



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

ORDER 207

Appeal 890278

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) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of 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. By letter dated July 10, 1989, a request was made to the Ministry of Health (the "institution") for the following:

Submissions made to the Information Commissioner re Appeal No. 88007 (sic) in 1988, 1989.

2. On August 11, 1989, the institution responded to the requester as follows:

The Ministry has reviewed your request for access to records under the Freedom of Information and Protection of Privacy Act and access has been denied under the authority Sections 19 and 52(3). 52(9) and 52(13) of the Act.

The reason this provision applies to the records requested is:

- Section 19 - Solicitor-Client privilege;
- Section 52(3) - The inquiry may be conducted in private;
- Section 52(9) - Information supplied in the course of an inquiry is privileged;
- Section 52(13) - No person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

3. By letter dated August 25, 1989, the requester appealed the denial of access.
4. On August 30, 1989, notice of the appeal was given to the institution and the appellant.
5. The records at issue were reviewed by an Appeals Officer. No attempt was made to mediate as the appellant and the institution both maintained their original positions.
6. By letter dated March 7, 1990, notice that an inquiry was being conducted to review the decision of the head was given to the institution and the appellant. Enclosed with the notice of inquiry was a copy of a report prepared by the Appeals Officer, intended to assist 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 sections of the Act which appear to the Appeals Officer, or

any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations need not limit themselves to the questions set out in the report.

7. Representations were received from the institution and the appellant. In its representations, the institution dropped its reliance on subsections 52(3) and (9). I have considered all representations in making my Order.

The issues arising in this appeal are as follows:

- A. Whether the appellant has a right of access to the representations made by an institution to the Information and Privacy Commissioner/Ontario, in the course of an inquiry under section 52 of the Freedom of Information and Protection of Privacy Act, 1987.
- B. If the answer to Issue A is in the affirmative, whether the record is subject to the discretionary exemption provided by section 19 of the Act.

Issue A: Whether the appellant has a right of access to the representations made by an institution to the Information and Privacy Commissioner/Ontario, in the course of an inquiry under section 52 of the Freedom of Information and Protection of Privacy Act, 1987.

The appellant has requested the representations made by the institution to the Information and Privacy Commissioner/Ontario (the "Commissioner") in Appeal Number 880007 and the institution has denied access to this record by relying on sections 52 and 19.

Section 52 contains the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that

are appealed to the Commissioner. The statutory authority of the Commissioner extends to the power to make a binding Order, the ability to require production of any record in the custody or under the control of an institution, the right to enter the premises of an institution and the right to conduct inquiries in private.

In arriving at my decision, I have considered the unique circumstances associated with an appeal. A person has made a request for a record and an institution has denied access to it. The person appeals the decision denying access to the Commissioner who must decide if the appellant is to receive access to the record. If an appellant were provided with access to the record or to other information that would disclose the content of the record, before the decision on access was made, the appeal would be redundant. I believe that this is one of the reasons why the Legislature adopted subsection 52(13) of the Act. Subsection 52(13) of the Act reads as follows:

The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person. (emphasis added)

Section 52 and in particular subsection 52(13), was discussed by Commissioner Sidney Linden in Order 164 (Appeal Number 890056), dated April 24, 1990, at page 21 where he stated:

...the words [in subsection 52(13)] "no person is entitled" to see and comment upon another person's representation mean that no person has the right to do so. In my view, the word "entitled", while not

providing a right to access representations of another party, does not prohibit me from ordering such an exchange in a proper case.

...the Statutory Powers Procedure Act does not apply to an inquiry under the Freedom of Information and Protection of Privacy Act, 1987. Thus, the only statutory procedural guidelines that govern inquiries under the Freedom of Information and Protection of Privacy Act, 1987 are those which appear in that Act. ...while the Act does contain certain specific procedural rules, it does not in fact address all the circumstances

which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.

...

Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer's Report, allow the parties a considerable degree of such disclosure. However, in the context of the statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and the institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

I agree with Commissioner Linden that there is no right of access to the representations made in the course of an inquiry. In my view, the Commissioner or his/her delegate has the fundamental power to control the inquiry process. In Re Cedarvale Tree Services Ltd. and Labourers' Int'l. Union of

North America, Local 183, [1971] 3 O.R. 832 (Ontario Court of Appeal), Mr. Justice Arnup, at page 841, stated as follows:

[T]he Board [Ontario Labour Relations Board] is a master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

In Practice and Procedure before Administrative Tribunals, The Carswell Company Limited, Toronto, 1988, Robert MacCaulay, Q.C. states that the above-noted observation of Mr. Justice Arnup with respect to the Ontario Labour Relations Board is of general application to administrative agencies. Further at pages 9-7 and 9-8 he states:

Generally, subject to any statutory provisions, boards have a common law obligation to run their own affairs as they see fit. This may be construed as a conferral of extensive discretion, but it is subject to the courts' powers to review. To be given wide discretion does not mean that it will be exercised in every case, but rather in the appropriate circumstances.

In Fishing Vessel Owners' Association of British Columbia et al. v. Canada, (1985) 57 N.R. 376 (Federal Court of Appeal), Mr. Justice Andy stated, at page 381, as follows:

Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. This, however, is subject to any limitations or

provisions imposed on it by the law generally, by statute or the rules of Court.

I believe that it is essential to the integrity of the inquiry system and to the effective operation of the appeal process set out in the Act that either the Commissioner or his/her delegate be the one who decide the question of whether an appellant will have access to the representations made by an institution in the course of an inquiry.

It is the practice of the Commissioner or his/her delegate during the course of an inquiry to review the representations of the parties to an appeal and to consider whether the appellant should

be given access to all or part of the representations, whether there is a need for clarification of representations or whether a party should be given the opportunity to respond to the representations.

The records at issue in this appeal are the representations made by the institution in the course of an inquiry conducted by the Commissioner in Appeal Number 880007, which resulted in Order 68 dated June 28, 1989. Order 68 is silent as to the issue of access by the appellant to the representations of the institution. It is to be noted that the appellant in the present appeal was also the appellant in Appeal Number 880007.

It is my view that the question of access to the institution's representations has already been dealt with by Commissioner Linden in the course of Appeal Number 880007. The fact that the

institution's representations were not provided to the appellant in Appeal Number 880007 confirms to me that the Commissioner already considered the question which is at issue in this appeal.

For all of the foregoing reasons, I conclude that the appellant has no right of access to the representations made in the course of Appeal Number 880007.

Original signed by: _____
Tom A. Wright
Assistant Commissioner

_____ November 27, 1990
Date