



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

ORDER P-666

Appeal P-9300069

Ministry of Health



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ORDER

NATURE OF THE APPEAL:

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 information pertaining to the requesters in their personal capacities and to a named physiotherapy centre. The time frame to which the application related was from 1965 to the date of the request.

Upon receipt of the application, the Ministry wrote to the requesters to clarify the type of information being sought.

Once the response was received, the Ministry located a large number of records that were responsive to the request. The Ministry granted access in full to many of these documents. The Ministry refused, however, to disclose over 160 records, either in whole or in part, based on the following provisions contained in the Act:

- Advice to government (section 13(1))
- Solicitor-client privilege (section 19)
- Invasion of privacy (section 21)
- Information provided to the Commissioner during an inquiry (section 52(9))
- Access to representations (section 52(13))

The Ministry also informed the requesters that 45 program areas of the institution had been searched in an effort to respond to the request. The requesters appealed the Ministry's denial of access to the Commissioner's office. The requesters also take the position that additional records which are responsive to the request should exist.

The mediation of this appeal was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and to the requesters (now the appellants). Representations were received from both parties.

While these representations were being considered, Commissioner Tom Wright issued Order M_170 which interpreted several statutory provisions of the Municipal Freedom of Information and Protection of Privacy Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because similar statutory provisions were at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the appellant and the Ministry. The parties were then given an opportunity to change or supplement the representations which they had previously made. Further representations were received from both parties.

In their submissions, the appellants also raised the application of section 23 of the Act, the so-called public interest override.

PRELIMINARY ISSUES:

Before considering the sections of the Act which the Ministry has applied to withhold the records at issue, I will address a number of preliminary issues which have arisen in this appeal.

(1) The Adequacy of the Search for Responsive Records

The present request/appeal involves some records which were the subject of an earlier request made to the Ministry in March 1988. When the Ministry issued a decision letter in response to this request, the requesters appealed that ruling. The appeal number assigned to this file was P-9000089. As part of their grounds for appeal, the appellants argued that the search which the Ministry had undertaken for responsive records was inadequate. This appeal was adjudicated by the Commissioner's office through the issuance of Orders 135 and P-211.

In Order P-211, then Assistant Commissioner Tom Wright ordered the Ministry to conduct further searches for information responsive to the request in the presence of a Compliance Investigator from the Commissioner's office. After undertaking this search, the Ministry identified a number of additional documents that were responsive to the request and issued a new decision letter where some of the records were withheld from disclosure.

The appellants subsequently appealed this access decision to the Commissioner's office. The appeal number assigned to this file was P-9100149. In this proceeding, the appellants also complained that the quality of some of the records which they had received was sub-standard and that the Ministry had not taken sufficient steps to search for and locate the original versions of these documents. During the mediation stage of this appeal, the Ministry undertook further searches for these records but could not locate the original versions.

In January 1992, the appellants withdrew Appeal Number P-9100149 except for the related issues involving the quality of photocopies and the adequacy of the records search. Shortly thereafter, the appellants filed a further request with the Ministry for the same type of information that was originally at issue in Appeal Number P-9000089. The time frame for the third request, however, extended from 1965 to the date of the new request in 1992, which was three years beyond the end date of the original application.

In response to this request, the Ministry withheld a number of additional records from disclosure. The appellants subsequently appealed this decision, thereby yielding Appeal Number P-9300069 which is the case presently before me. In their representations in this appeal, the appellants have again raised concerns about the adequacy of the search which the Ministry conducted for responsive records.

On this basis, I will now consider whether the Ministry's searches for records both in the context of Appeal Numbers P-9100149 and P-9300069 were reasonable in the circumstances of these cases.

At the outset, I would note that the search for records which formed the subject of Appeal Number P-9100149 was undertaken by Ministry personnel in the presence of a Compliance Investigator from this office. On this basis, I conclude that the scope of the searches undertaken met the standards of thoroughness contemplated under the Act. I also find, based on my review of the correspondence between the parties, that the Ministry attempted as best it could to

accommodate the concerns expressed by the appellants about the quality of the copies received in relation to this appeal.

With respect to Appeal Number P-9300069, the Ministry attempted to obtain clarification from the appellants about the kinds of records that were at issue. In response to this request, and where this clarification was forthcoming, it searched all relevant areas in the institution where the records might be located.

Where a requester provides sufficient detail about the records which he or she is seeking and an institution indicates that additional records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify the records which are responsive to the request. While the Act does not require that an institution prove to the degree of absolute certainty that such records do not exist, the search which the institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be found.

I have carefully considered the representations provided to me. I am satisfied that the searches conducted by the Ministry for higher quality copies in Appeal Number P-9100149 and for records in Appeal Number P-9300069 were reasonable in the circumstances of these cases.

(2) The Transfer of Portions of the Request

In its decision letter, the Ministry indicated that some of the records at issue, which had originally been in the custody of the Health Boards Secretariat, had more recently been transferred to the Archives of Ontario (the Archives). Rather than transferring this portion of the request to the Archives, the Ministry directed the appellants to submit a separate request to that institution. The Ministry did, however, provide the appellants with information on the exact location of the records within the filing system of the Archives.

In their representations, the appellants have asked whether it is their responsibility to seek access to any records which might be in the possession of the Archives or whether this responsibility should fall to the Ministry.

In order to address this issue, I will need to refer to section 25(1) of the Act. This provision stipulates that an institution must take certain steps where it (1) receives a request for information over which it does not have custody or control and (2) has knowledge that this document is in the possession of another institution. In this situation, the institution must, within

15 days of the receipt of the request, forward the request to the other institution and advise the requester in writing of this fact.

On the facts of this case, I find that, while the Ministry's efforts were designed to be helpful, it nonetheless failed to comply with the approach outlined in section 25(1) of the Act. On this basis, I order the Ministry to transfer the relevant portions of the request to the Archives of Ontario.

(3) Records Adjudicated in Previous Appeals or Otherwise Disclosed

A total of 14 records which are at issue in the present appeal were adjudicated upon in Order P-211 and were either withheld or disclosed to the appellants. Since the Commissioner's office has already issued a binding order with respect to these documents, they fall outside the scope of the present appeal.

In addition, in their representations, the appellants indicated that they had already obtained prior access to three additional records during the course of litigation. That being the case, I see no need to re-visit the subject of access to these records under the Act.

The 17 records to which I have referred to in this section are listed in Appendix A of this order and will not be discussed further.

(4) Records Responsive to the Request

In their representations, the appellants dispute the Ministry's position that the portions of Records F5 and F7 which have been withheld from them are not responsive to their request. I have carefully reviewed these records and find that the excerpts in question do not pertain to the appellants or their physiotherapy practice but rather to other physiotherapy practices in the province. On this basis, I find that the information in question falls outside the scope of this appeal.

(5) Duplicate Records

Some of the records in this appeal are duplicates of each other. These records (along with their duplicates in brackets) are Records A77 and A78 (F2), Record H3 (J3(a) representations only) and Record J20 (J21). As indicated in Appendix A, Records A77 and A78 are no longer at issue. My order with respect to Records H3 and J20 will also apply to their duplicates.

A list of the records which remain at issue and the sections claimed by the Ministry to deny access to each of these documents, in whole or in part, is attached to this order as Appendix B.

ISSUES:

There are eight additional issues to be addressed in this appeal which may be described as follows:

- A. Whether the records contain "personal information" as defined in section 2(1) of the Act and, if so, to whom the personal information relates.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records at issue.
- C. Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue.

- D. If the answer to Issues A, B and/or C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the personal information contained in the records.
- E. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information contained in the records.
- F. If the answer to Issues B or E is yes, whether there exists a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions provided by sections 13 or 49(b) of the Act.
- G. Whether section 52(9) of the Act applies to preclude the appellants from obtaining access to the records.
- H. Whether section 52(13) of the Act applies to preclude the appellants from obtaining access to the records.

EXEMPTIONS AND TESTS:

I will now more fully describe the exemptions and related provisions of the Act which the Ministry has claimed in conjunction with the tests developed by the Commissioner's office to determine when these provisions apply to particular record categories.

(1) Invasion of Privacy - Sections 2(1), 21, 47(a), 49(a) and (b)

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access. Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits an institution from releasing this information.

In both these situations, sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way in such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

(2) Advice to Government - Section 13

Section 13(1) of the Act states that:

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 and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

(3) Solicitor Client Privilege - Section 19

Section 19 consists of two branches, which provide a 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).

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. 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.

The term "legal advice" is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

(4) The Public Interest Override - Section 23

In order for section 23 of the Act to apply to a record, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

(5) Information Provided to the Commissioner during an Inquiry - Section 52(9)

Section 52(9) of the Act 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.

The privilege afforded to records by section 52(9) extends only to documents or correspondence which are supplied or produced in the course of an inquiry undertaken by the Commissioner's office.

In Order P-537, it has been held that correspondence exchanged between a party to an appeal and the Commissioner's office during the mediation or pre-inquiry stage of an appeal is also not subject to disclosure. That approach has been adopted for the following reasons (1) the Commissioner's office has a right to control its own process, (2) it is possible that such correspondence may contain the same information that was the subject of an earlier appeal and that was not disclosed and (3) to grant access to these records would encourage duplicate appeal proceedings and militate against finality in the appeals process.

Order P-592 has also held that the same rationale should apply to correspondence between the Commissioner's office and a party to the appeal which is exchanged following the inquiry stage of an appeal and which relates directly to the disposition of an appeal or the contents of any records which have not previously been disclosed.

(6) Access to Representations - Section 52(13)

Section 52(13) of the Act provides that:

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.

Except in unusual circumstances, the Commissioner's office will not order that the contents of the representations provided by one party to an appeal be released to another party.

SUBMISSIONS/CONCLUSIONS:

I will now consider the exemptions and related sections claimed by the Ministry in light of the tests which I have set out to determine whether these provisions apply to the records at issue.

ISSUE A: Whether the records contain "personal information" as defined in section 2(1) of the Act and, if so, to whom the personal information relates.

I have reviewed each of the records at issue in this appeal and the representations provided by the parties. In my view, because of the nature of the investigation which generated these documents, all of the records may be said to contain the personal information of the appellants. I also find that records C25, C27 to C80, C83, C84, C85, C90 to C153, J18 and J19 contain the personal information of individuals other than the appellants.

The personal information contained in the latter category of records includes the names, addresses and the identities of patients and referring physicians, physician billing numbers, details about the medical conditions of patients, diagnoses and the details of treatment.

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

The Ministry has claimed that the exemption contained in section 13(1) of the Act applies to Records J15, J22(b) and the second part of page 3 and all of page 4 of Record J23. I will consider Record J22(b) under my discussion of section 52(13) of the Act.

I have reviewed the two records for which section 13 has been claimed, along with the representations provided by the Ministry. Based on the tests which I have previously outlined, I find that this exemption applies to those portions of Record J23 for which this section has been claimed. This memorandum contains a recommendation which the intended recipient might either accept or reject.

I find, however, that Record J15, which is a draft letter authored by the Ministry's Freedom of Information Co-ordinator for transmittal to the appellant, does not contain any advice or recommendations. On this basis, it is not subject to exemption under section 13(1) of the Act.

Having determined that section 13(1) applies to a portion of Record J23, I have also considered the list of mandatory exceptions contained in section 13(2) of the Act and find that none of them apply in the circumstances of this appeal.

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

Of the records which remain at issue, the Ministry has claimed that section 19 applies to Records 323, H4, J12(a), J12(b), J22(a), J23, J25, J48 and J49 and to all or part of the information withheld from Records G5, J18(a) and J22.

I have carefully reviewed each of these records along with the representations provided to me by the parties. Based on the tests which I have previously set out, I find that Records 323, H4, J12(a), J22(a), J48, J49, the part of Records G5 and J22 for which this exemption was claimed, the second to last paragraph of Record J18(a) and the first two and a half pages of Record J23 all qualify for exemption under the second part of Branch 1 of section 19. Each of these documents was prepared by or for Crown counsel for use in giving legal advice.

I find, however, that neither Record J12(b) nor J25 qualify for exemption under section 19 of the Act. These documents do not contain legal advice nor were they prepared for use in litigation. On this basis, the two documents should be released to the appellants.

ISSUE D: If the answer to Issues A, B and/or C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the personal information contained in the records.

Under my discussion of Issues B and C, I have found that some of the records at issue in this appeal qualify for exemption under either sections 13(1) or 19 of the Act. These records also contain the personal information of the appellants. I have considered the Ministry's representations regarding its decision to exercise discretion in favour of not releasing this personal information under section 49(a) of the Act, and I find nothing improper in the determination which has been made.

ISSUE E: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information contained in the records.

Under my discussion of Issue A, I found that the majority of records at issue in this appeal contain the personal information of the appellants and other identifiable individuals.

In their representations, the appellants submit that the contents of these records represent an exception to the general rule, found in section 21(1) of the Act, that an institution must not release an individual's personal information to a third party. The appellants rely in particular on the wording of section 21(1)(e)(ii) of the Act which states that such personal information may be released:

for a research purpose if ... the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form ...

The Concise Oxford Dictionary (8th Edition) defines the term "research" to mean:

... the systematic investigation into and study of materials, sources, etc. in order to establish facts and reach new conclusions [and] ... an endeavour to discover new or to collate old facts etc. by the scientific study or by a course of critical investigation ...

Following a careful review of the evidence before me, I find that the appellants have not established that the personal information which they are seeking will be used for a research purpose as this term is commonly defined. On this basis, I find that the section 21(1)(e)(ii) exception to the section 21(1) mandatory exemption is not applicable in the present case.

The Ministry, on the other hand, submits that the presumptions against disclosure found in sections 21(3)(a) and (b) of the Act apply to the personal information contained in Records C25, C27 to C80, C83, C84, C85 and C90 to C153, either in whole or in part. For these reasons, the Ministry argues that the release of this information would constitute an unjustified invasion of the personal privacy of other named individuals under section 49(b) of the Act.

Sections 21(3)(a) and (b) provide that:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to

prosecute the violation or to continue the investigation.

I will first determine whether the personal information contained in these documents falls under the presumption found in section 21(3)(b) of the Act. In order to do so, it will be necessary for me to explore the context in which this information was originally created and then assembled together.

The personal information found in the records was initially collected by the Ministry during its own internal investigation into the billing practices of the appellants. According to the Ministry's representations, all of this information was then turned over to the Ontario Provincial Police detachment in Guelph, which subsequently initiated its own investigation. As a result of the OPP's inquiry, charges were subsequently laid against one of the appellants under The Criminal Code.

Based on the fact that the personal information was originally obtained for an internal Ministry investigation which did not have a law enforcement dimension, I must now consider whether the information was **compiled** as part of an investigation into a possible violation of the law for the purposes of section 21(3)(b) of the Act. The key issue is whether the term compiled means originally created or simply gathered or collected.

As indicated in the case of Page Estate v. Sachs (1993), 12 O.R. (3d) 371 (O.C.A.), the primary rule for interpreting legislation is that "the words of the statute must be first construed literally in their ordinary grammatical sense". On this basis, I will canvass the dictionary meaning for the term compile.

The Concise Oxford Dictionary (8th Edition) defines the word compile to mean:

... collect (material) into a list, volume, etc. [and] ... make up (a volume, etc.) from such material.

Webster's Third New International Dictionary, on the other hand, defines compile as:

"... 1. to collect and assemble (written materials or items from various sources) into a document or volume ..."

Thus, the ordinary grammatical meaning of compiled is to gather or collect rather than to create at first instance.

I have also reviewed the legislative history of section 21(3)(b) of the Act along with the purposes and scheme of the legislation. In my view, there is no evidence that the legislature intended to impose a different meaning on the term.

In arriving at my conclusion, I have also taken into account the decision of the United States Supreme Court in John Doe Agency v. John Doe Corporation 110 S. Ct. 471 (1989). In this case, the U.S. Defence Contract Audit Agency undertook a routine audit of a corporation which was completed in 1978. In 1985, the United States District Attorney instituted an investigation into possible fraudulent practices by the corporation.

The corporation subsequently filed a request under the U.S. Freedom of Information Act (the FOIA) for access to the records relating to the 1978 audit. At the time that the request was processed, these records were in the custody of the Federal Bureau of Investigation. This agency subsequently relied on Exemption 7 of the FOIA to deny access to the documentation. This provision protects from disclosure records or information compiled for law enforcement purposes where certain conditions are met.

In the course of issuing his decision, Justice Blackmun was required to interpret the scope of this provision. Speaking for the majority of the court, he stated that:

The wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been "compiled" when the Government invokes the Exemption 7. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents ... **This definition seems readily to cover documents already collected by the government originally for a non-law enforcement purpose...** [emphasis added]

After stressing that the term "compiled" does not mean "originally compiled", Mr. Justice Blackmun concluded his analysis in the following fashion:

We thus do not accept the distinction the Court of Appeals drew between documents that originally were assembled for law enforcement purposes and those which were not so originally assembled but were gathered later for such purposes. The plain language of Exemption does not permit such a distinction. Under the statute, documents need only to have been compiled when the response to the FOI request must be made.

To summarize, based on the dictionary definitions for the word "compile" and the interpretation placed on this term in the John Doe Agency case, I conclude that the ordinary meaning of compile for the purposes of section 21(3)(b) of the Act is to collect, gather or assemble together. Stating the matter differently, to compile does not mean to create at first instance.

The result of this interpretation is that, for personal information to be compiled and identifiable as part of an investigation into a possible violation of law under section 21(3)(b), it is not necessary for this information to have been originally created or prepared for that specific investigation. Rather, the section 21(3)(b) presumption will apply as long as the personal information was, at some point in time, assembled or gathered together as part of this investigation.

I am aware that, in Order P-612, a different meaning was ascribed to the term compiled in the context of section 21(3)(b) of the Act. Following a more detailed consideration of the issue, however, I have chosen not to follow the approach taken in that order.

[IPC Order P-666/April 27, 1994]

I have carefully reviewed the records at issue in this appeal, along with the representations provided by the parties. I am satisfied that the personal information contained in the records at issue was compiled by the OPP as part of an investigation into the billing practices of the appellants. That investigation was, in turn, directed towards determining whether there had been a violation of The Criminal Code for which charges could be laid. On this basis, I conclude that the release of this personal information would constitute a presumed unjustified invasion of the personal privacy of other individuals under section 21(3)(b) and must not be released to the appellants.

In their representations, the appellants submit that the factors set out in sections 21(2)(a) (public scrutiny of the institution) and 21(2)(d) (fair determination of the rights of the parties) of the Act collectively weigh in favour of disclosing the personal information contained in the records to them. As I have indicated previously, however, once a presumption under section 21(3) of the Act has been established, it may only be rebutted by the considerations outlined in section 21(4) or the public interest override found in section 23 of the Act (Order M-170).

I have considered section 21(4) of the Act and find that none of the personal information found in the records comes within the scope of this provision. I will deal with the application of section 23 in the next part of my order.

Based on this analysis, it is not necessary to determine whether the presumption against the disclosure of personal information found in section 21(3)(a) of the Act would also apply to the records at issue.

To summarize, I have found that the personal information of individuals other than the appellants contained in the records under consideration would, if disclosed, constitute a presumed unjustified invasion of personal privacy under section 21(3)(b) of the Act.

ISSUE F: If the answer to Issues B or E is yes, whether there exists a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions provided by sections 13 or 49(b) of the Act.

Under Issues B and D, I found that the Ministry properly exercised its discretion under sections 13(1) and 49(a) of the Act to exempt part of Record J23 from disclosure. I also found in my discussion of Issue E that a total of 121 additional records had been properly withheld from disclosure under section 49(b) of the Act. That being the case, I must now go on to consider the submission of the appellants that there exists a compelling public interest under section 23 of the Act in favour of disclosing these records. I would note that section 23 does not apply to records which have been properly withheld from disclosure under section 19 of the Act.

The appellants make their case for the application of section 23 in the following fashion:

The principle of compelling public interest manifests itself in the nature of my circumstances. I have been and am the subject or at the very least a party to a number of legal matters all of which are a matter of public record. In as much as matters of a legal nature disposed of and tried in a public judicial forum affect the public to the extent that precedent is established and that matters in which I have

been involved set precedent and in fact have altered certain aspects of the practice of physiotherapy, the conduct of disciplinary hearings and quasi-judicial proceedings in general, public interest in said matters exists.

I have carefully considered the representations advanced by the appellants. In my view, the predominant purpose for which the appellants seek the records in question is to further a private rather than a public interest. Even if I determined that a public interest exists in the disclosure of these records, I would not be prepared to conclude that such an interest was either compelling or that this interest clearly outweighs the purposes for which sections 13(1), 21 and 49(b) of the Act had been enacted.

For these reasons, I find that the public interest override found in section 23 of the Act does not apply to the records for which the sections 13(1) and 49(b) exemptions have been properly claimed. The Ministry may, therefore, withhold these records from disclosure.

ISSUE G: Whether section 52(9) of the Act applies to preclude the appellants from obtaining access to the records.

The Ministry has claimed that the privilege outlined in section 52(9) of the Act applies to Records J2, J5, J6, J7, J8, J12(c), J14(a), J16, J18(a), J20, J24 and the first paragraph of Record J22. In addition, I will consider Records J18 and J19 under this provision.

Records J16 and J20 are representations which the Ministry provided to the Commissioner's office in Appeal Number 8800179. In my view, it would be more appropriate to consider these records under my discussion of Issue H.

Records J2, J5, J6, J7 and J8 are internal Ministry memoranda regarding the disposition of various records under Order P-211.

Since these documents were not prepared during the course of an inquiry and because they do not represent correspondence between the Ministry and the Commissioner's office, they are neither subject to the privilege outlined in section 52(9) of the Act nor the basis for non-disclosure set out in Order P-537. Accordingly, these records should be disclosed to the appellant.

Records J12(c) and J24 are correspondence between the Ministry and the Commissioner's office regarding Appeal Number 880179 when this case was at the inquiry stage of the appeals process. Based on the wording contained in section 52(9) of the Act and the rationale outlined in Order P-537, I find that this information is privileged and not subject to disclosure.

Record J14 is a memorandum which documents the results of telephone discussions between the Ministry and the Commissioner's office regarding Appeal Number P-9100149 while this case was in the inquiry stage of the process. In my view, the disclosure of this record would reveal the actual communications between the institution and the Commissioner's office during the

inquiry process. For this reason, I find that this memorandum is also privileged under section 52(9) and based on the rationale outlined in Order P-537.

Records J18 and J19 are letters sent by the Commissioner's office to two affected persons involved in Appeal Number 880179. These letters have previously been disclosed to the appellants with the exception of the identity of the recipients. I have reviewed this information and find that it may properly be withheld from disclosure under section 52(9) of the Act in conjunction with the rationale outlined in Order P-537.

Record J18(a) discusses the severances which the Ministry made to a number of records prior to releasing these documents to the appellants. I have previously determined that the second to last paragraph of this document is exempt from disclosure under section 19 of the Act. I find that, for the purposes of section 52(9) of the Act, the contents of the record were not supplied to the Commissioner's office nor would they reveal information communicated in this fashion. On this basis, the information contained in this document, with the exception of the second to last paragraph, should be disclosed to the appellants.

Finally, Record J22 is an internal Ministry memorandum pertaining to Appeal Number 880179 after the case had moved into the inquiry stage of the appeals process. I have previously determined that the last two paragraphs of this document are exempt from disclosure under section 19 of the Act. I must now decide whether the first paragraph may be withheld under section 52(9). Since the contents of this record were not supplied to the Commissioner's office and because they would not reveal information communicated between the two organizations, I find that the privilege outlined in section 52(9) does not apply to the paragraph in question.

ISSUE H: Whether section 52(13) of the Act applies to preclude the appellants from obtaining access to the records.

Records H3, J12, J16, J20 and J22(b) collectively constitute the Ministry's representations in two appeals involving the appellants.

Records J12, J16 and J20 were the representations which the Ministry provided in Appeal Number 880179 which led to the issuance of Order P-211. In that appeal, the decision maker would have considered whether it was appropriate to provide the appellants with access to the Ministry's representations under section 52(13) of the Act. Since no such order was issued in that case and with a view towards avoiding duplicate requests for the same information, I conclude that it would be inappropriate to release these representations after the initial appeal has been concluded.

Records H3 and J22(b) constitute the representations made by the Ministry in Appeal Number P-9100149, some of whose issues are presently before me. I have carefully reviewed these representations. My conclusion is that the appellants do not require access to these submissions to enable them to make full representations in the present set of appeals. On this basis, and pursuant to section 52(13) of the Act, I find that they ought not to be released to the appellants.

ORDER:

1. I uphold the Ministry's decision not to disclose to the appellants Records 323, C25, C27 to C80, C84, C85, C90 to C153, G5, H3, H4, J12, J12(a), J12(c), J14, J14(a), J16, J18, J19, J20, J22(a), J22(b), J23, J24, J48, J49 as well as the second to last paragraph of Record J18(a) and the last two paragraphs of Record J22.
2. I order the Ministry to disclose to the appellants Records J2, J5, J6, J7, J8, J12(b), J15, J25 and the remainder of Records J18(a) and J22 within fifteen (15) days of the date of this order.
3. I order the Ministry to transfer that part of the request which relates to records formerly held by the Health Boards Secretariat to the Archives of Ontario within fifteen (15) days of the date of this order.
4. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ April 27, 1994

APPENDIX A

INDEX OF RECORDS NO LONGER AT ISSUE		
RECORD NUMBER(S)	EXEMPTION CLAIMED	PREVIOUS RECORD NUMBER AND DISPOSITION
A16 to A20	19	Record 4 Exemption upheld Order P-211
A24 and A25	13	Record 2 Exemption upheld Order P-211
A47	13	Record 3 Exemption upheld Order P-211
A72 and A73	19	Record 5 Exemption upheld Order P-211
A76	19	Record 6 Exemption upheld Order P-211
A77 and A78	19	Record 7 Exemption upheld Order P-211
A79	21	Record 11 Order P-211 Disclosed to appellants
C21, C22 and C24	21	Obtained by appellants during litigation

APPENDIX B

<p align="center">INDEX OF RECORDS AT ISSUE Appeal Number P-9300069</p>			
<p align="center">RECORD NUMBER(S)</p>	<p align="center">DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</p>	<p align="center">EXEMPTION(S) OR OTHER SECTION(S) CLAIMED</p>	<p align="center">DECISION ON RECORD</p>
323	Four page memorandum from legal counsel dated April 16, 1992	19	Withheld
C25	List of names and OHIP numbers of other named individuals	21	Withheld
C27 - C80	Questionnaires regarding physiotherapy services received	21	Withheld
C83	Memoranda disclosed with severances	21	Withheld
C84	OHIP claims information respecting a number of named individuals	21	Withheld
C85	Correspondence relating to a patient inquiry dated November 25, 1985	21	Withheld
C90 - C153	Questionnaires regarding verification of physiotherapy services	21	Withheld
G5	Memorandum dated February 25, 1986 from legal counsel	19	Withheld
H3	Representations of the Ministry with respect to Appeal Number P-910149	52(13)	Withheld
H4	Memorandum dated April 13, 1992 respecting the payment of physiotherapy fees	19	Withheld
J2	Memorandum relating to Order P-211	52(9)	Disclosed
J5 - J8	Memoranda relating to Order P-211	52(9)	Disclosed
J12	Representations of the Ministry with respect to Appeal Number 880179	52(13)	Withheld
J12(a)	Memorandum from legal counsel dated June 20, 1990	19	Withheld
J12(b)	Action request form dated June 7, 1990	19	Disclosed

INDEX OF RECORDS AT ISSUE
Appeal Number P-9300069

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTION(S) OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
J12(c)	Letter to Ministry Freedom of Information Co_ordinator dated June 5, 1990	52(9)	Withheld
J14(a)	Note to file dated February 17, 1992 regarding the mediation of Appeal Number P-910149	52(9)	Withheld
J15	Draft letter to appellant dated January 16, 1990 regarding Order 135	13(1)	Disclosed
J16	Representations of the Ministry with respect to Appeal Number 880179	52(9) and 52(13)	Disclosed
J18 and J19	Correspondence to affected persons with respect to Appeal Number 880179	21	Withheld
J18(a)	Note to file dated May 23, 1991 regarding the severance of records	19 and 52(9)	Disclosed
J20	Representations of the Ministry with respect to Appeal Number 880179	52(9)	Withheld
J22	Interoffice memorandum dated August 10, 1989 with respect to representations	19 and 52(9)	Withheld
J22(a)	Two-page undated memorandum respecting an IPC order	19	Withheld
J22(b)	Representations of the Ministry with respect to Appeal Number P-9100149	13(1) and 52(13)	Withheld
J23	Four-page memorandum with respect to representations for Appeal Number 880179	13(1) and 19	Withheld
J24	Correspondence dated July 26, 1989, respecting representations	52(9)	Withheld
J25	Memorandum from legal counsel dated April 27, 1989	19	Disclosed
J48	Memorandum from legal counsel dated May 4, 1988	19	Withheld

INDEX OF RECORDS AT ISSUE
Appeal Number P-9300069

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTION(S) OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
J49	Memorandum to legal counsel dated May 3, 1988	19	Withheld