



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

# **ORDER P-244**

**Appeal 890175**

**Ministry of Health**



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## O R D E R

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make Orders under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

### BACKGROUND:

On March 23, 1989, the requester wrote to the Ministry of Health (the "institution") under the Act asking that the institution:

1. examine the records of the Ontario Ministry of Health, Kingston Psychiatric Hospital, Kingston, Ontario and advise:
  - a) whether or not it has ever employed or had as a member of its active staff a person known as [Dr. A] ?
  - b) the date this gentleman became a member of Staff (or whatever other capacity he was employed)?
  - c) the date this gentleman ceased to be a member of that Staff or an employee of that hospital?
  - d) did that gentleman hold admitting privileges while he was a member of that hospital?
  - e) if admitting privileges were enjoyed by this gentleman, were they subject to any limitations?
  - f) the classification of this gentleman's licence and the restrictions, if any, which it is subject to.

2. examine the records of the Ontario Ministry of Health, Kingston, Ontario and advise:
  - a) whether or not [Dr. B] has ever been a member of the Hotel Dieu Hospital (at Kingston, Ontario) medical staff with admitting privileges?
  - b) what were the nature of these hospital admitting privileges, i.e. were there any conditions attached?
  - c) when did these privileges commence and when did they cease?

The institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") wrote to the requester advising him that access to the records which were responsive to the request had been denied under section 21(1) of the Act. The Co-ordinator also advised him that the decision to deny access was made by the then Deputy Minister of Health.

The requester appealed the institution's decision to deny access. The appellant also questioned the delegation of powers and duties by the head of the institution. He further stated that there is a public interest in disclosure of the records which outweighs any exemptions which might apply to the records. Notice of the appeal was given to the institution and the appellant.

The institution initially identified records which were responsive to parts 1(a), (b), and (c) of the request, and indicated that there were no records in existence which responded to the rest of the request. The appellant indicated

that he believed that records did exist which would respond to parts 1(d), (e) and (f) of the request.

Further, the institution indicated that it was unable to conduct a search for records concerning Dr. B because the Hotel Dieu Hospital is not an institution under the Act. The appellant initially disagreed, stating his position that the Hotel Dieu Hospital is an institution for the purposes of the Act. However, the appellant subsequently changed his view and decided not to pursue parts 2(a) - (c) of his request.

A Compliance Investigator from the Commissioner's Office was assigned to assess the adequacy of the institution's search for records. The Compliance Investigator interviewed employees of the Ministry of Health, the Kingston Psychiatric Hospital and the College of Physicians and Surgeons of Ontario. The Investigator concluded that no records existed which would respond to part 1(e) of the appellant's request. This information was conveyed to the appellant who indicated that he was satisfied with the search performed and that part 1(e) of his request was no longer at issue.

As far as question 1(d) of the request was concerned, the Compliance Investigator was informed by an official of the institution that physicians working at individual psychiatric hospitals are employed on contract by the Ministry of Health, and that once employed, an individual automatically has admitting privileges for the particular hospital. The institution had copies of Memoranda of Agreement which would, in conjunction with the knowledge of how psychiatric hospitals handle admitting privileges, respond to question 1(d) of the request.

With respect to question 1(f), the institution submitted a copy of a Hospital Practice Licence relating to Dr. A. As far as any restrictions on this licence is concerned, the Compliance Investigator determined that section 19 of Regulation 448 of the Health Disciplines Act contained the standard terms and conditions applicable to this type of licence. Although an amended version of the regulation has been prepared for presentation to the Regulations Committee of Cabinet, a review of The Ontario Gazette has provided no evidence that the amendment has been approved by the Lieutenant Governor in Council.

In summary, the records which were identified as being responsive to the appellant's request may be described as follows:

- Record 1:** An Employee Service Record relating to Dr. A (a portion of which responds to parts 1(a), (b) and (c) of the request).
- Record 2:** A Notice of Credits on Termination relating to Dr. A (a portion of which responds to part 1(c) of the request).
- Record 3:** A copy of Dr. A's Hospital Practice Licence (which responds to part 1(f) of the request).
- Record 4:** Five Memoranda of Agreement relating to Dr. A (portions of which respond to parts 1(a), (b) and (c) of the request and indirectly to part 1(d) of the request).
- Record 5:** (i) Regulation 448 of the Health Disciplines Act, and (ii) the draft amended version of the regulation (both of which respond to part 1(f) of the request).

Because settlement of the appeal was not achieved, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Notice was also given to Dr. A, as an affected person in the appeal. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making any representations to this office concerning the subject matter of the appeal. The appellant was also sent a copy of the Minister of Health's Delegation of Authority under section 62(1) of the Act. The appellant was asked to determine whether he was satisfied with the Minister's delegation of Authority to the Deputy Minister.

Written representations were received from the appellant, the institution and the affected person, Dr. A. The institution's position with respect to each of the records at issue in this appeal is as follows:

- (1) Access is denied to Records 1, 2 and 4 pursuant to section 21(3)(d) of the Act;
- (2) Access is also denied to Records 1 and 4 pursuant to section 21(3)(f) of the Act;
- (3) Access can be granted to Record 3 as this document is available to the public; and,
- (4) Record 5 is not responsive to the request. In the alternative, if the record is found to be responsive, the draft portion should be withheld pursuant to sections 12(1)(f), 18(1)(g), 22(a) and 22(b) of the Act.

The appellant and Dr. A were both notified of the institution's position with respect to all records. Dr. A was also advised that the institution was prepared to release Record 3 and that

representations were being sought from him specifically as to why that record should not be released. Both parties submitted additional representations.

**ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the head's powers under the Act were properly delegated to the identified decision-maker.
- B. Whether the information contained in the requested records qualifies as "personal information" as defined by section 2(1) of the Act.
- C. If the answer to Issue B is yes, whether disclosure of the personal information would be an unjustified invasion of the personal privacy of the person to whom the information relates.
- D. Whether either part of Record 5 is properly subject to exemption under the Act.
- E. If the answer to Issue C is yes, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption.

**SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the head's powers under the Act were properly delegated to the identified decision-maker.**

The institution's decision letter identified the decision-maker as the Deputy Minister of Health. The institution subsequently provided a delegation schedule which outlines the various delegations made by the Minister to employees of the institution. The appellant, in his letter of appeal, submitted

that the Deputy Minister is not a "head" within the meaning of section 2(1) of the Act, and as such did not have the power to make a decision pursuant to section 21(1) of the Act.

Section 2(1) of the Act provides the following definition:

"head", in respect of an institution, means,

- (a) in the case of a ministry, the minister of the Crown who presides over the ministry,

...

Pursuant to section 62(1) of the Act the head may delegate his or her powers and duties. Section 62(1) of the Act states:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

The delegation and the delegation schedule raise two issues which must be addressed. The actual delegation mentions only the delegation of "powers" rather than "powers and duties". Also, the delegation is not dated.

Section 62(1) of the Act refers to the delegation of "a power or duty" (emphasis added). The two terms are distinct; one distinction being that powers are discretionary and duties are mandatory.



Given that this appeal concerns the application of both discretionary and mandatory exemptions, the institution was requested to supply evidence which would indicate the Minister's intention with respect to the delegation of both powers and duties. Further, the institution was requested to supply evidence regarding the date when the delegation was signed by the Minister.

Two affidavits were supplied by the institution, one addressing the issue of the delegation and the other relating to the date the delegation was signed. The affidavits were signed by the individual who prepared the delegation and the delegation schedule. The affidavit concerning the intent of the delegation stated that "the intent of the Minister of Health was to delegate both the powers and duties conferred on her as Minister of Health to Ministry officers indicated on the delegation schedule" and "the intent of the Minister of Health was to authorize Ministry officials to use both the discretionary and mandatory exemptions found in the Freedom of Information and Protection of Privacy Act, 1987". With respect to the date of the delegation, the other affidavit stated that it "was signed by the then Minister of Health, the Honourable Elinor Caplan, on or about April 17, 1989".

After reviewing the delegation document and the contents of these affidavits, I am satisfied that the head has properly delegated her authority pursuant to section 62(1) of the Act, and that the Deputy Minister had the authority to make the decision in response to the appellant's request. I would, however, encourage the institution to review its delegation to ensure that it is current and reflects the present intention of the institution regarding decision-making under the Act.

**ISSUE B: Whether the information contained in the requested records qualifies as "personal information" as defined by section 2(1) of the Act.**

Dr. A claimed that section 21(1) applies to exempt the relevant portions of Records 1, 2, 3 and 4. The institution claimed the section 21(1) exemption only with respect to Records 1, 2 and 4, and not Record 3. Before deciding whether an exemption under section 21(1) of the Act applies, I must determine whether the information in question falls within the definition of personal information contained in section 2(1) of the Act.

Section 2(1) of the Act provides, in part, as follows:

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

...

(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,

...

(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;

In my view, the information contained in Records 1, 2, 3 and 4 falls within the definition of "personal information", and is properly considered personal information about the affected person.

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

I have found under Issue B that the information contained in Records 1, 2, 3 and 4 qualifies as "personal information" under the Act. Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this personal information, except in certain circumstances. One such circumstance is contained in section 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.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Records 1, 2 and 4

The institution and Dr. A both submitted that the personal information contained in those portions of Records 1, 2 and 4 which were responsive to the appellant's request, was collected for the purpose of the employment of Dr. A, and hence forms part of his employment history. As such, they argue, disclosure of these records would be presumed to constitute an unjustified invasion under section 21(3)(d). Section 21(3)(d) provides:

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

(d) relates to employment or  
educational history;

I have reviewed these records and, in my opinion, they relate to the employment history of Dr. A, and therefore satisfy the requirements of section 21(3)(d).

Because I have found that the requirements for a presumed unjustified invasion under section 21(3)(d) have been satisfied, I must now consider whether any other provisions of the Act create a rebuttal to this presumption.

Section 21(4) of the Act outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). Sections 21(4) (a) and (b) state:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;
- (b) discloses financial or other details of a contract for personal services between an individual and an institution;

In determining whether either section 21(4) (a) or (b) apply in the circumstances of this appeal, it is necessary for me to determine whether Dr. A was an employee of the institution or was retained under a contract for personal services.

Black's Law Dictionary (Sixth Ed.) defines both employee and independent contractor. Employee is defined as:

A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed... One who works for an employer; a person working for salary or wages.

Generally when person for whom the services are performed has right to control and direct the individual who performs the services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".

Independent contractor is defined as:

Generally, one who, in exercise of an independent employment contracts to do a piece of work according to his own methods and is subject to his employer's control only as to end product or final result of his work ... One who renders service in the course of self employment or occupation, and who follows employer's desires only as to results of work, and not as to means whereby it is to be accomplished ... He may or may not be an agent.

Some of the factors which may be considered in characterizing a relationship as either employee or independent contractor are:

- The level of control and supervision exercised by the person requiring the work to be done, with respect to how the work is to be performed, in what setting and under what conditions, the hours of work, as well as the results of the work; and,

- Whether the work was part of the essential ongoing operation of the employer.

In a letter dated May 14, 1991, the institution acknowledged that they were Dr. A's employer. The institution stated that the Kingston Psychiatric Hospital is a branch of the institution and that the human resources branches of all ten public psychiatric hospitals report directly to the Director of the Human Resources Branch of the Ministry of Health.

Record 4 outlines the hours of work, salary and benefits provided to Dr. A. The hours of work would, in my view, likely preclude Dr. A from working for another employer. As well, it would appear that some level of supervision is implied, given that salary increases of Dr. A are dependent upon satisfactory service. Therefore, it is my view that Dr. A was an employee of the institution.

Having found that Dr. A was an employee of the institution, I must now determine whether section 21(4)(a) of the Act rebuts the presumed unjustified invasion pursuant to section 21(3)(d).

Section 21(4)(a) is specific. It applies to only allow the release of a (job) classification, salary range, and benefits or employment responsibilities. These categories of information, while included to some extent in Records 1, 2 and 4, are not responsive to the appellant's request. The parts of Records 1, 2 and 4 which are responsive fall outside the scope of section 21(4)(a), and I find, therefore, that the presumption of an unjustified invasion under section 21(3)(d) has not been rebutted by section 21(4)(a).

In Order 20 dated October 7, 1988, former Commissioner Sidney B. Linden stated that "... a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual." In my opinion, the relevant portions of Records 1, 2 and 4 do not contain any information which pertains to section 21(2).

In conclusion, it is my view that disclosure of the portions of Records 1, 2 or 4 which are responsive to the appellant's request would constitute an unjustified invasion of the personal privacy of Dr. A.

Record 3

The institution claims that access should be granted to Record 3, the Hospital Practice Licence, because the licence is publicly available. Dr. A maintains that release of this licence would be an unjustified invasion of his personal privacy. He submitted that it relates to employment history, and that the disclosure of this record would, therefore, be presumed to constitute an unjustified invasion of personal privacy under section 21(3) (d).

Although this record has some connection to employment, as it must be obtained in order to work at a particular hospital, in my view this connection is too remote to constitute employment history, and I find that disclosure would not constitute a presumed unjustified invasion of personal privacy under section 21(3) (d).



As mentioned earlier, section 21(2) of the Act lists various criteria which must be considered in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

Dr. A has not identified any of the criteria under section 21(2) which would be relevant to a determination of whether or not disclosure would be unjustified. In addition, our investigation determined that the information in issue can be obtained, in a different form, from the College of Physicians and Surgeons. The College (which is not an institution covered by the Act) is a source of public information about the standing of physicians. The College is governed by the Health Disciplines Act.

Section 56(5) of the Health Disciplines Act states:

The Registrar shall maintain one or more registers in which is entered every person who is licensed to practise medicine, identifying any specialist status and terms, conditions and limitations attached to the licence, and shall note on the register every revocation, suspension and cancellation of a licence or recognition of specialist status and such other information as the Registration Committee or Discipline Committee directs.

Section 21 of Regulation 448 of the same Act states:

- (1) The information entered in the register respecting each member shall be,
  - (a) publicly available;
  - (b) capable of being printed promptly; and

- (c) available in printed form to any person during the normal hours of operation of the offices of the College.
- (2) The Registrar may give information from the register in printed or oral form to any person.
- (3) The Registrar shall issue a certificate of standing in respect of any member to any person who requests such a certificate and pays the fees prescribed by section (5).
- (4) A certificate of standing shall state,
  - (a) the information regarding the member that is contained in the register; and
  - (b) whether there is any outstanding referral to the Discipline Committee of the Fitness to Practise Committee in respect of the member, as of the date of the request.
- (5) The fee for the issuing of a certificate of standing is \$10.

The College is required to maintain a registry and make information available to the public. Although the document which would be made available is a Certificate of Standing rather than a photocopy of a Hospital Practice Licence, the information provided on the Hospital Practice Licence would be contained in the Certificate of Standing.

Having considered the criteria set out in section 21(2) and the public availability of the information, it is my view that disclosure of the Hospital Practice Licence would not constitute an unjustified invasion of Dr. A's personal privacy.

**ISSUE D: Whether either part of Record 5 is properly subject to exemption under the Act.**

The institution claimed that both parts of Record 5 were not responsive to the request. However, because part of the appellant's request concerned the licence and any restrictions on the affected person, the Compliance Investigator felt that Record 5 was responsive to the request. The licence, if read in conjunc-

tion with Regulation 448 of the Health Disciplines Act, answers the appellant's request. Accordingly, I am satisfied that both parts of Record 5 respond to the appellant's request.

Dealing first with part (ii) of Record 5, the institution claimed that even if Record 5 was relevant, the part which is a draft regulation would be exempt from disclosure pursuant to sections 12(1)(f), 18(1)(g), 22(a) and 22(b) of the Act.

Section 12(1)(f) of the Act states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

(f) draft legislation or regulations.

In its representations the institution argued that part (ii) of Record 5 is a draft regulation which was prepared for presentation to the Regulations Committee of Cabinet. All proposed regulations are approved by this Committee prior to proclamation by the Lieutenant Governor.

The institution, in its representations, advised that the head had considered but rejected the idea of seeking Cabinet consent to the disclosure of this part of the record, as provided by section 12(2)(b). Specifically, it submitted that "the record had not yet been before Cabinet as it was still in draft form ... it was considered to be inappropriate to seek the consent of the Executive Council to release publicly a document it had not yet had an opportunity to review in its regular process".

I have reviewed the contents of part (ii) of Record 5 and, in my view, it is a draft regulation and, therefore, falls within the mandatory exemption provided by section 12(1)(f) of the Act.

Accordingly, I uphold the head's decision not to disclose part (ii) of Record 5 which encompasses the draft amended version of section 19 of Regulation 448.

Because I have found that the draft amended regulation is exempt from disclosure under section 12(1)(f), it is not necessary for me to consider sections 18(1)(g) or 22(b).

I will now deal with part (i) of Record 5, the published version of section 19 of Regulation 448. During the course of this appeal, the institution was asked on a number of occasions to provide representations with respect to the release of part (i) of Record 5, but declined to do so. Accordingly, I find that the institution has not discharged the burden of establishing

that an exemption applies, and I order the head to disclose the current and published version of section 19 of Regulation 448 to the appellant.

**ISSUE E: If the answer to Issue C is yes, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption.**

Section 23 of the Act reads as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

In Order 68, dated June 28, 1989, former Commissioner Sidney B. Linden stated that in order for the so-called public interest override to apply, "there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question." (emphasis added)

I concur with Commissioner Linden's interpretation of section 23 and adopt it for the purposes of this appeal.

The appellant submitted that it is of compelling importance for the public to know the qualifications of physicians who are treating, or have treated them, and that the information to which he has been denied is of compelling importance to him and the refusal to provide access may affect his health and safety.

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, I have reviewed those portions of the requested records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

Having reviewed the contents of Records 1, 2, and 4 and considered the submissions of the appellant, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23.

**ORDER:**

1. I uphold the head's decision to deny access to Records 1, 2, 4 and part (ii) of Record 5.
2. I order the head to disclose Record 3 and part (i) of Record 5.

3. I further order the head not to disclose Record 3 until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give Dr. A sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided that notice of an application for judicial review has not been served on the institution or my office within this thirty (30) day period, I order that Record 3 be disclosed within thirty-five (35) days of the date of this Order.
  
4. I further order the institution to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made. The said notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:  
Tom Mitchinson  
Assistant Commissioner

October 23, 1991  
Date