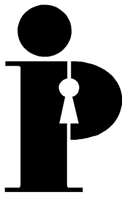

Information and Privacy Commissioner/Ontario
Commissaire à l'information et à la protection de la vie privée/Ontario

ORDER PO-1792

Appeal PA-990393-1

Ministry of Transportation

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BACKGROUND:

Under the Highway Traffic Act (HTA), legally qualified medical practitioners have a duty to report to the Registrar of Motor Vehicles of the Ministry of Transportation (the Ministry) the name, address and clinical condition of every person 16 years of age or over attending on the medical practitioner for medical services who, in the practitioner's opinion, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle [section 203(1) of the HTA].

This appeal concerns a request by a person who was the subject of such a report for access to that record.

NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry as follows:

> I am in receipt of your letter of suspension dated May 04 1999 stating that medical evidence has been received by the Ministry that indicates that I suffer from some medical condition which might impair my ability to operate a motor vehicle safely.
>
> This letter is a **request** for a copy of **all the information** that you are referring to which you state brought this decision under **The Freedom of Information Act** [appellant's emphasis].

The Ministry located a responsive record, a one page medical report, and notified the author of the report (the affected person) of the request. The affected person advised the Ministry that he/she objected to disclosure of the record to the appellant.

The Ministry then responded to the appellant's request as follows:

> Section 49(a) and (d) read in conjunction with section 20 of the Act provides that an individual may be refused access to their own personal information if disclosure could reasonably be expected to threaten the health or safety of an individual. [The Ministry is denying] you access to your records under this basis.

The appellant appealed the Ministry's decision to this office.

During the mediation stage of the appeal, the Ministry issued a revised decision as follows:

> ... [T]he ministry is no longer denying access under the following exemption: Section 49(d). The ministry however continues to deny access pursuant to section 49(a) read in conjunction with section 20 of the Act which provides that an individual may be refused access to their own personal information if disclosure could reasonably be expected to threaten the safety or health of an individual.

Also during the mediation stage of the appeal, the Ministry raised the possible application of section 49(b) of the Act, since it believed the record may contain the personal information of the affected

person. Section 49(b) is a discretionary exemption which permits an institution to refuse access to an individual's personal information where disclosure would constitute an unjustified invasion of another individual's personal privacy.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry and the affected person. In response, I received representations from the Ministry only. After reviewing the Ministry's representations, I determined that it was not necessary to seek representations from the appellant.

RECORD:

The record at issue in this appeal is a one page medical report concerning the appellant authored by the affected person.

PERSONAL PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved [paragraph (b)].

The Ministry submits that the record contains personal information of both the appellant and the affected person. The Ministry states that the record includes medical and address information about the appellant, as well as the affected person's address.

In my view, the record contains personal information about the appellant only, consisting of the appellant's medical and address information. The address associated with the affected person is his/her professional practice address, and therefore does not qualify as personal information [see Reconsideration Order R-980015 and Order PO-1663]. In addition, none of the other information in the record is "about" the affected person within the meaning of the section 2(1) definition. Accordingly, the record contains personal information of the appellant only. Therefore, the exemption at section 49(b) cannot apply, and the only exemption relevant in the circumstances is section 49(a), in conjunction with section 20.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/DANGER TO SAFETY OR HEALTH

Introduction

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, an institution may refuse to disclose to the individual to whom the information relates personal information,

> where section 12, 13, 14, 15, 16, 17, 18, 19, **20** or 22 would apply to the disclosure of that personal information [emphasis added];

The Ministry has claimed that section 20, in conjunction with section 49(a), applies to the record at issue. Section 20 of the Act reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The words "could reasonably be expected to" appear in the preamble of section 20, as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms." In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In Ontario (Minister of Labour), the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly [section] 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

In my view, despite this distinction, the party with the burden of proof under section 20 still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment could be expected to result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated [see Orders MO-1262 and PO-1747].

Ministry's representations

The Ministry made representations regarding section 49(b) in conjunction with section 21, and section 49(a) in conjunction with section 20. The thrust of both sets of representations is that the information in the record is highly sensitive and that if disclosed, it could reasonably be expected to

expose the affected person to physical danger or seriously threaten his/her safety or health. Although section 49(b) and 21 are no longer at issue, I will consider the representations of the Ministry on both issues due to their similarity.

In the circumstances, I am unable to provide all of the details of the Ministry's representations. I will do so to the extent possible. The Ministry submits:

> ... if the information is disclosed to the appellant, the affected person may be exposed unfairly to harm as set out in section 21(2)(e). More specifically ... the affected person could be exposed to physical danger if the record is disclosed. This is based on the following evidence:
>
> > Once the record was received by the Ministry, the affected person was contacted by telephone and at that time the person expressed fear for safety if the record was disclosed.
> >
> > The Ministry then followed up by writing to the affected person. The affected person responded with [a brief written statement of the reasons why he/she feared for his/her safety] ...
>
> . . . . .
>
> [S]ection 203 of the Highway Traffic Act is important in illustrating the sensitivity of the information and the section states:
>
> > (1) Every legally qualified medical practitioner shall report to the Registrar the name, address and clinical condition of every person sixteen years of age or over attending upon the medical practitioner for medical services who, in the opinion of the medical practitioner, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle.
> >
> > (2) No action shall be brought against a qualified medical practitioner for complying with this section.
> >
> > (3) The report referred to in subsection (1) is privileged for the information of the Registrar only and shall not be open for public inspection, and the report is inadmissible in evidence for any purpose in any trial except to prove compliance with subsection (1).
>
> The Ontario Court of Appeal in Toms v. Foster (1994), 7 M.V.R. (3d) 34 ... held that the obligation in section 203 is mandatory and not discretionary.
>
> As a mandatory obligation placed on medical practitioners, the information contained in the report is sensitive in that medical conditions and other information may be set out which not only contain information about the patient, but may also contain information related to the medical practitioner. Further, section 203(3) clearly states that such reports are privileged and are for the information of the Registrar of Motor Vehicles only. They are inadmissible for any purpose in any trial, except to prove

> compliance with subsection (1). Accordingly ... these records should also be deemed highly sensitive ...
>
> . . . . .
>
> [D]isclosure of the record to the appellant would constitute a threat to the safety of its author ...
>
> In establishing the threshold test under section 20 ... the Ontario Court of Appeal in Ontario v. Ontario (Minister of Labour) (1999), 46 O.R. (3d) 395, stated that the expectation of harm must be reasonable, but it need not be probable....
>
> Lastly ... disclosure in this particular case may be a deterrent to physicians in the province of Ontario who must comply with their statutory duty to notify the Ministry and provide their medical opinions concerning people who are unfit to drive. It is important for the safety of other drivers that physicians feel uninhibited in expressing their candid medical opinions.

Analysis

I am not satisfied that disclosure of the record to the appellant could reasonably be expected to threaten the safety or health of the affected person. In the circumstances, the expectation of the harms described in section 20 arising from disclosure is exaggerated.

The Ministry's safety or health concerns are based largely on the affected person's written submission to the Ministry, which by itself is not persuasive. Since the affected person made no submissions to me in response to the Notice of Inquiry I sent to him/her, I do not have the benefit of his/her views on the issues in this appeal, apart from the brief statement to the Ministry. Further, there is convincing evidence before me which refutes the basis for the affected person's fear of a threat to his or her safety or health. In the circumstances, I am unable to provide more detail about the nature of this evidence.

The Ministry expresses a concern that disclosure would have a chilling effect on doctors with respect to their duty to report under section 203(1) of the HTA. It is important to note that each case under the Act must be decided on its own merits. My decision is intended to apply only to the particular circumstances of this case. In the future, a section 49(a)/section 20 claim in the context of another request for a section 203(1) report may or may not be sustained, based on the specific facts of that case. In appropriate circumstances, the participation of an affected person in a future appeal of such a decision could enhance the possibility of a safety or health exemption claim being upheld.

Finally, the Ministry refers to section 203(3) of the HTA which states that the section 203(1) report is "privileged for the information of the Registrar only and shall not be open for public inspection" and that it is "inadmissible in evidence for any purpose in any trial except to prove compliance with subsection (1)." In this regard, I note that section 67(1) of the Act reads:

> This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

Subsection (2) lists several statutory provisions which prevail over the Act. This list does not include section 203(3) of the HTA. In addition, section 203(3) of the HTA does not specifically

provide that it prevails over the Act. As a result, the Act prevails over this section of the HTA and section 203(3) does not provide a basis for me to uphold the application of sections 49(a) and 20.

Conclusion

Accordingly, I find that the requested information is not exempt under section 49(a) in conjunction with section 20 of the Act. Since no other exemptions are at issue, I will order the Ministry to disclose the record to the appellant.

ORDER

1. I order the Ministry to disclose the record to the appellant no later than July 5, 2000, but no earlier than June 27, 2000.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the material sent to the appellant pursuant to provision 1.

Original signed by: June 13, 2000
David Goodis
Senior Adjudicator