



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER 130

Appeal 890156

Ministry of Health



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December 13, 1989

VIA PRIORITY POST

The Honourable Elinor Caplan  
Minister of Health  
10th Floor, Hepburn Block  
80 Grosvenor Street  
Toronto, Ontario  
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Dear Ms Caplan:

Re: Order 130  
Appeal Number 890156  
          [Appellant]

This letter constitutes my Order in the appeal by [named individual] (the "appellant") of the decision by the Ministry of Health (the "institution"), regarding the appellant's request for records under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On March 17, 1989 the institution received a letter from the appellant seeking access to the following:

...information which I was denied during a Health Disciplines Board review on November 27, 1986. In particular, I would appreciate access of (sic) letters by Dr. [named individual], Dr. [named individual], and my attorney [named individual]. (File #1159)

On April 7, 1989, the Freedom of Information and Privacy Co\_ordinator (the "Co\_ordinator") for the institution wrote to the authors of the letters referred to in the request (the

"affected persons"), pursuant to section 28 of the Act, and advised the appellant accordingly.

One of the affected persons consented to the release of her letter, and the Co\_ordinator disclosed this letter to the appellant on May 5, 1989. After considering the responses from the other affected persons, the Deputy Minister of Health advised the appellant that:

Access has been denied to the letters you requested from one of the doctors and the lawyer under section 20 of the Act.

On May 23, 1989, the appellant wrote to my office appealing the decision of the Deputy Minister, and I gave notice of the appeal to the appellant, the two affected persons and the institution on May 30, 1989.

Upon receipt of the appeal, an Appeals Officer was assigned to investigate the circumstances of the appeal, and attempt to mediate a settlement.

The Appeals Officer obtained and reviewed the requested records, which consist of four letters from the two affected persons written to the College of Physicians and Surgeons of Ontario.

Because settlement efforts were not successful, I sent a notice on July 26, 1989 to the appellant, the two affected persons and you advising that I was conducting an inquiry to review the decision of your Deputy Minister. An Appeals Officer's Report accompanied the Notice of Inquiry to assist the parties in making their representations concerning the subject matter of the appeal. The Report indicated that the parties need not limit themselves to the questions set out in the report, in making their representations to the Commissioner.

I received representations from the appellant's representative, the Co\_ordinator and one of the affected persons. After reviewing these representations, I determined that subsection 49(b) and hence section 21 of the Act might apply in the circumstances of the appeal, and requested additional representations from all parties.

All parties submitted representations, and I have considered them in making my decision in this appeal.

Before beginning my discussion of the specific issues in this case, I think it would be useful to briefly outline the purposes of the Act, as set out in section 1. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the Act. This subsection provides that

the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of this Act lies upon the head.

In his representations the Head maintained that the letters in question should not be disclosed because they met the requirements for exemption under section 20 of the Act. This section reads as follows:

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.  
(emphasis added)

Having reviewed the contents of the four letters and the representations of all parties, in my view, they do not satisfy the requirements for exemption under section 20. I find that the Head has not discharged the burden of establishing that the information contained in these letters, if disclosed, could reasonably be expected to seriously threaten the health or safety of any individual. My conclusion is unchanged by the representations of the affected persons.

As mentioned earlier in this Order, one of the purposes of the Act is to strike the proper balance between the public's right of access to government-held records and the right of individual privacy with respect to personal information about themselves which is held by the government. As Commissioner, I must be continually mindful of these two competing interests whenever I am required to determine whether a record should be disclosed. If, during the course of an appeal, it becomes evident that the privacy rights of an individual may be affected by the

disclosure of a record, in my view, I must consider the application of the provisions of the Act which deal with privacy protection, regardless of whether or not they have been raised by the parties during the course of the appeal.

In this case, although none of the parties raised the exemptions provided by subsection 49(b) and hence section 21 of the Act, I felt they might apply, and solicited representations on this issue from all parties.

Before considering the application of subsection 49(b), it is necessary to refer to subsection 47(1) of the Act, which gives an individual a general right of access to:

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

Subsection 49(b) of the Act reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

...

- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Before deciding whether the section 49(b) exemption applies, I must first determine whether the information contained in the records qualifies as "personal information" under subsection

2(1) of the Act, and if so, whether this information relates to the appellant, other individuals, or both.

I have reviewed the contents of the four records at issue in this appeal and, in my view, they contain "personal information" about both the appellant and the affected persons. Having reached this decision I must now consider whether disclosure of these records would constitute an unjustified invasion of the personal privacy of other individuals, and thereby meet the requirements for exemption under subsection 49(b).

Subsections 21(2) and (3) of the Act provide some guidance in determining what constitutes an "unjustified invasion of personal privacy".

In his representations, the appellant's representative submitted that:

The documents consist of four letters provided as background to a Health Disciplines Board hearing on November 27, 1986. [The appellant] requested disclosure of the letters at the hearing, but his request was

denied by the Board on the basis that 'there was nothing in the documents that [the appellant] needed in order to state his complaint'. The Board then dismissed [the appellant's] complaint. [The appellant] subsequently sought access to the letters under the Act in order to satisfy himself that there was indeed nothing in the letters that would have affected his complaint, or alternatively, to consider legal action to challenge the decision of the Board.

The refusal of the Ministry of Health to allow [the appellant] access to the letters in question has had the effect of preventing [the appellant] from assessing the Board's decision and from determining the full extent of his legal rights.

In support of his position that disclosure would not constitute an unjustified invasion of the personal privacy of the affected persons, the appellant's representative cited subsections 21(2)(a) and 21(2)(d) of the Act. These subsections read as follows:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

Although I have found that the contents of the letters and the representations submitted did not lead me to the conclusion that disclosure would satisfy the requirements of section 20 of the Act, I have considered the representations in light of subsections 21(2) (e).

Subsection 21(2) (e) of the Act states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

...

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

...

I discussed the proper application of subsection 49(b) of the Act in Order 37 (Appeal Number 880074), dated January 16, 1989. At page 9 of that Order I state:

The head must look at the information and weigh the requester's right of access to his own personal information against another individual's right to the protection of their privacy. If the head determines that release of the information would constitute an

unjustified invasion of the other individual's personal privacy, then subsection 49(b) gives him the discretion to deny access to the personal information of the requester.

I have carefully considered the representations made in support of the appellant's right to access his own personal information, as well as the representations made by the affected persons in supporting the protection of their rights to privacy. On balance, I find that disclosure of the records at issue in this appeal would constitute an unjustified invasion of the personal privacy of the affected persons and, therefore, they qualify for exemption under subsection 49(b).

In some cases it is possible to set out a more detailed explanation of reasons but in this case, my concern for the protection of personal privacy, has caused me to limit my explanatory remarks to those deemed necessary.

Therefore, I order the institution not to disclose the records at issue in this appeal to the appellant.

Yours truly,

Sidney B. Linden  
Commissioner

cc: Mr. Andrew Parr, FOI Co\_ordinator  
Appellant  
Affected Persons