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

ORDER P-494

Appeal Numbers:
P-910590, P-910956, P-910989,
P-910991, P-911122, P-911137

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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received six separate requests under the Freedom of Information and Protection of Privacy Act (the Act) from caregivers employed by the Kingston Psychiatric Hospital. Each request was for access to:

> Any and all information concerning myself, that may be in the possession of the Psychiatric Patients Advocate Office at Kingston Psychiatric Hospital or at the Provincial Psychiatric Patient Advocates Office at Toronto, Ontario.

The Ministry divided the requests for Psychiatric Patient Advocate Office (PPAO) records into two parts, one dealing with correspondence files and the other with advocate client files. With respect to correspondence files, the Ministry indicated that no records existed with respect to four of the requests and released some records with respect to the other two requests. This part of the decision was not appealed.

With respect to the second part of the request, access to records in the advocate client files was denied on the basis that the records were not covered by the Act by virtue of the application of section 65(2)(b). The requesters appealed the denial of access. In Interim Order P-374, former Assistant Commissioner Tom Mitchinson found that the PPAO records did not fall within the scope of section 65(2)(b) and ordered the Ministry to provide a proper decision letter regarding access to each appellant.

By letters to the appellants dated January 5, 1993, the Ministry denied access to the records on the basis that the PPAO files were not within the custody and control of the Ministry pursuant to section 10(1) of the Act.

Notice that an inquiry was being conducted to review the January 5th, 1993 decision of the Ministry was sent to the six appellants, the Ministry and the PPAO. The Ministry was invited to make representations regarding the application of exemptions should it be determined that the Ministry does have custody and/or control of the records. Representations were received from all parties. The Ministry and the PPAO made joint representations.

As a preliminary matter, I have considered the following requests from the PPAO which were contained in its representations:

> If the Commissioner considers any of the assertions of fact to be disputed, the Psychiatric Patient Advocate Office requests the opportunity to assert them by way of affidavit, or in a hearing. If the Commissioner agrees with the written arguments set out below, there is no need for the P.P.A.O. to make submissions orally. Otherwise, the P.P.A.O. requests that opportunity.

As the PPAO is aware, the procedures for processing appeals that have been developed by this Commission provide that representations are to be made in writing. In fact, the PPAO has made its representations in writing and indicates that it is satisfied with doing so provided that the Commissioner accepts the assertions of fact and agrees with the written arguments.

In my view, the PPAO has made helpful and complete representations which clearly set out its position on the issues arising in these appeals. Therefore, leaving aside what I consider to be the somewhat unusual way in which the PPAO's requests are phrased, I am of the view that this is not a situation where it would be appropriate to depart from the Commission's procedures for the receipt of representations.

The records at issue in these appeals consist of client contact sheets, memoranda from the Patient Advocate to staff at the facility, internal facility memoranda and correspondence.

ISSUES:

A. Whether the records are in the custody and/or under the control of the Ministry.

B. If the answer to Issue A is yes, whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

C. If the answer to Issue B is yes, whether the discretionary exemption provided by section 49(b) applies to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records are in the custody and/or under the control of the Ministry.

In their representations, the PPAO and the Ministry raised the concern that by providing copies of the records to the Commissioner's office they might prejudice their position that the Ministry does not have custody or control of the records.

One of the purposes of the Act as set out in section 1 is to provide the right of access to information in the custody or under the control of institutions in accordance with the principle that decisions on the disclosure of government information should be reviewed independently of government. In my view, in many situations, access by the Commissioner's office to the records at issue in an appeal is an integral element of the notion of independent review. However, I can appreciate the concern of the PPAO and the Ministry given the position they have taken on the issue of custody and/or control.

In my opinion, in circumstances such as those existing in these appeals, it would be "unfair" to require the production of the records from an institution and then use the fact of production, in itself, to refute the position advanced on the issue of custody or control. In essence, to do so would effectively penalize the institution for its co-operation and could well generate unnecessary and unproductive administrative and legal wrangling. Therefore, in my view, simply providing the Commissioner's office with a copy of a record does not, in and of itself, "prejudice" the position of an institution that it does not have custody and/or control of that record.

I will now consider the issue of the custody and/or control of the records at issue in these appeals.

In their representations, the appellants state:

> We do not accept that the files held by the Psychiatric Patient Advocate Program are not within the custody and control of the Ministry. The Advocates office is funded by the Ministry of Health and in fact is part of the Ministry of Health. Obviously the Advocates office must be accountable to someone. We would submit that it is accountable to the Ministry of Health.

The position taken by the PPAO and the Ministry is that the PPAO is independent from the Ministry and maintains its own highly confidential files. A great deal of background information has been provided in the representations of the PPAO and the Ministry to support the former's unique status. The representations refer to the following statement which appears in a report which was prepared following an independent review of the PPAO:

> While the Psychiatric Patient Advocate Office is an **internal advocacy program** in the sense that it is situated within the Ministry of Health, it was often described in the early years as being "quasi external", because advocates did not report to anyone in the hospitals, and because the provincial Co-ordinator had a high degree of independence in his reporting relationship with the Deputy Minister. [emphasis added]

The representations also refer to a Memorandum of Understanding (the Memorandum) dated September 1st, 1992 between the Minister of Health and the Director of the PPAO. The Memorandum states that its purpose is to confirm the existing "quasi-independent relationship" between the PPAO and the Ministry and to provide for the conversion of the PPAO's unclassified contract employees into classified civil servants, employed by the Ministry. It also provides a formal description of the nature of the PPAO's accountability to the Ministry.

Section 1(b) of the Memorandum describes the creation of the PPAO as follows:

> The Office [PPAO] was created as a quasi-independent program of the Ministry of Health in November, 1982 ...

Further, section 1(f) of the Memorandum describes the PPAO as a "... 'non-recurring project' of the Ministry since May 1983".

The memorandum also describes certain of the responsibilities of the Director of the PPAO as follows:

> 3(i) ... He or she shall report on a regular basis directly to the Deputy Minister on policy matters relating to advocacy and psychiatric patients' rights, and directly to the Assistant Deputy Minister for Health Systems Management Group on administrative matters.

With respect to the PPAO's records, the Memorandum states:

> 3(c) The [PPAO] is responsible for maintaining confidential records of instructed, non-instructed and systemic casework, complaints, findings and recommendations.
>
> (d) The [PPAO] is responsible for the custody and control of its confidential records.

The PPAO and the Ministry assert that the Memorandum confirmed the PPAO's **exclusive** custody and control of its records. They further assert, based on their interpretation of the Memorandum, that the Ministry itself does not have custody and/or control over PPAO records.

I have carefully considered the representations of the Ministry and the PPAO as they relate to the relationship between the Ministry and the PPAO. In this regard I have also reviewed the Memorandum of Understanding. In my view, by entering into the Memorandum the Ministry did not abdicate its authority over the PPAO. The Memorandum provides that the PPAO is responsible for maintaining confidential records relating to its advocacy operations. In my opinion, this does not mean that the PPAO has **exclusive** custody and/or control over records which it has been given the responsibility to maintain, to the exclusion of the Ministry, to which the PPAO is ultimately accountable.

In my opinion, the PPAO is fundamentally an internal program of the Ministry. It is not an entity that was created by statute, with its own separate legislative authority. Since I have concluded that the PPAO is a part of the Ministry, it follows that the records maintained by the PPAO fall within the overall custody and control of the Ministry for purposes of the Act.

ISSUE B: If the answer to Issue A is yes, whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

The definition of personal information contained in section 2(1) of the Act states, in part:

> "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,
>
> ...
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> ...
>
> (g) the views or opinions of another individual about the individual, and
>
> (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;

Generally speaking, the records consist of documents relating to interactions between the appellants and individuals who are patients in a psychiatric hospital.

Record 10 is the second page of a letter written by the appellant in Appeal P-910590, regarding employment-related concerns. In this letter the appellant mentions the name of a patient. In the copy of the record provided to this office, the patient's name has been severed. In my view, no purpose would be served by withholding this record from its own author and accordingly, I find that Record 10 should be disclosed to the appellant in Appeal P-910590 with the name of the patient severed.

Having reviewed the remaining records, in my view, each contains the personal information of one or more of the appellants and the personal information of one or more patients.

ISSUE C: If the answer to Issue B is yes, whether the discretionary exemption provided by section 49(b) applies to the records.

I have found that the records contain the personal information of the appellants and various patients. Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which reads as follows:

> 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) introduces a balancing principle. The Ministry must look at the information and weigh the requesters' rights of access to their own personal information against the other individuals' rights to the protection of their privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of other individuals' personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information (Order 37).

In Order P-440, Inquiry Officer Asfaw Seife discussed the application of section 49(b):

> In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

I agree with Inquiry Officer Seife's views and adopt them for purposes of these appeals.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of the personal information would result in an unjustified invasion of an individual's personal privacy.

Section 21(3) lists types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In their joint representations, the PPAO and the Ministry raise the presumption in section 21(3)(a) of the Act which 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;

In my view, in order for a record to fall within the scope of section 21(3)(a), it must relate to the matters specified in the section. The information must relate to medical, psychiatric or psychological matters, more specifically to history, diagnosis, condition, treatment or evaluation. In these appeals, the information at issue is contained in the advocate client files of the PPAO, whose mandate is to provide advocacy services to patients in psychiatric hospitals.

PPAO Patient Advocates are not medical, psychiatric or psychological caregivers. They are not involved in the history, diagnosis, condition, treatment, or evaluation of the patients.

In its representations the PPAO describes the Patient Advocate's relationship with the patients as one analogous to a solicitor-client relationship. In my view, this supports the position that the information contained in the records at issue in these appeals is different in nature from the types of information described in section 21(3)(a). Accordingly, I find that the presumption in section 21(3)(a) of the Act does not apply.

Further, I am of the view that none of the other presumptions in section 21(3) of the Act apply. I will now consider section 21(2) of the Act, which provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. Some of the factors favour disclosure and others favour protection of personal privacy.

In their representations, the appellants do not refer specifically to any of the section 21(2) factors, but I believe it can be inferred from their representations that they are raising the considerations contained in section 21(2)(d). The representations of the Ministry and PPAO raise the application of sections 21(2)(f) and 21(2)(h). These sections 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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > ...
> >
> > (f) the personal information is highly sensitive;
> >
> > ...
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 21(2)(d)

In Order P-312, former Assistant Commissioner Mitchinson set out the following requirements which must be established in order for section 21(2)(d) of the Act to be found to apply:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
>
> (2) the right in question is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellants assert that the Ministry and the PPAO are denying them their rights under the Act. In my view, the "rights" referred to in section 21(2)(d) do not include the "rights" created by the Act. However, even if this were not the case, the appellants have provided no evidence to support the application of section 21(2)(d). Therefore, I find that it is not a relevant factor in these appeals.

I am also of the view that none of the other factors under section 21(2) which favour disclosure are present.

Section 21(2)(f)

The Ministry and the PPAO submit that the personal information is highly sensitive. This information concerns the emotional and physical condition of the patients, the behaviour of patients and staff at the psychiatric hospital and it contains allegations of improper treatment of patients by staff and other complaints about the interactions of staff with the patients.

I accept that the information is of a highly sensitive nature and find that section 21(2)(f) is a relevant consideration.

Section 21(2)(h)

The PPAO and the Ministry have provided detailed background information about the PPAO. The PPAO deals with highly sensitive and confidential information provided by psychiatric patients about their interactions with staff. Great care has been taken by the PPAO to preserve the confidentiality of advocate client files, particularly with respect to the administration and staff of the psychiatric hospital. In its representations, the PPAO commented on the significance of this confidentiality as follows:

> All conversations between an advocate and client [patient] are confidential. None of the advocates' notes to the client file are inserted in the patient's clinical record or shared with the treatment team. The advocate will not discuss the client's issue with anyone without the client's consent.
>
> This confidential relationship is the cornerstone of the trust and confidence that clients place in our programme. Clients approach us routinely with issues that they consider too personal or contentious to share with staff.

I am satisfied that the information was provided by the patients in confidence and that section 21(2)(h) is a relevant consideration.

Having considered all of the relevant circumstances, the representations of the parties and the records themselves, I am satisfied that the disclosure of the records would constitute an unjustified invasion of the patients' personal privacy. Accordingly, I find that the records are properly exempt under section 49(b) of the Act.

As section 49(b) of the Act is a discretionary exemption, I have reviewed the Ministry's representations regarding its exercise of discretion in favour of denying access. I find nothing improper in the Ministry's exercise of discretion and would not alter it on appeal.

ORDER:

1. I order the Ministry to disclose Record 10 to the appellant in Appeal P-910590 with the name of the patient severed, within 15 days of the date of this order.

2. I uphold the Ministry's decision to deny access to the remaining records.

3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant in Appeal P-910590 pursuant to provision 1, **only** upon request.

Original signed by: July 13, 1993
Tom Wright
Commissioner