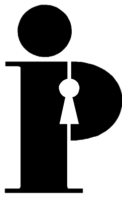

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1640

Appeal PA-980162-1

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information gathered by the police as part of their investigation into the death of the requester's brother. The requester's brother was murdered by an individual who then took his own life. The Ministry identified the responsive records and denied access to them on the basis of sections 14(1)(a), (b) and (f) (law enforcement), 19 (solicitor-client privilege) and 21(1) (invasion of privacy). The requester appealed the decision to deny access.

During mediation, the Ministry advised that it was also relying on the exemptions contained in sections 14(2)(a) (law enforcement) and 22(a) (information published or available). The Ministry located additional responsive records and also withheld access to them on the basis of the exemptions claimed for the other records. During mediation, the appellant agreed that the bail hearing transcripts for which the Ministry had claimed section 22(a) were no longer in issue. The appellant also agreed to narrow the scope to include only the medical records forming part of the police investigation, including the medical assessment notes and witness statement of a named doctor.

This office provided a Notice of Inquiry to the appellant and the Ministry. Representations were received from both parties. The Ministry advised that it was no longer relying on the exemptions contained in sections 14(1)(a), (b), (f), 14(2)(a) and 19. Accordingly, as these are discretionary exemptions, I will not consider their application further. The Ministry also indicates that the typed transcript of the named doctor's assessment of an individual referred to in the records was mistaken for a witness statement and that the doctor did not provide a statement to the police.

The records at issue in this appeal consist of 265 pages of medical records, including the medical assessment notes of the named doctor and other physicians, withheld by the Ministry on the basis of section 21(1) of the Act. I will refer to these records using the numbering system utilized by the Ministry, namely pages A1, A1a, and 0246-0499.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

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 and find that five pages numbered 0370 to 0374 do not contain personal information. Page 0370 contains only certain names, titles and addresses of individuals in their professional capacity. This information does not qualify as the personal information of those individuals. Since no other exemptions have been claimed by the Ministry to apply to them, these pages should be disclosed to the appellant.

I find that the majority of the information in the remaining pages relates to an individual whom I will refer to as the primary affected person. The records also contain information relating to the appellant's brother and other identifiable individuals (the other affected persons). The records do not contain the personal information of the appellant.

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.

The appellant submits that the exceptions in sections 21(1)(c) and (d) apply to permit disclosure of the records. The appellant does not dispute that the records contain personal information, including that of the primary affected person. The appellant explains that her brother was murdered by the primary affected person while the latter was out on bail. The primary affected person had been charged with uttering death threats against the brother and was taken into custody pending a bail hearing. At the hearing, the court ordered the primary affected person to undergo a psychiatric assessment, the results of which were to be presented at the next bail hearing. The Court, after hearing the testimony of the psychiatrist, released the primary affected person subject to certain conditions. Subsequently, the primary affected person shot the brother and then killed himself.

The appellant states that she has filed a complaint with the College of Physicians and Surgeons and needs the information to support the case. The appellant submits that the exceptions in sections 21(1)(c) and (d) apply because the assessment was specifically ordered for the bail hearing and the information was presented in open court.

Sections 21(1)(c) and (d) state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
>
> (d) under an Act of Ontario or Canada that expressly authorized the disclosure.

I do not accept the appellant's position. In order to qualify for disclosure under the exception in section 21(1)(c), the personal information must be **collected** and **maintained** specifically for the purpose of creating a record available to the general public. The fact that a physician gave oral testimony in court does not mean that the notes he may have taken and relied upon "have been collected and maintained specifically for the purpose of creating a record available to the general public". In my view, the exception in section 21(1)(c) has no application to the records in this appeal.

With respect to section 21(1)(d), the appellant submits that sections 672.16(1)(a), 672.16(2) and 672.2(2) of the Criminal Code require that the doctor's assessment must be filed with the court. The appellant goes on to say that the doctor testified about the assessment in court with the general public present. He submits, therefore, that section 21(1)(d) applies in the circumstances of this appeal.

I have reviewed the transcripts of the proceedings on bail hearing (when the assessment was ordered) and the actual bail hearing (when the doctor gave his opinion by viva voce evidence), included in the appellant's submissions. I do not see any evidence that the doctor's notes were filed with the Court or required to be filed with the Court as an exhibit.

In Order M-292, former Inquiry Officer Anita Fineberg determined that the interpretation of the phrase "expressly authorizes" as it is found in section 21(1)(d) should mirror that of the same phrase found in section 38(2) of the Act. She relied on the comments made in Compliance Investigation Report I90-29P, which stated:

> The phrase "expressly authorized by statute" in subsection 38(2) of the Act requires either that specific types of personal information be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute i.e in a form or in the text of the regulation.

I agree with the above interpretation and adopt it for the purposes of this appeal.

I have considered the representations of the appellant and I find that the exception in section 21(1)(d) has no application. The appellant has not provided me with any evidence to show that the specific type of personal information sought has been expressly described in a statute authorizing the disclosure. The section includes the word "expressly"; given this inclusion, the authority to disclose the specific records at issue in this appeal must be clear and explicit. It is not sufficient that the power may be implied. Therefore, I find that section 21(1)(d) does not apply.

In my view, the only exception that may have application in the circumstances of this appeal is 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.

Sections 21(2) and (3) of the Act give guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3)

lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

A section 21(3) presumption can be overcome if the personal information falls under section 21(4) or if there is a finding under section 23 of the Act that a compelling public interest exists in the disclosure of the record which clearly outweighs the purpose of the section 21 exemption.

The Ministry submits that section 21(2)(f) applies to the personal information in the intake sheets (pages numbered), that section 21(3)(a) applies to the remaining pages consisting of medical assessments and records and that section 21(3)(b) applies to the entire record. These sections reads as follows:

> (2) 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,
>
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
> >
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Ministry submits that the records are the medical and psychological assessment records of the primary affected person, the subject of a criminal investigation, from various hospitals and from his incarceration. The Ministry states that some aspects of what was then considered a double homicide, and has since been determined to be a murder and suicide, are still ongoing. The Ministry submits that the intake pages contain highly sensitive information, given the circumstances of the investigation. The Ministry states that all of the personal information in the records was compiled and is identifiable as part of a police investigation into a possible violation of the Criminal Code.

I have carefully reviewed the records together with the submissions of the parties.

I find that Page 0497, which is an occurrence report from an incarceration centre, contains information that can be characterized as highly sensitive, the disclosure of which can reasonably be expected to cause distress to the individuals named therein. I find that section 21(2)(f) is relevant and weighs in favour of non-

disclosure. I have considered all the factors listed under section 21(2) together with the all relevant circumstances and I find that the privacy concerns of the individuals identified in this record outweigh the appellant's right to disclosure.

I find that Pages A1, A1a and pages numbered 0246-0484, 0494 and 0496 consist of medical test results, laboratory reports and medical and psychological assessments. This information clearly relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of the primary affected person and I find that the presumption in section 21(3)(a) applies.

I find that the presumption in section 21(3)(b) applies to the records listed above as well as the remaining pages (0485-0493, 0495, 0498 and 0499), all of which were compiled and are identifiable as part of a criminal investigation. I find, therefore, that disclosure of the records would constitute an unjustified invasion of personal privacy and the exception in section 21(1)(f) applies.

PUBLIC INTEREST

Section 23 of the Act reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records; and second, this interest must clearly outweigh the purpose of the mandatory personal information exemption.

The appellant makes following submissions:

> ... that section 23 applies in this case as the purpose of the request for disclosure is to allow the College of Physicians and Surgeons to investigate a complaint against a member in relation to this assessment. The public interest is in enforcing the expected standards of care of professionals dealing with persons who may be suffering from mental illness. The issue of whether [the primary affected person] was fit to stand trial and appropriate to be released on bail were public safety issues that required this assessment be compiled under a criminal statute designed to protect public order and safety from the acts of individuals. It is of paramount importance that there be access to the records of this process in order that there can be a review of whether the system and the persons exercising their powers in it are functioning to the required standards.

I sympathize with the appellant and fully appreciate the difficult situation of the appellant and the family. In the circumstances of this appeal, the appellant must establish that a compelling public interest exists in the disclosure of the records. The appellant must also establish that this public interest clearly outweighs the mandatory privacy interests of the individuals identified in the records. I have reviewed the submissions of

the appellant. Based on the evidence before me, I find that the interest that exists in the disclosure of the records cannot be characterized as a public interest. Accordingly, I find that the requirements for the public interest over-ride have not been established and section 23 does not apply.

ORDER:

1. I order the Ministry to disclose pages 0370-0374 by sending a copy to the appellant by **December 22, 1998**.

2. I uphold the Ministry's decision to deny access to the remaining records.

3. In order to verify compliance with the terms of this order, I reserve the right to order the Ministry to provide me with a copy of the records disclosed in compliance with Provision 1.

Original signed by: December 1, 1998
Mumtaz Jiwan
Adjudicator