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

ORDER P-821

Appeal P-9300467

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 from a patient at a psychiatric hospital for access to all records in its possession which relate to him. The Board located a number of records responsive to the request and decided to deny access to them in full pursuant to the following exemptions contained in the Act:

- advice or recommendations - section 13
- information published or available - section 22(a)
- discretion to refuse requester's own information - section 49(a)
- invasion of privacy - section 49(b)

In addition, the Board claimed that the records are not subject to the Act, pursuant to section 65(2)(a). 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).

Pursuant to section 25(2) of the Act, the Board forwarded to the Ministry of Health that portion of the request which related to two documents as it appeared that the Ministry had a greater interest in these records.

The requester appealed the decision to deny access but did not dispute the transfer of a portion of the request to the Ministry of Health pursuant to section 25(2). During the course of the mediation of the appeal, access was granted to various records and the appellant agreed to limit the scope of his request to the tape recordings made of his Board hearings held on July 15 and August 5, 1993.

In a subsequent decision letter specifically relating only to the tape recordings, the Board relies upon the application of the following exemptions to deny access, in addition to those claimed above:

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

Further, the Board maintains that it is not obligated to provide copies of the tape recordings, under section 30(1) of the Act, as it would not be reasonably practicable to do so since the Board does not have the technological means to reproduce the tapes.

A Notice of Inquiry was forwarded to the Board and the appellant. Representations were received from both parties. As the tape recordings remain the only records at issue, I will address only the application of those exemptions which were claimed to apply to them by the Board.

PRELIMINARY ISSUE:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On September 17, 1993, 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 October 1, 1993) 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 October 21, 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 and 49(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 thirteen 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.

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

DISCUSSION:

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) That it does not have the technological means to reproduce these recordings.

(2) In order to preserve of 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 requested information is predominantly the personal information of the appellant. As such, the request procedure to be followed is that prescribed by section 48, rather than that in section 30.

Section 48(3) of the Act 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 being 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 submissions of the Board 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, however, 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 access to the appellant in the format which he requested by simply reproducing the tape recordings.

INVASION OF PRIVACY

The Board has claimed the application of section 49(b) of the Act to the 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;

During my independent review of the tape recordings at issue in this appeal, I found that, in addition to the recording of the appellant's Board hearing, side 2 of tape 6 contains a series of private conversations which took place following the conclusion of the appellant's hearing on August 5, 1993. The tape recorder was apparently inadvertently left running following the hearing.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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. I find that this portion of side 2 of tape 6 contains the personal information of individuals other than the appellant. The remaining tape recordings contain only the personal information of the appellant and ought to be disclosed to him.

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 information contained on side 2 of tape 6 and find as follows:

(1) None of the considerations listed in section 21(4) of the Act apply to the information contained in this portion of the tape recording.

(2) None of the presumptions contained in section 21(3) of the Act apply to the information contained in this portion of the tape recording.

(3) The disclosure of the information contained on side 2 of tape 6 would reveal personal information about individuals referred to in the record which is highly sensitive in nature, within the meaning of section 21(2)(f). This factor weighs in favour of the non-disclosure of the personal information.

(4) None of the factors which weigh in favour of disclosure apply to the personal information contained

on side 2 of tape 6.

(5) Disclosure of the personal information contained on side 2 of tape 6 would constitute an unjustified invasion of the personal privacy of the individuals referred to therein under section 49(b) and, accordingly, the information should not be disclosed to the appellant. Along with a copy of this order, I have provided the Board's Freedom of Information and Privacy Co-ordinator with a copy of side 2 of tape 6 in which I have edited the information which is not to be disclosed.

(6) Section 23 of the Act is not applicable to the tape recordings.

CLINICAL RECORDS

The Board has taken the position that 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 the majority of records maintained by the Board in respect of the requester, 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 include 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.

Order P-775 did not 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 were tendered at the appellant's 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.

In summary, I find that the Board must disclose to the appellant the tape recordings which are the subject of the appeal, with the exception of the last portion of side 2 of tape 6, which is exempt under section 49(b).

ORDER:

1. I uphold the Board's decision to deny access to that portion of the tape recording of the appellant's hearing of August 5, 1993 which contains the personal information of other individuals. 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 of side 2 of tape 6 which is **not** to be disclosed.

2. I order the Board to disclose to the appellant within fifteen (15) days of the date of this order the tape recordings of the appellant's Board hearing held on July 15, 1993 in their entirety as well as all of the August 5, 1993 hearing with the exception of that portion which has been edited from the copy of side 2 of tape 6 which I have provided to the Board's Freedom of Information and Privacy Co-ordinator.

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 tape recordings which are disclosed to the appellant pursuant to Provision 2.

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