



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

# **ORDER P-592**

**Appeal P-9300132**

**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/Télééc: 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 personal information and general records relating to certain Freedom of Information files maintained by the Ministry. The requester in the present appeal had also been the individual whose requests had prompted the opening of these files.

The Ministry located 70 records responsive to the request. Access was granted in full to 44 records. Access was, however, denied in part to one record pursuant to section 17(1)(b) of the Act and in full to the remaining 25 records pursuant to sections 13(1), 17(1)(b), 18(1)(f), 19, 52(9) and 52(13) of the Act.

The requester appealed the Ministry's denial of access, except for that information withheld pursuant to section 52(13). In addition, he questioned whether those who made the decision pertaining to his access request had the requisite authority to do so, and stated that he believed that further records should exist at the Oak Ridge Division of the Penetanguishene Mental Health Centre.

Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the appellant and a person (the affected person) whose rights may have been affected by the disclosure of information contained in one of the records. Representations were received from the appellant and the Ministry only.

Both during mediation, and following the receipt of representations, the appellant indicated that he was not seeking access to some of the records which had been withheld from him. In addition, duplicate documents were removed from the records at issue. The records which remain may be placed into three categories. The first are records which were supplied to the Commissioner's office during the inquiry stage of the appeals process. The second are records which were provided to the Commissioner's office in the pre-inquiry or mediation stage of the appeals process. The third category involves records which were internally generated within the Ministry which were not shared with the Commissioner's office at any stage of the appeal process.

The records at issue, along with a brief description and the exemptions applied by the Ministry to each, are listed in Appendix A to this order.

## PRELIMINARY ISSUES:

The appellant questions whether both the Director of the Legal Services Branch and the Administrator of the Penetanguishene Mental Health Centre (and Oak Ridge Division) had the requisite delegated authority pursuant to section 62(1) of the Act to deny access to certain of the records at issue.

Section 62(1) of the Act provides as follows:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

The Ministry has provided with its representations a copy of the Ministry of Health's Delegation of Authority document, which was in effect at the time the decision to deny access to some records was issued. It shows that Directors and Hospital Administrators have, among other powers, the delegated authority to grant access in part and to apply exemptions under sections 12 to 22 and section 49 of the Act. Thus, I am satisfied that the decision-makers had proper delegated authority to apply the exemptions cited.

I note that access was also denied to some of the records pursuant to section 52(9) of the Act. The delegation of authority does not refer specifically to section 52(9).

Section 52(9) of the Act provides as follows:

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.

Section 52(9) creates a particular type of privilege for information supplied or documents or things produced during an inquiry. In my view, it is not necessary that this privilege be referred to expressly in the head's delegation.

As a result, I am satisfied that the Director of Legal Services and the Administrator of the Penetanguishene Mental Health Centre (and Oak Ridge Division) also had the requisite authority to claim that the privilege referred to in section 52(9) applies to certain records at issue.

## **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records at issue.
- B. Whether the mandatory exemption provided by section 17(1)(b) of the Act applies to the records at issue.
- C. Whether the discretionary exemption provided by section 18(1)(f) of the Act applies to the records at issue.

- D. Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue.
- E. Whether the privilege contained in section 52(9) of the Act applies to the records at issue.
- F. Whether the Ministry made an adequate search for all records at the Penetanguishene Mental Health Centre and the Oak Ridge Division of the Penetanguishene Mental Health Centre.

## **SUBMISSIONS/CONCLUSIONS:**

### **ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies to the records at issue.**

The Ministry claims that the exemption contained in section 13(1) of the Act applies to Records 23C, 24C, 46C, 47C and 51C to 54C. Section 13(1) provides as follows:

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.

Advice for the purposes of section 13(1) of the Act 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 during the deliberative process (Order 118).

I have reviewed the records for which section 13(1) was claimed and am satisfied that the discretionary exemption provided by section 13(1) applies to all of Records 47C and 51C and to those parts of Records 23C, 24C, 46C, 53C and 54C, indicated on the highlighted copies of these records which I will provide to the Ministry. Those parts of Records 23C, 24C, 46C, 53C and 54C which do not qualify for exemption under section 13(1) contain merely the communication of information and do not reveal advice or recommendations.

It is my view that Record 52C is more appropriately addressed under Issue D, below.

Because section 13 is a discretionary exemption, I have also reviewed the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption and I find nothing improper in the determination which has been made.

### **ISSUE B: Whether the mandatory exemption provided by section 17(1)(b) of the Act applies to the records at issue.**

The Ministry submits that the exemption contained in section 17(1)(b) of the Act applies to three lines withheld from Record 20C and Record 26C in its entirety. Record 20C is described as a file summary briefing while Record 26C is a letter from an affected person to the Freedom of Information and Privacy Co-ordinator (the Co-ordinator), expressing this individual's views with regards to the disclosure of records.

Section 17(1)(b) of the Act states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly, or explicitly, where the disclosure could reasonably be expected to,

result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

For a record to qualify for exemption under section 17(1)(b) the Ministry and/or the affected person must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in 17(1)(b) will occur.

[Order 36]

Upon review of the records at issue and the representations of the Ministry, I am not satisfied that the withheld portion of Record 20C contains a trade secret or scientific, technical, commercial, financial or labour relations information. As this portion of the record does not satisfy Part 1 of the test set out above, the three lines withheld from disclosure in Record 20C do not qualify for exemption under section 17(1)(b).

I am satisfied that Record 26C contains commercial information, that it was implicitly supplied in confidence and that disclosure could reasonably be expected to result in similar information of the same quality and detail no longer being supplied to the Ministry. It is also my view that it is in the public interest that affected persons continue to make representations to institutions where

[IPC Order P-592/December 1, 1993]

third party interests are at stake and that these submissions be detailed and frank. The disclosure of such representations where the provisions of section 17(1)(b) would otherwise apply, would inhibit the flow of such information to institutions and would not serve the public interest.

As a result, I am satisfied that the mandatory exemption provided by section 17(1)(b) applies to Record 26C.

**ISSUE C: Whether the discretionary exemption provided by section 18(1)(f) of the Act applies to the records at issue.**

The Ministry submits that section 18(1)(f) applies to Record 46C, which is a note to file dated January 14, 1993. In order to qualify for exemption under section 18(1)(f) of the Act, the Ministry must establish that the record satisfies each element of the following three part test:

1. the record must contain a plan or plans; **and**
2. the plan or plans must relate to:
  - (i) the management of personnel or
  - (ii) the administration of an institution; **and**
3. the plan or plans must not yet have been put into operation or made public.

[Order P-229]

I have found under Issue A, that section 13(1) of the Act applies to part of Record 46C. Those parts of Record 46C still at issue do not contain a plan of any sort, and I conclude that section 18(1)(f) has no application to the remaining portions of the record.

**ISSUE D: Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue.**

The Ministry claims that section 19 of the Act applies to Records 49C, 50C, 51C and 52C. As I have found under Issue A that section 13(1) of the Act applies to all of Record 51C, it is not necessary for me to consider the application of section 19 to this record.

Section 19 of the Act provides as follows:

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.

This section consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication; **and**  
(b) the communication must be of a confidential nature; **and**  
(c) the communication must be between a client (or his agent) and a legal advisor; **and**  
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Record 49C is an inter-office memorandum from legal counsel to the Co-ordinator. This record contains no substantive advice or information and appears to be nothing more than an ordinary administrative communication which happened to originate from Crown counsel.

In my view, the Ministry has failed to demonstrate in its representations that this record is related to seeking, formulating or giving legal advice, that this record was created or obtained for the lawyer's brief or that the dominant purpose of the record was for use in giving legal advice or in contemplation of litigation or for use in litigation. It is my view, therefore, that section 19 does not apply to Record 49C.

Record 50C is a memorandum from the Co-ordinator to Crown counsel relating to seeking, formulating or giving legal advice. Record 52C is a record of an oral communication between Crown counsel and an employee of the Ministry's Freedom of Information office relating to the seeking and giving legal advice. I am satisfied that the exemption under section 19 applies to each of these records.

Because section 19 is a discretionary exemption, I have also reviewed the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption and I find nothing improper in the determination which has been made.

**ISSUE E: Whether the privilege provided by section 52(9) of the Act applies to any of the records at issue.**

The Ministry submits that section 52(9) of the Act applies to Records 3C, 8C, 13C and 59C.

This provision states as follows:

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.

Record 8C is a letter from an affected person to the Commissioner's office to which the Co\_ordinator had been copied, containing the party's representations submitted as part of the inquiry stage of the appeals process. Section 52(9) applies directly to this record.

Record 3C, however, is a Ministry of Health note to file, describing a telephone conversation between a staff person with the Ministry of Health and the Commissioner's office following the disposition of an appeal by way of an order. The note contains no reference either to the records at issue in the appeal or matters of substance relating to the appeal. Records 13C and 59C are internal Ministry correspondence, both of which appear to relate to appeals in the pre-inquiry stage of the process.

Section 52(9) was recently interpreted in Order P-537 by Inquiry Officer Anita Fineberg. In that order, it was noted that, since the records at issue in that appeal were generated during the

**[IPC Order P-592/December 1, 1993]**



mediation or pre-inquiry stage of the processing of an appeal, section 52(9) had no direct application to the records at issue. For the same reason, I find that section 52(9) has no direct application to Records 13C or 59C in the present appeal.

Inquiry Officer Fineberg went on, however, to distinguish between records which represented internal Ministry documentation and records which were correspondence between the Ministry and the Commissioner's office during the pre-inquiry stage of the appeals process. While Inquiry Officer Fineberg concluded that the former category of records should be released to the requester, subject to the application of other exemptions, the latter were not to be disclosed 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.

The same rationale should apply to correspondence between the Commissioner's office and the Ministry which is exchanged following the inquiry stage of an appeal and which relates directly to the disposition of an appeal or the contents of records not ordered disclosed. However, Record 3C describes an exchange between the Ministry and the Commissioner's office which is of an administrative nature only. In my view, information of this sort, which does not pertain directly to the substance of the appeal, falls outside the purview of both section 52(9) of the Act and the rationale set out in Order P-537. It should, therefore, be disclosed to the appellant.

Record 13C is a one-page covering letter from the Co-ordinator to an employee of the Ministry of Health to which is attached a copy of a two-page decision letter sent to the appellant in another appeal, and a copy of the four pages of records at issue in that appeal. As the first three pages of this record are internal Ministry correspondence, and because other exemptions have not been claimed, I conclude that this portion of Record 13C should be disclosed to the appellant.

The remaining four pages of Record 13C are documents which were the subject of another access request and appeal. As the question of access to these records has been previously disposed of in Order P-353, I will not re-address the issue here. To re-consider this issue would encourage duplicate appeal proceedings and militate against finality in the appeals process.

Finally, Record 59C is internal Ministry correspondence to which other exemptions have not been claimed. It is my view that it should be disclosed to the appellant in this appeal.

**ISSUE F: Whether the Ministry made an adequate search for all records at Penetanguishene Mental Health Centre and Oak Ridge Division of the Penetanguishene Mental Health Centre.**

The appellant is of the view that further records responsive to his request should exist. I must consider, therefore, whether or not the Ministry's search for the requested records was reasonable in the circumstances.

The appellant's representations state, in particular, that records should exist at Penetanguishene Mental Health Centre and at the Oak Ridge Division of the Centre. In its representations, the Ministry attested to the sufficiency of the search and confirmed that no further records responsive to the request had been located. Having carefully reviewed the representations of the appellant and the Ministry, I am satisfied that the Ministry has taken all reasonable steps to locate additional records which would respond to the appellant's request, and I find that the search was reasonable in the circumstances of this appeal.

**ORDER:**

1. I uphold the Ministry's decision not to disclose to the appellant Records 3C, 8C, 26C, 47C, 50C, 51C, 52C, the last four pages of Record 13C and the highlighted portions of Records 23C, 24C, 46C, 53C and 54C.
2. I order the Ministry to disclose to the appellant Records 20C, 49C, 59C, the first three pages of Record 13C and those portions of Records 23C, 24C, 46C, 53C and 54C which have **not** been highlighted in the copy of the records which I have provided with this order to the Freedom of Information Co-ordinator at your Ministry, within 35 days of the date of this order, and **not** earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ December 1, 1993

## APPENDIX A

RECORD NUMBER	DESCRIPTION OF RECORD	EXEMPTION(S) CLAIMED Section Number
3C	Note to file dated October 26 and 27, 1992	52(9)
8C	Letter from a third party to the Commissioner's office dated July 30, 1992	52(9)
13C	Cover letter dated July 17, 1992, enclosing a decision letter and four pages of records	52(9)
20C	Three lines withheld from a File Summary Briefing dated November 5, 1991	17(1)(b)
23C	Memorandum to the Deputy Minister dated November 13, 1991	13(1)
24C	Briefing note dated November 13, 1991	13(1)
26C	Letter from an affected person to the Ministry's Freedom of Information Co-ordinator dated November 5, 1991	17(1)(b)
46C	Note to file dated January 14, 1993	13(1) and 18(1)(f)
47C	Note to file dated January 12, 1993	13(1) and 18(1)(f)
49C	Inter-office memorandum dated January 28, 1993	19
50C	Inter-office memorandum dated January 28, 1993	19
51C	Inter-office memorandum dated January 8, 1993	13(1) and 19
52C	Note to file dated December 18, 1992	13(1) and 19
53C	Note to file dated December 2, 1992	13(1)
54C	Note to file dated December 2, 1992	13(1)
59C	Memorandum from the Freedom of Information Co-ordinator dated January 14, 1993	52(9)