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

ORDER P-820

Appeal P-9400191

Ontario Criminal Code Review Board

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ontario Criminal Code Review Board (the Board) received a request for all records in the possession of the Board which relate to the requester, a patient at a psychiatric facility, for the period January 1, 1978 to September 15, 1993.

The Board located a total of 89 records which were responsive to the request and disclosed 15 of them, with references to the personal information of other individuals removed under section 21(1) of the Act. The Board decided, however, to deny access to the remaining 74 records claiming the application of the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19
- information published or available - section 22(a)

In addition, the Board claimed that the records in question fell under section 65(2)(a) of the Act. This provision excludes from the application of the Act records which are **clinical records** as defined by section 35(1) of the Mental Health Act (the MHA).

The Board further advised the requester that a portion of his request had been transferred to the Kingston Police Services Board pursuant to section 25(2) of the Act as it appeared that the Police had a greater interest in several of the records.

The requester appealed the decision to deny access to the 74 records to the Commissioner's office. The appellant did not, however, challenge the decision to withhold access to the personal information contained in the other 15 records. Further, the appellant does not dispute the application of section 22(a) to two of the records and that the transfer of a portion of his request to the Kingston Police Services Board was proper.

During the mediation stage of the appeal, the Appeals Officer requested the Board to undertake a further search for responsive records. The Board located and provided the Commissioner's office with copies of tape recordings made of Board proceedings involving the appellant which were conducted on February 13, 1992, November 17, 1992, May 11, 1993 and February 24, 1994. These seven tape recordings also form part of the records at issue in this appeal.

A Notice of Inquiry was provided to the appellant and the Board. Representations were received from both parties. In its representations, the Board raised the application of additional exemptions and made other collateral arguments to deny access to the records at issue, particularly the tape recordings. Specifically, it submits that the tape recordings are exempt from disclosure under the following provisions of the Act:

- invasion of privacy - section 49(b)
- danger to mental or physical health of requester - section 49(d)
- danger to safety or health - section 20

In addition, pursuant to section 30(1) of the Act, the Board submits that it is not required to reproduce the tape recordings as it would not be reasonably practicable to do so.

The Board also acknowledged that, for the purposes of the Act, it maintains custody or has control over all of the records at issue in the appeal, regardless of where they may be physically located.

Because this appeal represents the first case in which the Commissioner's office has considered the disclosure of tape recordings of an administrative tribunal's hearings, additional representations were sought from the appellant, the Information and Privacy Branch of the Management Board Secretariat and the Society of Ontario Adjudicators and Regulators (SOAR).
Additional representations were received from the appellant and SOAR only.

PRELIMINARY ISSUE:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On March 29, 1994, the Commissioner's office provided the Board with a Confirmation of Appeal which indicated that an appeal from the Board's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Board would have 35 days from the date of the confirmation (that is, until May 9, 1994) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

It was not until September 22, 1994, following the issuance of the Notice of Inquiry, that the Board indicated for the first time that it wished to rely on sections 20, 49(b) and (d) of the Act to deny access to the tape recordings which are at issue in this appeal.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

Inquiry Officer Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, Inquiry Officer Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In the present case, the Board was advised of the policy in question yet decided to rely on a new discretionary exemption almost six months after the Confirmation of Appeal was issued. Since the Board has failed to advance any arguments to indicate why the 35-day time limit should not apply in the present appeal, I will not consider the application of the sections 20 and 49(d) exemptions in this appeal.

The Board has also raised the application of section 49(b) to the records. Section 49(b) is an exemption which protects the personal privacy of third parties in a fashion similar to section 21 of the Act, which is a mandatory exemption. On this basis, I believe that it would be appropriate for me to consider the application of this exemption in this order.

I will now address the exemptions and arguments raised by the Board in refusing to grant access to the subject records.

DISCUSSION:

CLINICAL RECORDS

The Board takes the position that the records at issue in this appeal, including the tape recordings, are clinical records within the meaning of section 65(2)(a) of the Act and are, therefore, outside the application of the Act. Section 65(2)(a) provides that:

> This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,
>
> > is a clinical record as defined by subsection 35(1) of the Mental Health Act;

In Order P-775, I ordered the disclosure of a number of records maintained by the Board in respect of a different requester, who was also a patient at a psychiatric facility. I specifically rejected the argument that section 65(2)(a) applies to exempt from disclosure records maintained by the Board in the performance of its review function. These records included the reports submitted by hospital staff at the appellant's annual review hearings with the Board and those documents created by the Board itself in which the appellant's status is adjudicated upon.

Insofar as the paper records maintained by the Board in relation to the appellant are concerned, I have not been provided with any cogent arguments which would dissuade me from the findings which I made in Order P-775 with regard to the application of section 65(2)(a) to records of this nature.

Order P-775 did not, however, address the application of section 65(2)(a) to tape recordings of the Board's proceedings. The tape recordings contain, among other things, the evidence presented by hospital staff concerning the treatment and prognosis of the appellant. Extensive reference is made to the doctor's reports which are entered as exhibits at the hearing.

I find that, consistent with my determination in Order P-775, the doctor's reports and other evidence recorded on tape were tendered at the hearing for a non-clinical purpose; the appellant's annual review by the Board. I further find that the Board is not part of the clinical team involved in the treatment of the appellant. Rather, its function is more custodial in nature and its control over the information contained in the tapes is not directed towards a clinical purpose.

Having considered the representations of the parties and following my independent review of the tape recordings, I find that they cannot properly be characterized as "clinical records" within the meaning of section 65(2)(a) of the Act. Accordingly, they fall within the application of the Act. I will address the application of the exemptions claimed to apply to these records below.

SOLICITOR-CLIENT PRIVILEGE

The Board claims the application of section 19 of the Act to Records 66 to 69. This section consists of two branches, which provide the Board with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Board indicates that Record 66, a memorandum from the Director of Regional Forensic Services at the Kingston Psychiatric Hospital to the Simcoe County Crown Attorney, is exempt from disclosure under Branch 2 of section 19.

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are met. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

I am satisfied that the record was prepared for Crown counsel, the Simcoe County Crown Attorney, in contemplation of litigation, specifically a hearing before the Board involving the appellant. Accordingly, Record 66 is properly exempt from disclosure under Part 2 of the section 19 exemption.

The Board claims that Branch 1 of the section 19 exemption applies to Records 67, 68 and 69. These records consist of memoranda to the Board's Chair from its Legal counsel regarding certain legal concerns which may arise from orders of the Board involving the appellant.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Board must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Following my independent review of the records and the representations of the parties, I find that Records 67, 68 and 69 consist of written communications of a confidential nature between a legal advisor, counselto the Board, and her client, the Board Chair. I further find that the memoranda are directly related to the provision of legal advice to the Board. I find, therefore, that Records 67, 68 and 69 are exempt from disclosure under Branch 1 of the section 19 exemption.

ADVICE OR RECOMMENDATIONS

The Board claims that section 13(1) of the Act applies to Records 47 to 65, 71 and 73(b). In Order P-775, I held that this exemption did not apply to documents similar to Records 47 to 65 in this appeal. These records consist of a report to the Lieutenant Governor in Council following the Board's annual review of the appellant's status. I adopt the reasoning expressed in that order to find that Records 47 to 65 do not qualify for exemption under this section.

Record 71 is a letter from the Chairman of the Board to the Lieutenant Governor in Council which contains a recommendation as to a suggested course of conduct. I find that this record qualifies for exemption under section 13(1) of the Act.

Record 73(b) is a letter from the Acting Administrator of the Whitby Psychiatric Hospital to the Director of Investigations for the Ombudsman of Ontario. The letter is a response to a complaint made by the appellant about his treatment at the facility. I find that Record 73(b) does not contain "advice or recommendations" within the meaning of section 13(1). Accordingly, I find that Record 73(b) does not qualify for exemption under section 13(1) and should be disclosed to the appellant.

In summary, I find that only Record 71 is exempt from disclosure under section 13(1).

INVASION OF PRIVACY

As discussed above, the Board claims that the invasion of privacy exemption contained in section 49(b) of the Act applies to the seven tape recordings in their entirety. This section provides that:

> 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;

Under section 2(1) of the Act, "personal information" is defined, in part, to mean information relating to the medical or psychiatric history of an individual.

I find that the tape recordings in their entirety contain the personal information of the appellant. I also find that a portion of the February 24, 1994 tape recording contains information about another individual's medical and psychiatric history. Accordingly, I find that this information qualifies as the personal information of the other individual within the meaning of the Act.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining this issue. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

I have carefully reviewed the tape recordings and find as follows:

(1) The information contained in the tape recording which relates to the other individual concerns her medical and psychiatric history. Accordingly, I find that the disclosure of this information would constitute a presumed unjustified invasion of her personal privacy under section 21(3)(a).

(2) I find that section 21(4) does not apply to this information, nor is section 23 a relevant consideration.

(3) Accordingly, I find that the disclosure of the information contained in the tape recording which relates solely to the other individual would constitute an unjustified invasion of her personal privacy under section 21(3)(a), and that the exemption in section 49(b) applies to that portion of the February 24, 1994 tape recording only.

(4) I find that the remaining portions of the tape recording contain information which are not subject to a section 21(3) presumption. Nor are there any factors enumerated in section 21(2) of the Act which favour the non-disclosure of this information. On this basis, having found that no other exemptions apply to this information, the remaining portions of the tape recording of the appellant's February 24, 1994 hearing, as well as the tapes for the hearings held on February 13, 1992, November 17, 1992 and May 11, 1993 should be disclosed to the appellant in their entirety.

(5) Along with a copy of this order, I have provided to the Board's Freedom of Information and Privacy Co-ordinator a copy of the tape recording of the appellant's February 24, 1994 hearing from which I have deleted the personal information of the other individual.

METHOD OF ACCESS

The Board claims that, under sections 30(1) and (2) of the Act, it may refuse to copy or make available for examination the tape recordings of Board hearings involving the appellant. The Board bases its submission on the following considerations:

(1) The Board does not have the technological means to reproduce these recordings.

(2) In order to preserve the security and integrity of the tape recordings, they cannot be released for copying or for personal examination by the appellant.

(3) It would be an unreasonable expense for the Board to have the tape recordings transcribed pursuant to a request under the Act.

(4) It would not be reasonably practicable to give the appellant the opportunity to examine the tape recordings given that the appellant is a patient in a medium security psychiatric facility.

In this appeal, the tape recordings contain the personal information of the appellant rather than general records. As such, the request procedure to be followed is that prescribed by section 48(3) of the Act, rather than that in section 30.

Section 48(3) provides that:

> Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,
>
> (a) permit the individual to examine the personal information; or
>
> (b) provide the individual with a copy thereof.

In Order P-233, Commissioner Tom Wright outlined the obligations of institutions and appellants in situations where access is requested to records which may be voluminous or difficult to copy. The order dealt with a request for personal information under section 48 of the Act and the wording of section 48(3) which deals with the manner in which access is to be granted to personal information.

In that order, Commissioner Wright made the following general observations:

> Where the person who is given access to his or her own personal information requests a particular method of access, the head must establish why it would not be reasonably practicable to comply with the preferred method of access.
>
> Therefore, in my view, any doubt as to the reasonableness of an institution's decision to require a requester to attend at an institution to examine his or her own personal information, as opposed to providing copies, should be resolved in accordance with one of the main purposes of the Act - that individuals should have access to their own personal information.

The issue addressed in this portion of Order P-233 was the reasonableness of the Board's position that the requester should attend in person to view the records, as opposed to being given copies of them. However,

I find that the principles expressed by the Commissioner apply equally where an institution asserts that it is unreasonable to provide a requester with a copy of a record in the format requested.

I agree with the Board's submissions that, in the circumstances of this appeal, it would be neither practicable, nor protective of the security and integrity of the records, to have the original versions of the tapes forwarded to the appellant for examination. I also agree that the Board is not obligated under the Act to have transcripts of the tapes prepared. The appellant is not, however, seeking access to transcripts. Rather, he wishes to receive copies of the actual tape recordings. In his original request, and again in his representations, the appellant clearly indicates that he does not expect that transcripts of the tape recordings should be made by the Board.

I do not agree that the Board lacks the technological capability to reproduce copies of the tape recordings. The tapes sought total some five hours of recorded hearings on ordinary audio cassette tapes. I find that the method of reproducing cassette tapes of this nature is relatively straight-forward and does not require any expensive or complicated equipment.

For this reason and being mindful of the principles set forth by Commissioner Wright in Order P-233, I find that it is reasonably practicable for the Board to provide the appellant with access to the tapes in the format which he requested by simply reproducing the tape recordings.

PUBLIC POLICY CONSIDERATIONS

In its representations, SOAR has made a series of submissions which relate to the issue of access to tape recordings and transcripts of tribunal proceedings generally. These may be summarized as follows:

(1) A tape recording of a tribunal proceeding should not be considered a "record" within the meaning of section 2(1) of the Act.

(2) A tape recording which has yet to be transcribed is a record which is "currently available to the public" within the meaning of section 22(a) of the Act.

(3) The Board is entitled to pass on the costs of reproducing a tape recording to a requester seeking his own personal information.

With respect to the first issue, section 2(1) of the Act defines a record to include a "sound recording". On this basis, I find that a tape recording made of a Board hearing constitutes a record for the purposes of the Act.

Regarding the second issue, I cannot agree that a tape recording of a Board hearing, which has not been transcribed, is a record "available to the public". In order to protect the privacy of patients and witnesses involved in its proceedings, the consent of the Board is required before transcripts may be ordered from a

court reporter. The public is not permitted to order a copy of such a transcript without the permission of the Board. Accordingly, I find that the tape recordings at issue in this appeal are not "currently available to the public" and the Board is not entitled to exempt them from disclosure under section 22(a) of the Act.

It is possible that the situation could be otherwise for other tribunals but it is not necessary for me to make such a determination in the context of the present appeal.

With respect to the third issue, section 57(2) of the Act precludes an institution from requiring the payment of a fee for access to an individual's own personal information. I have reviewed all of the records at issue in this appeal, including the tape recordings, and find that they contain the personal information of the appellant. On this basis, the Board is precluded from charging the appellant a fee for access to the records in question.

ORDER:

1. I uphold the Board's decision to deny access to Records 66, 67, 68, 69 and 71 and to that portion of the tape recording of the appellant's hearing of February 24, 1994 which contains the personal information of another individual. I have provided the Board's Freedom of Information and Privacy Co-ordinator with an edited copy of this tape, in which I have edited that portion which is **not** to be disclosed, along with a copy of this order.

2. I order the Board to disclose to the appellant Records 1 through 65, 70, 72, 73(a) and 73(b) and the tape recordings of the appellant's Board hearings held on February 13, 1992, November 17, 1992 and May 11, 1993 in their entirety as well as all of the February 24, 1994 hearing with the exception of that portion which has been edited from the copy of the tape recording which I have provided to the Board's Freedom of Information and Privacy Co-ordinator within thirty-five (35) days of the date of this order, but not before the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: December 20, 1994
Donald Hale
Inquiry Officer