



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 202

Appeal 890310

Ministry of Health



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O R D E R

INTRODUCTION:

On March 21, 1989, a request was submitted to the Ministry of Health (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). The requester sought access to:

Health Discipline Board file re: hearing on
21/March/89 in Queenston Rm *Please provide complete
copy of the file - by Reg'd Mail.

On May 5, 1989, the institution provided access to part of the requested records and responded to the balance of the request in the following manner:

Some of the material requested has been severed from the record under the authority of one of the exemptions from disclosure provided for in the Act. Where material has been severed the legal authority is noted in the margin next to the information removed.

The exemptions used are: Section 49(a), 20, and 49(b) personal information, health and safety. Mr. B.H. Barrett, Chairman of the Health Disciplines Board was responsible for the decision.

On June 14, 1989, the requester again wrote to the institution. The relevant portion of this letter reads as follows:

I would like to request the copy of the complete file with respect to the hearing of Health Disciplines Board dated March 21/1989.

I am applying the above request under the Freedom of Information Act.

According to an official with the institution, the institution did not receive this letter.

On September 8, 1989, following several telephone conversations with the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator"), the requester again wrote to the institution, enclosing a copy of his letter of June 14, 1989, and requesting the following information under the Act:

H.D.B. FILE #1513

Re: [the name of the appellant's wife]

1. Date, Time, Place of Abortion performed by Dr. [wife's physician].
2. Date, Time and Place of [appellant's wife's] visit to Dr. [wife's physician's] office to enquire about abortion.
3. Wellesley Hospital Abortion Committee report.
4. Dr. [wife's physician] reply to the College of Physicians re my complain (sic).

On September 13, 1989, the Co-ordinator replied to the requester's letter of September 8, 1989. He indicated that:

...

You also attached a copy of a letter dated June 14, 1989 in which you request a copy of the complete file with respect to the hearing of your complaint against Dr. [wife's physician] held by the Health Disciplines Board on March 21, 1989.

Our research indicates that a copy of this record requested in your June 14, 1989, letter was sent to you under the Freedom of Information and Protection Act on May 5, 1989. (File Number PI-025-89).

Some of the material contained in the record was severed out under the authority of Sections 49(a), 49(b) and 20.

Sections 49(a) and (b) refer to disclosure of another individual's personal information while Section 20 refers to danger to health and safety.

To ensure that you received as complete a copy of the records that you were entitled to under the Act, which would include those requested in your letter dated September 8, 1989, a second review of the Health Disciplines board file was undertaken.

Our investigation, did not find any records to which were entitled, other than those that had been previously disclosed to you.

For this reason, this office has not generated a request under the Act from your latest correspondence.

On October 4, 1989, the requester appealed the decision of the institution pursuant to subsection 50(1) of the Act. This subsection gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution under the Act to the Commissioner.

In his letter of appeal the appellant stated:

Re: Health Disciplines Board File #1513

I wish to appeal under the privacy act for the information which I requested from the Ministry of Health.

Please find the enclosed copies of my request dated 8 September, 1989 and their reply dated 13 September, 1989.

I would like you to intervene in this matter and direct the Ministry of Health and Health Disciplines Board to release the following information and documents to me:

Re: [the name of the appellant's wife]

1. Date, Time, Place of abortion performed by Dr. [wife's physician] (From his correspondence to the College of Physicians and Surgeons of Ontario or from any other source.)
2. Record of her visit to Dr. [wife's physician's] office to enquire about abortion.
3. Wellesley Hospital Abortion Committee Report.
4. Dr. [wife's physician's] reply to the College of Physicians and Surgeons of Ontario.

Please be advised that all these (sic) information was brought into discussion during the Health Disciplines Board hearing and therefore is public information and no longer confidential.

On October 10, 1989, notice of the appeal was given to the institution and the appellant.

In accordance with the usual practice, the appeal was assigned to an Appeals Officer who contacted the institution's Freedom of Information and Privacy office in order to obtain a copy of the requested records and discuss possible mediation of the appeal.

The institution advised the Appeals Officer that it was of the view that the Commissioner did not have jurisdiction to consider the appellant's appeal. The institution's position was that the documentation requested in the appellant's letter of September 8, 1989, was subsumed by the appellant's previous request, for which a decision was made on May 5, 1989, and that this fact was known to the appellant. The appeal would therefore be outside the 30-day period for filing an appeal prescribed by subsection 50(1) of the Act.

Officials from both the institution and this office met to clarify some of the issues arising in this appeal. At the meeting, it was agreed that in the appeal would proceed immediately to the inquiry stage of the appeals process. As a preliminary issue, it was agreed that a determination would be made concerning the question of the jurisdiction of the Information and Privacy Commissioner or his delegate to review the head's decision dated May 5, 1989. If it was determined that the Commissioner had the jurisdiction to review the head's decision, the matter of the application of the exemptions cited by the institution to deny access to the requested records would also be addressed. Finally, it was agreed that the appropriateness of the institution's response to the appellant's letter of September 8, 1989, would be considered.

Notice that an inquiry to review the decision of the head was being conducted was sent to the appellant and the institution. The appellant's wife did not receive notice of the appeal because she could not be located. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the

parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's report outlines the facts of the appeal, and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer or any of the parties, to be relevant to the appeal. The Appeals Officer's report indicates that the parties, in making representations, need not limit themselves to the questions set out in the Report.

Written representations were received from the appellant and the institution and I have considered all representations in making this Order.

In relying on subsections 49(a) and 49(b) of the Act as the basis for denying access to the requested records, the institution treated the appellant's request of March 21, 1989, as one for personal information about himself.

I have reviewed all the records at issue in this appeal as well as the requests of the appellant and the correspondence between him and the institution. In my view, given that the appellant was the complainant in the Health Disciplines Board proceedings, it was appropriate for the institution to consider the application of subsection 49(b) in response to his first request dated March 21, 1989.

However, it is my view that as far as the appellant's request of September 8, 1989 is concerned, it is abundantly clear that he was seeking access to information relating to another person, namely his wife. In some cases the records also contain information about other individuals. In my view, once the institution had reviewed the records at issue, it should have treated this request as one for personal information about an individual other than the appellant and proceeded under section 21 of the Act, rather than section 49. Accordingly, I will examine section 21 as it relates

to the records at issue in this appeal and, if necessary, consider section 20 in the alternative.

The records which are contained in the Health Disciplines Board file and to which access was denied, either in whole or in part, may generally be described as follows:

Record 1: Record of Complaint, dated January 19, 1988.

Record 2: Letter from the appellant's wife's physician to the Complaints Investigator with the College of Physicians and Surgeons of Ontario, dated October 15, 1987.

Record 3: Letter from another of the appellant's wife's physicians to the Complaints Investigator with the College of Physicians and Surgeons of Ontario, dated October 22, 1987.

Record 4: Letter from the first physician to the Complaints Investigator with the College of Physicians and Surgeons of Ontario, dated November 13, 1987.

Record 5: Medical records of the appellant's wife.

These five records comprise the entire record of Health Disciplines Board File #1513. They are responsive to the appellant's request as stated in his letters of March 21, 1989, June 14, 1989 and items #1 and #4 in his letter of September 8, 1989. Items #2 and #3 in the September 8, 1989, letter are neither contained in this Health Disciplines Board file, nor are they in the custody or under the control of the institution. Rather they are the medical records of the appellant's wife held by her physician and the Wellesley Hospital, a private institution, which is not covered by the Act.

PURPOSES OF THE ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the

public and that necessary exemptions from the right of access should be

limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that a record, or part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

BACKGROUND:

On September 2, 1987, the appellant filed a complaint with the College of Physicians and Surgeons of Ontario respecting his wife's physician. The College's Complaints Committee determined, on May 18, 1988, that the matter would not be referred to its Discipline Committee. On June 1, 1988, the appellant asked the Health Disciplines Board to review the College's decision. In the course of its review, the Health Disciplines Board considered the relevant documentation and the submissions of the parties. On May 1, 1989, the Board confirmed the decision of the College.

The appellant was present at the Health Disciplines Board hearing and, during the course thereof, became privy to certain medical information concerning his wife. This information was confirmed in the Decisions and Reasons of the Board forwarded to the appellant on May 1, 1989.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

- A. Whether the Information and Privacy Commissioner or his delegate has jurisdiction to review the decision of the head.
- B. If the answer to Issue A is in the affirmative, whether the information contained in the requested records qualifies as "personal information" as defined by subsection 2(1) of the Act.
- C. If the answer to Issue B is in the affirmative, whether disclosure of the personal information would be an unjustified invasion of the personal privacy of the persons to whom the information relates.
- D. If the answer to Issue C is in the negative, whether any parts of the records are properly subject to exemption under section 20 of the Act.

ISSUE A: Whether the Information and Privacy Commissioner or his delegate has jurisdiction to review the decision of the head.

It is the position of the institution that I do not have the statutory authority to consider this appeal because it was filed "out of time", i.e. beyond the 30-day period prescribed by subsection 50(2) of the Act.

Subsection 50(2) of the Act reads as follows:

An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

The institution argues that the appellant's requests of March 21, 1989, and September 8, 1989, were the same request. It states that it complied with sections 24 and 30 of the Act in its decision letter of May 5, 1989 to the appellant and therefore asserts that it has neither the statutory authority to, nor did it, deal with the same request more than once.

I do not accept the institution's position. In my opinion the institution either treated the appellant's letter of September 8, 1989 as the same, continuing request or as a new request.

Despite its argument to the contrary, at a minimum the institution appears to have treated the appellant's request of September 8, 1989, as being the same as his request of March 21, 1989. In his letter to the appellant dated September 13, 1989, the Co-ordinator wrote:

To ensure that you received as complete a copy of the records that you were entitled to under the Act, which would include those requested in your letter dated September 8, 1989, a second review of the Health Disciplines board file was undertaken.

Our investigation, did not find any records to which you were entitled, other than those that had been previously disclosed to you.

For this reason, this office has not generated a request under the Act from your latest correspondence.

It is clear from this letter that the institution did take some action in response to the appellant's September 8, 1989 letter.

It reviewed the Health Disciplines Board file again and made a decision thereon, i.e. that the appellant had received all the information to which he was entitled. It conducted this review having regard to the records requested in the September 8, 1989 letter. I believe that this action indicates that the institution viewed the appellant's letter of September 8, 1989, as a continuing request, originating in his letter of March 21, 1989.

I am also of the opinion that the above action on the part of the institution constitutes a response to a new request. Merely because the institution did not generate a new request file in response to the September 8, 1989 letter, is not determinative of the issue of whether something should be treated as a request for purposes of the Act.

Thus, by its course of conduct, the institution either treated the September 8, 1989, letter as a new request or reviewed its prior decision of May 5, 1989, and made another, albeit the same, decision. Based on the facts as set out above, it is not clear which approach was adopted by the institution.

The institution's conduct notwithstanding, it is not evident to me that the Act precludes a requester from submitting the same request more than once. Should a requester do this, the institution must make a decision, which could be the same or different from that previously issued with respect to the same request.

In view of the fact that the institution felt that it had made a final decision in response to the appellant's request of March 21, 1989, it seems only appropriate that it should have opened a

new file upon receipt of the appellant's letter of September 8, 1989. The institution should have responded to this request on its own merits, as a new request, irrespective of the fact that the records at issue might have been the same and its decision identical to that issued in response to the previous request.

Therefore, I conclude that the institution's letter of September 13, 1989, was a decision made by the head in response to a request made under the Act. The appellant filed his notice of appeal on October 4, 1989, which brings it within the statutory 30-day period. I therefore find that I have the authority to review the decision of the head.

As I have reached the conclusion that the appellant's request of September 8, 1989 was a new request, the response to which he appealed within the appropriate time limit, I do not have to address the question of my jurisdiction to review the head's decision dated May 5, 1989. Nor do I have to consider the institution's argument that it would suffer significant prejudice should I decide to entertain this appeal.

ISSUE B: If the answer to Issue A is in the affirmative, whether the information contained in the requested records qualifies as "personal information" as defined by subsection 2(1) of the Act.

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act, and to determine whether this information relates to the appellant, another individual, or both.

Subsection 2(1) of the Act states:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

As far as Record 1 is concerned, the institution now submits that the business address, qualifications, date of first registration in Ontario, registration status and licence number of the appellant's wife's physician is information of a public

nature and should be disclosed to the appellant. I agree. I also agree that the physician's date of birth meets the statutory definition of "personal information".

Records 2, 3, 4 and 5 also contain "personal information" about individuals other than the appellant, information that falls within the subsection 2(1) definition.

ISSUE C: If the answer to Issue B is in the affirmative, whether disclosure of the personal information would be an unjustified invasion of the personal privacy of the persons to whom the information relates.

Under Issue B, I found that the five records at issue in this appeal contain personal information about individuals other than the appellant. Once it has been determined that a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this personal information to any other person than the individual to whom it relates, except in certain circumstances. One such circumstance is contained in subsection 21 (1) (f) of the Act which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

...

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Guidance is provided in subsections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(3) of the Act sets out a list of the types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

As far as Record 1 is concerned, the only information remaining at issue is the date of birth of the appellant's wife's physician. In the circumstances of this appeal, in my view the disclosure of this information would constitute an unjustified invasion of personal privacy.

The institution has submitted that subsections 21(2)(e), (f) and (h) apply to Records 2, 3, 4 and 5. In addition, it claims that these four records fall within subsection 21(3)(a) of the Act.

Subsections 21(2)(e) and (f) of the Act read as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

...

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

...

The relevant provision of subsection 21(3) reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

...

I do not agree with the institution's position that Records 2, 3 and 4 fall within subsection 21(3)(a) of the Act. Rather, my review of these records and the submissions of the parties leads me to the conclusion that the information contained therein is highly sensitive, such that the circumstances outlined in subsection 21(2)(f) apply. It is on this basis that I uphold the decision of the head to deny access to these records.

The presumption that disclosure would constitute an unjustified invasion of personal privacy found in subsection 21(3)(a) clearly applies to all of Record 5. The appellant's position is that this information is public information, having been revealed to him during the Health Disciplines Board hearing and confirmed in its written decision. He further submits that such an invasion of privacy is justified on the basis of the purpose for which he desires access to this information, i.e. to lay criminal charges.

In my opinion, there is nothing in the Act to justify the disclosure of this information on either of these two grounds. None of the factors listed in subsections 21(1) or 21(4) of the Act exist to rebut the presumption in subsection 21(3)(a) regarding Record 5. The fact that the appellant is already aware of most of the medical information concerning his wife does not negate the application of subsection of 21(3). I therefore uphold the head's decision to deny access to Record 5.

As I have answered Issue C in the affirmative, I do not have to consider the application of section 20 to any of the records at issue in this appeal.

ORDER:

1. I uphold the head's decision to withhold the severance in Record 1 dealing with the date of birth of the appellant's wife's physician only. I order that the other information which was previously severed from Record 1 be disclosed by the head to the appellant on the basis that it is information of a public nature. I further order the head to make this disclosure within 20 days from the date of this Order and to advise me in writing within 5 days from the date of disclosure, of the date on which disclosure was made. The notice concerning disclosure should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

2. I uphold the head's decision to withhold Records 2, 3, 4 and 5 from disclosure in their entirety.

Original signed by: _____
Tom A. Wright
Assistant Commissioner

_____ October 30, 1990
Date