



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

Reconsideration Order R-980023

Appeal P-9800031

Order P-1568

Ministry of Health



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/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The Ministry of Health (the Ministry) provides funding for a number of development projects across Ontario which are operated on behalf of individuals who have received treatment for mental health problems. One such project was operated by an organization known as the Mental Health Consumer/Survivor Employment Association of Essex County (the Association). The Ministry provided funding for the operation of a project through which the Association operated a restaurant in the City of Windsor.

The Ministry received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to:

1. Records relating to an audit of the Association conducted in August 1996.
2. Records related to any communications between the Ministry and the District Health Council of Windsor-Essex County (the Health Council) relating to the Association from January 1995 to the date of the request.
3. Records related to any communications between the Ministry and/or the Health Council and the Consumer/Survivor Alliance of Windsor with respect to any issue relating to the Association from January 1995 to the date of the request.
4. Any contact sheets maintained by the Ministry on the Association from January 1995 to the date of the request.
5. Any records relating to any personal references to the requester or a numbered Ontario corporation held by the Ministry.

The Ministry located a number of records and granted access to some of them, in whole or in part. Access to the remaining records, or parts of records, was denied pursuant to the following exemptions contained in the Act:

- section 13(1) - advice or recommendations
- sections 18(1)(c), (d) and (e) - economic and other interests
- section 18(1)(g) - proposed policies, plans or projects of an institution
- section 19 - solicitor-client privilege
- section 20 - danger to safety or health
- section 21(1) - invasion of privacy

The requester, now the appellant, appealed the Ministry's decision. A Notice of Inquiry was provided to the appellant and the Ministry soliciting their submissions on the application of the exemptions claimed to the records. Because it appeared that the records may contain the personal information of the appellant and/or other identifiable individuals, the parties were asked to address the possible application of sections 49(a) and (b) of the Act.

Following the receipt of representations from the appellant and the Ministry, I issued Order P-1568 which upheld the Ministry's decision to deny access to some of the records, and ordered the disclosure of others, including Record C-14, to the appellant.

The Ministry has since brought an application for judicial review to the Ontario Court (General Division) Divisional Court respecting my decision to order the disclosure of Record C-14.

THE RECONSIDERATION REQUEST

The Ministry has requested that I reconsider my decision with respect only to Record C-14 on the basis that it contains the personal information of identifiable individuals within the meaning of section 2(1) of the Act and that the disclosure of this information would result in an unjustified invasion of these individuals' personal privacy, as contemplated by section 49(b) of the Act. The Ministry submits that a fundamental defect occurred in the adjudication process as the individuals who are named or are identifiable in Record C-14 were not notified of the appeal under section 50(3) of the Act and were not given the opportunity to make submissions with respect to the disclosure of this record under section 52(13) of the Act.

Record C-14 is a one-page set of notes taken by a Ministry Auditor following an interview with a representative of the Canadian Mental Health Association (the CMHA). The Ministry submits that this record contains the personal information of the CMHA representative, a named Ministry official and other unnamed, but identifiable, consumer/survivors involved in the program being audited.

Following receipt of the reconsideration request, I determined that the Ministry had made out a prima facie case for the reconsideration of Order P-1568. As a result, a Supplementary Notice of Inquiry was provided to the Ministry, the appellant and to the CHMA official whose interview was recorded in Record C-14. Additional representations were received from each party.

DOES THE RECONSIDERATION REQUEST FIT WITHIN THE COMMISSIONER'S POLICY ON THE RECONSIDERATION OF ORDERS?

The Information and Privacy Commissioner has developed a policy which summarizes the grounds upon which a decision maker may reconsider a decision. In brief, the policy provides that a decision will be reconsidered only where there is a fundamental defect in the adjudication process, some other jurisdictional defect in the decision or a clerical or other similar error in the decision.

The Ministry submits that a fundamental defect occurred in the adjudication process as certain identifiable individuals whose personal information is contained in Record C-14 were not notified of the appeal under section 50(3) and not given the opportunity to make submissions in respect of the appeal under section 52(13) of the Act. It relies on the decisions of the Divisional Court in Ontario (Attorney General) v. Fineberg [1996] O.J. No. 67 (Div. Ct.) and Collins v. Ontario (Pension Commission) (1986), 56 O.R. (2d) 274 at 289-290. The Ministry submits that these cases prescribe that the Commissioner's office has what the Ministry describes as a "positive obligation to notify" these individuals on the basis of sections 50(3) and 52(13) of the Act, and as a matter of fairness.

The appellant and the CMHA representative have not addressed this aspect of the reconsideration request in their submissions.

I have considered all of the circumstances of this reconsideration request and the submissions of the Ministry and find that, in failing to notify the CMHA representative of the appeal under section 50(3) and not giving this individual the opportunity to make submissions under section 52(13), a fundamental defect in the adjudication process occurred. I will, accordingly, proceed to reconsider my decision in Order P-1568 with respect only to my findings about Record C-14.

DISCUSSION:

PERSONAL INFORMATION

Does Record C-14 contain the personal information of the CMHA representative?

The Ministry submits that Record C-14 contains the personal information of the CMHA representative under the following paragraphs in the definition of “personal information” in sections 2(1) of the Act:

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

The Ministry argues that the disclosure of the information contained in Record C-14 would reveal the CMHA representative’s name, as well as the fact that he/she cooperated with the Ministry’s auditors and provided information to them. It suggests that these facts constitute the personal information of this individual. The Ministry also submits that the information in Record C-14 qualifies as the opinions or views of the CMHA representative about the operation of the program which was the subject of the audit.

It argues that this interpretation of the definition of “personal information” is consistent with other orders issued by the Commissioner’s office, particularly where the information was not provided in the course of the individual’s job responsibilities or in their professional capacity. It relies on the decision in Order P-654, where former Adjudicator Anita Fineberg held that statements taken from employees during a Management Review of the practices of the Rent Review Hearings Board constituted the personal opinions of the employees about other individuals and Board practices, and thereby qualified as their “personal information” within the meaning of the definition of that term in section 2(1).

The Ministry submits that similar witness statement information taken and recorded in the context of an internal investigation into certain unauthorized activities by another employee was found to contain the personal information of the witnesses in Order M-521. The Ministry argues that in the context of Workplace Discrimination and Harassment Program investigations and

other internal Ministry program investigations, witnesses' names and other information were found to constitute their "personal information" [Orders P-685, P-723, P-962, P-1014 and P-1169].

In Reconsideration Order R-980015, I reviewed the jurisprudence relating to the definition of the term "personal information" as it relates to individuals who act as the representative of their employer organization. I found that:

... the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. Individuals expressing the position of an organization act simply as a conduit between the intended recipient of the message and the organization. The voice is that of the organization rather than that of the individual delivering the message. In the usual case, the views expressed are those of the organization, as opposed to the personal opinions or views of the individual within the meaning of section 2(1)(e) of the Act. Further, this information will not be considered to be "about" the individual, for the reasons set out above.

The information contained in Record C-14 was compiled in the course of an audit by the Ministry into the activities of the appellant and the consumer/survivor organization which employed him. The CMHA representative was contacted by the Ministry to provide any information which he/she may have learned in his/her capacity as the Executive Director of the Windsor/Essex County Branch of this organization about the operation of the program being audited. In my view, the CMHA representative provided the views and opinions which are expressed in the record in his/her capacity as Executive Director, on behalf of the CMHA. These views and opinions do not reflect the **personal** opinions or views of the Executive Director, in the sense required by paragraph (e) of the section 2(1) definition of "personal information", nor were they provided in any capacity other than as an official with the CMHA.

I find that because Record C-14 does not reflect the personal opinions or views of the Executive Director about the operation of the program, it does not qualify as the personal information of this individual under paragraph (e) of the definition in section 2(1). In fact, because the views and opinions which are expressed in the record pertain primarily to the appellant, I find that the exception described in paragraph (e) applies, since the opinions or views relate to the appellant.

Similarly, I find that while Record C-14 refers to the Executive Director by name, it does not contain any other information which may be described as his/her "personal information". The statement taken by the auditor includes factual information provided by the Executive Director about the origins of the program and the involvement of the appellant, but does not include anything of a personal nature relative to the Executive Director. Accordingly, I find that this information cannot qualify as personal information under paragraph (h) of the definition of that term.

Finally, I find that because the information is not "about" the Executive Director, it cannot qualify as "personal information" under the definition of that term which is contained in the introductory wording in section 2(1). Record C-14 is "about" the consumer/survivor organization under investigation and the involvement of the appellant in that organization.

Because I have found that Record C-14 does not contain the personal information of the CMHA representative, it is not necessary for me to address the application of section 49(b) to this record as only "personal information" is subject to this exemption.

Does Record C-14 contain the personal information of any consumer/survivors?

The Ministry submits that Record C-14 refers to "consumer/survivors" and that although they are not named in the document, they are "identifiable". As a result, the information qualifies as their "personal information" as defined in the introductory wording in section 2(1). The Ministry relies on the decision in Order P-230 where former Commissioner Tom Wright held that:

Provisions of the Act relating to the protection of personal privacy should not be read in a restrictive manner. If there is a **reasonable expectation** that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information. [my emphasis]

The Ministry submits that the consumer/survivor population in this program was fewer than 20 people "with a core of normally 5-7" individuals. It argues that because the appellant was involved in the operations of the program, it is reasonable to expect that he will be able to identify the individuals whose concerns are expressed in Record C-14.

I cannot agree that the references contained in Record C-14 could reasonably be expected to enable the appellant to identify by name the consumer/survivors referred to therein. In my view, the "concerns" outlined in the record originated with the CMHA and not the consumer/survivors. In addition, I find that the number of such consumer/survivors involved in the program over the period of time covered by the audit was such that any such references could involve any number of individuals and it would be very difficult, if not impossible to identify any single individual from the record.

Accordingly, I find that the information contained in Record C-14 is not "about" any identifiable consumer/survivors and cannot, therefore, be said to constitute the "personal information" of any of these individuals. For the reasons described above, this information is not, therefore, exempt from disclosure under section 49(b).

Does Record C-14 contain the personal information of the individual referred to in section 3?

The Ministry suggests that Record C-14 also contains the personal information of an employee of its' Consumer/Survivor Development Initiatives Program (CSDI Program) who is mentioned by name in this document. It argues that because this individual's name was provided to the auditor by the Executive Director in the course of the audit, it constitutes the employee's personal information. It further suggests that because this individual was not notified by this office of the appeal under section 50(3) or given the opportunity to make submissions under section 52(13), this reconsideration process is fundamentally flawed.

The reference to this individual in Record C-14 is to the fact that he/she "played a role" in "an attempt to put things on a better footing". I find that any involvement in the discussions between the consumer/survivor organization and the CMHA on the part of the Ministry employee was in his/her capacity as an employee of the Ministry, and not in any personal capacity. The individual's involvement in the matter was purely as a result of his/her employment by the Ministry's CSDI Program and not as a result of his/her personal activities.

For this reason, I find that the information in Record C-14 which relates to this individual does not qualify as his/her "personal information" for the purposes of section 2(1) and cannot, therefore, be exempt under section 49(b).

Based on my review of the record and the material provided by the parties, for the reasons elaborated above, I am not persuaded that an error occurred which requires me to alter my decision in Order P-1568.

ORDER:

1. I order the Ministry to disclose Record C-14 in its entirety to the appellant by providing him with a copy by **January 28, 1999**, but not before **January 25, 1999**.
2. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Donald Hale
Adjudicator

December 22, 1998