



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

ORDER P-1088

Appeal P-9500069

Ministry of Health



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NATURE OF THE APPEAL:

The appellant was the complainant in two matters before the Health Disciplines Board. He submitted a request to the Ministry of Health (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to the contents of the Ministry's files pertaining to these two complaints.

The Ministry conducted a search in the Health Board Secretariat and located the two complaint files. Access was granted to a large number of records found in these files. In addition, some records were withheld, in whole or in part, based on the following exemptions in the Act:

- invasion of privacy - sections 21(1) and 49(b)

The Ministry also withheld information under section 65(2)(b), which removes some information pertaining to patients in a psychiatric facility from the scope of the Act.

The appellant filed an appeal of the denial of access under the exemptions and under section 65(2)(b).

A Notice of Inquiry was sent to the appellant and the Ministry. This Notice was also sent to two physicians and another individual, all of whom are mentioned in the records. Representations were received from the appellant and the Ministry only.

The records at issue, and the sections of the Act which the Ministry seeks to apply to each of them, are listed in Appendix A to this order. This list assigns record numbers to the documents, and references the page numbers assigned by the Ministry in its decision letter. The list also identifies whether access to each record was withheld in full, or in part.

PRELIMINARY ISSUE:

PSYCHIATRIC PATIENT RECORDS

The Ministry claims that Records 6 through 9, and Records 18 through 44, are outside the scope of the Act because of section 65(2)(b). This section states:

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

contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.

In Order P-374, Assistant Commissioner Tom Mitchinson made the following observations about section 65(2)(b):

... [I]t is important to note that records which fall under section 65(2)(b) are not covered by the alternative access scheme contained in the [Mental Health Act (MHA)].

[IPC Order P-1088/December 22, 1995]

I feel that in order to be consistent with the purposes of the Act, subsection (b) should be read restrictively. To find otherwise would exclude a broad range of psychiatric patient records from access by a patient under either the MHA or the Act. In my view, in order for a record to fall within the scope of section 65(2)(b), it must contain the types of information listed in the section, it must be in respect of a psychiatric patient, and it must have a clinical purpose, nature or value.

I agree with these comments and adopt them for the purposes of this appeal.

In order to establish the application of section 65(2)(b), the Ministry must demonstrate that the records:

- (1) contain the types of information listed in section 65(2)(b); **and**
- (2) be in respect of a patient in a psychiatric facility as defined by section 1 of the MHA; **and**
- (3) have a clinical purpose, nature or value (Order P-374).

I will consider each of these requirements in turn.

Part 1

In my view, with the exception of the four records mentioned below, all of the records for which section 65(2)(b) has been claimed consist of information in respect of the diagnosis, care and treatment of the appellant, and meet the first requirement under this section. The four exceptions are Records 18, 34, 41 and 43. Record 18 is a consent by the appellant to disclosure of a clinical record. Records 34, 41 and 43 are authorizations re: personal effects. I find that Records 18, 34, 41 and 43 do not have a sufficient connection to patient care to meet the first requirement.

Part 2

Section 1 of the MHA defines “psychiatric facility” as one designated as such by regulation under that statute. I am satisfied that the hospital in question is so designated. I am also satisfied that the appellant was a patient in the hospital between February 22, 1986 and April 17, 1986, and again between April 23 and June 19, 1986. On this basis, I find that, with several exceptions, the records for which section 65(2)(b) has been claimed are in respect of the appellant “in” a psychiatric facility, and meet the second requirement under this section. The exceptions are Records 19, 21, 22, and 27. These consist of “progress notes” recorded by a physician, but they fall outside the periods of hospitalization and appear to reflect office visits. On this basis, I find that these records are not in respect of a patient “in” a psychiatric facility and therefore they do not meet the second requirement.

Part 3

The records at issue are all in the Ministry’s possession because of the proceedings before the

Health Disciplines Board.

In Order M-389, Assistant Commissioner Tom Mitchinson commented on whether a record which had been removed from its original clinical setting could meet the third requirement under section 65(2)(b). He stated as follows:

In the present case, the records have been removed from the clinical setting, and are being maintained by [the institution] for a non-clinical purpose. In my view, in order to satisfy the third part of the test, an institution must establish that the reason for having the records in its custody or control has a clinical purpose, nature or value; the fact that the original reason for creating or compiling the records may have had a clinical purpose, nature or value, in my view, is not sufficient to satisfy the requirements of section 65(2)(b).

The Ministry argues that section 65(2)(b) applies because the copies in the Ministry's possession

maintain their initial 'clinical purpose, nature or value' because they were used by the [College of Physicians and Surgeons of Ontario] and the [Health Disciplines Board] to investigate and decide on the medical and psychiatric treatment rendered [the appellant] by [the two doctors who were the subject of the appellants' complaints].

I do not agree with this submission. In my view, a decision as to whether a complaint against the two physicians is justified is not a clinical matter pertaining to the appellant; rather, it is a question of professional standards and whether they have been met or violated **by the physician**.

Therefore, I find that Records 6 through 9, and Records 18 through 44 have not met the third requirement under section 65(2)(b). Therefore, this section does not apply to these records and I will order the Ministry to make a decision regarding disclosure of these records under the Act.

INVASION OF PRIVACY

The Ministry claims that the withheld parts of Records 1, 2, 3, 4, 10, 11, 12, 13 and 14, and Records 5, 15, 16, 17 and 45 in their entirety, are exempt under section 21(1) or 49(b).

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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 have reviewed the records to determine whether they contain personal information, and if so, to whom the personal information relates.

Records 1, 2, 3, 4, 10, 11, 12, 13, 15, 16 and 45 all pertain to the appellant's complaint against one of the physicians (whom I will refer to as "Physician A"). Some of these records consist of

correspondence between the Health Disciplines Board and Physician A, and others are completed Record of Complaint forms pertaining to Physician A. These documents all identify the appellant as the complainant and the physician as the subject of the complaint, and on this basis, I find that all of them contain the personal information of these individuals. In addition, Record 45 contains references to members of the appellant's family, and the wife of Physician A; these references constitute the personal information of those individuals.

Record 14 is the Record of Complaint pertaining to the appellant's complaint against the other physician (whom I will refer to as "Physician AB"). Again, this document identifies the appellant as the complainant and the physician as the subject of the complaint, and on this basis, I find that it contains the personal information of these individuals.

Record 5, a letter from Physician B to the College of Physicians and Surgeons, is primarily concerned with the appellant's course of treatment while under the doctor's care. This is the appellant's personal information. Occasional references to other members of the appellant's family would qualify as the personal information of those individuals. This record does not contain any personal information regarding Physician B; it is on his business letterhead, and the information about his interactions with the appellant pertain to normal professional activities with no "personal" component relating to the physician.

Record 17 is a letter from an individual other than the appellant to the College of Physicians and Surgeons, pertaining to the appellant's complaint against Physician A. This letter identifies the appellant as the complainant and Physician A as the subject of the complaint, and on this basis, I find that it contains personal information pertaining to both of these individuals. It recounts the author's own experiences with Physician A, and on this basis, I find that it also contains her personal information.

In this appeal, the Ministry has raised the possible application of two "invasion of privacy" exemptions, namely, sections 21(1) and 49(b).

The section 21(1) exemption can only apply to records which do **not** contain the requester's personal information. As I have found that all the records for which this section has been claimed do contain the requester's personal information, section 21(1) is not applicable (Order M-352).

However, under section 49(b) of the Act, where a record contains the personal information of both the requester 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. As noted, the record does contain the personal information of the requester and other individuals, and accordingly, I will consider whether section 49(b) applies.

In this situation, sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Ministry claims that the factors favouring non-disclosure in sections 21(2)(f) (highly sensitive information) and 21(2)(h) (information supplied in confidence) apply to the birth date, licence number and residential address of the physicians. The severances in Records 1, 2, 3, 4, 10, 11, 12, 13 and 14 all contain information falling into one or more of these categories. In the absence of any representations from the physicians, I find that there is insufficient evidence for me to conclude that sections 21(2)(f) and (h) apply to this information. However, in my view, the nature of this information, and its lack of connection to the substance of the complaints, is a relevant circumstance favouring non-disclosure. I find that its disclosure would be an unjustified invasion of personal privacy and I uphold the Ministry's severances in these records.

Records 15 and 16 consist of letters from Physician A to the College of Physicians and Surgeons relating to the complaint against him. These letters contain the personal information of the appellant and Physician A only. They set out Physician A's responses to various matters raised during the complaint investigation process. The Ministry submits that the factors favouring non-disclosure in sections 21(2)(f) (highly sensitive information) and 21(2)(h) (information supplied in confidence) apply. The circumstances support a view that these records were submitted in confidence, and the existence of a complaint regarding a physician is highly sensitive. I find that these two factors apply to these records.

In Order P-1042, I considered the necessity for an adequate degree of disclosure to one of the parties in a Workplace Discrimination and Harassment investigation to be a "relevant circumstance" to be considered under section 21(2). In this regard, I stated:

This factor, which favours disclosure, has not been referred to in previous orders. It relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.

In my view, this factor applies to Records 15 and 16. In the circumstances, particularly in view of the fact that Physician A did not submit representations opposing disclosure, I find that this factor outweighs the factors favouring privacy protection. Therefore, disclosure of Records 15 and 16 would not constitute an unjustified invasion of personal privacy and I find that they are not exempt under section 49(b).

Record 45 is similar to Records 15 and 16, except that it contains personal information pertaining to several individuals other than the appellant and Physician A. As with Records 15 and 16, the Ministry argues that sections 21(2)(f) and (h) apply to this record, and I agree, for the reasons outlined above with respect to Records 15 and 16. I also find that the factor pertaining to "adequate degree of

disclosure” applies to this record, except for the parts which constitute the personal information of individuals other than the appellant and Physician A. With respect to the information of these other individuals (which I have highlighted on the copy of this record which is being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator with this order), I find that disclosure would be an unjustified invasion of their personal privacy, and it is exempt under section 49(b). For the remaining information in this record, I find that, on the same basis outlined above for Records 15 and 16, the circumstances favouring disclosure outweigh those favouring non-disclosure. Therefore, disclosure of this information would not be an unjustified invasion of personal privacy and it is not exempt under section 49(b).

I found, above, that Record 5 consists of the personal information of the appellant, with occasional reference to members of his family which would be their personal information. However, the record indicates that the appellant was present at the interviews during which the information about family members was provided to Physician B, and therefore I find that disclosure of this information to the appellant would not be an unjustified invasion of privacy. As the record contains no personal information pertaining to Physician B, its disclosure cannot be an unjustified invasion of his privacy. I find that section 49(b) does not apply to this record.

The Ministry argues that the presumed unjustified invasion of privacy in section 21(3)(a) (medical history, etc.) applies to Record 17. This record outlines the medical history and treatment of an individual other than the appellant. On this basis, I agree that this presumption applies. The appellant has raised several subsections of section 21(2) and submits that they support disclosure. However, even if I were to apply them, they cannot rebut a presumption under section 21(3) (Order M-170). Sections 21(4) and 23 do not apply to this record, and I find that it is exempt under section 49(b).

ORDER:

1. I order the Ministry to provide the appellant with an access decision regarding Records 5 through 9, and Records 18 through 44, in accordance with sections 26, 28 and 29 of the Act, without recourse to a time extension, treating the date of this order as the date of the request. I further order the Ministry to provide me with a copy of this decision within five (5) days after it is sent to the appellant.
2. I uphold the Ministry’s decision to deny access to Record 17 in its entirety, and to the information it severed from Records 1, 2, 3, 4, 10, 11, 12, 13 and 14. I further uphold the Ministry’s decision to deny access to the parts of Record 45 which are highlighted on the copy of this record which is being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator with a copy of this order.
3. I order the Ministry to disclose Records 5, 15 and 16 in their entirety, and the parts of Record 45 which are **not** highlighted on the copy of this record which is being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator with a copy of this order, within thirty-five (35) days after the date of this order, and not earlier than the thirtieth (30th) day after the date of this order.

4. To verify compliance with Provision 3, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____

John Higgins

Inquiry Officer

_____ December 22, 1995

APPENDIX A

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	MINISTRY PAGE NUMBER(S)	DESCRIPTION	SECTION(S) CLAIMED
1	3	Letter to Physician A from Health Disciplines Board dated December 16, 1988	21(1) (record withheld in part)
2	6	Letter to Physician A from Health Disciplines Board dated April 20, 1988	21(1) (record withheld in part)
3	11	Letter to Physician A from Health Disciplines Board dated October 3, 1988	21(1) (record withheld in part)
4	C	Record of Complaint re Physician A dated January 4, 1988	21(1) (record withheld in part)
5	64-66	Letter from Physician B to College of Physicians and Surgeons dated October 26, 1987	21(1), 49(b) (whole record withheld)
6	46-49	History and Physical Examination form re appellant, dated February 26, 1986	65(2)(b) (whole record withheld)
7	50-52	Summary of Hospitalization re appellant, dated May 31, 1986	65(2)(b) (whole record withheld)
8	53-54	History and Physical Examination form re appellant, dated April 23, 1986	65(2)(b) (whole record withheld)
9	55-56	Summary of Hospitalization re appellant, dated June 22, 1986	65(2)(b) (whole record withheld)
10	D	Letter to Physician A from Health Disciplines Board dated April 23, 1991	21(1) (record withheld in part)
11	J	Letter to Physician A from Health Disciplines Board dated December 11, 1990	21(1) (record withheld in part)
12	Q	Letter to Physician A from Health Disciplines Board dated April 5, 1990	21(1) (record withheld in part)
13	C	Record of Complaint re Physician A dated November 13, 1989	21(1) (record withheld in part)
14	D	Record of Complaint re Physician B dated November 13, 1989	21(1) (record withheld in part)
15	28-29	Letter from Physician A to College of Physicians and Surgeons, April 22, 1989	21(1) (whole record withheld)
16	195-196	Letter from Physician A to College of	21(1), 49(b) (whole

RECORD NUMBER	MINISTRY PAGE NUMBER(S)	DESCRIPTION	SECTION(S) CLAIMED
		Physicians and Surgeons dated October 15, 1989	record withheld)
17	82-85	Letter to College of Physicians and Surgeons re Physician A dated May 18, 1989	21(1) (whole record withheld)
18	23	Appellant's consent to disclosure of a clinical record dated February 22, 1989	65(2)(b) (whole record withheld)
19	34	Progress Note re appellant by Physician B	65(2)(b) (whole record withheld)
20	35	Department of Social Work referral of appellant to Physician B dated August 3, 1987	65(2)(b) (whole record withheld)
21	36-38	Progress Notes and handwritten notes re appellant by Physician B	65(2)(b) (whole record withheld)
22	40-44	Progress Notes re appellant by Physician B	65(2)(b) (whole record withheld)
23	45-46	History and Physical Examination form re appellant, dated April 22, 1986	65(2)(b) (whole record withheld)
24	47-49	Summary of Hospitalization re appellant, dated May 31, 1986	65(2)(b) (whole record withheld)
25	50-51	Summary of Hospitalization re appellant, dated June 22, 1986	65(2)(b) (whole record withheld)
26	52-53	Psychological Assessment re appellant, dated March 18, 1986	65(2)(b) (whole record withheld)
27	54-55	Progress Notes re appellant by Physician B	65(2)(b) (whole record withheld)
28	87	Hospital Registration Form re appellant, dated February 22, 1986	65(2)(b) (whole record withheld)
29	88-93	History and Physical Examination re appellant, dated February 1986	65(2)(b) (whole record withheld)
30	94-105	Progress Notes re appellant	65(2)(b) (whole record withheld)
31	106-108	Summary of Hospitalization re appellant, dated May 31, 1986	65(2)(b) (whole record withheld)
32	109-111	Progress Notes re appellant	65(2)(b) (whole record

RECORD NUMBER	MINISTRY PAGE NUMBER(S)	DESCRIPTION	SECTION(S) CLAIMED
			withheld)
33	112-120	Test results re appellant	65(2)(b) (whole record withheld)
34	121-123	Authorizations re personal effects	65(2)(b) (whole record withheld)
35	124	Hospital Registration form re appellant, dated April 23, 1986	65(2)(b) (whole record withheld)
36	125	Emergency Treatment Record, date illegible	65(2)(b) (whole record withheld)
37	126-128	History and Physical Examination form re appellant, dated April 23, 1986	65(2)(b) (whole record withheld)
38	129-135	Progress Notes, re appellant	65(2)(b) (whole record withheld)
39	136-137	Summary of Hospitalization, dated June 22, 1986	65(2)(b) (whole record withheld)
40	138-139	Report of consultation re appellant, April 23, 1986	65(2)(b) (whole record withheld)
41	140-142	Authorizations re personal effects	65(2)(b) (whole record withheld)
42	143	Test Results re appellant	65(2)(b) (whole record withheld)
43	144	Authorization re personal effects	65(2)(b) (whole record withheld)
44	145-151	Test results re appellant	65(2)(b) (whole record withheld)
45	197-200	Letter from Physician A to College of Physicians and Surgeons dated November 28, 1987	21(1), 49(b) (whole record withheld)