



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

# ORDER P-215

Appeal 900199

Ministry of Health



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## O R D E R

### INTRODUCTION:

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 been given notice of a request for a record under subsection 28(1) a right to appeal any decision of a head to the 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. On March 19, 1990, the Ministry of Health (the "institution") received a request from an individual as follows:

I am requesting access to two (2) documents.

The first is a letter written to the then Administrator of the Mental Health Centre, Penetanguishene, Ontario, Mr. L.W. McKerrow on October 22, 1984, by [a named individual].

I would also like Mr. McKerrow's response to [a named individual] dated October 23, 1984.

2. On April 6, 1990, the institution issued notice to a person (the "affected person") whose interests might be affected by the disclosure of the records, in accordance with subsection 28(1)(b) of the Act. The head received representations from the affected person as to whether the records should be disclosed.
3. On May 3, 1990, the institution wrote to the affected person and to the requester advising that it had decided to grant access to the requested records, but that it would sever and withhold the home address of the affected person contained in the records, pursuant to section 21 of the Act.
4. By letter dated May 4, 1990, the affected person appealed the decision of the head to disclose the records. The appellant claimed that the following provisions of the Act applied to cause the records to be withheld from disclosure: Subsections 14(1)(e), 14(1)(f), 14(2)(d), 14(3), section 20, subsections 21(1)(a), 21(1)(f), 21(2)(e), 21(2)(f), 21(2)(h), 21(2)(i), 21(3)(a), 21(5), 65(2)(a) and 65(3). Notice of the appeal was given to the institution, the appellant and the requester.
5. The records were obtained and reviewed by the Appeals Officer assigned to the case. The Appeals Officer contacted the institution, the appellant and the requester in an effort to mediate a settlement of the appeal. During the course of mediation, the appellant raised additional exemptions as applying to the records: subsections 10(1), 10(2), 14(1)(d), section 19, subsections 21(2)(d), 42(a)

and (b), section 43, subsections 49(a), (b), (d), (e) and 65(2) (b).

6. Settlement was not effected and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the institution, the appellant and the requester. Enclosed with the Notice of Inquiry 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. 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. Written representations were received from the appellant, the institution and the requester. I have considered all of the representations in making my Order.

**PURPOSES OF THE ACT/BURDEN OF PROOF:**

It is important to note at the outset the purposes of the Act as outlined in subsections 1(a) and (b). 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.

**PRELIMINARY ISSUE:**

There is a preliminary matter which I will address prior to considering the application of the exemptions to the requested records. In his letter of appeal, the appellant stated that:

The record is contained in and is part of my Clinical File as defined by clause 29(1)(a) of the Mental Health Act and therefore this Act does not apply to this record. Therefore access should be denied.

The Freedom of Information and Protection of Privacy Act, 1987, as amended, expressly provides that it does not apply to certain records. Specifically, subsection 65(2) provides as follows:

This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by clause 1 (p) of the Mental Health Act, where the record,

- (a) is a clinical record as defined by clause 29(1)(a) of the Mental Health Act; or
- (b) contains information in respect of the history, assessment,
- (c) diagnosis, observation, examination, care or treatment of the patient.

In response to the question of whether the requested records were "in respect of" a patient in a psychiatric facility, as defined by clause 1(p) of the Mental Health Act, the institution submitted that:

The Mental Health Centre, Penetanguishene, is a facility within clause 1(p) of the Mental Health Act for the "observation, care and treatment of persons suffering from mental disorder" and it is designated as a psychiatric facility under Ontario Regulation 609 under the Mental Health Act.

The "record" is not itself "in respect of a patient in a psychiatric facility" because at the time the letter was written the Appellant was not a patient in a psychiatric facility.

I have reviewed the records at issue and agree that they were written at a time when the appellant was not a patient in a psychiatric facility. However, this fact alone is not dispositive

of the issue. Both letters refer to events in which the appellant was involved, and which occurred during the time when the appellant was a patient in a psychiatric facility under the Mental Health Act. Subsection 29(1)(b) of the Mental Health Act provides that:

"patient" includes former patient, out-patient, and former out-patient.

Accordingly, I am satisfied, that the records in issue are "in respect of a patient in a psychiatric facility".

I must now consider whether the requested records are clinical records as defined by clause 29(1)(c) of the Mental Health Act.

I am advised that the records are contained in the appellant's clinical file at the mental health facility. They also appear to be contained in the files of the Administrator of the facility. The fact that the records may be located in files other than or in addition to the patient's clinical file is not of itself dispositive of whether the record is a clinical record.

Subsection 29(1)(c) of the Mental Health Act provides as follows:

In this section,

- (a) "clinical record" means the clinical record compiled in a psychiatric facility in respect of a patient, and includes a part of a clinical record.

Regarding whether the records were "compiled" in respect of a patient in a psychiatric facility, the institution submits:

The Appellant was a former patient, but a "clinical record" can only be compiled with respect to a person who is under the observation, care and treatment in a psychiatric facility. The record was not therefore compiled in a psychiatric facility nor was it compiled in respect of a patient in the facility.

The definition of "clinical record" contained in the Mental Health Act does not limit the class of records to those records

which were created at the time the subject of the records was a patient. It is possible that records created prior to the subject's becoming a patient could have relevance to the care, observation and treatment of a patient, and might therefore be of assistance to health officials charged with treating the patient.

The word "compile" is defined in the Concise Oxford Dictionary as follows: "collect (materials) into a list, volume, etc.; make up (volume etc.) of such materials; accumulate." In my view, the records at issue in this appeal have been accumulated or compiled in the appellant's clinical file by officials charged with the care of a psychiatric patient.

Subsection 65(2)(b) of the Freedom of Information and Protection of Privacy Act, 1987, provides a list of types of records which are clearly treatment based in relation to a psychiatric patient. However, I am of the view that this list does not qualify or define what is to be considered a "clinical record" under subsection 65(2)(a). The definition of "clinical record" found in subsection 29(2)(c) of the Mental Health Act does not define the content of a clinical record. It requires that such a record be compiled in a psychiatric facility in respect of a patient. In my opinion, the fact that the records at issue are contained in the clinical file of a patient in a psychiatric facility is prima facie evidence that the records are "clinical records". This evidence is not rebutted by the fact that the records may also be located in non-clinical files.

I find therefore, that the records at issue in this appeal are "clinical records" within the meaning of subsection 65(2)(a) of the Freedom of Information and Protection of Privacy Act, 1987,



as amended. Accordingly, the Act does not apply to these records, and they fall outside the scope of the Act.

In view of the foregoing, I will not address the application of the exemptions to the records.

Original signed by:  
Tom A. Wright  
Assistant Commissioner

January 28, 1991  
Date