



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

# **ORDER P-294**

**Appeal 900615**

**Ministry of Health**



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## O R D E R

### BACKGROUND:

The Ministry of Health (the "institution") received a request for access to all documents relevant to the Health Disciplines Board investigations of two named physicians which were conducted in response to complaints made by the requester about medical treatment given to his father, who is now deceased.

After receiving the request, the institution notified seven individuals whose interests might be affected (the "affected persons") pursuant to section 28(1) of the Freedom of Information and Protection of Privacy Act (the "Act"), and gave them the opportunity to express their views regarding disclosure of the records.

The institution also advised the requester that the Act does not permit disclosure of information regarding his father to him without obtaining documentation which would demonstrate that he had been officially appointed as his father's personal representative, and confirm that he was seeking the information in relation to the administration of his father's estate. The requester provided no such documentation to the institution.

Five affected persons responded to the notification. Four consented to disclosure of the records which related to them, and the fifth objected to disclosure.

After receiving the responses of the affected persons, the institution informed the requester that partial access to the

records would be granted. Of the 289 pages which the institution identified as responding to the request, 139 were disclosed in their entirety, including the records consented to by the four affected persons. The remaining records were denied, in whole or in part, pursuant to section 21(1) of the Act.

The requester appealed the decision of the institution to grant partial access.

The Appeals Officer obtained and reviewed a copy of the 150 pages of records which remained at issue. In order to determine if the appellant was his father's personal representative, the Appeals Officer asked the appellant to provide either a copy of his father's will naming him as executor, or letters of administration appointing him as administrator. The appellant was also asked to provide proof that his request related to the administration of his father's estate. The appellant did not provide the Appeals Officer with any additional documentation.

During the course of mediation, the institution agreed to disclose 10 additional pages to the appellant. Because further mediation was not possible, the matter proceeded to inquiry. An Appeals Officer's Report was prepared and sent, together with a Notice of Inquiry, inviting the institution, the appellant and the original seven affected persons to make representations. Written representations were received from the institution, the appellant and two affected persons. One affected person had previously consented to disclosure when contacted by the institution, and records relating to him have been released by the institution and are no longer at issue in this appeal.

Of the 140 pages which remain at issue, two pages were partially severed and 138 were withheld in their entirety.

The records at issue may be described as follows:

- Record 1 Record of Complaint re: Physician "X", disclosed except for severance of "X"'s date of birth (page A)
- Record 2 Record of Complaint re: Physician "Y", disclosed except for severance of "Y"'s date of birth (page B)
- Record 3 Letter from Physician "X" to the College of Physicians and Surgeons of Ontario, dated October 13, 1987 (pp. 85-86)
- Record 4 Letter from Physician "Y" to the College of Physicians and Surgeons, dated September 22, 1987 (p. 87)
- Record 5 Letter from Physician "Y" to the College of Physicians and Surgeons, dated October 6, 1987 (pp. 88-90)
- Record 6 Clinical Records re: Appellant's father (pp. 91-120, 155-159, 170-262 and 275-276)
- Record 7 Letter from Physician "Z" to the College of Physicians and Surgeons, dated November 2, 1987 (p. 164)

**PRELIMINARY ISSUE:**

Many of the records at issue contain medical information relating to the appellant's deceased father, which appears to qualify as the father's personal information.

Section 47 of the Act gives an individual a general right of access to his own personal information. Section 66(a) of the Act goes on to state that:

Any right or power conferred on an individual by this Act may be exercised,

where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate

The appellant would be able to exercise his father's right to request and be granted access to his father's personal information, if he is able to demonstrate that he is his father's "personal representative" and that his request for access to the information relates to the administration of his father's estate.

The term "personal representative" in section 66(a) is not defined in the Act. However, section 66(a) relates to the administration of an estate of an individual and the meaning of the term must be derived from this context. The term "personal representative" is defined in section 1 of the Estates Administration Act as:

"personal representative" means an executor, an administrator, or an administrator with the will annexed.

In my view, the term "personal representative" in section 66(a) of the Act has the same meaning, i.e., an executor, an administrator, or an administrator with the will annexed.

The appellant was asked by both the institution and the Appeals Officer to provide documentary evidence to establish that he is

his father's personal representative. The appellant advised the institution and the Appeals Officer that Chinese family tradition provides that he, as elder son of the family, is the legal administrator of his father's estate. He submitted, as proof of this status, photocopies of "Consent for Information" forms produced by the College of Physicians and Surgeons of Ontario, which he had signed as "executor" of his father's estate.

In order to establish that he is his father's personal representative, for the purposes of section 66(a) of the Act, the appellant would be required to provide evidence of his authority to deal with the estate of his deceased father. The production by the appellant of letters probate, letters of administration or ancillary letters probate under the seal of the proper court would be necessary. In my view, the two "Consent for Information" forms are not sufficient evidence to demonstrate that the appellant is his father's personal representative for the purposes of the Act.

Therefore, in the circumstances of this appeal, I am not satisfied that the appellant is entitled to exercise his father's right of access to personal information. Accordingly, the appellant's request for information, as it relates to his father's personal information, is subject to the mandatory provisions of section 21 of the Act.

**ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records at issue qualifies as "personal information", as defined by section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the exemption provided by section 49(b) of the Act applies in the circumstances of this appeal.
- C. If the answer to Issue A is yes, whether the exemption provided by section 21 of the Act applies in the circumstances of this appeal.

**SUBMISSIONS/CONCLUSIONS:**

**Issue A: Whether the information contained in the records at issue qualifies as "personal information", as defined by section 2(1) of the Act.**

In all cases where the request involves access to personal information, it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" in section 2(1) of the Act, and to determine whether this information relates to the appellant, another individual, or both.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

Section 2(2) of the Act states:

personal information does not include information about an individual who has been dead for more than thirty years.

Having reviewed the records, I find that only page 86 of Record 3, and the second paragraph of Record 4 contain the appellant's personal information. These portions of Records 3 and 4 also contain the personal information of other individuals.

Further, I find that the following records contain the personal information of individuals other than the appellant, one of whom is the appellant's deceased father: Records 1 and 2, (the severed

portions); Record 3, page 85; Record 4, (all except the second paragraph); and Records 5, 6 and 7. Because the appellant's father has not been dead for more than 30 years, section 2(2) is not applicable in the circumstances of this appeal.



**Issue B: If the answer to Issue A is yes, whether the exemption provided by section 49(b) of the Act applies in the circumstances of this appeal.**

Although section 21 was cited by the institution as the basis for exempting all of the records at issue in this appeal, the institution identified and discussed portions of the records which contain the appellant's personal information, and I am prepared to accept that the institution intended to exempt these portions from disclosure pursuant to section 49(b) of the Act.

I found under Issue A that page 86 of Record 3 and the second paragraph of Record 4 contain the personal information of the appellant and other individuals.

Section 49(b) states,

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) of the Act introduces a balancing principle, which requires the head to look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the head determines the release of the information

would constitute an unjustified invasion of the other individual's personal privacy, section 49(b) gives him/her

discretion to deny the requester access to the personal information. (Order 37)

Sections 21(2) and 21(3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy. I have reviewed the provisions of section 21(3) and I find that none of them are relevant to these records.

Turning to section 21(2), the institution submits that the information is "highly sensitive information (section 21(2)(f))" because page 86 of Record 3 contains "allegations made against one physician", and Record 4 contains "the views of a physician about providing records to the Requester". The institution also claims that these records "were provided ... in confidence (section 21(2)(h))" and that "disclosure would unfairly damage the reputation of [the authors of the letters]" (section 21(2)(i)).

Sections 21(2)(f), (h) and (i) of the Act read as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

With regard to page 86 of Record 3, I note that the allegations which the institution claims are highly sensitive, are allegations about a physician which were made by the appellant, himself. In addition, the institution has not provided any evidence to support its claim that the information was supplied in confidence, or that its disclosure could unfairly damage the reputation of any person referred to in the record. I also note that the author of Record 3 declined to make any representations. In my view, sections 21(2)(f), (h) and (i) are not relevant considerations with regard to page 86 of Record 3. I find that disclosure of this portion of Record 3 would not constitute an unjustified invasion of another individual's personal privacy, and it does not qualify for exemption under section 49(b) of the Act.

In his representations, the author of Record 4 states that this record was submitted to the College of Physicians and Surgeons in confidence. I find that the contents of the letter do not support this claim. The record expresses concern that information submitted in the context of the College's complaint investigation be kept confidential, but nothing to indicate that Record 4 should also be treated in this manner. I find that disclosure of the second paragraph of Record 4 would not constitute an unjustified invasion of another individual's personal privacy, and that this portion of the record does not qualify for exemption under section 49(b) of the Act.

**Issue C: If the answer to Issue A is yes, whether the exemption provided by section 21 of the Act applies in the circumstances of this appeal.**

I have found under Issue A that information contained on page 85 of Record 3, Record 4 (with the exception of the second paragraph),

and Records 1, 2, 5, 6, and 7 is the "personal information" of individuals other than the appellant, including the appellant's father.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances, to any one other than the individual to whom the information relates. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In its representations, the institution cites the application of section 21(3)(a) to raise the presumption that disclosure of much of the severed information would constitute an unjustified invasion of the personal privacy.

Section 21(3)(a) reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

I find that only those portions of records which contain the personal information of the appellant's father are potentially subject to the section 21(3)(a) claim. For the purposes of this

Order, I will categorize these records as "Group 1" records. They can be described as follows:

- The last paragraph of page 85 of Record 3, which describes a medical procedure performed on the appellant's father;
- All portions of Record 5, with the exception of the first paragraph on page 88 and the final two paragraphs on page 90, which describes the on-going medical condition and treatment of the father;
- Record 6 which consists of medical information, including nurses' and doctors' notes made during the father's hospitalization; physician referral and reporting letters; admissions history; and progress notes and surgical reports.

I find that all Group 1 records clearly relate to the medical history, diagnosis, condition and treatment of the appellant's father and satisfy the requests of a presumed unjustified invasion of personal privacy under section 21(3)(a).

Once the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been satisfied, I must

then consider whether any other provisions of the Act come into play to rebut this presumption.

Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, none of the factors listed in section 21(4) exist to rebut the presumed unjustified invasion of personal privacy under section 21(3).

In Order 20, dated October 7, 1988, Commissioner Linden stated that:

...[A] combination of circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual.

In this appeal, I have not been provided with any evidence to establish the relevance of any factors listed under section 21(2), and I find that there is no combination of the circumstances set out in this section which is so compelling as to outweigh the presumption of an unjustified invasion of personal privacy under section 21(3).

Therefore, I find that disclosure of all Group 1 records would constitute an unjustified invasion of the appellant's father's personal privacy, and I uphold the head's decision to deny access to these records.

I will now address the application of section 21 to those portions of the records to which the presumption under 21(3) does not apply, which I will refer to as "Group 2" records, namely:

- The severed portions of Records 1 and 2;
- Record 3, everything but the final paragraph on page 85;
- Record 4, everything but the second paragraph;
- Record 5, the opening of the letter and the first paragraph on page 88, and the final two paragraphs and closing on page 90; and
- Record 7.

I have reviewed the severances made to Records 1 and 2 and, in my view, disclosure of the birth dates of Physician "X" and Physician "Y" would constitute an unjustified invasion of their personal privacy.

In its representations, the institution states that sections 21(2)(f), (h) and (i) are relevant considerations in determining whether disclosure of the information contained in the remaining

Group 2 records constitutes an unjustified invasion of personal privacy. (These sections are quoted on page 8).

The institution states that the personal information in Record 3 is "highly sensitive" information because it contains allegations made against Physician "X"; Record 4 includes a "sensitive comment"; and both records were provided to the College of Physicians and Surgeons in confidence, and would unfairly damage the reputations of Physicians "X" and "Y" if disclosed.

With regard to the relevant parts of page 85 of Record 3, sections 21(2)(f), (h) and (i) do not appear to be relevant

considerations, and I have not been provided with any evidence by the institution to support the application of these sections. Again, I note that the author of Record 3 chose not to make representations. In my view, disclosure of the remainder of page 85 (with the exception of the final paragraph which I have found qualifies for exemption as part of the Group 1 records) would not constitute an unjustified invasion of personal privacy pursuant to section 21 of the Act.

Under Issue B, I found that the second paragraph of Record 4 did not qualify for exemption under section 49(b). For the same reasons as I expressed in my discussion of Issue B, I find that disclosure of the balance of the information in Record 4 would also not constitute an unjustified invasion of the author's personal privacy and, therefore, does not qualify for exemption under section 21 of the Act.

I have reviewed Record 7 and the portions of Record 5 to which the presumption under section 21(3) does not apply, and, in the absence of any representations from the institution and/or the relevant affected person regarding these records, I find that disclosure would not constitute an unjustified invasion of any individual's personal privacy, and these records should be released.

**ORDER:**

1. I uphold the head's decision not to disclose the severed portions of Records 1 and 2, and Record 6 in its entirety.
2. I uphold the head's decision not to disclose the last paragraph on page 85 of Record 3, and all portions of



Record 5, with the exception of the opening of the letter and the first paragraph on page 88, and the final two paragraphs and closing on page 90.

3. I order the head to disclose the remaining portions of Records 3 and 5 not covered by provision 2, and Records 4 and 7 in their entirety.
  
4. I order that the institution not disclose the portions of the records listed in provision 3 of this Order until thirty (30) days following the date of issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the records and portions of records described in provision 3 of this Order be disclosed within thirty-five (35) days of the date of this Order.
  
5. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
  
6. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 3, upon request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ May 1, 1992