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

ORDER P-211

Appeal 900008

Ministry of Health

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

O R D E R

INTRODUCTION:

This is the Final Order in the matter of Appeal Number 880179, dealt with in part by Commissioner Sidney B. Linden in Interim Order 135, dated December 21, 1989 which provided as follows:

1. I order the head to sever the handwritten note from the top right hand corner of record 1 and release the balance of the record to the appellant within twenty (20) days of the date of this Order and to advise me of its release within five (5) days of the date of release.

2. **I find that the exemption provided by subsection 13(1) of the Act would apply to the severed portion of record 1 and records 2 and 3.**

3. **I find that the exemption provided by section 19 of the Act would apply to records 4, 5, 6 and 7.**

4. **I order the head to reconsider the exercise of her discretion under subsection 49(a) with respect to the severed portion of record 1 and all of records 2, 3, 4, 5, 6 and 7 within twenty (20) days of the date of this Order, and to provide me with written notification of her decision regarding the exercise of discretion along with accompanying reasons within five (5) days of the date of the decision. I remain seized of this matter.**

5. I order the head to release records 8, 9 and 10 to the appellant within twenty (20) days of the date of this Order and to advise me of the release of these records within five (5) days of the date of release.

6. I order the head to release records 11 and 12 to the appellant. I also order that the institution not release these records until 30 days following the date of issuance of this Order. This time delay is necessary in order to give the affected party sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the institution and/or me within this 30-day period, I order that the records be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

7. **I remain seized of the issue related to the adequacy of the search for records conducted by the institution.**

For reasons which I will explain below, Items 2, 3, 4 and 7 of the Interim Order 135 are the matters which I will deal with in this Final Order.

BACKGROUND:

On March 21, 1988, the Ministry of Health (the "institution") received a request under the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") for the following:

> ...all the information that you have in your files that concerns, pertains and/or make reference to me and any members of my entire family for the period commencing 1965 to the present.

On March 24, 1988, the Senior Program Advisor for the institution's Freedom of Information and Privacy office responded to the requester as follows:

> In our telephone conversation of March 22nd you further clarified this by stating your request is for any and all claims and/or complaints to OHIP from 1965 to present for yourself (practitioner number [number]) and claims for members of your family for services you have rendered to them.

On May 17, 1988, the head granted access to some records and denied access, in whole or in part, to others citing subsections 49(a), 12(1)(b), 13(1), 14(1)(a), (b), (c), (d), (g), (h), 19 and 49(b) of the Act.

On June 15, 1988, the requester appealed the decision of the head of the institution pursuant to subsection 50(1) of the Act. This subsection gives a person who has made a request for access to personal information under subsection 48(1) a right to appeal any decision of a head to the Information and Privacy Commissioner.

The Appeals Officer assigned to the appeal obtained and reviewed the records at issue. While settlement of the appeal was not possible, the records at issue were reduced to twelve in number.

Representations were received from both the institution and the appellant. Two affected persons received notice of the appeal

and submitted representations. All of these representations were considered by Commissioner Sidney B. Linden in arriving at his decision in Interim Order 135.

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.

On January 16, 1990, this office received confirmation from the institution that the unsevered portion of Record 1 and Records 8, 9 and 10 had been released to the appellant, pursuant to Items 1

and 5 of Interim Order 135 and that Records 11 and 12 would be forwarded to the appellant in 10 days provided that notice of an application for judicial review was not served on the institution or this office within that time.

On January 30, 1990, this office received written notification of the head's reconsideration of the exercise of her discretion together with the accompanying reasons. By letter dated June 28, 1990, the head provided further written representations on the exercise of her discretion.

By letters dated April 9, 1990, the appellant and the institution were provided with a summary of the Compliance Investigator's findings with respect to the outstanding issue of the adequacy of the institution's search for records that responded to the appellant's request.

Representations regarding the adequacy of the institution's search for records were received from the institution and the appellant.

By letters dated June 5, 1990 and June 7, 1990, the institution and appellant, respectively, were advised that I would be deciding the remaining issues in this appeal and in addition to determining the adequacy of the institution's search for records, I would be making an independent finding with respect to the applicability of subsection 49(a) of the Act. It is my view that in order to make an independent finding under subsection 49(a) of the Act, I must also decide whether the exemptions provided by subsection 13(1) and section 19 would apply to the records for which Commissioner Linden previously found these sections would apply.

In making my Order, I have considered the written representations of the institution and all representations of the appellant.

RECORDS IN ISSUE:

The records were identified in Interim Order 135 as follows:

1. Memorandum - October 19, 1987.
2. Memorandum - October 12, 1976.
3. Memorandum - July 28, 1980.
4. Briefing notes.
5. Memorandum - May 1, 1978.
6. Memorandum - October 26, 1987.
7. Memorandum - January 4, 1984.
8. Memorandum - December 17, 1986.

9. Hand-written note - November 18, 1986.

10. Letter - November 18, 1986.

11. Letter - November 28, 1985.

12. Letter - November 5, 1985.

In this Order the records are referred to by the same number as used in the Interim Order 135.

ISSUES:

The issues to be dealt with in this Final Order are as follows:

A. Whether any part of the records at issue would fall within the subsection 13(1) exemption and, if so, whether any of the exceptions listed in subsection 13(2) apply to require the head to disclose any of the records or parts thereof.

B. Whether any part of the records at issue would fall within the section 19 exemption.

C. If the answer to either Issue A or B is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of this appeal.

D. Whether the institution's search for records responsive to the request was reasonable in the circumstances.

DISCUSSION:

ISSUE A: Whether any part of the records at issue would fall within the subsection 13(1) exemption and, if so, whether any of the exceptions listed in subsection 13(2) apply to require the head to disclose any of the records or parts thereof.

The records for which Commissioner Linden found the exemption provided by subsection 13(1) would apply are described in detail in Interim Order 135. To summarize, they are:

- The severed portion of Record 1, being a memorandum dated October 19, 1987;

- Record 2, being a memorandum dated October 12, 1976; and

- Record 3, being a memorandum dated July 28, 1980.

Subsection 13(1) of the Act provides that:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Subsection 13(2) of the Act provides that:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (b) a statistical survey;
>
> (c) a report by a valuator, whether or not the valuator is an officer of the institution;
>
> (d) an environmental impact statement or similar record;
>
> (e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;
>
> (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

> (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

The general purpose of the section 13 exemption was discussed in Order 94 (Appeal Number 890137), dated September 22, 1989. At page 5 of that Order Commissioner Linden stated:

> ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

The Commissioner addressed the meaning of the term "advice" in Order 118 (Appeal No. 890172), dated November 15, 1989. At page 4 of that Order he stated:

> In my view, "advice", for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I agree with Commissioner Linden's views of subsection 13(1). Having reviewed the records at issue along with the representations of both parties, I concur with Commissioner Linden that the exemption provided by subsection 13(1) would apply to the severed portion of Records 1, 2 and 3, and that none of the exceptions to the exemption found in subsection 13(2) are available for these records.

ISSUE B: Whether any part of the records at issue would fall within the section 19 exemption.

The records for which Commissioner Linden found the exemption provided by section 19 would apply are described in detail in Interim Order 135. To summarize, they are:

- The severed portion of Record 4, being a briefing note dated October 19, 1987;
- Records 5, 6 and 7, being memoranda from the institution's legal counsel to senior employees of the institution.

Section 19 of the Act provides that:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

On pages 11, 12 and 13 of Interim Order 135, supra Commissioner Linden set out his interpretation of section 19. I adopt Commissioner Linden's views regarding the interpretation of section 19 and having reviewed the records at issue along with the representations of the parties, I find that the exemption

provided by section 19 would apply to the severed portion of Record 4 and Records 5, 6 and 7.

Issue C: If the answer to either Issue A or B is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of this appeal.

Subsection 49(a) of the Act provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

I have found under Issue A that part of Record 1 and Records 2 and 3 met the criteria for exemption under subsection 13(1) while in Issue B, I found that part of Record 4 and Records 5, 6 and 7 met the criteria for exemption under section 19. The exemption provided by subsection 49(a) therefore applies, and gives the head discretion to refuse disclosure.

In Interim Order 135, Commissioner Linden found that the appellant made compelling arguments with respect to his rights and interests while finding that the head's representations as to the exercise of her discretion did not refer to the circumstances of the particular case but rather,

> At best they set out general concerns common to most institutions. The head has clearly not considered why, in this case, the appellant's rights and interests are outweighed by these general concerns.

In so finding, Commissioner Linden ordered the head to reconsider the exercise of discretion in respect of the severed portion of Records 1, 2, 3 and all of Records 4, 5, 6 and 7 and to provide him with reasons. In making that Order, Commissioner Linden relied on Order 58 dated May 16, 1989 wherein he stated:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

I have reviewed the institution's representations on the reconsideration of the head's exercise of discretion and the reasons for same. The head has provided reasons which address the circumstances of this case and I am satisfied that discretion has been exercised in accordance with established legal principles and would not alter it on appeal.

ISSUE D: Whether the institution's search for records responsive to the request was reasonable in the circumstances.

At the inquiry stage of the original appeal, the appellant raised his belief that additional records existed, which would respond to his request, but which were not identified by the institution. So as not to delay the disposition of the appeal

with respect to the already identified records, Interim Order 135 was issued. One of the provisions of Interim Order 135 was that Commissioner Linden remain seized of the issue of the adequacy of the institution's search for records.

The Appeals Officer wrote to the institution on July 10, 1989, advising of the appellant's claim that additional records should exist and citing as examples (provided by the appellant): Ombudsman

reports and correspondence, letters of support to the Minister and audit letters to patients. The Appeals Officer requested that the institution complete a further search and advised that a Compliance Investigator from this office would be assigned to investigate the matter.

In the interim, the appellant provided the Compliance Investigator with copies of the letters which he had obtained elsewhere, but which had not been identified during the institution's search.

Subsequently, a compliance investigation was undertaken and interviews were conducted in Toronto and Kingston. A summary of the compliance investigation findings was sent to both the appellant and the institution on April 9, 1990.

In the course of the compliance investigation, an issue arose with respect to the scope of the appellant's request. The appellant's original request, received by the institution on March 21, 1988, reads as follows:

> I and all the members of my family are officially requesting all the information that you have in your files that concerns, pertains and/or makes reference to me and any members of my entire family for the period commencing 1965 to present.

The Compliance Investigator was subsequently provided with a copy of a letter dated March 24, 1988 from the Senior Program Advisor which stated:

> In our telephone conversation of March 22nd you further clarified this by stating your request is for any and all claims and/or complaints to OHIP from 1965 to present for yourself (practitioner number [number]) and claims for members of your family for services you have rendered to them.

Based on this March 24, 1988 letter, the institution apparently decided not to do a further search for records as requested by the Appeals Officer, instead taking the position that a proper search had been conducted in view of the narrowed scope of the request. This position is explained in the institution's representations where it is stated that:

> The request by the appellant was for records of all claims and/or complaints to OHIP from 1965 until the present (March 21, 1988).

The appellant takes the position that he did not narrow his request in the telephone conversation, but rather specified that his request for "all information..." was to include OHIP material. He goes on to state:

> The fact that I have been provided with materials that exceed the parameters specified in Mr. Novick's March

> 24, 1988 letter both before and after my appeal to the commission makes the fact that I did not narrow my request utterly evident.

Given the existence of documentary evidence of the narrowing of the request, I accept the institution's position on the scope of the request. While I do not have before me the records which were disclosed to the appellant, the fact that they might exceed the parameters of the narrowed request would not necessarily convince me that the request was not narrowed, in view of the information before me. Having said that, I am of the view that the types of records identified in the Appeals Officer's letter to the institution dated July 10, 1989 could fall within the scope of the narrowed request.

Having determined the scope of the request to be as set out in the Senior program Advisor's letter of March 24, 1988, the issue for me to determine is whether the institution has taken all reasonable steps to locate records that respond to the appellant's request.

According to the summary provided to the parties, the Compliance investigation was conducted with a view to the following:

- identifying the specific files and data banks that were searched by the institution in response to the appellant's request;

- determining whether records and/or types of records the appellant claims should exist within the institution's files are contained in the files the institution did search;

- identifying and assessing whether other files and data banks might contain records responsive to the appellant's request.

The Compliance Investigator's investigation was somewhat hampered by the fact that the institution did not have available for his viewing the over 300 records which the institution had released to the appellant. Despite this, in the course of conducting both interviews and selected physical searches of files, the investigator discovered some discrepancies; specifically, the investigator found that:

- the following related files/databanks were not searched by the institution:

    1. Ontario Physiotherapy Association/Board of Directors of Physiotherapists (Kingston).
    2. General correspondence physiotherapy (Kingston).
    3. Special services unit files (Toronto).
    4. MGS Records Centre (Toronto).
    5. "New" investigation file maintained by Djamel Lounis.

- Certain files were not searched on the premise that copies should be in the files which were searched. The investigator found this not always to be the case.

- An "old" investigation file in the possession of Djamel Lounis is said to contain some audit letters but the institution did not search this file. Accordingly, the

institution did not make a decision on access to these letters and they were not at issue in this appeal.

- While there was no evidence of the existence of the records provided by the appellant, the Compliance Investigator only searched selected files.

- An unsearched file (the "new" investigation file) did contain a letter from Ms Glaze to Djamel Lounis which fell within the timeframe set out in the request.

The institution's representations state the following:

> The Ministry submits that in processing this request Ministry personnel who were expert and experienced in working with the files relevant to the request, searched all areas of the Ministry relating to claims or complaints to OHIP. They searched for records from 1965 to March 21, 1988 pertaining to [appellant]. Claims for members of [appellant's] family for services rendered to them by him were part of the search. All documents identified as being relevant to the request were considered for disclosure under the Freedom of Information and Protection of Privacy Act, 1987.

The institution also points out that, with respect to the three letters provided by the appellant to support his claim that other records should exist, the Compliance Investigator "is reported to have located...a letter to Ms S. Glaze from Mr. D. Lounis [sic] Jan. 7, 1988, ...[but that it] cannot be located in the Investigation File - Evarest House. The Ministry of Health maintains that it does not exist."

The appellant submits that the discrepancies in the institution's initial search are significant enough to warrant a

new search of areas already searched and a search of relevant areas identified by the investigator as unsearched.

The appellant further submits that while the summary of the compliance investigation set out who the investigator interviewed,

> ... it is appropriate and imperative that I be advised of who said what rather than be rendered a general statement that "the institution" said or did whatever...

And finally, the appellant submits that certain persons who were involved in the search are also persons who have an interest in proceedings against him and are thereby in a conflict of interest position.

Taking into consideration both the evidence obtained from the compliance investigation and the representations of the parties, I find that the institution has failed to establish the reasonableness of its search for records responsive to the narrowed request. As I intend to order the institution to search files/databanks previously searched and search previously unsearched files/databanks in the presence of a Compliance Investigator from this office, no useful purpose would be served by commenting on the appellant's representations regarding certain individuals and suggestions of conflict of interest.

I acknowledge that my order that the institution conduct the necessary searches in the presence of a Compliance Investigator is somewhat unusual. However, in my view, the circumstances associated with the appeal are such that I feel that it is

necessary in order to adequately address the concerns of the appellant.

ORDER:

1. I uphold the head's decision to withhold the severed portion of Records 1, 2 and 3, pursuant to subsections 13(1) and 49(a) of the Act.

2. I uphold the head's decision to withhold Records 4, 5, 6 and 7, pursuant to section 19 and subsection 49(a) of the Act.

3. I order the institution to conduct a search for records responsive to the narrowed request in the presence of a Compliance Investigator from this office. The search shall encompass all files/databanks previously searched, as well as those listed in Appendix "A" to this Order.

4. I order the institution to conduct the search and issue a decision on disclosure for any previously unidentified records responsive to the request within 60 days of the date of this Order. I have fixed the timeframe at 60 days so as to allow for the necessary co-ordination between this office and the institution. If previously unidentified records are located and a decision on disclosure is issued, I order the institution to provide me with a copy of the decision within ten (10) days of the date notice of the decision is sent to

the appellant. Such copy should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

5. I anticipate that some difficulty may arise in implementing terms 3 and 4 of this Order and therefore, I remain seized of this matter in order to provide whatever assistance may be required.

6. I order the institution to produce to this office within 15 days of the date of this Order a copy of all records to which the appellant has previously been granted access.

Original signed by: January 11, 1991
Tom A. Wright Date
Assistant Commissioner

APPENDIX A

Previously unsearched files/databanks to be searched:

1. Ontario Physiotherapy Association/Board of Directors of Physiotherapists (Kingston).

2. General correspondence physiotherapy (Kingston).

3. Special services unit files (Toronto).

4. MGS Records Centre (Toronto).

5. "New" investigation file maintained by Djamel Lounis.