OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-52

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Charmaine Lowe, Adjudicator
October 24, 2002

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Summary: Applicant requested copies of all of his personal information from his employer, a youth correctional facility, and the Ministry's regional, personnel and financial services offices. Ministry initially failed to respond completely on one set of records but ultimately discharged its s. 6(1) duty. No order to conduct further searches or to provide a complete response is necessary.

Key Words: duty to assist – adequacy of search – respond openly, accurately and completely – every reasonable effort – grievance records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6(1).

Authorities Considered: B.C.: Order 02-03, [2002] B.C.I.P.C.D. No. 3; Order 02-12, [2002] B.C.I.P.C.D. No. 12.

1.0 INTRODUCTION

[1] The applicant in this case is an employee of a youth correctional facility ("Facility") now operated by the Ministry of Children and Family Development ("Ministry). By his own admission, the applicant has launched over 20 grievances against his employer over the past 12 years. It seems that in the course of reviewing his personnel file, to prepare for a pre-arbitration meeting, the applicant became suspicious of what he saw as attempts to hide information from him. These suspicions were exacerbated when, according to the applicant, one of the Facility's directors admitted to maintaining his own files on the applicant – separate from the applicant's personnel file – and informed the applicant initially that he could review the files, only to inform him later that he would have to make an access to information request for the file. As a result

of this interaction, the applicant became convinced that other directors at the Facility had unofficial or "ghost" files about him.

[2] On July 31, 2000, the applicant submitted a request to the Ministry of Attorney General (the Ministry formerly responsible for the Facility) for all information pertaining to him held by the Facility and its "affiliated departments". On August 3, 2000, the Ministry of Attorney General transferred the applicant's request to the Ministry, the public body responsible for the Facility since 1996. In clarifying what he meant by "affiliated departments", the applicant listed the Ministry's Regional Program Operations, Personnel Offices and Financial Services Division as potential sources of responsive records. Within the Facility, the applicant specified the Director's Office, the Director of Operations, the Director of Staffing, the Director of Programs and the Senior Corrections Officers' "Pink Book" as potential sources of his personal information. From these departments and any others his employer might have knowledge of, the applicant requested any and all information pertaining to himself from the start of his employment in December of 1989 to the present.

[3] On September 27, 2000, the Ministry wrote to the applicant seeking clarification of his reference to a "Senior Corrections Officers Pink Book".

[4] On May 30, 2001, the Ministry responded to the applicant's request by providing copies of records it had located. (Some information was removed from these records under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("Act") but that issue is not before me in this inquiry.) The applicant was also informed that records regarding an ongoing grievance had not been ordered but that these records would be available to him through the arbitration process or, when the issues have been settled, through "the information and privacy process". Finally, the Ministry informed the applicant that it had not located a "Senior Corrections Officers Pink Book".

[5] On September 14, 2001, the Ministry informed the applicant that it had located additional records and provided the applicant with copies of the records it located. (Some information was also removed from these records under s. 22 of the Act but that issue is also not before me in this inquiry.) Among the additional records the Ministry located were closed grievance files from when the Facility was under the auspices of the Ministry of Attorney General. (The Ministry states that these files were not located previously as staff conducting the search did not initially realize these files were onsite.) With respect to additional records located regarding unresolved grievances, the Ministry told the applicant the following:

> I have been informed that an unresolved grievance from 1998 makes specific reference to a closed grievance from 1997, and as a result the 1997 grievance documents are not included. I have also been informed that there is an outstanding grievance from 1999. I have been told that this grievance remains outstanding until written confirmation from the Union regarding this grievance has been received. You can access these documents through the Information and Privacy process once the grievances have been resolved.

[6] Sometime after September 5, 2001 (the exact date was not provided), additional records were located in the Ministry's central Human Resources Branch. The Ministry did not initially search this office for responsive records as it was assumed that any human resources records held by the central office would be duplicates of records held by the Vancouver office responsible for providing human resources support to the Facility. However, when the Ministry eventually searched the central office, additional records, described as "four grievance files and one file filled with miscellaneous documents", were located. According to the Ministry's initial submission, at the time of the inquiry, a decision had not yet been made on whether the applicant was entitled to receive access to these records.

[7] On November 1, 2001, the applicant requested a review of the Ministry's response to his request on the grounds that the Facility held additional records containing his personal information which had not been disclosed to him. According to the applicant, those records included: alleged unofficial or "ghost" files held by the Facility's Directors; grievance records (including notes and tape recordings of grievance meetings); investigation records; e-mail messages between personnel and senior management; and the "Senior Corrections Officers Pink Book".

[8] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act"). I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[9] The only issue before me in this inquiry is whether the Ministry has, in accordance with s. 6(1) of the Act, made every reasonable effort to assist the applicant by responding to his request openly, accurately and completely. Specifically, has the Ministry conducted an adequate search for records and provided a complete response in terms of its s. 6(1) obligations? Previous orders have established that the Ministry has the burden of proving that it fulfilled its duty under s. 6(1).

3.0 DISCUSSION

[10] **3.1 Portfolio Officer's Fact Report** – On February 18, 2002, this Office issued the Notice of Inquiry and Portfolio Officer's Fact Report ("Fact Report") to the applicant and the Ministry. On February 19, 2002, the Ministry raised concerns about the Fact Report, on the basis that it contained references to statements and events that transpired during the mediation process and to the personal views of the Portfolio Officer as to what was demonstrated by evidence. The Ministry argued that these statements were inappropriate and inconsistent with this Office's Policies and Procedures and, as such, should be removed. The Ministry also stated that, while the Notice of Inquiry identified the issue under review in this inquiry as the adequacy of the Ministry's search for records, the Fact Report referred to the Ministry withholding information from the

applicant in a way that commingled the adequacy of search issue with substantive access issues. The Ministry requested that the Fact Report be amended to clarify that the only issue under review was the search issue.

[11] On February 28, 2002, this Office received the applicant's initial submission. It was based on the Fact Report and stated in part "I agree with the facts contained in the Fact Report."

[12] On February 28, 2002, this Office's Executive Director, having reviewed the Ministry's concerns and the applicant's initial submission, decided that an amended Notice of Inquiry and Fact Report would be issued. The amended Fact Report made no reference to the statements and events the Ministry objected to and stated that the issue under review is the adequacy of the Ministry's search for records. The applicant submitted a new statement but objected to the decision to amend the original Fact Report.

[13] I have reviewed both the original and amended Fact Reports and have decided not to consider the original Fact Report in reaching my decision. While I do not necessarily agree with the Ministry's objections to the original Fact Report, I cannot see how the amendments to the Fact Report prejudice the applicant's position, as the parties were notified of the decision and permitted more time to make representations. I note, in fact, that the applicant provided a revised initial submission that is much more detailed than the original version. I might also add that, despite the importance the applicant attaches to the original Fact Report and the Ministry's clear objections to it, I do not find that the original Fact Report provides any additional evidence that would assist me in reaching my decision on whether or not the Ministry met its s. 6(1) search obligations. The applicant's revised submission was much more helpful in that regard.

[14] **3.2 Standard of Review for Adequate Search** – A public body is required, in order to perform its duty under s. 6(1) of the Act, to undertake an adequate search for records that respond to an access request. Section 6(1) of the Act reads as follows:

> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[15] The Information and Privacy Commissioner has discussed the standards for searching for records, and for describing those searches, in numerous orders. See, for example, Order 02-03, [2002] B.C.I.P.C.D. No. 3, at para. 14, where the Commissioner said the following:

> Section 6(1) of the Act requires the College to "make every reasonable effort" to assist an applicant by responding "openly, accurately and completely" to an access request. Although the Act does not impose a standard of perfection, it is well established that, in searching for records, a public body must do that which a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. The evidence should describe all potential sources of records, identify those searched and identify any sources that were not searched, with reasons for not doing so. The evidence should also indicate how the

searches were done and how much time public body staff spent searching for records.

[16] I have applied these standards in reaching my decision here.

[17] **3.3 Adequacy of Search for Records** – The Ministry argues that it has made every reasonable effort to search for records responsive to the applicant's request. Its search included records at the Facility, the Human Resources Division (including both headquarters, in Victoria, and the Vancouver office responsible for supporting the Facility) and the Financial Services Branch (including the offices in both Vancouver and Victoria). The Ministry submits that its searches in these areas have been what a fair and rational person would expect and that it has no reason to think that any other area of the Ministry would have records responsive to the applicant's request. (para. 4.34, initial submission). In support of its position, the Ministry relies on affidavits sworn by the following individuals (in order to protect the identity of the applicant, I have not named the directors at the Facility):

1. Melinda Minkley, Information and Records Officer for the Ministry, who was responsible for processing the applicant's request for records;

2. Sandra Lindsay, Human Resources Advisor with the Ministry, who is responsible for providing human resources services to the Facility and was responsible for searching for records held in the Human Resources Services office;

3. A senior director at the Facility ("Director A") who was responsible for facilitating the search for records at the Facility; and,

4. Another director at the Facility ("Director B") who was responsible for searching for records responsive to the applicant's request, including the log books referred to as "Pink Books".

[18] The applicant cites several examples of records that he believes exist, but which the Ministry did not provide to him. I will deal with each of these types of records in turn.

Grievance records

[19] The applicant states that he has had over 20 grievances against his employer and refers to approximately 40 pages of documentation that he provided to the Portfolio Officer in this matter, which I assume he believes support his argument that the Ministry has not provided him with all responsive records. In addition, the applicant states that he witnessed managers taking extensive notes and making tape recordings at various grievance-related meetings he attended. He states that he received many pages of records from the Ministry regarding what he refers to as his "minor grievances" but only a minimal number of pages with respect to his "nine more significant grievances". According to the applicant, his union has provided him with about 2 ½ inches of records regarding the "nine serious grievances". He believes that the Ministry should have similar documentation.

[20] Unfortunately, the applicant did not submit copies of the approximately 40 pages of records for the purposes of this inquiry so I am unable to determine if they do support his case or have any relevance to the s. 6(1) issue. However, the Ministry, in its reply submission, refers to 49 pages of records provided by the applicant, which appear to be the same records the applicant provided to the Portfolio Officer. Although the Ministry does not attach these records, it does describe the records in some detail and responds to the applicant's apparent belief that these records indicate that the Ministry's response was not complete.

[21] In referring to the 49 pages of records provided by the applicant, the Ministry states that it, in fact, disclosed several of these records to the applicant. Other records were "identified but not disclosed to the Applicant". (The Ministry is apparently reviewing its initial decision to not disclose these records.) Finally, the Ministry states that it did not locate the remaining records but argues that this does not mean the Ministry failed to conduct an adequate search. It notes that some of the records are addressed to the applicant from the union or other agencies with no indication that they were copied to the Ministry. The Ministry also states that some of the records it was unable to locate were generated prior to, or at the time of, responsibilities for youth corrections being transferred from the Ministry of Attorney General to the Ministry for Children and Families. The Ministry does not know why these records were not located during its search but submits that its search efforts have, nevertheless, been exhaustive.

[22] With respect to the applicant's comments about witnessing managers tape recording meetings and taking notes, the Ministry replies that it is the Facility's practice to record meetings relating to grievances where it is determined that a transcript may be required later, for example, if a matter proceeds to arbitration. However, if an arbitration hearing does not occur, then there is, according to the Ministry, no need for the Facility to retain tapes beyond their scheduled retention period. (The Ministry does not state what the retention period for this type of record is, however.) The Ministry states that while there may have been tapes made of meetings involving the applicant in the past, that does not mean that the Ministry still has custody or control of such tapes. In any event, the Ministry submits, its search for tapes relating to the applicant was thorough.

[23] With respect to meeting notes, the Ministry states that any notes relating to the applicant have been located. The Ministry has provided affidavit evidence from Director A stating that he contacted the managers referred to by the applicant as having taken notes at meetings involving the applicant. One of the directors stated that he had notes relating to an investigation that post-dated the applicant's request but otherwise everyone confirmed that all responsive records had been located and retrieved. In specifying that the meeting notes had been "located and retrieved", I assume that the Ministry is making the point that this does not necessarily mean that the notes were released to the applicant. As the Ministry did inform the applicant that records relating to unresolved grievances were being withheld, it is possible that notes taken at meetings relating to the applicant's grievances fall into this category. However, as the Ministry's decision to withhold information is not before me, I can make no finding on this.

[24] With respect to the applicant's argument that the Ministry should have located and provided him with copies of records he received from his union, the Ministry submits that it does not necessarily have copies of any correspondence prepared by the union. The union keeps its own files and generates its own documents and may have records that the Ministry does not have. More to the point, however, is the fact that the Ministry admits that it has grievance-related records which it has not provided the applicant. As previously noted, the Ministry informed the applicant in its May 30, 2001 and September 14, 2001 decision letters that records relating to unresolved grievances would not be provided. The Ministry argues that "[t]he applicant should not mistake such a prior decision to withhold records as evidence that the Ministry did not locate and retrieve such records."

[25] I agree with the Ministry that the applicant appears to be confused about the issue under review in this inquiry. In his initial submission, the applicant states that the Ministry's search is both inadequate and that materials have clearly been withheld. The applicant then went on to say:

> I understand that the Ministry has not denied the existence of those "unofficial files" but has refused to release them because of an ongoing grievance. There is no current ongoing grievance between me and my employer other than this application under the Freedom of Information Act.

[26] This statement supports the Ministry's concern about a commingling of substantive access issues with the search issue. The fact that it identified records as ongoing grievance records and chose to withhold them is not a search issue.

[27] I should say, however, that part of the applicant's confusion may result from how the Ministry chose to respond to the applicant's request. For example, the Ministry told the applicant that records regarding ongoing grievances were "not ordered". What does this mean? Does it mean the Ministry retrieved these files, reviewed them and decided that one or more of the exceptions in the Act permitted it to withhold ongoing grievance files? If so, the Ministry does not appear to have informed the applicant what section of the Act it relied on to withhold the information. Or does it mean the Ministry decided, as appears to be suggested, not even to retrieve the files for review. If so, it would not necessarily be at all clear to the applicant whether the Ministry's decision was a decision to refuse access or a failure to provide a complete response as required by s. 6(1).

[28] The Ministry later clarified in its initial submission that records relating to the applicant's ongoing grievances were retrieved by a Facility staff member and "are currently being kept in a single file pending resolution of this FOI matter" (para. 12, Director A affidavit, Ministry's initial submission). I am, therefore, satisfied that the Ministry did, in fact, retrieve the files, although it could have been clearer about this in its decision letter.

[29] Although the issue of whether or not the Ministry complied with its duty under s. 8 to provide reasons for refusing access to a record (including the section of the Act on which the refusal is based) is not before me in this inquiry, I believe I would be remiss if

I did not remind the Ministry that the Act contains no "ongoing grievance" exception. Only information that falls under one of the exceptions listed in the Act can be withheld. Also, if one or more of these exceptions apply to the records the Ministry identified as "ongoing grievance" records, it is not apparent from its decision letters what those sections might be or what the Ministry's reasons for refusing access might be. Nor does it appear from statements such as "not ordered" that the Ministry reviewed the records with a view to severing them or providing partial release as is required by s. 4(2).

[30] These concerns do not mean, however, that the Ministry failed to conduct an adequate search and respond completely to the applicant's request for grievance-related records. While it may not have provided the applicant with a section of the Act upon which it was relying to withhold "ongoing grievance" records, it did communicate to the applicant its decision to withhold access. If the applicant disagreed with the decision, he had the right to request a review of the decision to withhold records related to unresolved grievances. The applicant argues in his submissions that he has no on-going grievances but again this is really an argument on whether or not the Ministry properly withheld records and has no place in an inquiry into whether or not the Ministry conducted an adequate search and responded completely to the applicant's request. If the applicant did request a review of the Ministry's decision to withhold records, that issue is not before me in this inquiry and I can make no finding on whether the decision was correct.

[31] The fact that the applicant did not request a review of the Ministry's decision to withhold records related to unresolved grievances (at least as part of this inquiry) makes his argument that the Ministry failed to conduct an adequate search for grievance records problematic. It is difficult for him to argue that the Ministry failed to locate certain records when he has no idea what records the Ministry has withheld. It is possible that the very records the applicant is looking for are the ones that the Ministry identified as being withheld in its May 30, 2001 and September 14, 2001 decision letters. (According to the Ministry's submission this appears to be the case for at least some of the records.) However, I am unable to confirm this because, as stated above, that decision is not at issue in this inquiry.

[32] For the reasons given above, I accept that the Ministry has made every reasonable effort to locate grievance-related records. As the Commissioner has clarified in numerous orders, "every reasonable effort" does not impose a standard of perfection on public bodies. It does, however, require a public body to conduct a search that a fair and rational person would consider comprehensive and thorough. The Ministry described its search efforts in some detail, setting out the process it followed in determining where responsive records might reside, the areas and departments it searched and the results of those searches. It also provided affidavit evidence from the individuals who conducted the searches. Where, despite its search efforts, records in the applicant's possession were not located in its files, the Ministry offered objectively reasonable explanations as to why it would not have these records.

[33] Based on the Ministry's submission and the absence of evidence to the contrary from the applicant (which is not to say that the applicant has the burden of proof) – including the applicant's failure to provide copies of the very records he wishes me to

believe should have been found in the Ministry's files – I find, subject to my comments below, that the Ministry conducted an adequate search and responded completely for grievance records regarding the applicant.

Grievance records released after close of inquiry

[34] On September 10, 2002, I wrote to the Ministry asking it to clarify the current status of the grievance records belatedly located in the Ministry's central Human Resources Branch. With respect to these records, para. 30 of the Minkley affidavit states:

> Those records included four grievance files and one file filled with miscellaneous documents. These records included records not previously located. I am currently reviewing those records to determine what information is releasable from them.

[35] In addition, para. 4.31 of the Ministry's initial submission states:

> The Ministry is currently reviewing these records and will provide them to the Applicant, subject to any exceptions under the Act.

[36] As the issue in this inquiry is whether or not the Ministry complied with its duty under s. 6 of the Act, I wrote to inquire if the Ministry had provided the applicant with a response to the records described in para. 4.31 of its initial submission and para. 30 of the Minkley affidavit.

[37] While this inquiry is not concerned with records the Ministry has located and identified as being withheld in its letters to the applicant of May 30, 2001 and September 14, 2001, this inquiry is concerned with whether or not the Ministry has located and issued a response on *all* responsive records. Paragraph 30 of the Minkley affidavit states that the Ministry is reviewing records found in its central Human Resources Branch to determine what information is releasable from them. This statement and the last sentence in para. 4.31 of the Ministry's initial submission suggest that the Ministry had not, at least as of the date of the Minkley affidavit (March 14, 2002), completed its response with respect to these records.

[38] I asked the Ministry to clarify in a further submission whether or not it responded completely respecting these records, and if so, whether the status of these records remained the same. The Ministry responded that it provided the applicant with a response to these records on July 8, 2002 (almost four months after the date of this inquiry) and provided me with a copy of its decision letter. According to the Ministry's decision letter, the applicant was provided with additional records subject to some information being withheld under s. 22.

[39] Although the Ministry confirmed that, by virtue of its disclosure of additional records on July 8, 2002, it had responded completely to the applicant's request, it argues that the only issue for my consideration was whether, at the time of the inquiry, the Ministry had conducted an adequate search for records, and not whether it had also responded completely to the request.

[40] I acknowledge the Ministry's point that the issue was framed in the Notice of Inquiry as a review of the adequacy of the public body's search for records. However, I do not agree that this issue does not include by implication a duty to report the results of that search. If it did not, it would lead to the absurd result that a public body could be said to have met its s. 6 duty to conduct an adequate search by searching for records but not retrieving those records, reviewing those records or informing the applicant whether it had located records responsive to the request, let alone providing a response as to whether the applicant was entitled to access. If a public body were not required to inform the applicant of the results of its search for records the applicant requested, including whether or not the applicant was entitled to access, how could the applicant ever be assured that an adequate search occurred?

[41] In any event, I notified the Ministry on September 10, 2002 that I would be considering the issue of whether the Ministry responded completely to the applicant's request and provided the Ministry with an opportunity to make submissions on the issue.

[42] Section 6 of the Act requires a public body, in responding to a request, not only to conduct an adequate search but to also respond "openly, accurately and *completely*" (added emphasis). In responding "completely" to a request, a public body must make every reasonable effort to search for responsive records and then it must, in order to have responded "completely", either provide the records it located to the applicant or provide grounds for withholding those records. While the Ministry provided the applicant with a response on all the other records it located, it did not, until almost four months after the close of this inquiry, provide the applicant with a response on these additional records belatedly located in the central Human Resources Branch.

[43] I find, therefore, that the Ministry initially failed, when responding to the applicant's access request, to comply with its s. 6(1) obligation to respond completely to this part of the applicant's request. I am satisfied, however, that the Ministry, in providing the applicant with its July 8, 2002 decision ultimately discharged its s. 6(1) obligation. It is, therefore, not necessary for me to order the Ministry, under s. 58(3), to perform its duty under s. 6 to respond completely.

E-mail records

[44] The applicant stated in his letter requesting a review that he has over 50 pages of inter-office e-mails between personnel and senior management regarding him which were not released to him in response to his request. The applicant did not provide copies of these emails for the purpose of my review and did not provide any further argument on this issue in his initial or reply submission.

[45] While the Ministry also does not mention e-mails specifically in its submissions, I am satisfied that its search for records concerning the applicant, including electronic mail messages, was adequate. The affidavits of Minkley and Director A indicate that Facility employees, including those specifically named by the applicant, were contacted and confirmed that they did not have any additional records concerning the applicant. As

any records would include electronic mail messages, I am satisfied that the Ministry's search for these records was adequate. Furthermore, I am reminded that the Ministry has identified certain records, relating to unresolved grievances, as records it has withheld. As this decision is not before me, I cannot confirm whether the withheld records include electronic mail messages but it would seem that this is possible. While the applicant does not have the burden of proof in this case, his argument that the Ministry conducted an inadequate search because he has e-mails in his possession that have not been released to him would be more persuasive, although not determinative on the matter, if it had been confirmed that these records were not included in those being withheld by the Ministry.

Investigation Records

[46] When the applicant viewed his personnel file in preparation for a pre-arbitration meeting, he apparently noticed documents referring to a reprimand, which, according to the applicant, he had contested and won. The applicant had apparently been told that any reference to this matter would be removed from his file. The applicant says he thought it was suspicious that these documents were not in his personnel file when he had previously viewed it, but had somehow reappeared. Of particular concern to the applicant was the fact that a record of the reprimand had reappeared on his file but there was nothing in the file to show that he had been cleared of the allegation. According to the applicant, one of these documents was a letter about the allegation made against him. While the applicant did not provide a copy of the letter for the purposes of this inquiry, the applicant states that the letter refers to an investigation on the allegation being completed. The applicant says that he has received no records about this investigation.

[47] The applicant also states that his personnel file contains a memo from the Workers' Compensation Board ("WCB"), dated September 21, 1990, about a work injury the applicant suffered in December of 1989. Once again, the applicant did not provide a copy of this memo but says that it indicates that a certain manager suspected that the injury was sustained elsewhere. The applicant goes on to state that he was terminated as a result of this matter but later reinstated. The applicant surmises that this manager would not have made such an allegation without some investigation so the applicant reasons that records relating to this investigation must exist.

[48] According to the Ministry, the applicant had requested in 1999 that a number of records be removed from this file. The applicant was apparently informed that some information could not be removed but that other records, referred to as "the loose material at the front of his file", would be removed. The issue of why records which should have been removed from the applicant's personnel file were not removed, or were removed and replaced, is not before me in this inquiry but I mention the applicant's request to have records removed from his file as I find it relevant to the issue of why other records, which he is now arguing should be in his file, may no longer be there.

[49] The Ministry states it has "no reason to retain records relating to a disciplinary matter after the discipline in question had been overturned" (para. 10, reply submission) or "any records related to a termination that was later overturned" (para. 11, reply submission). As the applicant also informed me in his submission that these decisions

had been overturned, and appears to have requested that all records relating to these matters be removed from his file, I am inclined to accept the Ministry's reasoning that the investigation records on these matters, if they ever did exist, would not necessarily have been retained. The fact that one letter and one memo referring to these matters still existed at the time the applicant viewed his personnel file does not mean that other records do or should. The Ministry seems to concede that these records should not have ended up back in the applicant's file but states that these records have since been destroyed and argues that, in any event, it is irrelevant to the search issue. I agree.

[50] In further reply to investigation records related to the comment in the WCB memo, the Ministry submits that it is more than likely that the comment attributed to the Facility manager in the WCB memo was offered merely as an opinion in response to a question from the WCB adjuster rather that the result of an independent formal investigation. "After all", the Ministry argues, "it should not be surprising that a WCB adjuster would, when confronted with the timing of the injury (*i.e.* in the first month of employment), will inquiry [*sic*] into whether the injury occurred during employment or whether it predated employment" (para. 11, Ministry's reply submission). I agree that it is possible that the comment attributed to the Facility manager (as described in the Ministry's and applicant's submissions) was simply an opinion and not based on an investigation but more persuasive, in my view, to the matter of adequate search is the Ministry's evidence that the Manager to whom the comment was attributed was contacted and confirmed that he had no additional records concerning the applicant (paras. 27 and 31, Minkley affidavit, Ministry's initial submission and paras. 8-10, Director A affidavit, Ministry's reply submission).

Unofficial or "ghost" files

[51] The applicant claims that he was informed by one of the Facility's directors that the director had two unofficial files on the applicant and that all the directors keep unofficial files. The applicant states that he has not received these files.

[52] He stated that his director "admitted on tape that he and all other Directors and others have what is knows [*sic*] as ghost/shadow or running files (all unofficial) regarding myself." According to the applicant, he was initially told he could review these files and then told that he had to make a freedom of information request for them. The applicant states that when he received his records through the freedom of information process, it did not include these "ghost files". In reply, the Ministry acknowledged that the director had files regarding the applicant in his possession but said that the records in the files relate to ongoing grievances and, as such, were withheld.

[53] Once again, it is apparent that the real issue here is not whether the Ministry conducted an adequate search in response to the applicant's request, but that it made a decision to withhold these records, a matter not before me in this inquiry. Unfortunately, it does not appear that the applicant was informed until this inquiry that the "ghost" files his director had on him related to on-going grievances and that this was the reason why, first, he had to make a freedom of information request for them and,

second, why the records were withheld. Perhaps if he had been told, this inquiry could have been avoided, at least on this issue.

[54] I say this because it is clear to me and, in my opinion, should have been clear to the Ministry that the applicant, right from the start, was particularly interested in these "unofficial" or "ghost" files held by his director. In fact, it appears to be the main reason he made his access request in the first place. While the applicant was informed that records related to on-going grievances were being withheld, he was not informed that the records he specifically requested – namely, the records in the possession of his Director – related to on-going grievances and, as such, were being withheld. When the applicant did not receive these records, this apparently led him to conclude that the Ministry had not conducted an adequate search for the records or, worse, was denying their existence. For this reason, the applicant appears to have gone to great lengths to prove that he had been told these records existed, including by taping conversations with his Director, when, as it turns out, the existence of these records was never in dispute. I must conclude that the Ministry's search for these files was adequate as it confirms that it has located and retrieved the director's files on the applicant, but note that it is unfortunate the Ministry was not more precise in its correspondence to the applicant that these records did exist, but a decision had been made to withhold them.

[55] With respect to the applicant's belief that other directors have "ghost" files on him, the Ministry's evidence indicates that the Facility's directors were contacted regarding the applicant's request and all confirmed that they either had no records or that the records had already been located and retrieved (with the exception of the one director who stated he had some notes regarding a current investigation which had been created after the date of the applicant's request and, therefore, were not responsive). The difficulty once again with the applicant's argument that the Ministry's search for records was inadequate is that if the records he believes these other directors have in their possession are related to unresolved grievances, it is possible that they were withheld as opposed to not located. Director A emphasizes this point at para. 12 of his affidavit when he states:

> There are certain records held in the [Facility] that have been identified but not disclosed to the Applicant. Those records include records relating to open grievances, records dealing with investigations into complaints made by the Applicant of misuse of managerial authority and some handwritten notes concerning grievances involving the Applicant.

Senior Corrections Officers Pink Book

[56] The applicant believes that the Facility maintains what he refers to as the "Senior Corrections Officer's Pink Book". The applicant believes that these books are used to record daily evaluations of employees and requested that any information about him in these books be released to him.

[57] Minkley states, at paras. 19 and 21 of her affidavit, that the Facility requested clarification as to what the applicant was referring to as the "Pink Book". The applicant apparently clarified that he was seeking an "unofficial record, kept in a pink binder in the

top drawer of the Senior Corrections Officer's desk" and suggested that the Ministry direct its inquiries to a particular director at the Facility.

[58] Director A states that he questioned the director the applicant referred to about the existence of a "Senior Corrections Officer's Pink Book" and an individual who has been an Officer in Charge at the Facility since 1992, and was told the following:

> These individuals advised me, and I believe it to be true, that there used to be a book with a brown leather cover, kept in a locked drawer of a desk used by the Officer in Charge, containing evaluative statements about employees. That book apparently contained notes by the supervisors and Officers in Charge concerning the performance of employees. Such a book is no longer maintained by the [Facility] and I understand that no such book has been maintained since about 1992. I have not been able to confirm what happened to those books. To the best of my knowledge the Ministry no longer has custody of such books (para. 6).

[59] Director A states that the Facility has not been able to locate a record described as the "Senior Corrections Officer's Pink Book" but does say that the Facility has "a number of log books that have been and/or are maintained for the purpose of chronicling events occurring in the [Facility], 24 hours a day, 7 days a week." Among the logbooks he lists is one called the "Senior Correctional Officer in Charge Log Book" which "details specific events occurring during a shift." Director A further deposes at para. 10:

> In the course of my duties as A/Executive Director, Youth Custody, I have had many occasions to review logs [*sic*] books of the types mentioned in the preceding paragraph. Any references in those log books to employees generally appear in the context of the day to day operations of the facility, and not to any subjective evaluation of an employee. For instance, there are sometimes references in log books to a specific employee calling for help when there is altercation [*sic*] between youth in the [Facility]. The [Facility's] log books are not designed to record subjective evaluations of employees. Nor, in my experience, do log books contain subjective evaluations of employees. As such, I have no reason to believe that a review of the [Facility's] log books would result in the location of personal information concerning the applicant. By "personal information" I mean information relating to the applicant as an individual (including subjective evaluations), as opposed to references in log books to his name in the context of his performing his day to day job functions (such as a reference to his signing an incident report).

[60] Additionally, Director A states:

> Each of the Log Books referred to in paragraph 9 of this affidavit would be replaced or renewed about four to six times during the course of a year. Given that the applicant has worked at the [Facility] since 1989, I would estimate that approximately 420 books have been created during that period (assuming that each log book was replaced an average of 5 times during the year). I estimate that it would take days for a person to read through that number of log books for the purpose of determining whether or not there was any personal information relating to the Applicant. As mentioned, I have no reason to believe that a review of any of

> those books would result in the location of personal information concerning the Applicant (para. 11).

[61] In his initial submission, the applicant states that the "Pink Book" he referred to in his request is not the leather bound book the Ministry refers to above. He states that a certain senior correctional officer "has seen and written in the "Pink Book" as have other senior correctional officers" but he offers no evidence to support this claim. The applicant goes on to say that, if the Ministry denies the existence of the "Pink Books" or the unofficial files, this office "should interview senior correctional officers as to the existence of these books and files".

[62] I have decided that it is not necessary to interview senior correctional officers as to the existence of "Pink Books" or unofficial files, as I am satisfied, with the evidence provided by the Ministry, that it undertook an adequate search for these books.

[62] Director B states, in paras. 8-13 of her affidavit, that she took part in a search for Senior Correctional Officer's log books previously known as "Pink Books". She states that that search included a search of her office, the office of the Officer in Charge and searches of offices previously used by Senior Correctional Officers. She states that no one has been able to locate the "Pink Books".

[63] In his reply submission, the applicant appears to have confused Director A's statements in para. 6 about the brown leather-covered book which did contain evaluative statements about employees, but which hasn't been maintained by the Facility since 1992, with Director A's statements in para. 10 about the log books which are currently maintained to record day-to-day operations and which apparently do not contain subjective evaluations about employees. The following statement by the applicant suggests that he mistakenly believes that Director A is describing the same book:

> As to the log books themselves, I note that although [Director A] tries to claim that they do not have any "subjective evaluation" of employees (paragraph 10), but he admits that they contain "evaluative statements about employees" (paragraph 6).

[64] The applicant further states:

> [Director A] refers to seven types of books maintained by the [Facility]. However, I am only asking for the "Senior Correctional Officer in Charge" log books, since those are the one [*sic*] which contain the "evaluative statements".

[65] However, Director A specifically stated that his review of the Senior Correctional Officer in Charge Log Books indicated that they did *not* contain subjective evaluations of employees. As a result of the applicant's apparent confusion, I am left unclear as to whether the applicant is requesting that the Ministry search the Senior Correctional Officer in Charge log books because he believes, mistakenly it would appear, that they contain evaluative statements about employees or if he is requesting a search of log books be conducted regardless of their content.

[66] If the applicant is arguing the latter, the Ministry admits that it has not searched the log books for references to the applicant and argues that it should not be required to, in order to fulfill its s. 6(1) duties, as it is unlikely that the log books contain the applicant's personal information as it interprets "personal information". The Ministry states that it interpreted the applicant's request as being for "information relating to the applicant personally, *i.e*. as an individual". According to the Ministry such information would include "subjective evaluations about the applicant and any personnel related records" but not references to the applicant "where it appears only in relation to his performing his day to day job functions" (para. 4.17, Ministry's initial submission). The Ministry submits that its interpretation of the applicant's request was reasonable.

[67] In Order 02-12, the Commissioner accepted the Workers' Compensation Review Board's ("WCRB") interpretation of an applicant's request for "all records at the Review Board related to me" as covering only records relating to him in a personal capacity, as opposed to any records in which his name appears, as being reasonable. However, in that case, the Commissioner had evidence that the WCRB had informed the applicant of how it was interpreting his request and that the applicant had not challenged that interpretation. In this case, I have no evidence that the applicant accepted or, at least, did not challenge the Ministry's interpretation of his request.

[68] If the Ministry is arguing that records relating to the applicant performing his day-to-day job functions do not contain the applicant's personal information, I cannot agree. The Act defines personal information as "recorded information about an identifiable individual", which would include records about an individual performing his job. The wording of s. 22(4)(e) also makes it clear that the definition of personal information includes information relating to an individual performing his or her job functions. Section 22(4)(e) states that "a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body." This section makes it clear that while information about an individual performing his or her day-to-day job functions is considered to be "personal information", it would not be an unreasonable invasion of that individual's privacy to disclose this personal information. The crucial point here is that the information is still considered to be an individual's personal information.

[69] Having said this, I do not necessarily find the Ministry's interpretation of the scope of the applicant's request to be unreasonable (although it should have clarified its interpretation with the applicant). The applicant has stated repeatedly that the log books he wants searched are the ones used to evaluate employees. Not once does he appear to have asked for references to himself performing day-to-day work activities, such as signing an incident report. When the Ministry first informed the applicant of the results of its search for a "Pink Book", it informed him that, while there used to be a brown leather-covered book used by the Officer in Charge that contained notes of employees' performance, this book was no longer used and had not been used for several years. The Ministry went on to inform the applicant that "the current Supervisor/Officer in Charge logbooks superceded this form of record keeping" but were "more general in information recorded" and did not "contain comments on employee performance or personnel

matters" (Ministry's decision letter of May 30, 2001). Although the Ministry informed the applicant about the existence and nature of the current Officer in Charge Log Book on May 30, 2001, the applicant did not request that the Ministry search these log books for his personal information. Instead he continued to argue that a separate "Pink Book" existed up to and including in his initial submission. It was not until his reply submission that the applicant, as quoted above, stated that it was the Senior Correctional Officer in Charge log books that he wanted searched and even here, he appears to have done so under the mistaken impression that they contain "evaluative statements".

[70] Even though the Ministry admits that it did not search the Senior Correctional Officer in Charge log books, for the reasons outlined below, I am not inclined to order it to do so. Despite the Ministry's efforts to clarify what log books the applicant was referring to in his request for records, it is still not clear to me that the Senior Correctional Officer in Charge Log Books are the log books the applicant wants searched. Given the Ministry's estimate of the number of log books that would exist for the time period specified by the applicant (four to six log books a year for 12 years), I am not prepared to order a search of this magnitude just in case this is the information the applicant is looking for. Even though the applicant finally states in his reply submission that it is the Senior Correctional Officer in Charge Log Books he wants searched (despite his earlier arguments that a separate "Pink Book" exists), he appears to do so under the misapprehension that they contain "evaluative statements". The Ministry clearly stated that these log books are *not* used to record evaluative statements about employees. Rather, any references to employees generally appear in the context of day-to-day operations of the facility. While I do not agree with the Ministry that such a reference to the applicant would not be his personal information, it does not appear to be what the applicant is looking for when he requests "evaluative statements".

[71] In summary, I find that the Ministry has discharged its s. 6 duty to make every reasonable effort to search for log books referred to as "Pink Books" and described by the applicant as containing evaluations about employees. With respect to the leather-covered book, which various staff recall but which was not located, I find that further searches are not necessary as the applicant has clearly stated this is not the book he is looking for. Finally, I find that it is not necessary for the Ministry to search the Senior Correctional Officer in Charge Log Books, at this time, for references to the applicant, as it is not clear that the applicant is looking for the type of general information contained in these log books. Should the applicant at a later date decide that he is interested in accessing references to himself performing day-to-day work duties, I suggest that he specifically request this information from the Ministry, providing sufficient detail, as stated in s. 5(a) of the Act, to allow an experienced employee, with reasonable effort, to identify the records sought.

4.0 CONCLUSION

[72] Despite its initial failure to comply with its s. 6(1) duty to respond to the applicant openly, accurately and completely regarding the records belatedly located in the central Human Resources Branch, I find, under s. 58(3)(a) of the Act, that in all other respects the Ministry discharged its s. 6 obligations in searching for records responsive to the

applicant's request and responding completely to that request. In light of its later July 8, 2002 decision on the records located in the central Human Resources Branch, I find that the Ministry ultimately did respond completely to the applicant's request and that no order is necessary regarding further searches for records or requiring the Ministry to provide a complete response.

October 24, 2002

ORIGINAL SIGNED BY

Charmaine Lowe
Adjudicator