



Information and Privacy
Commissioner/Ontario

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

ORDER 133

Appeal 880270

Ministry of Health



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December 21, 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 133
Appeal Number 880270
[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 June 27, 1988, the institution received a request from the appellant for access to the following information:

I would like copies of all documents held in the Administrator's file (Oak Ridge Division of the Mental Health Centre in Penetanguishene), with regard to any investigations or hearings into my complaints I made about [a named individual]. This includes anything from March 30, 1988 onwards.

The information I require includes:

1. any written complaints or letters from myself.
2. any written material submitted by [a named individual].

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3. any written material submitted by any other staff person.
4. any written material submitted by the staff union.
5. any written material submitted by another patient.
6. the minutes of investigations or hearings held by Administration regarding my complaints against [a named individual].
7. any letters, written by anyone, that has (sic) anything to do with complaints made by myself about [a named individual].

On August 16, 1988, the Freedom of Information and Privacy Co_ordinator for the institution (the "Co_ordinator") responded to the request in the following manner:

...I am pleased to inform you that disclosure has been granted...

Some of the material requested has been severed from the record under the authority of one of the exemptions from disclosure provided for in the Act. Where material has been severed the legal authority is noted in the margin next to the information removed.

Subsections 14(1)(a), (b) and (f) were the exemptions invoked by the institution and noted in the margin of the record next to the severed information.

On August 28, 1988, the appellant wrote to my office appealing the institution's decision. On September 7, 1988, I gave notice of the appeal to the appellant and the institution.

As soon as the appeal was received in my office, 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 records at issue in this appeal. They consist of the following:

- Record 1 _ a memo dated May 11, 1988 from the Associate Administrator, Oak Ridge Division to the named individual that the appellant complained about;
- Record 2 _ a memo dated April 15, 1988 from the Assistant Director of Nursing, Oak Ridge Division to the Associate Administrator with respect to the investigation of the appellant's allegations about the named individual;
- Record 3 _ a memo dated April 7, 1988 from the Head Nurse _ Ward 04, Oak Ridge Division to the Assistant Director of Nursing which is a summary and findings of the investigation into the appellant's allegations; and
- Record 4 _ a note dated March 26, 1988 from the named individual (whom the appellant complained about) to the Head Nurse _ Ward 04.

These records relate to the appellant's complaints with respect to a member of the staff (the "affected person") of the Oak Ridge Division of the Penetanguishene Mental Health Centre (the "Centre"). The records indicate that as a result of the appellant's allegations, an investigation was ordered. Although at one point the appellant requested that the investigation be discontinued, the Nursing Department felt that a preliminary investigation was warranted. Following the investigation the appellant and the affected person were advised that the appellant's allegations had not been substantiated and therefore no further action would be taken.

Since the appeal could not be resolved through mediation, an Appeals Officer's Report was prepared and sent to both parties on July 27, 1989, together with a Notice of Inquiry. The parties were asked to make representations to me concerning the subject matter of the appeal. The Appeals Officer's Report requested information from the parties as to the possible application of section 49 of the Act in addition to the exemptions claimed by the institution. 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 on August 2, 1989, and from the institution on September 7, 1989. The institution cited subsections 14(1)(d), 14(1)(e), 14(2)(a), section 20, and subsections 21(2)(f), 21(2)(h), 21(2)(i), 21(3)(b), 21(3)(g) as

additional exemptions. Shortly thereafter, the institution released record 1 to the appellant.

On September 26, 1989, the institution was requested by my office to clarify some of the matters raised in their representations. A response from the institution was received on October 11, 1989 which indicated that it was no longer relying on the exemptions in subsections 14(1)(a), 14(1)(b) and 14(1)(f) of the Act. Accordingly, no further consideration will be given to these subsections in this Order.

On October 31, 1989, a member of my staff wrote to the affected person to give notice of the Inquiry and to request representations. On November 30, 1989, I received the affected person's representations.

I have considered representations from all of the parties in making my decision.

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 counter_balancing 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.

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.

Both the institution and the affected person made representations which indicated that disclosure of personal information in the records would constitute an unjustified invasion of the affected person's privacy.

Before deciding the application of the exemptions claimed, 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. Specifically, subsection 49(b) provides that:

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;

Prior to 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, the affected person or both.

As previously mentioned, the records at issue in this appeal relate to the investigation of allegations made by the appellant with respect to the affected person. As such they contain allegations and statements about the appellant and the affected person.

I have reviewed the contents of the records at issue in this appeal and in my view, they contain "personal information" as defined in subsection 2(1) of the Act. I find that the statements and/or allegations in each of the records are properly considered recorded information about both the appellant and the affected person. Having reached this decision I must now consider whether disclosure of these records would

constitute an unjustified invasion of the personal privacy of the affected person and thereby meets the requirements for exemption under subsection 49(b).

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 to his own personal information, as well as the representations made with respect to the protection of the affected person's 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 person and, therefore, the records qualify for exemption under subsection 49(b).

My comments at page 6 in Order 130 (Appeal Number 890156) dated December 13, 1989, are also applicable to the circumstances of this appeal. In that Order I stated:

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.

As I have found that the records at issue in this appeal qualify for exemption under subsection 49(b) it is not necessary for me to address the other exemptions which have been claimed.

Although I have found that subsection 49(b) applies to the records in question in this appeal, I have also reviewed the records with a view to determine whether they might reasonably be severed pursuant to subsection 10(2) of the Act.

Subsection 10(2) of the Act states that:

Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

With respect to whether the records could reasonably be severed the head submitted that:

It is the opinion of the head that the personal information of the requester, is interwoven with the personal information about the third party, in the investigation report to the point that it can not reasonably be severed.

After reviewing the records, I do not accept the submissions of the head and I find, in fact, that there are portions of records 2 and 3 in which it is possible to sever the personal information that relates solely to the affected person or is interwoven with the personal information of the appellant, from the personal information relating solely to the appellant. Along with this Order, I have provided the head with a copy of records 2 and 3 with the severances which I feel are appropriate in the circumstances of this appeal.

I find that it is not possible to sever record 4 since the personal information of the appellant is interwoven with the personal information of the affected person. Accordingly, I uphold the head's decision to deny the appellant access to record 4 in its entirety.

In summary, I Order the head to sever those portions of records 2 and 3 containing personal information which solely relates to the affected person or is interwoven with the personal information of the appellant and to disclose the remaining parts of records 2 and 3 to the appellant within twenty (20) days of

the date of this order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure, of the date on which disclosure was made.

Yours truly,

Sidney B. Linden
Commissioner

Enclosure

cc: Mr. Andrew Parr, FOI Co_ordinator
Appellant
Counsel for Affected Person