



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

ORDER P-341

Appeal P-900171

Ministry of the Attorney General



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléco: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of the Attorney General (the institution) received a request for access to records relating to a number of Supreme Court of Ontario court files and actions in which the appellant was the plaintiff.

The institution granted partial access to the records it identified as being responsive to the request, claiming sections 19, 21 and 22 of the Freedom of Information and Protection of Privacy Act (the Act) as the basis for denying access to the remainder. The requester appealed the institution's decision to this office.

Because attempts to mediate the appeal were not successful, the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution, and the author of one of the responsive records (the affected person). Enclosed with each Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Written representations were received from all three parties.

During the course of the appeal, the scope of the request was narrowed by the appellant to one five-page letter (the record) from an insurance adjustment bureau to the law firm which was representing the Ministry of Health in a court action involving the requester. During the inquiry stage, the institution purported to exempt this record in its entirety, pursuant to sections 19 and 49(a) of the Act. One sentence on page 4 of the record was originally exempt under section 21 (the severance).

ISSUES:

- A. Whether the institution granted access to the severed record under the Act.
- B. Whether information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- C. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to any portion of the record.
- D. Whether the discretionary exemptions provided by sections 19 and 49(a) of the Act apply to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the institution granted access to the severed record under the Act.

Subsection 30(1) of the Act states:

Subject to subsection (2), a person who is given access to a record or a part thereof under this Act shall be given a copy thereof unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations.

A severed version of the record was originally included among the records released by the institution in response to the appellant's request. The entire record was released, subject to the one-sentence severance on page 4 of the record, which was exempt under section 21 of the Act.

According to information obtained during the course of the appeal, after receiving a copy of the severed record, the appellant wrote to the affected person expressing concern about its contents. The affected person, in turn, contacted the institution, and the institution arranged to have the record retrieved from the appellant. The record had been in the appellant's possession for approximately two weeks at the time of retrieval. As indicated above, the institution now purports to exempt the entire record under sections 19 and 49(a) of the Act.

In its representations, the institution outlines the steps taken in responding to the appellant's original request. As part of this process, an employee of the institution conducted a page-by-page review of all responsive records and made recommendations regarding their treatment under the Act to the designated head, "...including recommendations with respect to the exercise of discretionary exemptions applicable to certain documents...". According to the outline, the employee recommended that the record at issue in this appeal should be released to the requester, subject to the severance of the one sentence on page 4 of the record under section 21 of the Act. After discussing the recommendations with the employee, the designated head included the severed record among the documents released to the requester. The institution maintains that at no time during this process was the possible applicability of section 19 to the record raised with or by the designated head. After the record was released and the institution was contacted by the affected person, the record was retrieved, and a decision was made at that time to claim exemption under sections 19 and 49(a) of the Act. The institution submits that:

"...while it can be said that a decision was made to include the document in question among those portions of the record released to the requester, this decision was made without any consideration of the possible applicability of a valid exemption under the FOI Act..."

"...while a copy of the document was forwarded to the requester, the Ministry did not "grant access" to the document within the meaning of the FOI Act. It is submitted that section 30 of the Act only entitles a requester to view or have a

copy of a document when a decision has been made to "grant access" to that document. To "grant access" to a document necessarily involves consideration of all exemptions provided in the legislation which might be applicable to the document in question, and a determination by the designated decision-maker as to whether or not claiming a discretionary exemption would be justified and appropriate in the particular circumstances of a request...".

"The designated decision-maker has now reviewed the document in question with the issue of solicitor-client privilege in mind, and has determined that in the circumstances he would exercise his discretion to deny access to the record on the basis of solicitor-client privilege (pursuant to sections 19 and 49(a) of the Act). It is submitted that it is only at the point of the designated decision-maker's re-examination of the record, taking into consideration the possible applicability of the section 19 exemption, that a decision could be said to have been made to "grant access" or "deny access" within the meaning of the FOI Act".

The issue of whether access to the record has been granted by the institution was not addressed in the representations submitted by the appellant or the affected person.

In my view, when a request for information is received by an institution, it is the head's (or delegated head's) responsibility, as decision maker under the Act, to identify and review all records which fall within the scope of the request, and to give full consideration to all relevant factors under the Act when determining whether or not to grant access. This consideration includes determining whether any exemptions provided in the Act apply, and if a discretionary exemption applies, whether discretion will be exercised in favour of or against disclosure.

During the course of the decision making process in this case, the designated head and the individual who initially reviewed the records discussed the applicability of exemptions to the responsive records. The designated head considered and applied various mandatory and discretionary exemptions, including section 19, to certain records. A decision was made to claim section 21 with respect to the severance on page 4 of the record, and to release the severed record, along with other records, to the requester.

In the vast majority of cases where a record has been released by an institution in response to a request made under the Act, the matter does not come before the Information and Privacy Commissioner. That is because the institution is presumed to have determined that the released record is responsive to the request, and that, in the institution's view, either no mandatory or discretionary exemptions apply, or if a discretionary exemption does apply, the head has exercised discretion in favour of release.

As far as the record at issue in this appeal is concerned, without making comment on the possible application of section 19 to the record, it is my view that in responding to the original request the designated head must be deemed to have either concluded that the record, with the exception of the section 21 severance, did not qualify for exemption, or chosen to exercise his discretion against claiming exemption under section 19. While it is perhaps not within my jurisdiction to comment on the manner in which this record was retrieved from the appellant, it is my responsibility to determine whether access to the record has been granted under the Act, and I

find that the appellant has been provided with access to the severed record. Therefore, I find that it is not possible for the institution to raise a claim under the discretionary exemptions provided by sections 19 and 49(a) after access has been granted.

I will now consider whether section 21 of the Act was properly applied to the one-sentence severance on page 4 of the record.

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

The definition of "personal information" found in section 2(1) of the Act states in part:

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

...

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

The institution submits that the severance contains the personal information of the affected person. The affected person's representations make no reference to the issue of personal information. The appellant also makes no specific reference to the definition of personal information, although comments made in his representations support the position that the record contains his personal information.

Having reviewed the record, in my view, the severance contains the views and opinions of the affected person which relate to matters other than the appellant, and thereby satisfies the requirements of paragraph (e) of the definition of personal information. The rest of the record contained the personal information of the appellant only.

ISSUE C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to any portion of the record.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances, to anyone other than the individual to whom the information relates. 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,

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

I have determined under Issue A that the severance contains the personal information of the affected person.

The institution claims section 21 as the basis for exempting the severance, but does not explain how release of the information would constitute an unjustified invasion of the affected person's personal privacy. As stated earlier, the affected person makes no reference to the personal information issue in his representations.

Because section 21 of the Act is a mandatory exemption, I have looked to the various provisions of sections 21(2) and (3) to determine if any are relevant in determining whether disclosure of the affected person's personal information would constitute an unjustified invasion of his privacy.

In my view, section 21(2)(h) is a relevant consideration. This section reads 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,

the personal information has been supplied by the individual to whom the information relates in confidence;

At the end of the record, the affected person points out the importance of treating the contents of the letter confidentially. In the circumstances of this appeal, I find that it is reasonable to conclude that the affected person supplied the information contained in the record in confidence, and that disclosure of the severance would constitute an unjustified invasion of his personal privacy.

The appellant submits that section 21(2)(d) is a relevant consideration in the context of this appeal, and that it should outweigh the affected person's privacy interest.

Section 21(2)(d) of the Act states:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

At page 8 of Order P-312, I outlined the following four-part test which must be met in order for section 21(2)(d) of the Act to be regarded as a relevant consideration in the circumstances of an appeal:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellant submits that disclosure of the record is necessary in order to deal with the issue of whether a disclosure of the appellant's clinical record had taken place contrary to the Mental Health Act.

Having reviewed the severance, in my view, it does not contain information which could be related to the Mental Health Act, nor does it contain information which would shed light on how the record's contents were obtained. I find that the appellant has failed to establish the requirements of the test, and that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

Because of the manner in which I have disposed of Issues A, B and C, it is not necessary for me to consider Issue D.

ORDER:

1. I uphold the head's decision to deny access to the second sentence of the fifth paragraph on page 4 of the record.
2. I order the head to provide the remainder of the record to the appellant in accordance with the provisions of section 30 of the Act.
3. I order that the institution not make the disclosure described in provision 2 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 part of the record be disclosed within thirty-five (35) days of the date of this Order.
4. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
5. In order to verify compliance with the provisions of this Order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 2 above, only upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

August 12, 1992