



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

# **ORDER 51**

**Appeals 880257, 880278 and 880279**

**Ministry of Health**



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**[IPC Order 51/April 11, 1989]**

## O R D E R

These appeals were received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) the right to appeal any decision of a head under the Act to the Commissioner.

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

1. On June 21, 1988, the Ministry of Health (the "institution") received the following request for access to records:

"1. Amount of money that [medical laboratory service organization A] were paid in the fiscal years, 1984, 1985, 1986, 1987.

2. Amount of money that [medical laboratory service organization B] were paid in the fiscal years 1984, 1985, 1986, 1987.

3. Amount of money that [medical laboratory service organization C] were paid in the fiscal years, 1984, 1985, 1986, 1987.

4. I would like copies of submitted bids and/or contracts for [medical laboratory service organization A].

5. I would like copies of submitted bids and/or contracts for [medical laboratory service organization B].
  6. I would like copies of submitted bids and/or contracts for [medical laboratory service organization C]. NO EXCLUSIONS TO THE ABOVE INFORMATION."
2. The institution processed the items as six separate requests. Access to the records referred to in paragraphs 4, 5 and 6 was provided to the requester. As far as the other three requests were concerned, the requester was informed by letter on August 4, 1988 that "...access has been denied [by the Deputy Minister of the institution] under the authority of Section 67 of the Act." In this letter, the institution's Freedom of Information and Privacy Co\_ordinator (the "Co\_ordinator") pointed out that section 44(2) of the Health Insurance Act acted as a confidentiality provision, barring the application of the Act.
  3. On August 17, 1988, the requester wrote to me appealing the decisions of the Deputy Minister and I gave notice of the appeals to the institution.
  4. Copies of the requested records were obtained and reviewed by an Appeals Officer assigned to these appeals.
  5. The appellant was provided with a copy of my Order 9 (Appeal Number 880016) released July 28, 1988, wherein I held that section 44 of the Health Insurance Act was a confidentiality provision within the meaning of section 67

of the Freedom of Information and Protection of Privacy Act, 1987. That Order referred to section 44 of the Health Insurance Act and discussed my approach to the application of section 67 of the Act. The appellant was advised that the issue to be determined in these appeals concerned the scope of the confidentiality provision in question and whether it was sufficiently broad to cover the requested records.

6. Attempts were made by the Appeals Officer and the parties to settle these appeals, however a settlement was not effected as both parties maintained their respective positions.
7. On February 2, 1989 my office sent notices to the appellant and the institution that I was conducting an inquiry to review the decisions of the head. Enclosed with this letter was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeals. The Appeals Officer's Report outlines the facts of the appeals 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 appeals. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.
8. On February 17, 1989, the parties were asked to provide written representations on the issue arising in these appeals.

9. Written representations were received from the institution and I have considered them in making this Order. No representations were received from the appellant.

The issue arising in these appeals is as follows:

Whether subsection 44(1) of the Health Insurance Act operates to bar the application of the Freedom of Information and Protection of Privacy Act, 1987 in the circumstances of these appeals. Specifically:

- A. Whether the confidentiality provision precludes access to the records requested by the appellant; and
- B. Whether any of the statutory exceptions listed in subsection 44(2) of the Health Disciplines Act operate to allow the release of the records requested by the appellant.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection (1)(a) provides the 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. The 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.

It should also be noted that section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions of the Act lies upon the head. Where, as in these appeals, an institution purports to withhold records or information from disclosure pursuant to a confidentiality provision, the onus is on the institution to prove that the confidentiality provision in question operates as a bar to the application of the Act.

Section 67 of the Act reads as follows:

(1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,

- (a) the repeal of unnecessary or inconsistent provisions; and
- (b) the amendment of provisions that are inconsistent with this Act.

(2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

(3) Subsection (2) shall not have effect until two years after this section comes into force.

Section 67 does not contain an exemption to the Act's disclosure obligations. Rather, subsection 67(2) provides that the Act overrides "confidentiality provisions" in other legislation, unless the other legislation specifically provides otherwise.

However, because subsection 67(3) delays the application of subsection 67(2) until January 1, 1990, a head may be bound not to disclose information pursuant to a "confidentiality provision" contained in another piece of legislation until that date.

In my Order 9 (Appeal Number 880016) and my Order 18 (Appeal Number 880086), I found that subsection 44(1) of the Health Insurance Act did qualify as a "confidentiality provision" as that term is used in section 67 of the Freedom of Information and Protection of Privacy Act, 1987. Thus, the issues to be determined in this appeal are whether the records requested by the appellant fall within the scope of subsection 44(1) and, if so, whether any of the statutory exemptions listed in subsection 44(2) operate to allow for the release of the records.

I would like to stress that in determining these issues, I am not engaged in a balancing of access and privacy interests. Rather, my responsibility is to ensure that the rights and obligations set out in the Act are respected and complied with. Where an institution purports to remove itself from the ambit of the Act through the use of a "confidentiality provision" in another Act, it is my responsibility to scrutinize the provision of that other Act to ensure both the relevance and application of the provision.

Section 44 of the Health Insurance Act reads as follows:

(1) Each member of the Medical Review Committee, every practitioner review committee, the Medical Eligibility Committee and the Appeal Board and each employee thereof, the General Manager and each person engaged in the administration of this Act and the regulations shall preserve secrecy with respect to all

matters that come to his knowledge in the course of his employment or duties pertaining to insured persons and any insured services rendered and the payments made therefor, and shall not communicate any such matters to any other person except as otherwise provided in this Act.

(2) A person referred to in subsection (1) may furnish information pertaining to the date or dates on which insured services were provided and for whom, the name and address of the hospital and health facility or person who provided the services, the amounts paid or payable by the Plan for such services and the hospital, health facility or person to whom the money was paid or is payable, but such information shall be furnished only,

- (a) in connection with the administration of this Act, the Health Disciplines Act, the Public Hospitals Act, the Private Hospitals Act or the Ambulance Services Act (Canada), the Medical Care Act (Canada) or the Criminal Code (Canada), or regulations made thereunder;
- (b) in proceedings under this Act or the regulations;
- (c) to the person who provided the service, his solicitor or personal representative, the executor, administrator or committee of his estate, his trustee in bankruptcy or other legal representative;
- (d) to the person who received the services, his solicitor, personal representative or guardian, the committee or guardian of his estate or other legal representative of that person; or
- (e) pursuant to a subpoena by a court of competent jurisdiction.

(3) The information referred to in subsection (1) may be published by the Ministry of Health in statistical form if the individual names and identities of persons who received insured services are not thereby revealed.

(4) The General Manager may communicate information of the kind referred to in subsection (2) and any



other information pertaining to the nature of the insured services provided and any diagnosis given by the person who provided the services to the statutory body governing the profession or to a professional association of which he is a member.

Furthermore, sections 52 and 53 of Regulation 452 under the Health Insurance Act, prescribe that "laboratory services" are insured services for the purposes of the Act.

I have reviewed the requested records and, in my view, they contain information clearly pertaining to "insured services rendered and the payments made therefor" and therefore fall within the scope of subsection 44(1) of the Health Insurance Act.

Turning to the exceptions to confidentiality listed in subsection 44(2) of that Act, I note that the appellant has provided me with no information respecting the application of this subsection. In particular, I have no basis for concluding that the appellant is a member of the class of persons who may be entitled to the requested information pursuant to paragraphs (c) and (d) of subsection 44(2). Therefore, I find that subsection 44(2) does not operate to allow for the release of the requested records.

In conclusion, I find that subsection 44(1) of the Health Insurance Act is a "confidentiality provision" barring the application of the Freedom of Information and Protection of Privacy Act, 1987 until January 1, 1990. As the records

requested by the appellant fall within the scope of that provision, I have no basis for interfering with the institution's decisions.

Original signed by: \_\_\_\_\_  
Sidney B. Linden  
Commissioner

\_\_\_\_\_ April 11, 1989  
Date