



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

ORDER P-259

Appeal 900132

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 under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

BACKGROUND :

On December 5, 1989, the Ministry of Health (the "institution") received a request for a "package" of documents used at a Health Disciplines Board hearing which had been held in response to a complaint made by the requester about his past psychiatric treatment.

The institution advised the requester that disclosure of these records might affect the interests of certain other individuals (the "affected persons") and that they were being given the opportunity to make representations before the institution decided whether to release the records.

The institution notified eleven affected persons on January 3, 1990, pursuant to section 28(1) of the Act.

Ten affected persons responded to the notification. Two consented to disclosure of the records which related to them, and the other eight submitted that the records should not be disclosed.

On February 2, 1990, the institution informed the requester that partial access to the records would be granted. Because the affected persons had thirty days to appeal this decision to the Commissioner, the requester was told that the records could not be disclosed before then. None of the affected persons appealed the head's decision.

On March 2, 1990, some of the requested records were disclosed to the requester. The rest were denied in their entirety, pursuant to sections 20, 49(b), 49(d) and 21(3)(a) of the Act.

On March 20, 1990, the requester appealed the decision of the institution.

The Appeals Officer obtained and reviewed a copy of the records. Of the original 168 pages of records, 106 were exempted by the institution. It is these exempted records which are the subject of this appeal. They consist of a treating physician's progress notes and psychiatric assessment of the appellant; letters from the appellant to a treating physician; and letters from various treating physicians to the College of Physicians and Surgeons (the "CPSO"). Throughout this Order, I will refer to the records by the numbers noted below:

- | | |
|----------|--|
| Record 1 | Letters written by the Requester to physician "A" (pp. 63-78) |
| Record 2 | Letters/reports to the College of Physicians and Surgeons of Ontario (CPSO) from physician "A" (pp. 79-84 and pp. 19-20) |
| Record 3 | Clinical notes written by physician "A" (pp. 21-62) |
| Record 4 | Letter dated February 1, 1988, to the CPSO from physician "B" (pp. 93-94) |

- Record 5 Letter dated January 27, 1988, to the CPSO from physician "C" (pp. 88-90)
- Record 6 Letter dated December 10, 1987, to the CPSO from physician "D" (pp. 91-92)
- Record 7 Letters dated January 17, January 18 and February 28, 1988, to the CPSO from physician "E" (pp. 95-98)
- Record 8 Letter dated December 15, 1987, to the CPSO from physician "F" (p. 99)
- Record 9 Letter dated February 2 and 25, 1988, to the CPSO from physician "G" (pp. 100-125)
- Record 10 Letter dated July 20, 1988, to the CPSO from physician "H" (p. 134B)
- Record 11 Letter dated August 15, 1988, to the CPSO from "I" (p. 145)

Mediation of the appeal was unsuccessful, and the matter proceeded to an inquiry. Notices of Inquiry were sent to the institution, the appellant and the affected persons. Written representations were received from the appellant, the institution and seven affected persons.

In its representations, the institution indicated that it was no longer relying on section 21(3)(a).

ISSUES:

The issues arising in this appeal are as follows:

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

- B. Whether any of the requested records fall within the discretionary exemptions provided by sections 20 and 49(a) of the Act.
- C. Whether any of the requested records fall within the discretionary exemption provided by section 49(d) of the Act.
- D. Whether any of the requested records fall within the discretionary exemption provided by section 49(b) of the Act.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act states, in part:

"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,
- ...
- (e) the personal opinions or views of the individual except where they relate to another individual,

...

- (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 contain information which falls within the definition of personal information contained in subsection 2(1). They all contain recorded information about the appellant, including information relating to his medical, psychiatric, psychological and employment history; the personal

opinions or views of the appellant; and the views or opinions of other individuals about the appellant. Some of the records also contain personal information of other individuals.

The institution has submitted that comments made by various affected persons (i.e. physicians) about the appellant contained in certain records constitute the personal information of the affected persons. I do not accept the institution's position. In my view, the portions of all records which contain the views and opinions of the treating physicians about the appellant and/or details regarding the treatment provided by these persons to the appellant are the personal information of the appellant, and not of the treating physicians.

ISSUE B: Whether any of the requested records fall within the discretionary exemptions provided by sections 20 and 49(a) of the Act.

The institution claimed that all of the records qualify for exemption under section 20 of the Act.

Section 20 provides that:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

Commissioner Tom A. Wright considered the application of section 20 in Order 188, dated July 19, 1990. At page 13 of that Order he stated:

As in section 14, section 20 stipulates that the institution may refuse to disclose a record where doing so could reasonably be expected to [emphasis added] result in a specified type of harm. In my view, section 20 similarly requires that the expectation of a serious threat to the safety or health of an individual, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one which is based on reason.

I concur with Commissioner Wright's interpretation, and adopt it for the purposes of this appeal.

As described above, Record 1 is a collection of letters written by the appellant to physician "A". Some of these letters contain serious threats against physician "A" and his family. The institution submitted that disclosure of these letters could seriously threaten the health and safety of the appellant and certain physicians.

I have carefully reviewed these letters and considered the submissions. The content of some of the letters is disturbing. However, I am mindful of the fact that they were written by the appellant himself, almost five years ago, and I am not convinced, based on the information before me, that disclosing his own letters to the appellant would seriously threaten the safety or health of the appellant or any other individual.

Records 2 and 3 are letters and clinical notes written by physician "A". As discussed above, Record 1 includes threatening letters written by the appellant to physician "A". These letters provide evidence of a serious threat to physician "A", and I am satisfied that disclosure of Records 2 and 3 could reasonably be expected to result in a serious threat to the safety of physician "A". Therefore, I uphold the head's decision to exempt Records 2 and 3 from disclosure.

Physician "B" has submitted that he, too, has been threatened by the appellant. Once again, this behaviour by the appellant is sufficient to satisfy me that disclosure of Record 4 could reasonably be expected to seriously threaten the safety of physician "B". Therefore, I uphold the head's decision to exempt Record 4 from disclosure.

Records 5 through 11 are letters written by other physicians to the College of Physicians and Surgeons of Ontario. I have reviewed the contents of these letters and all submissions relating to them, and I am not convinced that disclosure of these records could reasonably be expected to seriously threaten the safety or health of any individual.

In summary, I find that Records 2, 3 and 4 qualify for exemption under section 20. I further find that no parts of these records can reasonably be severed without disclosing information which falls within the section 20 exemption.

Section 49(a) provides as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information [emphasis added];

As discussed above, I am satisfied that the Records 2, 3 and 4 qualify for exemption under section 20 of the Act. Accordingly, the discretionary exemption provided by subsection 49(a) is available to the head to deny access to these records in the circumstances of this appeal.

The institution has made submissions regarding the exercise of discretion in refusing to disclose these records. I am satisfied that the head has properly exercised her discretion to refuse to disclose Records 2, 3, and 4 in their entirety, and would not alter this decision on appeal.

I will now consider whether any of the remaining Records 1, 5, 6, 7, 8, 9, 10 or 11 qualify for exemption under either section 49(d) or 49(b) of the Act.

ISSUE C: Whether any of the requested records fall within the discretionary exemption provided by section 49(d) of the Act.

Section 49(d) provides:

A head may refuse to disclose to the individual to whom the information relates personal information, that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

The appellant submitted that disclosure of all records could in fact be beneficial to him. He was previously given access to letters written by certain physicians who consented to disclosure, and according to the appellant, he found these letters helpful rather than harmful. He submitted that further disclosure of his physicians' advice and observations would help him understand and deal with his health problems.

Some of the affected persons, however, submitted that disclosure of their letters could be prejudicial to the appellant's mental health. The institution also claimed section 49(d) to exempt all

remaining records, relying on the opinions expressed by the various affected persons. In considering these submissions, I am mindful of the fact that these physicians are commenting on the possible response of a patient whom they have not treated in as long as four years.

In the circumstances, I have not been provided with sufficient information to convince me that disclosure of the remaining records could reasonably be expected to prejudice the mental

health of the appellant. Accordingly, I find that none of the remaining records qualify for exemption under section 49(d).

ISSUE D: Whether any of the requested records fall within the discretionary exemption provided by section 49(b) of the Act.

I have found under Issue A that the records at issue in this appeal contain the personal information of the appellant. Some of the remaining records also contain the personal information of other individuals, specifically, Records 7, 8, 9 and 11. With respect to these records, I must now determine whether disclosure would constitute an unjustified invasion of the personal privacy of these other individuals, and therefore qualify for exemption under section 49(b).

Section 49(b) of the Act provides as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) introduces a balancing principle. The head must look at the information and weigh the appellant's right of access to his own personal information against other individuals' 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 section 49(b) gives the head the discretion to deny access to the personal information of the requester.

I have reviewed each of the records carefully and considered the representations of the institution, the appellant and the affected persons. Some of the personal information contained in the records relates solely to other individuals, and some is so intertwined with the personal information of the appellant that it would not be possible to reasonably sever and disclose the appellant's personal information, without also disclosing the personal information of the other individuals.

Sections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of the other individual's personal privacy. I have considered the provisions of section 21(3), and am of the view that none of them are relevant considerations in the present appeal.

I have also considered the various factors outlined in section 21(2). In my view, the two listed circumstances which are relevant in this appeal are sections 21(2)(f) and 21(2)(h), which read as follows:

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

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In my view, the personal information about persons other than the appellant which is contained in Records 7, 8, 9 and 11 is properly characterized as sensitive information, which has been provided in confidence by the persons to whom it relates. It therefore falls within the type of information listed under sections 21(2)(f) and (h). The appellant, in his representations, has indicated that he is content to have the personal information of other individuals "stricken and omitted."

Having carefully reviewed the records and representations, it is my view that disclosure of the personal information contained in certain records or parts thereof, would constitute an unjustified invasion of other individuals' personal privacy. The records or parts of records are as follows:

- Record 7, page 95 -- the second sentence of the fourth paragraph and all of the fifth paragraph;
- Record 8 in its entirety;
- Record 9, page 100 -- the second and third paragraphs;
- Record 9, page 102 -- the paragraph numbered as 1);
- Record 11 -- the final four words of the third sentence of the second paragraph.

Section 49(b) is a discretionary exemption. The head has provided submissions regarding the exercise of discretion to refuse to disclose the requested records under section 49(b). After reviewing these submissions, it is my view that the head's decision should not be disturbed on appeal. Accordingly, I

uphold the decision of the head to refuse to disclose the records or parts of records set out above.

I find that the remaining records do not qualify for exemption under section 49(b).

ORDER:

1. I uphold the head's decision to deny access to Records 2, 3 and 4 in their entirety, pursuant to sections 20 and 49(a) of the Act.

2. I uphold the head's decision to deny access to the following records or parts of records pursuant to section 49(b):

Record 7 -- On page 95, the second sentence of the fourth paragraph and all of the fifth paragraph;

Record 8 -- In its entirety;

Record 9 -- On page 100, the second and third paragraphs; and on page 102, the paragraph numbered as 1);

Record 11 -- The final four words of the third sentence of the second paragraph.

3. I order that the balance of Records 7, 9 and 11 be disclosed to the appellant in accordance with the severances indicated under paragraph 2, and that Record 8 be withheld in its entirety.

4. I order that Records 1, 5, 6 and 10 be disclosed to the appellant in their entirety.

5. I order that the institution not make the disclosure described in paragraphs 3 and 4, above, until thirty (30) days following the date of the issuance of this Order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided that 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 the parts of the record be disclosed within thirty-five (35) days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

6. Any notices 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

December 19, 1991
Date