



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

ORDER 19

Appeal 880055

Ministry of Correctional Services



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Appeal Number 880055

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, (the "Act") which gives a person who has made a request for personal information under subsection 48(1) of the Act, a right to appeal to me any decision of a head under the Act.

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

1. On February 4, 1988, the Ministry of Correctional Services (the "institution") received a request for access to a complete copy of the appellant's probation case file covering the period from January, 1987 to January 7, 1988.
2. By letter dated March 10, 1988, the Freedom of Information and Privacy Co_ordinator for the institution replied to the appellant, attaching photocopies of documents from the appellant's Probation Case File but not including the following records from the file: 1) a psychological report prepared by the Regional Psychologist, 2) the casenotes of the Probation and Parole Officer, and 3) the Level of Supervision Inventory Form.

In its letter to the appellant, the institution gave its reasons for not forwarding these records and cited subsection 48(4) of the Act stating that a ministry "shall

ensure that personal information is provided to an individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used". The letter further stated that "In order to provide you with an opportunity to have personal information on your Probation Case File explained to you,...[the Regional Psychologist] has indicated that he would be willing to review his report, the casenotes and the Level of Supervision Inventory Form with you at a mutually agreeable time. If you wish to meet with him to discuss the contents of the file, you are encouraged to contact...[him] directly at ...[telephone number]."

3. On March 30, 1988, the appellant sent a letter to me appealing the decision "to deny access to the requested records under the Act".
4. On April 15, 1988, the records at issue in this appeal were examined by the Appeals Officer.
5. On April 18, 1988, the Appeals Officer wrote to the appellant to confirm that the appellant understood the institution's position that access would be granted to the records if she attended with the Regional Psychologist so that he could explain the contents of the records to her before releasing them. In this letter, the appellant was also advised that the Appeals Officer had examined the records in issue.

6. On April 28, 1988, the appellant advised the Appeals Officer by telephone that she would not attend with the Regional Psychologist and maintained that the institution's requirement that she do so before releasing the records to her effectively denied her access to the records.
7. On June 17, 1988, I sent notice to the appellant and the institution stating that I was conducting an inquiry into this matter to review the decision of the head of the institution.
8. On July 5, 1988, I sent notice to the appellant and the institution requesting that written representations be made to me prior to July 22, 1988. I received written representations from the institution but not from the appellant.
9. Further representations were requested from the institution on August 30, 1988 and received on September 8, 1988.

It should be noted, at the outset, that one of the principal purposes of the Act as stated in subsection 1(b) is:

"to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information".

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in the Act lies upon the head.

The issue arising in this appeal is as follows:

Whether any part of the records still undisclosed can be disclosed without the necessity of having someone explain them to the appellant.

In its written representations, the institution indicated that, after further consultation with the Regional Psychologist, it was prepared to release the casenotes of the Probation and Parole Officer and the Level of Supervision Inventory Form to the appellant without an explanation, although it maintained that it would still be "advisable" for the appellant to attend to meet with the Probation Officer who prepared the report or the Acting Area Manager and it invites the appellant to do so. Regardless of whether or not the appellant agrees to accept the institution's offer to have these records explained to her, my order is that the institution release these records to the appellant within twenty (20) days of the date of this Order.

With respect to the record still at issue (the Regional Psychologist's report) subsection 47(1)(a) of the Act states as follows:

"Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution;"

In its letter to the appellant dated March 10, 1988, and in its written representations to me on this inquiry, the institution has relied on subsection 48(4) as its authority to require the

appellant to attend at the institution to have this record "explained" to her by the psychologist who wrote it.

Subsection 48(4) of the Act states that:

"Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used."

In its representations, the institution stated that,

"Given the appellant's psychiatric history and Dr. s's diagnostic impression of [. . .], the ministry maintains that the appellant's comprehension of this report in the absence of a professional explanation by Dr. _____ would be unduly compromised."

I agree that subsection 48(4) of the Act does place a duty on the head to "ensure that the personal information is provided to the individual in a comprehensible form". Clearly, the subsection creates a duty to ensure that the average person can comprehend the record. For example, a computer_coded record would be incomprehensible to the average person if provided without the key which will "unlock" it.

But, does subsection 48(4) create a further duty on the head to assess a specific requester's ability to comprehend a particular record? With respect, I do not think that it does. Absent a request for an explanation or clarification by the requester to make a record comprehensible to him or her, an independent assessment by a head of a requester's abilities to comprehend is not necessary. Above all, I do not think that a perception on the part of the head that a particular requester will not be

able to understand a record is a justification for refusing to disclose the record.

In this case, the requester would have no difficulty in "understanding" or "comprehending" the contents of the record in question _ the record is in a "comprehensible form" as required by the Act.

In this appeal I see the primary concern of the institution as being the possibility that the requester may "misinterpret" the significance or use of medical or psychiatric terms in the record at issue. As part of the institution's representations, their Regional Psychologist stated:

"I have had a significant amount of experience myself in dealing with the clients of psychologists and other mental health practitioners who have had significant upsets and distortions in their personality that were caused by misinterpretations of technical mental health records that were not designed for independent access by the client. In some instances, they have carried these distorted and painful ideas with them for many years. Granting access in the method chosen by the ministry minimizes this concern by giving both the appellant and the staff member an opportunity to clarify any aspect of the records that appears to have a damaging potential."

The Act provides a head with the discretion to refuse to disclose a record containing personal information based on a head's reasonable belief as to a particular characteristic or proclivity of the requester. Subsection 49(d) of the Act reads as follows:

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

- (d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;"

The personal information in question in this appeal is "medical information" and subsection 49(d) gives the head the discretion whether or not to release this kind of information. However, the institution has not suggested that the head has or should have exercised his discretion under subsection 49(d) in favour of non_disclosure. In the absence of any reference by the head to subsection 49(d) of the Act, I must conclude that he felt that the factors required for the application of that subsection were not present in this case. Furthermore, subsection 49(d) of the Act does not give the head the discretion to disclose such a record "with an explanation" _ either the prejudice contemplated by the subsection can be reasonably expected to arise as a result of disclosure or it will not _ the head must exercise his or her judgment and make that decision.

Therefore, my Order in this case is that the institution release all of the records at issue (the casenotes of the Probation and Parole Officer and the Level of Supervision Inventory Form, referred to on page 4 above and the report of the Regional Psychologist) to the appellant within twenty (20) days of the date of this Order. This institution is ordered, within seven (7) days of the date on which disclosure is made, to confirm to me in writing that disclosure has taken place.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ October 7, 1988
Date