



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

ORDER P-1070

Appeal P-9500457

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/Téléco: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Health (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for information about the appellant's husband, who died of AIDS in 1993. Before responding to the request, the Ministry contacted the appellant and confirmed that she was seeking access to the following:

- all information about the appellant's husband relating to tests for the HTLV-III virus (now known as HIV), including but not limited to tests conducted by a named physician between April 1984 and November 1985; and
- a copy of her husband's complete Ontario Health Insurance Plan (OHIP) billing history.

The original request also referred specifically to records held by several federal bodies such as the Canadian AIDS Centre and the Laboratory Centre for Disease Control. The federal status of these bodies, and the fact that they are not institutions under the Act, was subsequently explained to the appellant.

The Ministry identified three areas where responsive records could be located and conducted searches in those areas. Only one responsive record was located, namely the OHIP Claims Reference File (CREF) relating to the appellant's husband. The CREF is a record of all claims for OHIP-insured services.

In its decision letter, the Ministry indicated that, in its view, the appellant could not avail herself of the provisions of section 66(a) of the Act. This section permits the personal representative of a deceased person to exercise a right or power of the deceased under the Act if the exercise of the right or power relates to the administration of the deceased's estate.

The import of the Ministry's decision that section 66(a) did not apply is that, in the Ministry's view, the appellant was not able to "stand in her husband's shoes" for the purposes of the request. Access to the CREF was denied under the "invasion of privacy" exemption in section 21(1) of the Act.

The appellant filed an appeal of this decision, objecting to the denial of access and indicating that additional responsive records should exist.

A Notice of Inquiry was sent to the Ministry and the appellant. Only the Ministry submitted representations. The issues in this appeal are: (1) whether the appellant can rely on section 66(a) of the Act, (2) whether the record identified by the Ministry is exempt under section 21(1), and (3) whether the Ministry conducted a reasonable search for records.

DISCUSSION:

RIGHT OF ACCESS OF A PERSONAL REPRESENTATIVE

As noted above, section 66(a) may permit a deceased individual's personal representative to exercise a power or right of the deceased individual under the Act. This section states:

[IPC Order P-1070/December 1, 1995]

Any right or power conferred on an individual by this Act may be exercised, where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate.

Since individuals may have a greater right to receive records containing their own personal information than other individuals would have to that information, and since it appears that the records contain a great deal of personal information pertaining to the appellant's husband, the appellant's ability to obtain this information could be enhanced by section 66(a), if it applies.

Under section 66(a), the appellant would be able to exercise her husband's right to request and be granted access to his personal information if she is able:

1. to demonstrate that she is the deceased's "personal representative" **and**
2. to demonstrate that her request for access "relates to the administration of the deceased's estate".

In Order P-1027, Inquiry Officer Donald Hale considered the provisions of section 66(a) of the Act, and expanded the situations in which an individual could be found to be a "personal representative". He also expanded the meaning of the phrase "relates to the administration of the deceased's estate", as compared to the interpretation of these two phrases in previous orders.

Inquiry Officer Hale found that, where an individual's estate was not of sufficient value to merit an application for the appointment of a "personal representative" (i.e. an executor or administrator), a close family member of the deceased could, in some circumstances, be likened to a personal representative, thus meeting the first criterion under section 66(a).

He also concluded that the second criterion could be met if "granting access to the requested records would enable the deceased's personal representative to make an informed decision about matters which relate to the estate". Previous orders had interpreted the phrase "relates to the administration of the deceased's estate" more narrowly.

I will bear in mind these interpretations from Order P-1027 in my assessment of whether the appellant in this case should be permitted to rely on section 66(a) of the Act.

In this case, the appellant has not submitted representations. Accordingly, I am not aware of the value of her husband's estate or whether she is, in fact, a personal representative. However, even if I were to find that she fits within the criteria for being considered a "personal representative" as explained in Order P-1027, I would still not find that section 66(a) applies. This is because, under the second criterion under section 66(a), I have not been provided with any information to indicate that the appellant requires the requested information "to make an informed decision about matters which relate to the estate". In her request, the appellant indicated that she wants the requested information "to set

her mind at rest". In my view, this relates to the appellant's personal affairs, not to matters concerning her husband's estate.

Therefore, although I sympathize with the appellant's position, I find that she has not satisfied the criteria in section 66(a) as interpreted in Order P-1027.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Section 2(1) lists some specific examples of items which constitute an individual's personal information. One such example is found in item (b) under the definition, which indicates that "information relating to the ... medical ... history of the individual" is personal information.

I have reviewed the record, which, as previously noted, consists of the appellant's husband's OHIP claims record. This record includes the dates on which medical services were provided, the amounts paid, and codes which denote the services provided. I find that the record consists, in its entirety, of personal information relating to the appellant's husband.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. The only exception to this prohibition against disclosure which could apply in this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if 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 in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The Ministry argues that the information in the record falls under the presumption in section 21(3)(a). This section states:

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

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

In Order P-867, Inquiry Officer Anita Fineberg considered whether the contents of a CREF constituted an individual's medical history. In this regard, she stated that:

[p]art of the contents of these files, as described by the Ministry, is "an insured's medical service history" which, in my view, constitutes at least a portion of that individual's medical history.

I agree. In my view, the substantive part of the CREF does constitute part of the medical history of the appellant's husband. For this reason, I find that the record "relates to" his medical history within the meaning of section 21(3)(a), and the presumption applies.

As noted above, once a presumption is found to apply, it can only be rebutted if section 21(4) or section 23 applies. I have not been provided with any information to support the application of either of these sections. Therefore, the presumption in section 21(3)(a) has not been rebutted, and disclosure would constitute an unjustified invasion of personal privacy.

Accordingly, the record is exempt under section 21(1).

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which she is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The Ministry's representations indicate that it identified three of its program areas which might have responsive records, and contacted all of them to determine whether they had any such records. Only the CREF was identified.

The Ministry indicates that Ontario Public Health Laboratories did not conduct HIV testing between April 1984 and November 1985 (the dates mentioned in the request).

The Ministry also indicates that it cannot identify test results pertaining to the appellant's husband. The Ministry explains that its records relating to test results on reportable diseases such as HIV/AIDS do not include the full names of patients; rather, these individuals are identified only by initials in the Ministry's records.

The Ministry also indicates that requests for information on tests conducted at the Laboratory Centre for Disease Control (a federal body referred to in the request) should be addressed directly to that agency.

All of the representations summarized above with respect to the Ministry's attempts to locate responsive records were verified by affidavits and memoranda prepared by Ministry staff which were included with the Ministry's representations.

In my view, the Ministry took reasonable steps to locate responsive records. Moreover, I note that the appellant has not provided any information to support her position that additional records should exist.

Accordingly, I find that the Ministry's search for responsive records was reasonable in the circumstances.

ORDER:

1. I uphold the Ministry's decision to deny access to the CREF pertaining to the appellant's husband.
2. The Ministry's search for responsive records was reasonable and the appeal on that issue is denied.

Original signed by: _____
John Higgins
Inquiry Officer

_____ December 1, 1995