

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3490-F

Appeal PA14-28

Waypoint Centre for Mental Health Care

May 14, 2015

**Summary:** The appellant made a request to the Waypoint Centre for Mental Health Care (Waypoint) for access to two security videotapes. Waypoint denied access to the videos, claiming the discretionary exemptions in section 49(a) (discretion to refuse requester's personal information), in conjunction with section 14(1) (law enforcement) and section 49(b) (personal privacy), in conjunction with section 21(1). In Order PO-3478-I, the adjudicator found that the videos contain the personal information of the appellant, other patients and visitors to Waypoint. The application of the exemption in section 49(b), in conjunction with section 21(1) was upheld. However, the adjudicator did not uphold Waypoint's exercise of discretion and ordered it to re-exercise its discretion and provide the adjudicator with representations on that issue. This is the final order, disposing of the remaining issue in the appeal, Waypoint's re-exercise of discretion, which is upheld.

### OVERVIEW:

[1] This is the final order in this appeal. It addresses the re-exercise of discretion by the Waypoint Centre for Mental Health Care (Waypoint), disposing of the final issue raised in response to a request for copies of security videotapes taken at Waypoint.

[2] In response to the request, Waypoint identified two videotapes and denied access to them in their entirety, claiming the discretionary exemptions in section 49(b) (personal privacy), in conjunction with the mandatory exemption in section 21(1)

(personal privacy) and section 49(a) (discretion to refuse requester's personal information), in conjunction with sections 14(1)(e), (k) and (l) (law enforcement), of the *Act*.

[3] On April 10, 2015, I issued Order PO-3478-I, upholding Waypoint's decision. However, in that order, I also commented as follows on Waypoint's exercise of discretion:

Based on Waypoint's representations, I am not satisfied that it properly exercised its discretion because it failed to take into account relevant considerations and took into account irrelevant considerations. In particular, in its representations, Waypoint advised it took into consideration factors such as:

- the reason why the appellant seeks access to the videos;  
and
- possible implications of future access requests by other patients for similar types of videos.

In taking these factors into consideration, Waypoint then concluded that the appellant has no "justifiable" or "good" reason for receiving access to the videos, and that future requests of a similar nature would result in an "administrative nightmare" for Waypoint. In my view, these are not relevant or proper considerations. First, a requester is not required to provide or "justify" the reason for an access request. If an institution receiving a request is of the view that the request is made for a purpose other than access, it can notify the requester that it has decided that the request is frivolous and vexatious. That decision can then be appealed to this office. In this case, Waypoint did not do so and did not raise it in its representations. For an institution to determine that a requester has no "good" reason for an access request is a conclusion based on irrelevant or improper considerations.

Second, whether or not the results of this access request and appeal may lead to further access requests is completely irrelevant. Given that Waypoint is subject to the access provisions of the *Act*, institutions such as Waypoint should be prepared to receive access requests on an ongoing basis without categorizing access requests as "administrative nightmares."

In addition, I find that Waypoint did not take into consideration the purposes of the *Act*, including the principles that:

- information should be available to the public;

- individuals should have a right of access to their own personal information;
- exemptions from the right of access should be limited and specific;
- and the privacy of individuals should be protected.

[4] Accordingly, I included Order Provision 2, which contained the following term related to the exercise of discretion:

I order Waypoint to re-exercise its discretion under section 49(b) of the *Act* and to provide me with representations on its exercise of discretion by **May 11, 2015**.

[5] On May 11, 2015, Waypoint complied with Order Provision 2 by providing me with representations on the results of its re-exercise of discretion. Portions of the representations met this office's confidentiality criteria<sup>1</sup> and will not be set out in this order, but were taken into consideration in determining whether Waypoint properly re-exercised its discretion.

[6] For the reasons that follow, I uphold Waypoint's re-exercise of discretion and dismiss the appeal.

## **DISCUSSION:**

### **Did Waypoint properly re-exercise its discretion under section 49(b) of the *Act*?**

[7] The section 49(b) exemption is discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, Waypoint must exercise its discretion in deciding whether or not to disclose it.

[8] The Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

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<sup>1</sup> Set out in *Practice Direction 7*.

[9] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>2</sup>

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[10] In its representations, Waypoint provided background information describing itself as a unique institution in that part of its mandate is to provide specialized health care and risk management for psychiatric patients. These patients may include individuals who have been found not criminally responsible of criminal conduct by reason of mental disorder, as well as involuntary patients who are a danger to themselves and/or others. This client base, Waypoint advises, is considered to be the most dangerous in the province and/or those individuals who cannot be safely managed in a less secure psychiatric facility. Waypoint is considered to be the most secure of the psychiatric facilities in the province. Waypoint submits that its exercise of discretion under the *Act* took place within this health care and safety focused context.

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<sup>2</sup> Orders P-344 and MO-1573.

[11] Waypoint states that it acknowledges that because the appellant and other individuals appear in the videos, the appellant's access to his own personal information must be balanced with the rights of the other patients (depicted in the videos) to the protection of their privacy.

[12] Waypoint goes on to state that it took the following factors into consideration in re-exercising its discretion:

- various patients and visitors depicted in the videos did not provide their consent to disclose their own personal information;
- disclosure of the videos would not promote health and safety at Waypoint, particularly for the individuals appearing in them;
- the information in the videos, which relates to the health and psychiatric status of patients, is of a highly sensitive nature and may negatively impact an individual's reputation due to the stigma associated with mental illness;
- the application of section 21(3)(a) of the *Act*, which creates a presumption that the disclosure of information relating to psychiatric history, diagnosis, condition, treatment or evaluation constitutes an unjustified invasion of personal privacy; and
- the appellant's criminal history and threat to the safety of others.

[13] Lastly, Waypoint states that it acknowledges that individuals ought to have access to their own personal information. However, Waypoint submits, given that the facts in this situation include the competing interests of the privacy of other patients and security concerns, it has properly re-exercised its discretion to refuse to disclose the two videotapes to the appellant

[14] I find that, in re-exercising its discretion, Waypoint took into account relevant factors and weighed them both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, Waypoint's representations reveal that it considered the appellant's position and circumstances, balanced against the protection of the privacy of other individuals' personal information, as well as the safety of others in re-exercising its discretion not to disclose the information at issue.

[15] Under all the circumstances, therefore, I am satisfied that Waypoint has appropriately re-exercised its discretion under section 49(b). Accordingly, I uphold Waypoint's re-exercise of discretion to apply the exemption in section 49(b) to the videotapes I did not order disclosed in Order PO-3478-I.

**ORDER:**

The appeal is dismissed.

Original signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ May 14, 2015