Information and Privacy
Commissioner/Ontario

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

ORDER 159

Appeal 890238

Ministry of Health

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Commissioner.

On January 5, 1990, Sidney B. Linden, Information and Privacy Commissioner/Ontario appointed the undersigned Assistant Commissioner and delegated to the undersigned, the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On July 5, 1989, the requester wrote to the Ministry of Health seeking access to:

> Curriculae (sic) vitae of all members of Health Disciplines Board.
>
> Copies of all unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board.

2. On July 18, 1989, the Freedom of Information and Privacy Co-ordinator for the Ministry of Health (the "institution") responded to the request in the following manner:

> Unfortunately, access is not possible as the records requested are exempt under Section 21(3),

> personal information; and, Section 22(a), information that is currently available to the public.
>
> The information contained in curriculae vitaes (sic) is personal information under section 21(3) of the Act and, as such, is exempt from disclosure.
>
> With respect to unreported court decisions regarding the practices and procedures of the Health Disciplines Board, this too is exempt as the information is currently available to the public through the Office of the Registrar of the Supreme Court of Ontario.

3. On August 8, 1989, this office received an appeal from the decision of the institution in which the appellant stated:

> The Ministry of Health has refused to disclose the unreported judgments of the Divisional and Weekly Courts affecting the practices and procedures of the Health Disciplines Board and directed me to the Registrar of the Supreme Court. (Mr. Dunlop) (sic) who advises that he will not conduct the search of hundreds of thousands of files in order to locate a few decisions that are already known to the Registrar of the Health Disciplines Board. You will note that this information is important to me because the Board recently stalled a request for disclosure of its record, then decided to turn the request into a motion, 'heard' the motion secretly and based on an unreported decision, reversed its earlier position and disclosed. This conduct makes full disclosure of all unreported decisions of considerable importance.
>
> I also have requested a copy of the curriculae (sic) vitae of the Board members. Prima facie the refusal to disclose is justified as the qualifications and associations of the members that are relevant to their fitness to sit as Board members are what I seek to know. However, I believe that disclosure is in the public

> interest since the Board is, unlike a court, not independent. It is this lack of independence which results in the public interest in disclosure overriding the private interest of the members in confidentiality.

4. On August 18, 1989, notice of the appeal was given to the institution and the appellant.

5. The Appeals Officer obtained and reviewed the curricula vitae of five of the seven members of the Health Disciplines Board (the "Board"). Newspaper articles were attached to one of the curricula vitae. The institution agreed to disclose the newspaper articles to the appellant. The Appeals Officer was advised that the institution does not have custody or control of the curricula vitae of two of the Board members.

6. The institution maintained its position that the unreported court decisions are publicly available and that disclosure of the curricula vitae would be an unjustified invasion of the Board members' personal privacy. As a result, it was apparent to the Appeals Officer that a mediated settlement of the appeal would not be possible. Therefore, these two issues along with the institution's claim that it does not have custody or control of the curricula vitae of two of the Board members remain to be addressed in this appeal.

7. As mediation of the appeal was unsuccessful, notice that an inquiry to review the decision of the head was being conducted, was sent to the appellant and the institution on February 13, 1990. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist

the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

9. Written representations were received from the appellant and the institution. I have considered the representations of both parties in making this Order.

The issues arising in this appeal are as follows:

A. Whether the curricula vitae of members of the Health Disciplines Board contain "personal information" within the meaning of subsection 2(1) of the Act.

B. If the answer to Issue "A" is in the affirmative, whether disclosure of the curricula vitae would be an unjustified invasion of the personal privacy of the persons to whom the information relates, pursuant to section 21 of the Act.

C. If the answer to Issue "B" is in the negative, whether the two remaining curricula vitae are in the custody or under the control of the institution within the meaning of subsection 10(1) of the Act.

D. Whether the curricula vitae could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

E. Whether the unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board are properly exempt from disclosure pursuant to subsection 22(a) of the Act.

Before beginning my discussion of the specific issues in this case, I think it would be useful to outline briefly the purposes of the Act as set out in section 1. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

ISSUE A: Whether the curricula vitae of members of the Health Disciplines Board contain "personal information" within the meaning of subsection 2(1) of the Act.

Where a request involves access to personal information I must, before deciding whether an exemption applies, ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act. Subsection 2(1) of the Act provides the following definition:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

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

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(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.

In my view, the information contained in the curricula vitae of members of the Board is clearly personal information within the meaning of subsections 2(1)(a)(b)(d) and (h) of the Act.

ISSUE B: If the answer to Issue "A" is in the affirmative, whether disclosure of the curricula vitae would be an unjustified invasion of the personal privacy of the persons to whom the information relates, pursuant to section 21 of the Act.

Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act

prohibits the disclosure of this information, except in certain circumstances. In particular, subsection 21(1)(f) of the Act reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> ...
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Subsection 21(3) sets out a list of the types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Commissioner discussed the proper application of subsection 21(3) in Order 20, (Appeal Number 880075) dated October 7, 1988. At page eight of that Order the Commissioner stated:

> [Subsection 21(3)] specifically creates a presumption of unjustified invasion of personal privacy and in so doing delineates a list of types of personal information which were clearly intended by the legislature not to be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason.

Subsection 21(3) of the Act reads, in part, as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> ...
>
> (d) relates to employment or educational history;
>
> ...

> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Health Disciplines Board is constituted under the Health Disciplines Act. The Health Disciplines Act was enacted in 1974 to provide for the self-governing of the health disciplines of dentistry, medicine, nursing, optometry and pharmacy. Each health discipline is constituted as a College with a governing Council, Board of Directors and Committees, each with its own legislated responsibilities and duties.

According to a publication of the Health Boards Secretariat entitled "The Health Disciplines Board",

> The Act establishes the Health Disciplines Board whose members are lay people who are not employed by the Government and who are not, and never have been, members of a health discipline.
>
> There are seven members on the Board including a chairman and a vice-chairman. The members are appointed by the Lieutenant Governor-in-Council on recommendation of the Minister of Health and come from across the province and from different walks of life.
>
> It is the responsibility of the Board to ensure that the Colleges act reasonably and in the public interest, in their handling of registration of health professionals, and complaints.

Having reviewed the requested records and the representations received from the appellant and the institution, I find that the personal information in the curricula vitae of members of the Board relates to the members' employment or educational history, indicates racial or ethnic origin and political beliefs or associations. As such, disclosure of the personal information

contained in the curricula vitae would constitute a presumed unjustified invasion of the members' personal privacy pursuant to
subsections 21(3)(d) and (h) of the Act.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under subsection 21(3) have been satisfied, I must then consider whether any other provision of the Act comes into play to rebut this presumption. In Order 20, supra, the Commissioner outlined some of the situations in which the presumption provided by subsection 21(3) might be rebutted. At page 9 of that Order, the Commissioner stated:

> It is clear that the types of information listed in subsection 21(4) operate to rebut the presumption set out in subsection 21(3). The application of section 23 of the Act, which provides that an exemption from disclosure of a record under, amongst other sections, section 21 "does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption" may also result in disclosure. A further instance that is clear arises when a type of information listed under subsection 21(3) also triggers section 11 of the Act, which obliges the head to disclose any record "if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public".
>
> I believe that it is premature at this stage of the development of the Act to state that only the application of subsection 21(4), section 23 and section 11 can effectively rebut the presumptions set out in subsection 21(3). It could be that in an unusual case, a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual.

The appellant made reference to section 23 of the Act to rebut the presumption of an unjustified invasion of personal privacy and in support of disclosure of the requested records.

Section 23 of the Act states that:

> 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)

The Commissioner considered the proper interpretation of section 23 in Order 24 (Appeal Number 880006) dated October 21, 1988. At page 14 of that Order the Commissioner stated:

> The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The burden of proof with respect to section 23 was considered in Order 61 (Appeal Number 880166) dated May 26, 1989. The Commissioner stated at page 11:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case, and therefore the burden of establishing that section 23 applies is on the appellant.

The appellant submitted that:

> Prima facie the refusal to disclose is justified as the qualifications and associations of the members that are relevant to their fitness to sit as Board members are what I seek to know. However, I believe that disclosure is in the public interest since the Board is, unlike a court, not independent. It is this lack of independence which results in the public interest in disclosure overriding the private interest of the members in confidentiality.

In my view, the appellant has failed to demonstrate a compelling public interest in disclosure of the personal information in the requested records which clearly outweighs the purpose of protecting personal privacy under section 21 of the Act. Therefore, I find that the presumption of an unjustified invasion of the Health Disciplines Board members' personal privacy has not been rebutted and I uphold the head's decision not to disclose the requested records.

Although I have upheld the decision of the head, I encourage the institution, in keeping with the spirit of the Act, to prepare, in consultation with individual board members, a brief biography of each member. These biographies would then be available to interested members of the public.

ISSUE C: If the answer to Issue "B" is in the negative, whether the two remaining curricula vitae are in the custody or under the control of the institution within the meaning of subsection 10(1) of the Act.

As I have found that disclosure of the curricula vitae is prohibited by section 21 of the Act, it is not necessary for me to address the issue of whether the two remaining curricula vitae are in the custody or under the control of the institution

within the meaning of subsection 10(1) of the Act. This is due to the fact that even if I were to find that the institution did have custody or control of these records, their disclosure would be prohibited as outlined in Issue B.

ISSUE D: Whether the curricula vitae could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

While I have found that release of the personal information in the curricula vitae would be an unjustified invasion of the personal privacy of the Board members, I have also reviewed these records with a view to determining whether severances can reasonably be made pursuant to subsection 10(2) of the Act.

Subsection 10(2) of the Act states that:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In Order 24 (Appeal Number 880006) dated October 21, 1988, the Commissioner established the approach which should be taken when considering the severability provisions of subsection 10(2). At page 13 of that Order the Commissioner stated:

> A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, at the same time protecting the confidentiality of the record covered by the exemption.

Following a review of the curricula vitae, I find that it is not possible to make severances without disclosing the information that falls under the exemption.

ISSUE E: Whether the unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board are properly exempt from disclosure pursuant to subsection 22(a) of the Act.

Subsection 22(a) of the Act has been raised by the institution as the basis for refusing to disclose unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board.

Subsection 22(a) reads as follows:

> 22. A head may refuse to disclose a record where,
>
> (a) the record or the information contained in the record has been published or is currently available to the public;
>
> ...

Subsection 22(a) was considered in Order 42 (Appeal Number 880052) dated March 2, 1989. At page 10 of that Order the Commissioner stated that:

> This section provides a head with discretion not to release information that has been published or is currently available to the public in another form. It does not impose a requirement on the head to refuse disclosure; it gives the head an opportunity to refuse to disclose the requested information if it is otherwise available.

In Order 124 (Appeal Number 880124) dated November 24, 1989, the Commissioner reviewed the head's responsibility when relying on subsection 22(a). At page 12 the Commissioner stated that:

> However, in my view, when an institution relies on subsection 22(a), the head has a duty to inform the requester of the specific location of the records or information in question.

The institution advised the appellant that the unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board are publicly available through the Office of the Registrar of the Supreme Court of Ontario or through a publicly available computer database known as Quick Law.

In its representations, the institution stated that:

> The Appellant, by her own submission, indicated that the decisions are available from the Registrar of the Supreme Court of Ontario, yet he advised her that he would not conduct a search for the records. Section 22 of the Act does not stipulate that the institution must actually find records which are publicly available. The fact that the information is available to the public and the institution has informed the Requester of the specific location of the records satisfies the requirements of subsection 22(a).
>
> Furthermore, the Health Disciplines Board is unable to locate unreported judgments of the court in its files without searching through approximately 4,500 files. The role of the Health Disciplines Board is to review decisions of the complaints committee of the College of Physicians and Surgeons of Ontario. The complainant or the member complained against may request that the Health Disciplines Board review the decision of the complaints committee pursuant to section 8 of the Health Disciplines Act. The registration committee and the applicant or registrant

> are parties to proceedings before the Health Disciplines Board. The parties to proceedings may appeal from a decision of the Health Disciplines Board pursuant to subsection 11(9) of the Health Disciplines Act. The Health Disciplines Board can be named as a party in the court proceedings, but usually the complainant and the physician, or College are the parties to the action.

Subsection 11(9) of the Health Disciplines Act reads as follows:

> Any party to proceedings before the Board under this section may appeal from its decision or order to the Divisional Court in accordance with the rules of court and the provisions of section 13 apply with necessary modifications as if it were an appeal from a decision or order of a discipline committee.

In its representations, the institution further stated that:

> The Health Disciplines Board is therefore not directly involved in the appeals, and it does not as a matter of course receive copies of the court decisions. Consequently, a search of all the Health Disciplines Board's files would have to be conducted in order to retrieve court decisions. Even if the file contained a court decision, the Registrar of the Health Disciplines Board would not know whether it was an unreported or reported decision.
>
> The Health Disciplines Board retains their own counsel from outside the Government; therefore these unreported decisions which, in most cases, do not effect the Board are not generally received by the Board. Furthermore, a search of every Health Disciplines Board file would be very costly and the decisions are available to the public through the Supreme Court of Ontario. If the Appellant had more information regarding the requested court decisions such as the names of the parties, or the date of the action it would be easier to retrieve the decisions from the Registrar of the Supreme Court of Ontario. A search via "Quick law" which is a publicly available source of information would reveal the type of

> information the Appellant has requested without knowledge of the names of the parties to the action.

In support of her position that the unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board are not publicly available, the appellant indicated that Mr. Dunlop, Registrar of the Supreme Court, advised her that he will not conduct a search of hundreds of thousands of files in order to locate a few decisions that are already known to the Registrar of the Health Disciplines Board.

In her representations, the appellant further stated that:

> ...the registrar of the court automatically sends copies of all decisions to the parties. Sometimes the Board is a party. The successful party gives the order to the Board because the Board is obligated to implement it in the matter before it and to apply the decision in future. The Board does therefore have copies of all such decisions readily available as can be seen from its conduct.

The appellant also submitted that:

> ...this is no request for reported decisions (sic) and the Registrar will not go wrong in supplying all decisions as only a handful have been reported and are conceivably in the public domain. I do not agree that they are public even if reported as ordinary citizen can hardly be expected to read law reports. Refusal to supply these decisions on the basis that Quick Law has them (and it does not have all unreported decisions) and Quick Law is in the public domain is unwarranted having regard to the decision to release the newspaper reports on the background of the Chairman. Newspaper reports are in the public domain and the head cannot refuse to disclose one set of information because it is in public domain while disclosing another set of information because it is in the public domain. Nor do I agree that Quick Law is in the public domain.

A member of the Commissioner's staff contacted Mr. Dunlop, Registrar of the Supreme Court, to determine what a member of the public would be required to do to obtain the records requested by the appellant. Mr. Dunlop indicated that the Divisional Court Office has an index of the proceedings of the Divisional Court which are available to the public. The index lists the title of the proceeding alphabetically by the name of the plaintiff. It also includes the date of filing and a file number assigned to the proceeding.

In the circumstances of this appeal, the appellant would be required to manually review the indices for the years of interest to locate any proceedings relating to the Health Disciplines Board. She would then be able to provide the Divisional Court Office with a list of the file numbers to facilitate their retrieval. A fee of $2.50 would be charged for each file that is retrieved. The appellant would be responsible for any costs associated with making a photocopy of the files.

After carefully considering the representations of the appellant and the institution together with the information obtained from the Registrar's office, I am of the view that the unreported decisions requested are publicly available.

Support for the position I have taken can be found in an analysis of the way in which the Federal and various Provincial access legislation deals with publicly available information, by McNairn and Woodbury in Government Information: Access and Privacy, De Boo, 1989. At page 2-24 the authors state:

> Other information for which there is already a system of public access in place will be regarded as being available to the public. Someone who is seeking such

> information will normally be required to proceed in accordance with the rules of that system. A person who puts in an access request for a deed to property or a list of directors in a company's information return, for example, will likely be instructed to visit the land or companies registry to locate and view the relevant document. A government institution is unlikely to undertake a search for such a document when it has provided the facility for that to be done by members of the public or their representatives. If copies of a deed or a company return, once located, are ordered from the public office, charges will be levied in accordance with the scale of fees under the land registration or companies legislation, rather than that under the access legislation.
>
> The authority for diverting the requester to another access system in these circumstances is fairly clear under the federal, Manitoba and Ontario Acts. While the other access statutes are silent on this matter, they should not be interpreted as creating a right to use their access processes in preference to resorting to the public record. In other words, the existing systems for access to particular kinds of information will take priority even if not as convenient or cost effective for the requester. In fact, the Quebec Act states specifically that its access rights do not apply to information in certain public registers, namely those with respect to land transactions, civil status and matrimonial regimes. (emphasis added)

Subsection 22(a) of the Act is a discretionary exemption. As such, it provides the head with the option to disclose the requested records even though they may, in the head's view, qualify for exemption under this subsection. The factors considered by the head in exercising her discretion not to disclose the unreported decisions were outlined in the institution's representations as follows:

> The fact that each of 4,500 files would have to be searched to locate the files containing decisions of the courts was a major factor affecting the head's decision. Even if the files containing court decisions

> were identified through the above-noted process not all of the decisions would be located and the Registrar of the Health Disciplines Board would not know if the decision had been reported. Furthermore, a search of each Health Disciplines Board's file would be very expensive. These factors were considered by the head in exercising her discretion not to disclose the records.

I find nothing improper in the way in which the head has exercised her discretion and would not alter it on appeal.

In summary my Order is as follows:

1. I uphold the head's decision not to disclose the personal information in the curricula vitae of the members of the Health Disciplines Board.

2. I find that it is not possible to make reasonable severances to the curricula vitae without disclosing the information that falls under the exemption.

3. I uphold the head's decision not to disclose the unreported decisions of the courts regarding the practices and procedures before the Health Disciplines Board pursuant to subsection 22(a) of the Act.

Original signed by: April 17, 1990
Tom Wright Date
Assistant Commissioner