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

ORDER 205

Appeal 890219

Ministry of Health

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O R D E R

INTRODUCTION:

On May 30, 1989, the Ministry of Health (the "institution") received a request under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). The requester sought access to:

> All information contained in the file of the Associate Administrator of Oak Ridge relating to and including the investigation of a complaint by me against [a named employee], dated in 1986 or 1987.

On June 26, 1989, the institution's Freedom of Information and Privacy Co-ordinator advised the requester that pursuant to section 27 of the Act the time frame for responding to the request was extended 30 days to July 26, 1989. The reason given for the time extension was to provide sufficient time for the institution to conduct consultations before making a decision on whether or not to grant access to the requested records.

On July 17, 1989, the requester was provided with a copy of six of the requested records which were severed pursuant to subsections 21(1), (2), and (3) of the Act. The remaining three records were withheld in their entirety pursuant to subsections 14(2)(a), (c), and (d) of the Act.

On July 20, 1989, the requester appealed the head's decision to sever some of the requested records and withhold others in their entirety. He did not appeal the extension of time for responding
to his request. Subsection 50(1) of the Act 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 to the Commissioner. Notice of the appeal was given to the appellant and 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.

The nine records (11 pages in total) which are relevant to this appeal were obtained and reviewed by the Appeals Officer. Records 1, 2 and 3 are internal memoranda from the staff of Oak Ridge Division of the Penetanguishene Mental Health Centre ("Oak Ridge") relating to the investigation of allegations of misconduct made by the appellant against a staff member. These records were withheld from disclosure in their entirety under subsections 14(2)(a), (c) and (d) of the Act. Records 4 to 9 are letters written by the appellant which outline and relate to his allegations against a staff member at Oak Ridge. The appellant submitted these records to the staff of Oak Ridge. The names of persons other than the appellant were severed from these records pursuant to section 21 of the Act.

Attempts were made to effect a settlement of the appeal. These settlement efforts were unsuccessful. Therefore, on March 28, 1990, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution and to 11 persons who might be affected by the disclosure of the requested records (the "affected persons"). Enclosed with each notice letter was a report prepared by the Appeals Officer, in order 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. This report indicates that the parties need not limit themselves to the questions set out in the report.

Representations were received from the institution, the appellant, and four of the affected persons. I have reviewed and considered these representations in making this Order.

In its representations, the institution indicated that it was no longer relying on subsections 14(2)(a), (c) or (d) and that it was prepared to disclose additional portions of the requested records. In response to questions set out in the Appeals Officer's Report, the institution submitted that section 49 applied to Records 1 to 3. The institution also denied access to information at the bottom of page 2 of Record 3 pursuant to subsections 14(1)(e), (i), (j), (k) and (l) of 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 a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

A. Whether the information contained in the records qualifies as "personal information", as defined in subsection 2(1) of the Act.

B. If the answer to Issue A is in the affirmative, whether the exemption provided by subsection 49(b) applies in the circumstances of this appeal.

C. Whether the exemptions provided by subsections 14(1)(e), (i), (j), (k) and (l) apply to Record 2.

ISSUE A: Whether the information contained in the records qualifies as "personal information", as defined in 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 exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) and to determine whether it 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;

In my view, all of the records at issue in this appeal contain information which falls within the definition of personal information under subsection 2(1) of the Act. I find that the personal information contained in each of the records is properly considered personal information about both the appellant and other individuals.

ISSUE B: If the answer to Issue A is in the affirmative, whether the exemption provided by subsection 49(b) applies in the circumstances of this appeal.

In Issue A, I found that the information contained in the records at issue in this appeal qualifies as "personal information" about the appellant and other individuals. I must now determine whether the records fall within the exemption provided by subsection 49(b) of the Act.

Subsection 47(1) of the Act gives an individual a general right of access to personal information about them in the custody or under the control of an institution. However, this right of access under subsection 47(1) is not absolute. Subsection 49(b) provides an exception to this general right of access to personal information by the person to whom it relates, where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his own personal information against another individual's right to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of another individual's personal privacy, then subsection 49(b) gives the head discretion to deny access to the personal information of the requester.

Subsection 21(2) of the Act provides guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy. Subsection 21(3) of the Act identifies types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Three of the affected persons provided this office with their consent to disclose their personal information as contained in Records 1, 2, 3 and 4. Therefore, this information should be disclosed to the appellant according to the highlighted copy of the records provided to the head.

As previously mentioned, Records 1, 2 and 3 are memoranda relating to the investigation of the appellant's allegations of misconduct of a staff member of Oak Ridge. As such, these records contain the names of patients and staff members interviewed, including the appellant and the staff member against whom the complaint was made. The records either summarize or provide a verbatim account of their evidence. The institution advised in its representations that it was now prepared to disclose these records to the appellant with severances of the names of affected persons and part of an affected person's statement.

I have carefully considered the manner in which the head has balanced the appellant's right of access to his own personal information in Records 1, 2 and 3 with the rights of the affected persons to the protection of their personal privacy. For the most part, I accept the institution's position that disclosure of the severed personal information in Records 1, 2 and 3 would constitute an unjustified invasion of the personal privacy of the affected persons and therefore qualifies for exemption under subsection 49(b) of the Act. However, I find that disclosure of some of the severed personal information would not constitute an unjustified

invasion of the personal privacy of the affected persons and therefore does not qualify for exemption under subsection 49(b) of the Act. For example, I do not accept that disclosure of a verbatim statement of the appellant in which he mentioned the names of some of the affected persons included in Record 1 would constitute an unjustified invasion of the personal privacy of the affected persons.

As previously mentioned, Records 4, 5, 6, 7, 8 and 9 are letters written by the appellant which outline and relate to his allegations of misconduct against a staff member at Oak Ridge. The appellant submitted these records to the staff of Oak Ridge. The institution disclosed these records to the appellant with the names of affected persons severed.

Having considered the institution's representations and the circumstances of this appeal, I am unable to conclude that disclosing to the appellant the names of affected persons severed from the records written by him would constitute an unjustified invasion of the personal privacy of the affected person mentioned therein.

In reviewing the head's application of the subsection 49(b) balancing test to the portions of Records 1, 2 and 3 which qualify for exemption under this subsection, it is clear to me that the head is willing to provide the appellant with virtually full disclosure. I find nothing improper in the way in which the head has exercised her discretion and would not alter it on appeal.

ISSUE C: Whether the exemptions provided by subsections 14(1)(e), (i), (j), (k) and (l) apply to Record 2.

Section 14 of the Act reads, in part, as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> ...

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

The institution submits that the information severed at the bottom of page 2 of Record 3 is part of the security manual of a maximum security institution. According to the institution, if this information were released, it would endanger the security of a building and facilitate the escape of a person who is under lawful detention. The institution also submits that releasing the information would jeopardize the security of the institution and facilitate the commission of an unlawful act, namely, aiding the appellant or other person at the institution to escape. The institution then goes on to say that disclosure would reveal the philosophy of the institution regarding security.

I have previously considered the meaning of the words "could reasonably be expected to" in the context of subsection 14(1) of the Act and found that the expectation must not be fanciful,

imaginary or contrived, but rather one that is based on reason. I also found that an institution relying on the subsection 14(1) exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act. [See Order 188 (Appeal Number 890265) dated July 19, 1990.]

In my opinion the institution has not provided sufficient evidence to establish that disclosure of the information severed at the bottom of page 2 in Record 3 could reasonably be expected to result in any of the harms identified in subsections 14(1)(e), (i), (j), (k) and (l) of the Act. In my view, the severed information reveals only a "philosophy" as it relates to security, and nothing else. Therefore, I find that the severed information does not qualify for exemption under subsection 14(1) of the Act.

ORDER:

1. I order the head to disclose Records 1 and 3 to the appellant in accordance with the highlighted copy I have provided to the head. The portions of the records which have been highlighted indicate those portions which I have found to be exempt from disclosure to the appellant.

2. I order the head to disclose Records 2, 4, 5, 6, 7, 8 and 9 to the appellant in their entirety.

3. I order that the head not release the records at issue in this appeal until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that this record be disclosed within thirty_five (35) days of the date of this Order.

4. I order the head to advise me in writing within five (5) days 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: November 19, 1990
Tom A. Wright Date
Assistant Commissioner