be the applicant's personal information and releasable under section 6(1). I am of the opinion that the disciplinary recommendation against a third party, as set out on page 10, does not prevent the release of Record 4.1 under section 23(1)(a), as section 6(2) provides that if information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. Moreover, that disciplinary recommendation against the third party is properly severable as the third party's personal information under section 16(2)(g) (previously discussed).

Section 23(1)(a) is also not applicable to Record 4 because part of the information is an instruction or guideline issued to the officers or employees of a public body. Section 23(2)(f) provides that such information cannot be withheld under section 23(1).

Finally, section 23(1)(a) does not apply to Record 2 (transcripts of staff statements) or Record 3 (incident reports), as neither record meets the tests as set out for the reasons discussed above.

The next issue is whether section 23(1)(b)(i) ("consultations or deliberations") apply to the Records. In the broadest sense this section could be used to withhold any discussion whatsoever between any of the parties named in the section. If this were so, there would be very little access to any information under the Act. This cannot be right given the purpose of the Act which is stated in section 2 to be "...to allow any person a right of access ... subject to limited and specific exemptions as set out in this Act,". When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

Records 2 ("transcripts of staff statements") contains interrogations of employees. Interrogations are neither "consultations" nor "deliberations", as no opinions are expressed and no group of officers or employees discusses or considers any matter. Therefore, section 23(1)(b)(i) does not apply to Record 2. Record 3 (incident reports) and Record 4 (correspondence) are merely descriptions of incidents, or staff and manager summaries of information. Records 3 and 4 also do not meet the tests for "consultations" or "deliberations". Furthermore, Record 4.1 (excluding the previously released Findings and Recommendations, about which I do not intend to comment) is one officer's summary of information, rather than a view as to the appropriateness of a particular proposal or suggested action, and also does not meet the criteria under section 23(1)(b)(i).

In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either "advice etc" under section 23(1)(a) or "consultations or deliberations" under section 23(1)(b).

Conclusion:

Alberta Justice incorrectly applied section 23(1)(a) and section 23(1)(b)(i) to the Record.

The Records should be released, subject to severing as required under section 16.

ORDER

I order that Records 2 through 4 and 4.1 be released to the Applicant, subject to severing of employment history, names and information that could identify individuals, as previously indicated in this order.

I ask that Alberta Justice notify me in writing, within 30 days, that this order has been complied with.

Robert C. Clark
Information and Privacy Commissioner

POSTSCRIPT

As discussed, Alberta Justice applied section 19 ("disclosure harmful to law enforcement") to the Records at issue. I must point out that not everything that Alberta Justice does can automatically be considered to be "law enforcement", nor can all records produced by Alberta Justice be subject to that section.

Section 67(1) of the Act places the burden of proof on the head of the public body to show that the applicant has no right of access to the record or part of the record, and when I am required to review the actions of the head, the head must discharge this burden of proof in justifying the refusal of access under any section of the Act. Mere statements, as in Alberta Justice's submission, that harm may result from disclosure do not discharge the head's burden of proof. There must be evidence of a causal connection between the disclosure and the harm. The head of the public body should have that evidence before he makes his decision and I must have that evidence in reviewing the head's decision.

Furthermore, the records under consideration were produced in an investigation that resulted in disciplinary action against the Applicant. Fairness demands that an investigated person be given as much disclosure of the records as possible. The Ontario Commissioner has stated in Ontario Order P-597 that the degree of disclosure should be more extensive if the investigation is likely to result in discipline. I find that statement compelling.