



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2144

Appeal PA-020227-1

Public Guardian and Trustee



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Public Guardian and Trustee (the PGT), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to records in the following terms:

This is in regards to a letter sent from Penetang in 1995 to allow them to medicate me without my consent.

I would like the complete file including all/any dialogue/letters from Penetang included.

The PGT located a number of responsive records and decided to grant full or partial access to some records, and to deny access to others in their entirety.

In denying access to certain records or parts of records, the PGT relied on the discretionary exemption in section 49(b) of the *Act* (discretion to refuse requester's own information) in conjunction with section 21(1) (unjustified invasion of personal privacy), with reference to the criterion in section 21(2)(f) (highly sensitive). Initially, the PGT also referred to section 13 of the *Act*, but this section is no longer in issue.

The requester appealed the decision of the PGT. During the course of mediation through this office, certain issues were narrowed or clarified. As I have indicated, section 13 is no longer in issue. The PGT decided to release additional information in the records. The appellant believes that more records should exist. Specifically, he believes that there should be a record of a conversation between himself and a named employee of the PGT in 1995, as well as a record of a conversation between the same PGT employee and a named physician. In addition to the denial of access, therefore, the reasonableness of the PGT's search for records is also an issue in this appeal.

I sent a Notice of Inquiry to the PGT and to an affected party, inviting them to submit representations on the facts and issues raised by this appeal. The affected party did not respond. I shared the representations of the PGT with the appellant, who was also invited to submit representations. The appellant has not provided any representations.

CONCLUSION:

I find that section 49(b), in conjunction with section 21(1), applies to exempt the information from disclosure.

RECORDS:

Of the records located by the PGT, nine pages remain at issue. The PGT has denied access to pages 9 and 10 in their entirety. These pages are excerpts from a Health Decisions Questionnaire. The PGT has also denied access to portions of pages 6, 7, 8, 12, 16, 17 and 26, which consist of PGT memoranda, PGT correspondence, and internal PGT notes and email messages.

DISCUSSION:

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the PGT has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the PGT will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the PGT to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the PGT must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the PGT response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In this appeal, the PGT has submitted an affidavit by counsel with the PGT, describing the search for records. This individual describes her review of the request, her contact with another individual having current knowledge of the file to which the request pertained, her review of the File Management System of the PGT with a view to determining whether there were any other relevant files, and her review of the files. This individual also describes a further search undertaken at the request of the Co-ordinator at the Ministry of the Attorney General's Freedom of Information and Protection of Privacy Office.

After reviewing the submissions of the PGT, including the affidavit, I find that it made a reasonable determination about the likely location of responsive records, and collected and reviewed the relevant files. On the basis of the representations and evidence before me, I find that the PGT has conducted a reasonable search for records responsive to the request.

PERSONAL INFORMATION

Before turning to the section 21/49(b) exemptions claimed by the PGT, I will consider whether the records contain personal information, and if so, to whom that personal information relates. The answer to these questions determines which parts of the *Act* may apply.

The application of the section 21 personal privacy exemption, as well as the application of the section 49 (b) exemption, depends on a finding that the records contain "personal information" as defined in 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 [paragraph (c)] 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 [paragraph (h)].

On my review of the records, I find that they all contain the personal information of the appellant. I am also satisfied that they contain the personal information of individuals other than the appellant. Some of the information consists of views and opinions provided to the PGT by other individuals about the appellant. In some circumstances, this type of information is considered to be "about" the subject individual, rather than "about" the individual giving the opinion. Indeed, the definition of "personal information" under the *Act* **excludes** the personal opinions or views of an individual where they relate to another individual. In the circumstances of this appeal, however, I am satisfied that the views and opinions given by other individuals about the appellant also reveal the personal information of these other individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/UNJUSTIFIED INVASION OF PERSONAL PRIVACY

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

Section 49(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

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.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types

of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Sections 21(3) and 21(4) are not relevant to my findings in this appeal.

In the case before me, the PGT have relied on the factor in section 21(2)(f) to support its decision to withhold the personal information in the records. Section 21(2)(f) provides:

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,

the personal information is highly sensitive;

The PGT has provided some background about the circumstances under which the information in the records was collected. It states that the PGT is often requested to make health care decisions for individuals who are incapable of making those decisions themselves and have nobody else willing or able to make that decision available to them. The Treatment Decisions Unit of the PGT is the department responsible for gathering information relating to the treatment being proposed, and asking questions of the physicians proposing the treatment. The Treatment Decisions Unit also attempts to locate any next of kin who may be willing and able to make decisions on behalf of the alleged incapable person.

If relatives are found, then the Treatment Decisions Consultant must contact them in order to determine whether these individuals are willing to make treatment decisions instead of the PGT. If they are not willing to do so, then the reason given must be documented on the file.

The Treatment Decisions Unit was involved with the appellant in June of 1995. A physician found that the appellant was incapable of consenting to treatment and contacted the PGT for consent. Prior to making any decisions, staff of the Treatment Decisions Unit contacted the relatives of the appellant to determine whether or not they would make decisions regarding the treatment on behalf of the appellant.

I have reviewed the personal information about individuals other than the appellant contained in the disputed portions of the records. I am satisfied, given their content and the context in which this information was collected, that this personal information is highly sensitive. I find that the factor in section 21(2)(f) weighs strongly in support of a conclusion that the disclosure of this information would be an unjustified invasion of the personal privacy of these individuals.

I also find that there are no factors in section 21(2) weighing in favour of disclosure of this information. Accordingly, taking into account section 21(2)(f), I am satisfied that disclosure of the personal information of individuals other than the appellant in the disputed portions of the records would constitute an unjustified invasion of their personal privacy.

Further, I am satisfied that it is not possible to sever the personal information of the appellant from the personal information of individuals other than the appellant.

Finally, I find that the PGT has exercised its discretion appropriately in refusing access to the personal information of the appellant under section 49(b), in the circumstances of this appeal.

ORDER:

I uphold the decision of the PGT to deny access to pages 9 and 10 of the records in their entirety, and to the severed portions of the other records at issue.

Original signed by: _____
Sherry Liang
Adjudicator

_____ May 14, 2003