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

ORDER P-537

Appeal P-9300053

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

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 a number of Freedom of Information files which the Ministry had previously opened to respond to earlier access requests made by the same requester. More specifically, the requester sought access to all general records found in the files, to the requester's personal information, and to all decisions made by a named Ministry employee. The requester identified those locations within the Ministry in which the search for these records should be conducted. He further indicated that the time frame for the request was from January 1, 1990 until June 30, 1992.

The Ministry located records responsive to the request but denied access in full based on the exemption contained in section 14(2)(a) of the Act. The Ministry also relied on section 52(9) of the Act as a further ground for resisting disclosure. The requester appealed the denial of access, and raised the application of section 63(2) of the Act with respect to records in the custody or control of the Health Disciplines Board.

The appellant also maintained that the Ministry did not provide him with a proper decision letter in the manner prescribed in Order 81, and requested that the Ministry provide a list of the records to which access was denied along with a general description of each document.

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. Representations were received from both parties.

In its representations, the Ministry states that it provided the appellant with access in full to a number of records and access in part to two additional records. The Ministry also indicated that it had withdrawn its claim for exemption based on section 14(2)(a) of the Act. In his representations, the appellant stated that he was abandoning his assertion that section 63(2) applied to any of the records. He also clarified that he was not seeking access to any records in the files that were created while his previous files were in the inquiry stage of the appeals process.

THE RECORDS:

The records remaining at issue in this appeal as identified by the Ministry in the index it provided to this office with its representations are Records 9 and 12 (disclosed in part), and Records 13, 16, 17, 41, 44, 46, 47, 48, 63-66, 112-116, 118, 122, 127, 135, 150-155, 161-166, 177-182, 191-196, and 201-206 to which access was denied in full.

As I have already indicated, during the period of time covered by the present appeal, the Ministry had opened several Freedom of Information files to process access requests made by the same individual who is the appellant in this case. In many instances, the appellant was satisfied by the decision of the Ministry made in response to the request and did not appeal the decision of the Ministry to the Commissioner's office. The appellant has received full access to the documents in these files.

In the other 12 files which are at issue, this individual had appealed the decision of the Ministry to the Commissioner's office. The Ministry and the Commissioner's office both opened an appeal file to deal with each of these cases. An Appeals Officer was then assigned to attempt to resolve the appeal by way of a mediated settlement between the appellant and the Ministry. During the mediation stage of these appeals, the Appeals Officer and employees of the Ministry corresponded on various issues involving the appeal. In addition, Ministry personnel authored internal memoranda, notes etc. concerning these appeals. It is these documents that were generated during this **mediation** stage of the appeals process that constitute the records at issue in this appeal.

These records may be characterized as follows:

(1) Internal Ministry Documentation (Records 13, 46, 47, 48, 65, 66, 112, 114, 115, 135, 136, 151, 152, 162, 163, 178, 179, 192, 193, 202, 203, and the severed portions of Records 9 and 12).

(2) Correspondence from the Ministry to the Commissioner's office (Records 16, 17, 44, 63, 113, 122, 127, 154, 165, 181, 195, and 205).

(3) Correspondence from the Commissioner's office to the Ministry (Records 41, 64, 116, 153, 155, 161, 164, 166, 177, 180, 191, 194, 196, 201, 204, and 206).

PRELIMINARY ISSUE:

The appellant is of the view that the Ministry's decision letter is inadequate in that it failed to provide him with an index of the records. He asserts that the decision letter should have included a description of the records to which access was being denied in whole or in part, the exemptions applied to each record, and an explanation for the application of each exemption to each record. He refers to Order 81 to support this proposition.

In its representations, the Ministry took the position that "notwithstanding Order 81, the original decision letter was proper and appropriate, given the circumstances surrounding the request."

The issue that I must determine is what type of decision the Ministry should have issued in response to the appellant's request.

When an institution receives an access request for a large volume of records or for records that are unduly expensive to produce, it has three options. First, it may issue a final decision and, if applicable, a final fee estimate. Second, it may extend the 30-day time limit for making an access decision for a period that is reasonable in the circumstances. Third, it may provide the requester with an interim decision and fee estimate.

Order 81, referred to in the representations of the appellant, established the steps that an institution should take when exercising the third option - the issuance of an interim decision letter and fee estimate. However, this option is only available to institutions in limited circumstances where the records responsive to the request are unduly expensive to produce for review by the head prior to the issuance of a final decision.

In my view, the request in the present appeal did not give rise to a situation in which the Ministry could choose to issue a decision of the nature described in Order 81. It was not a case in which the record was unduly expensive to produce for inspection by the head of the institution in making a decision. Rather, it is my opinion that the Ministry correctly processed this request, in the normal course, by issuing a final decision. The final decision was issued pursuant to section 26 of the Act and access was denied to some of the records. That section reads:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27 and 28, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

When an institution denies access to a record, in whole or in part, pursuant to section 26 of the Act, it is required to issue a notice of refusal to the requester setting out the elements enumerated in section 29(1)(b) of the Act. That section states:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In providing a notice of refusal under section 29, the extent to which an institution describes a record in its decision letter will have an impact on the amount of detail required under section 29(b)(ii). For example, should an institution merely describe a record as a "memo", more detailed reasons for denying access would be required than if a more expansive description of the record had been provided. Whichever approach is taken, the key requirement is that the requester must be put in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324).

In my view, the notice of refusal issued by the Ministry in this appeal did not satisfy the requirements of section 29(1)(b) of the Act because it did not provide the appellant with sufficient information about the nature of the records at issue. In particular, it neither provided a description of the individual records at issue nor an explanation of why section 52(9) applied to those records to which the Ministry was denying access.

A copy of the edition of "IPC Practices", which outlines the requirements of a proper decision letter and which includes a sample index prepared by the Commissioner's office was forwarded to the Ministry along with the Notice of Inquiry. I would encourage the Ministry to refer to this document for future decisions made under the Act.

Because I have disposed of all issues relating to the records in this order, there would be no useful purpose served in requiring the Ministry to provide a new decision letter to the appellant.

ISSUES:

The only issue remaining in this appeal is whether the Ministry properly denied access to the records at issue in accordance with the provisions of section 52(9) of the Act. This section states that:

> Anything said or any information supplied or any document or thing produced by a person in the course of an **inquiry** by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court. [emphasis added]

SUBMISSIONS/CONCLUSIONS:

As I have stated, the records at issue were generated during the **mediation** or pre-inquiry stage of the processing of 12 appeals that the appellant had previously filed against prior decisions of the Ministry. Accordingly, because section 52(9) refers to the production of documents or things in the course of an **inquiry**, in my view, it has no direct application to the records in this case.

The issues raised in this appeal are significant and have not been addressed in previous orders of the Commissioner's office. In my view, it is important to consider the records at issue in this appeal in the context of the general scheme of the appeals process provided for by the Act. Accordingly, I believe that it would be useful to first provide a brief overview of the appeals process as conducted by the Commissioner's office pursuant to the terms of the Act. I will then consider whether any other statutory provisions might apply to the records. I will initially deal with the records in categories 2 and 3 as described above. For the purpose of clarity, I will refer only to sections of the provincial Act. My comments are, however, equally applicable to the corresponding sections of the Municipal Freedom of Information and Protection of Privacy Act.

The appeals process is initiated when the Commissioner's office receives a letter of appeal from a person who is dissatisfied with the decision which he or she has received from a government institution in response to a request for access to information. The Commissioner's office then opens an appeal file and the institution whose decision is being appealed is notified of the appeal. An Appeals Officer is appointed as a mediator pursuant to section 51 of the Act which states:

> The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

Should the Appeals Officer not be able to effect a settlement of the appeal, the Commissioner, or his designate, will then conduct an inquiry and make an order disposing of the matters at issue. The statutory authorization for the conduct of the inquiry and the issuance of orders is found in sections 52(1) and 54(1) of the Act respectively. Section 52(1) reads as follows:

> Where a settlement is not effected under section 51, the Commissioner shall conduct an inquiry to review the head's decision.

Section 54(1) prescribes that:

> After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

As I have indicated, the records at issue in the present appeal were generated during the mediation stage of the appeals process. While, pursuant to section 51 of the Act, there is no requirement that the Commissioner appoint a mediator, in all 12 appeals from which the records at issue were generated, the Commissioner had, as is the general practice, authorized an Appeals Officer to try to effect a settlement of the appeals. During mediation, the Appeals Officers necessarily communicated both orally and in writing with the appellant and the Ministry.

While there are no orders of the Commissioner's office where the records considered were created during the mediation stage of an appeal, there are orders which have dealt with requests for the exchange of representations submitted in the inquiry stage of an appeal. These orders have examined the ability of the Commissioner's office to control its own process and the approach to take in dealing with collateral or derivative access requests. It is my view that these orders provide guidance in addressing the issues raised by this appeal.

The orders which I have referred to involve the interpretation of section 52(13) of the Act. This provision states:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order 164, former Commissioner Sidney B. Linden considered an appellant's request for a copy of the representations of the Ministry which had been submitted during the inquiry.

The Commissioner determined that because the Act did not specifically address all of the circumstances which arose in the course of an inquiry, he had the power to control the process. He decided that, if the institution's representations were given to the appellant, the contents of the record would effectively be disclosed. Accordingly, he did not order the exchange of representations.

This approach was followed by Commissioner Tom Wright in Order 207, where a similar request had been made for access to representations. In that order, Commissioner Wright expanded on the authority of the Commissioner or his/her delegate to control the inquiry process. He quoted from case law and administrative law texts to support his position. As I believe that the contents of that order have relevance to the present appeal, I will set out the relevant passages from that order.

In Re Cedarvale Tree Services Ltd. and Labourers' Intl. Union of North America, Local 183, [1971] 3 O.R. 832 (Ontario Court of Appeal), Mr. Justice Arnup, at page 841 stated as follows:

> [T]he Board [Ontario Labour Relations Board] is a master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred on it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the court (if it be a rule at all) is that the board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

In Practice and Procedure before Administrative Tribunals, The Carswell Company Limited, Toronto, 1988, Robert MaCaulay, Q.C. states that the above-noted observation of Mr. Justice Arnup with respect to the Ontario Labour Relations Board is of general application to administrative agencies. Further at pages 9-7 and 9-8, he states:

> Generally, subject to any statutory provisions, boards have a common law obligation to run their own affairs as they see fit. This may be construed as a conferral of extensive discretion, but it is subject to the courts' powers to review. To be given wide discretion does not mean that it will be exercised in every case, but rather in the appropriate circumstances.

In Fishing Vessel Owners' Association of British Columbia et al. v. Canada (1985), 57 N.R. 376 (Federal Court of Appeal), Mr. Justice Andy states, at page 381, as follows:

> Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or the rules of Court.

In Order 207, Commissioner Wright again concluded that the appellant had no right of access to the representations of the institution.

The issue of the exchange of representations arose again in Order P-345 in which Commissioner Wright reviewed the contents of Orders 164 and 207. He also made reference to comments made by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision

dated May 6, 1991, in the context of an application for judicial review of Order 162. On pages 11 and 12 of his decision, Mr. Justice Isaac stated:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act, which, in my view shield such information from disclosure.

Mr. Justice Isaac then went on to quote sections 52(13) and 55(1) of the Act. I have previously referred to section 52(13). Section 55(1) provides that:

> The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

After reviewing the previous orders and considering the more recent caselaw, Commissioner Wright again concluded that the appellant had no right of access to the representations of the institution.

Orders 164, 207, and P-345 all addressed the issue of the exchange of representations. In my view, however, the analysis may be equally applicable to the records in categories 2 and 3 in this appeal (correspondence between the Ministry and the Commissioner's office) in the sense

that there exist similar concerns about disclosure of the information contained in these records. It is not necessarily just the representations of the Ministry that may contain references to, or quotes from, the records at issue; such information may also be found in correspondence to and from the Ministry, or other parties to the appeal, and the Commissioner's office.

In addition, to order this correspondence disclosed when the records for which the original access request was made were not released on appeal, would represent a collateral and indirect means of obtaining access to information that was the subject of another proceeding.

I believe that the process envisaged under the Act was not intended to be used in such a manner or for this purpose. Nor should the process result in the same information having to be considered in potentially two separate appeals, which is a possibility if the requester submits an original access request and a subsequent request for the institution's Freedom of Information file.

To summarize, it is my view that the records in categories 2 and 3 should not be disclosed to the appellant for the following reasons:

(1) The Commissioner's office has a right to control its own process.

(2) It is possible that these records may contain the same information that was the subject of the original appeal that was not disclosed.

(3) To grant access to these records would encourage duplicate appeal proceedings and militate against finality in the appeals process.

In my opinion, this view is consistent with the general scheme of the legislation as set out in sections 52(9), 52(13), and 55(1) of the Act. It is also consistent with the legal authorities and academic sources cited with respect to questions of procedure which arise before administrative tribunals. Accordingly, I uphold the Ministry's decision to deny access to the records set out in categories 2 and 3 on page 2 of this order.

I will now consider the records in category 1. In my view, different considerations apply to these records which represent the internal documentation generated by the Ministry during the course of processing the appellant's prior appeals. While it is true that some of these records contain information that is similar to that included in the records which fall under categories 2 and 3, these documents were created by Ministry personnel for the purpose of processing the appeals. They do not fall within the sphere of the Commissioner's office appeals process.

The Ministry has available to it the exemptions provided for in sections 12 to 22 of the Act should it wish to withhold certain information contained in these records. For example, any discussion of the Ministry's position on these appeals that might reveal a suggested course of

action for the Ministry to take, might be exempt pursuant to section 13 of the Act. In this appeal, the Ministry has chosen not to invoke any discretionary exemptions; nor do any mandatory exemptions apply to these records. Accordingly, it is my view that the category 1 records should be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 16, 17, 41, 44, 63, 64, 113, 116, 122, 127, 153, 154, 155, 161, 164, 165, 166, 177, 180, 181, 191, 194, 195, 196, 201, 204, 205, and 206.

2. I order the Ministry to disclose Records 13, 46, 47, 48, 65, 66, 112, 114, 115, 135, 136, 151, 152, 162, 163, 178, 179, 192, 193, 202, and 203 and those portions of Records 9 and 12 not previously disclosed to the appellant within 15 days of the date of this order.

3. In order to verify compliance with Provision 2 of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant, **only** upon request.

[IPC Order P-537/September 20, 1993]

Original signed by: September 20, 1993
Anita Fineberg
Inquiry Officer