



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# **ORDER P-402**

Appeal P-9200221

Ministry of Health



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# ORDER

## BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all correspondence, letters, memos, documents, notices and internal communications about or mentioning the Church of Scientology, including communications from the College of Physicians and Surgeons, Ontario Medical Association, Canadian Mental Health Association, Clarke Institute of Psychiatry, Ontario Psychiatric Association, Ontario Psychological Association, and the World Federation of Mental Health.

The Ministry identified 42 responsive records. Before responding to the request, the Ministry notified an organization whose interests could be affected by the release of some of the records. This organization advised the Ministry that it had no objection to the release of these records. The Ministry then responded to the requester by providing access to thirty-three records in their entirety, and denying access to the remaining 9 records, in whole or in part, pursuant to sections 13(1), 19, 21(1), 65(2)(a) and/or 65(2)(b) of the Act. The requester appealed the Ministry's decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from both parties.

The records which remain at issue in this appeal, and the corresponding exemption claims associated with them are described as follows:

- Record 1      May 22, 1980 Action Request slip from the Deputy Minister of the Ministry to the Director of Legal Services, with a two-page attachment. Action Request slip severed under section 19. Page 2 of attachment severed under section 65(2)(a).
- Record 2      June 28, 1991 memorandum from Legal Counsel at Ministry to Director of Legal Services regarding letter from the Citizens' Commission on Human Rights. Severed in its entirety under section 19.
- Record 3      June 28, 1991 memorandum from Legal Counsel at Ministry to other staff of Ministry, including Director of Legal Services, regarding Church of Scientology assault charges. Severed in its entirety under section 19.
- Record 4      July 25, 1990 memorandum from Legal Counsel at Ministry to Acting Administrator of Queen Street Mental Health Centre regarding staff information session held on July 19, 1990. Page 1 severed under section 65(2)(a). Pages 2-5 severed under page 19.
- Record 5      November 4, 1980 memorandum from Consultant at Policy Development Branch of Ministry to Minister, with one page attachment, regarding letters and

documents from the Church of Scientology "Hill Report". Memorandum severed under section 13(1).

- Record 29 June 27, 1991 memorandum from staff person at Community Mental Health Branch of Ministry to Correspondence Clerk at Ministry, and one-page attachment, regarding telephone response to Tony Silipo, M.P.P. from Minister. Attachment severed under section 21(1).
- Record 34 January 9, 1991 memorandum from Policy/Program Analyst at Ministry to Director of Mental Health Facilities Branch regarding meeting held with Legal Counsel. Severed in its entirety under section 19.
- Record 35 January 8, 1991 letter from Director of Mental Health Facilities Branch of Ministry to the Citizens Commission on Human Rights regarding treatment of named individual. Pages 1 and 2 severed under section 65(2)(a).
- Record 36 January 2, 1991 memorandum from Policy/Program Analyst at Ministry to Legal Counsel, and five-page attachment, regarding summary of complaints received from the Citizens Commission on Human Rights. Attachment withheld in its entirety under section 65(2)(b).

## **ISSUES:**

The issues arising in this appeal are:

- A. Whether the severed portions of Records 1, 4 and/or 35 fall within the scope of section 65(2)(a) of the Act.
- B. Whether the severed portions of Record 36 fall within the scope of section 65(2)(b) of the Act.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to severed portions of Record 5.
- D. Whether the discretionary exemption provided by section 19 of the Act applies to Records 2, 3, 34 and/or the severed portions of Records 1 and/or 4.
- E. Whether the mandatory exemption provided by section 21(1) of the Act applies to the severed portions of Records 1, 4, 29, 35 and/or 36.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the severed portions of Records 1, 4 and/or 35 fall within the scope of section 65(2)(a) of the Act.**

Section 65(2)(a) of the Act states:

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

is a clinical record as defined by subsection 35(1) of the Mental Health Act;

In Order P-374, I made the following comments regarding section 65(2) of the Act:

It would appear to me that section 65(2) was included in the Act for two reasons: to acknowledge the extra sensitivity of records relating to the care and treatment of psychiatric patients; and to recognize the separate access and privacy scheme for psychiatric patient records under the MHA. Under section 65(2)(a), "clinical records", as defined by section 29(1)(a) [now section 35(1)] of the MHA are specifically excluded from the Act, but are generally accessible to the patient under the MHA.

The Mental Health Act (the MHA) also governs access to "clinical records" by individuals other than the psychiatric patient.

In order for a record to fall within the scope of section 65(2)(a), it must be in respect of a psychiatric patient, and it must be a "clinical record", as defined by section 35(1) of the MHA [Order P-389].

Section 35(1) of the MHA defines clinical record as the "clinical record compiled in a psychiatric facility in respect of a patient, and includes part of a clinical record".

The Ministry severed the names of certain individuals contained in Records 1, 4 and 35. In its representations, the Ministry states that "[T]he institution is not of the view that the records in which the name appears are clinical records. Only those records in the custody and control of the psychiatric hospitals are clinical records; however, the name is contained therein." The Ministry feels that, because the name of a patient is part of the clinical record, merely confirming that he/she is a patient would violate the MHA.

I do not accept the Ministry's position regarding the application of section 65(2)(a) to the severed parts of Records 1, 4 and 35. These records were not "compiled in a psychiatric facility" and cannot, therefore, be classified as "clinical records", as defined by section 35(1) of the MHA. In my view, regardless of whether the name of a psychiatric patient is part of that person's "clinical record", the name itself is not sufficient to bring a record which would otherwise not qualify as a "clinical record" within the scope of the definition.

Because I have found that the records were not "compiled in a psychiatric facility", it is not necessary for me to consider whether the records are "in respect of a psychiatric patient".

Therefore, I find that severed portions of Records 1, 4 and 35 do not fall within the scope of section 65(2)(a) of the Act.

Section 21(1) of the Act is a mandatory exemption. Because the severed portions of Records 1, 4 and 35 appear to contain personal information of individuals other than the appellant, I will include these records under my discussion of section 21(1) in Issue E.

**ISSUE B: Whether the severed portions of Record 36 fall within the scope of section 65(2)(b) of the Act.**

Section 65(2)(b) of the Act states:

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

contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.

In order for a record to fall within the scope of section 65(2)(b), it must satisfy the requirements of the three-part test I established in Order P-374. It must:

- (1) contain the types of information listed in section 65(2)(b); **and**
- (2) be in respect of a psychiatric patient; **and**
- (3) have a clinical purpose, nature or value.

Having reviewed the severed portions of Record 36, I find that they satisfy the requirements of the first two parts of the test; they contain some of the types of information listed in section 65(2)(b), and are in respect of psychiatric patients. However, in my view, these portions of the record do not satisfy the third part of the test. I considered a similar issue in Order P-389, where I made the following comments:

In my view, in order to satisfy the third part of the test, an institution must establish that the reason for having the records in its custody or control has a clinical purpose, nature or value; the fact that the original reason for creating or compiling the records may have had a clinical purpose, nature or value, in my view, is not sufficient to satisfy the requirements of section 65(2)(b).

Similarly in this appeal, while the information severed from Record 36 may also exist in a patients "clinical record" or other record which would fall under the scope of section 65(2)(b), Record 36 was created by a Policy/Program Analyst at the Mental Health Facilities Branch to inform the Legal Services Branch of certain complaints concerning individual psychiatric patients. The reason for having Record 36 in the custody and control of the Ministry's Legal

Services Branch or Mental Health Facilities Branch has no "clinical purpose, nature or value" and, accordingly, I find that the third requirements of the test has not been established, and the severed portions of Record 36 do not fall within the scope of section 65(2)(b) of the Act.

Again, because the severed portion of Record 36 appears to contain personal information of individuals other than the appellant, I will include this record under my discussion of section 21(1) in Issue E.

**ISSUE C: Whether the discretionary exemption provided by section 13(1) of the Act applies to the severed portions of Record 5.**

Section 13(1) of the Act states:

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.

It has been established in a number of previous orders that advice for the purposes of section 13(1) 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 in the deliberative process [Orders 118, P-304, P-348 and P-356]. "Recommendations" should be viewed in the same vein [Orders 161, P-248, P-348 and P-356].

Having reviewed the severed portions on page 1 of Record 5, in my view, they describe a course of action identified by a Consultant in the Ministry's Policy Development Branch and recommend its adoption by the Minister. Therefore, I find that these severed portions of Record 5 qualify for exemption under section 13(1).

Because section 13(2) provides a number of mandatory exceptions to the section 13(1) exemption, I have reviewed sections 13(2)(a) - (l), and find that none of the exceptions apply in the circumstances of this appeal. I have also reviewed the Ministry's representations regarding the exercise of discretion in favour of claiming the exemption under section 13(1), and find nothing improper in the circumstances.

**ISSUE D: Whether the discretionary exemption provided by section 19 of the Act applies to Records 2, 3, 34 and/or the severed portions of Records 1 and/or 4.**

Section 19 of the Act states:

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.

The institution claims the first part of the common law solicitor-client privilege as the basis for exempting Records 2, 3 and 34, and portions of the first page of Record 1 and pages 2-5 of Record 4.

In order for a record to be subject to the first part of the common law solicitor-client privilege, the institution must provide evidence that a record satisfies the following test:

1. there must be a written or oral communication; **and**
2. the communication must be of a confidential nature; **and**
3. the communication must be between a client (or his agent) and a legal adviser; **and**
4. the communication must be directly related to seeking, formulating or giving legal advice.

[Order 210]

Records 1, 2, 3 and 4 are written communications between legal advisors and Ministry personnel and, therefore, satisfy parts 1 and 3 of the test.

Record 34 is a written communication from a Ministry employee who is not a legal advisor, to the Director of the Ministry's Mental Health Facilities Branch. In this memorandum, the employee reports on the content of her meeting with a legal advisor and the advice she received at that meeting. Former Commissioner Sidney B. Linden considered a similar situation in Order 150, where he stated:

In my view, an Appeal Assistant acts as the agent of the Board member in the review and analysis of a Rent Review Hearings Board file. If legal advice from a legal advisor is required, the Appeal Assistant acts as the agent of the Board member in seeking and receiving this advice, and communications between the Appeals Assistant and a legal advisor constitute communications between a client and his/her solicitor.

I find that the same reasoning applies to Record 34, and that parts 1 and 3 of the test for exemption have been established.

Turning to part 2 and 3 of the test, the institution submits that "[A]n examination of the records themselves indicates the confidential nature of the communication". Having reviewed the records, I find that they are of all a confidential nature and that they all relate to the seeking, formulating or giving legal advice. Therefore, parts 2 and 4 of the test are also satisfied, and I find that Records 2, 3 and 34, and the severed portions of Records 1 and 4 all qualify for exemption under section 19 of the Act.

I have reviewed the Ministry's representations regarding the exercise of discretion in favour of claiming the section 19 exemption, and I find nothing improper in the circumstances.

**ISSUE E: Whether the mandatory exemption provided by section 21(1) of the Act applies to the severed portions of Records 1, 4, 29, 35 and/or 36.**

The Ministry claims section 21(1) of the Act as the basis for exempting the name of an individual in Record 29. In addition, in my discussion of Issues A and B, I determined that information severed from Records 1, 4, 35 and 36 should also be considered under this mandatory exemption.

Section 2 of the Act reads, in part, as follows:

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

...

- (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,

...

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Having reviewed Records 1, 4, 29, 35 and 36, I find that the information severed from Records 1, 4, 29 and 35 qualifies under subsection (h) of the definition of personal information, and that the information severed from Record 36, which concerns the names and the care and/or treatment details of certain psychiatric patients, qualifies under sections (b) and (h) of the definition of personal information.

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, including "if the disclosure does not constitute an unjustified invasion of personal privacy" [Section 21(2)(f)].

Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy, and section 21(2) provides some criteria for the Ministry to consider in determining whether the disclosure of the record would result in an unjustified invasion of personal privacy.

The Ministry relies on section 21(3)(g) and section 21(2)(h) to support its decision to deny access to the name severed from Record 29. I find that section 21(2)(f) might also be a relevant consideration with respect to Records 1, 4, 35 and 36.



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

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

consists of personal recommendations or evaluations character references or personnel evaluations;

Also, sections 21(2)(f) and (h) 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;

In my view, the name severed from Record 29, in and of itself, cannot properly be characterized as any of the types of information listed in section 21(3)(g) or any of the other types of information listed in other subsections of section 21(3); and, the same reasoning applies to the names and other information severed from Records 1, 4, 35 and 36. Therefore, I find that no presumption of an unjustified invasion of personal privacy exists with respect to any of the information contained in these records.

As far as the various factors under section 21(2) are concerned, in my view, it is not necessary for me to determine whether or not the considerations outlined in sections 21(2)(f) and/or (h) apply to the information severed from Records 1, 4, 29, 35 and 36, because none of the factors which weigh in favour of disclosure of the names and other severed portions of these records are present in the circumstances of this appeal. Therefore, I find that the mandatory exemption provided by section 21(1) of the Act applies to prohibit disclosure of the personal information of individuals other than the appellant which has been severed from Records 1, 4, 29, 35 and 36.

**ORDER:**

1. I uphold the Ministry's decision not to disclose Records 2, 3 and 34, and the severed portions of Records 1 and 4 which were exempted under section 19.

2. I do not uphold the Ministry's decision not to disclose those portions of Records 1, 4, 35 and 36 which were exempted under section 65(2)(a) and/or (b) of the Act, but I order the Ministry not to disclose these portions of Records 1, 4, 35 and 36 because they qualify for exemption under section 21(1) of the Act.

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

\_\_\_\_\_ January 15, 1993