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

ORDER P-775

Appeal P-9400097

Ontario Criminal Code Review Board

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ontario Criminal Code Review Board (the Board) received a request from a patient in the Penetanguishene Mental Health Centre (the PMHC) for access to records relating to himself. The Board located 74 responsive records but denied access to these documents in their entirety based upon the following exemptions contained in the Act:

- advice or recommendations - section 13
- law enforcement - section 14(1)(b)
- information published or available - section 22(a)
- discretion to refuse requester's own information - section 49(a)

In addition, the Board claimed that a number of the records are not subject to the Act pursuant to section 65(2)(a). This provision excludes from the application of the Act records which are **clinical records** as defined by section 35(1) of the Mental Health Act (the MHA).

The requester appealed these decisions to the Commissioner's office. A Notice of Inquiry was provided to the appellant, through his agent, and the Board. Representations were received from the Board, and the appellant, by his agent.

THE MANDATE OF THE BOARD

I will now describe how the appellant's records came before the Board and the statutory authority of the Board in relation to the records at issue.

The Board was established pursuant to section 672.38(1) of the Criminal Code (the Code) to:

> "make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered ..."

The records at issue in this appeal comprise those documents held and received by the Board including all "disposition information". This information includes all or part of any assessment and any other written information about the accused that is before the Board and is relevant to making a disposition. It may include documents submitted to the Board at a disposition hearing by the Attorney General of Ontario, the accused or the hospital having custody of the accused. Section 672.51(2) of the Code requires that copies of all disposition information be made available to the accused or his counsel.

The Board is also required to keep a record of its disposition hearings and to include in the record any assessment report submitted. The Board must also state its reasons for making a disposition and shall provide all of the parties to the hearing with a copy of its disposition and reasons.

Where the Board makes a disposition which directs, by order, that the accused be detained in custody in a hospital pursuant to section 672.54(c) of the Code, it shall issue a warrant of committal of the accused. Section 672.81 of the Code requires that the Board hold a disposition hearing every 12 months in cases where the accused is held in custody.

The records which are the subject of the present appeal relate to the disposition information compiled by the Board, and its predecessors, the Lieutenant Governor's Board of Review and the Advisory Review Board, concerning the appellant, between January 1, 1976 and September 15, 1993.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Board has claimed the application of the exemption contained in section 13(1) to Records 53 to 67 and to the undisclosed portions of Records 72 and 73.

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.

Records 53 to 67 contain the submissions of the Chair of the Lieutenant Governor's Board of Review and Advisory Review Board, the predecessors to the present Board, to the Lieutenant Governor and the Administrator of the PMHC following the appellant's annual hearing by the Board for the years 1979 to 1992, inclusive. A portion of each submission contains the recommendations of the Board to the Administrator of the PMHC and the Lieutenant Governor concerning the disposition of the appellant's annual review.

Section 13(2) of the Act describes a number of exceptions to the advice or recommendations exemption contained in section 13(1). One of these exceptions, set out in section 13(2)(l), relates to:

> "the reasons for a final decision, order or ruling of an officer of an institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution ..."

In Re Able and Advisory Review Board (1980), 31 O.R. (2d) 520, Mr. Justice John Arnup of the Ontario Court of Appeal considered whether the Advisory Review Board, the predecessor to the Lieutenant Governor's Board of Review and the Ontario Criminal Code Review Board, in fact makes a "decision" about an accused person at a disposition hearing, regardless of the fact that its disposition report contains only a "recommendation" to the Lieutenant Governor. He held that:

> Does Ontario's Advisory Review Board make a "decision" which brings into play the requirement that it act fairly? O'Driscoll J. held that it did not, relying on s.3(2)(g) of the Statutory Powers and Procedures Act and R v Ontario Labour Relations Board, Ex p Kitchener Food Market Ltd. The view enunciated by O'Driscoll J. forms the principle argument of the appellant Board. I do not accept this position.
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> In Martineau No. 2, Dickson J. said:
>
> > In my opinion, **certiorari** avails as a remedy whenever a public body has power to decide any matter affecting the rights, interests, property, privileges or liberties of any person.
>
> In my view, the Board has power to decide such a question. Grange J. observed ...
>
> > The Lieutenant Governor is, of course, not bound to act upon the recommendations in the report, but I do not think I go too far - indeed I think I only state the obvious - when I say that a patient's only hope of release lies in a favourable recommendation by the Board.
> >
> > Just as the Lieutenant Governor need not act upon the Board's report so the Board need not act upon the information and reports of the officer in charge, but there can be no question that these will influence the Board and may in many cases be decisive. If counsel for the patient seeks, as he must, to represent his client properly, one can well understand his desire, even his imperative need, to examine such reports.
>
> I agree completely with these comments, but I would go even further. The whole purpose of the establishment of an advisory review board was to create an independent body, bringing to its task a considerable and varied expertise of its own, and likely to develop an even greater expertise with the kind of problem assigned to it, with the hoped-for result that no-one would be kept indefinitely in a mental institution, half-forgotten, and with his situation unreviewed except by the staff of the institution. It is inherent in the conception and operation of such a board that its recommendations will virtually always be accepted.

For the purposes of this appeal, I adopt the reasoning of Mr. Justice Arnup and find that the recommendations of the Advisory Review Board, the Lieutenant Governor's Board of Review and the

Ontario Criminal Code Review Board contained in Records 53 to 67 may be characterized as decisions rather than as advice or recommendations within the meaning of section 13(1) of the Act. The recommendations, accordingly, fall within the exception provided by section 13(2)(l) and must be disclosed to the appellant.

The Board has also claimed the application of the advice or recommendations exemption to the undisclosed portions of Records 72 and 73. I find that the withheld parts of these records fall within the exemption provided by section 13(1) as they contain the recommendations of the Secretary of the Advisory Review Board to the Minister of Health.

LAW ENFORCEMENT

The Board has claimed the application of the law enforcement exemption contained in section 14(1)(b) of the Act to Records 68 and 74. Record 68 is a copy of a four-page statement given by the appellant to the Ontario Provincial Police on May 11, 1979. Record 74 is a 107-page investigation report prepared by the Ontario Provincial Police and submitted as an exhibit at the appellant's Lieutenant Governor's Board of Review hearing on October 24, 1985.

It has been indicated in previous orders of the Commissioner's office that the purpose of the section 14(1)(b) exemption is to preclude access to documents in circumstances where disclosure could reasonably be expected to interfere with an on-going law enforcement investigation. As the investigation pertaining to these two records has been inactive for many years, I am not satisfied that the disclosure of Records 68 or 74 could reasonably be expected to interfere with a law enforcement investigation. Accordingly, I find that the exemption has no application in the circumstances of this appeal and, as this is the only exemption applied to these records, they should be disclosed to the appellant.

INFORMATION PUBLISHED OR AVAILABLE

The Board has claimed the application of the exemption contained in section 22(a) of the Act to Records 69, 70 and 71, which are copies of the Indictment, Certificate of Sentence and the endorsement of the Court at the time of the appellant's trials in 1977 and 1980.

It has been established in a number of previous orders that an institution that wishes to rely on section 22(a) has a duty to inform the requester of the specific location of the publicly available records.

By letter dated August 29, 1994, the Board notified the appellant of the location of the Court Office where copies of these records may be obtained. I agree, therefore, that the documents in question are publicly available. I further find that the Board has satisfied its obligation to inform the appellant as to the specific location of the records.

Accordingly, I find that Records 69, 70 and 71 are properly exempt from disclosure under section 22(a) of the Act.

CLINICAL RECORDS

The Board maintains that the Act has no application to Records 1 through 67 as they are "clinical records" within the meaning of section 65(2)(a) of the Act. Section 65(2)(a) states that:

> This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,
>
> > is a clinical record as defined by subsection 35(1) of the Mental Health Act;

In order for a record to fall within the scope of section 65(2)(a), it must be in respect of a psychiatric patient and it must be a "clinical record".

Section 35(1) of the Mental Health Act defines the term "clinical record" as:

> the clinical record compiled in a psychiatric facility in respect of a patient, and includes part of a clinical record.

There is no dispute that the Records 1 through 67 are in respect of a psychiatric patient, the appellant, who is in the custody of a psychiatric facility, the PMHC.

In its representations, the Board maintains that, as Records 1 to 52 were "compiled in a psychiatric facility" (the PMHC), they are prima facie clinical records within the meaning of section 35(1) of the Mental Health Act. It further asserts that, to the best of its knowledge, all of the Board's records which were supplied to it by the PMHC as disposition information, including Records 1 to 52, formed part of the appellant's clinical records at the hospital.

The Board then states that only information contained in the appellant's clinical records would be included in the disposition information provided to the Board by the PMHC. The Board also indicates that it relies upon the hospital and counsel for the patient to provide it with the disposition information necessary to properly adjudicate on the issues which it must address.

In Order P-215, Commissioner Tom Wright made the following comment concerning the definition of "clinical record":

> The definition of "clinical record" found in subsection 29(2)(c) of the Mental Health Act does not define the content of a clinical record. It requires that such a record be compiled in a psychiatric facility in respect of a patient.

Records 1 to 52 consist of assessment reports, occurrence reports, various notes on observations of the appellant by professional hospital staff and records relating to the diagnosis, treatment and care of the appellant created by staff at the PMHC. Also included in this group of records are documents created by the Board or its predecessors relating to the appellant's annual review hearings.

In Order P-389, Assistant Commissioner Tom Mitchinson accepted the submissions of the Ministry of Health that clinical records maintained by a psychiatric facility lose their status as "clinical records" when they, or copies of them, leave the facility and are used by another institution for a different **non-clinical** purpose.

I find that, in the present appeal, Records 1 to 21, 23 to 27 and 30 to 37 were compiled by the PMHC as the clinical records of the appellant for a clinical purpose. These documents were then copied and provided to the Board for a different, non-clinical purpose, the appellant's annual review by the Board. I further find that the Board is not part of the clinical team involved in the treatment of the appellant, rather its function is more custodial in nature and its control over these records was not, therefore, for a clinical purpose.

Having considered the representations of the parties and following my independent review of the records, I find that Records 1 to 21, 23 to 27 and 30 to 37 cannot properly be characterized as "clinical records" within the meaning of section 65(2)(a) of the Act. Accordingly, they fall within the application of the Act. As no exemptions under the Act were claimed to apply to these records, they should be disclosed to the appellant.

The remaining documents, being Records 22, 28, 29 and 38 to 52 were not "compiled in a psychiatric facility" but rather, were created by the Board or its predecessors and cannot be considered to be "clinical records" as defined in section 35(1) of the MHA. On this basis, these documents are not excluded from the application of the Act by virtue of section 65(2)(a). Again, as no exemptions under the Act were claimed to apply to these records, they should be disclosed to the appellant.

The Board has also claimed that section 65(2)(a) of the Act applies to Records 53 to 67. These documents are the written record of the appellant's annual hearing before the Lieutenant Governor's Board of Review and its predecessor, the Advisory Review Board. They include a statement of the exhibits filed, the Board's reasons and its recommendations to the Lieutenant Governor following each of the appellant's hearings between 1979 and 1991.

As these documents were created by the Board, and not compiled in a psychiatric facility, I cannot agree that they are "clinical records" within the meaning of the MHA. I find, therefore, that Records 53 to 67 do not fall within the category of records excluded from the Act by section 65(2)(a). On this basis, they should be released to the appellant.

REASONABLENESS OF SEARCH

[IPC Order P-775/October 11, 1994]

The appellant argues that the Board's search for responsive records was not reasonable. I have reviewed the submissions of the Board as to the search undertaken for records responsive to the request and am satisfied that, in the circumstances of the appeal, the search undertaken was reasonable in the circumstances of this appeal.

ADEQUACY OF DECISION LETTERS

The appellant disputes the adequacy of the decision letters issued in the course of the appeal. He argues that the description of the records contained in each letter is not sufficiently detailed. I find that the Board has met its obligation to provide the appellant with sufficient information to enable him to properly evaluate the nature of the records and the exemptions put forward for each document.

DELEGATION OF AUTHORITY

The appellant argues that the fact that the decision letters issued to him were signed by the Board's counsel on behalf of its Chair renders the decision invalid. I disagree. As the decision letters were issued at the instruction of the Board's Chair, the fact that the letters may have been signed on the Chair's behalf by another individual is not fatal to the decision itself and does not invalidate these decisions.

ORDER:

1. I order the Board to disclose to the appellant Records 1 to 68 and Record 74 in their entirety and those portions of Records 72 and 73 which are **not** highlighted on the copy of the records provided to the Board's Freedom of Information and Privacy Co-ordinator within fifteen (15) days of the date of this order.

2. I uphold the Board's decision not to disclose Records 69, 70, 71 and the undisclosed portions of Records 72 and 73 to the appellant.

3. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: October 11, 1994
Donald Hale
Inquiry Officer