



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

INVESTIGATION REPORT

INVESTIGATION I94-023P

A DISTRICT HEALTH COUNCIL



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INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning a District Health Council (the Council).

The complainant was the Executive Director of the Council from 1989 until October 1993. In October 1993, the complainant left this position for a secondment with the Ministry of Health (the Ministry). The complainant maintained that, before she took up the new position with the Ministry, numerous disclosures of her personal information were made by the Council to the Ministry; to a local newspaper; to Members of a Council committee; and to the public. These disclosures were related to her employment at the Council and her performance as Executive Director, and included information that she had allegedly been terminated and had been given a number of alternatives, one of which was the secondment at the Ministry.

She also complained that there had been a disclosure by the Council's acting Chair to the Ministry that she was seeking access to information under the Freedom of Information and Protection of Privacy Act (the Act).

The complainant stated that these disclosures were contrary to section 42 of the Act.

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Was the information in question "personal information", as defined in section 2(1) of the Act? If yes,
- (B) Did the Council disclose the complainant's personal information to the Ministry, and if so, was the disclosure in compliance with section 42 of the Act?
- (C) Did the Council disclose the complainant's personal information to a local newspaper, and if so, was the disclosure in compliance with section 42 of the Act?
- (D) Did the Council disclose the complainant's personal information during two Committee meetings and in the minutes of these meetings? If so, were the disclosures in compliance with section 42 of the Act?
- (E) Was the Council's disclosure to the public of the complainant's personal information, contained in two letters of resignation from two Council Members, in compliance with section 42 of the Act?
- (F) Did the Council's acting Chair disclose to the Ministry that the complainant was seeking access to information under the Act, and if so, was the disclosure in compliance with section 42 of the Act?

- (G) Was the Council's disclosure of the complainant's personal information to a Ministry employee in compliance with section 42 of the Act?

RESULTS OF THE INVESTIGATION

Issue A: Was the information in question "personal information", as defined in section 2(1) of the Act?

Section 2(1) states, in part:

"personal information" means recorded information about an identifiable individual, including,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual..

The information in each of the disclosures in question related to the complainant's employment at the Council and her performance as Executive Director, including information about her termination of employment, severance pay, and secondment, and the views and opinions of two other Council Members about the complainant.

In our view, this information met the requirements of paragraphs (g) and (h) in section 2(1) of the Act.

Also at issue was the complainant's name together with the fact that she had made an access request under the Act. As we have previously found in other compliance investigations and orders, this information met the requirements of paragraph (h) in section 2(1) of the Act.

Conclusion: The information in question was "personal information" as defined in section 2(1) of the Act.

Issue B: Did the Council disclose the complainant's personal information to the Ministry, and if so, was the disclosure in compliance with section 42 of the Act?

The complainant stated that the Council's Executive Members disclosed her personal information to a branch of the Ministry. The complainant provided us with a confidential memorandum addressed to the Council Members, dated October 1993, in which the Chair of the Council stated that a certain decision had been made after **consultation** with the Ministry. The complainant stated that the information disclosed to the Ministry during this "consultation" was her employment and performance related personal information.

The Council informed us that there had been a discussion between the Chair and the Ministry, where the possible termination of the complainant's employment, the need for severance pay, and

the possibility of a secondment with the Ministry had been discussed. The Council advised us that this discussion took place because any decision involving the possible termination of an employee and the payment of severance pay, required consultation with the funding agency, which, in this case, was the Ministry. The Council also discussed the matter with the Ministry in an attempt to provide the complainant with an alternative to the termination of her employment, (i.e. a possible secondment with the Ministry).

However, the Council stated that no personal information had been provided relating to the complainant, and therefore, there had been no disclosure of the complainant's personal information.

As we have previously stated, information about the complainant's termination, severance pay, and secondment is personal information under the Act. Therefore, it is our view that, in its discussion with the Ministry, the Council disclosed the complainant's personal information.

Under the Act, personal information in the custody or under the control of an institution cannot be disclosed except in the specific circumstances outlined in section 42 (For full text, see Appendix A).

The Council submitted in its response to our draft report that, had personal information been disclosed, it would have been disclosed in compliance with section 42(e) of the Act. Section 42(e) states that an institution shall not disclose personal information in its custody or under its control except "for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder".

The Council stated that the information in question was disclosed to comply with the duties of the Council as provided in an Order-In-Council which requires that the Council advise the Minister of Health on the planning and co-ordination of health services in its designated area. The Council further stated that the co-ordination of health services is accomplished in part by the work of the Executive Director. Therefore, any decision to terminate the Executive Director affects the co-ordination of health services.

It is our view that the word "complying" in section 42(e) indicates that the requirement in question must be **mandatory** in nature. In other words, in order for section 42(e) to apply, the Order-In-Council must impose a duty on the Council to disclose the complainant's personal information. It is our view that the Order-In-Council does not compel the Council to disclose such personal information. Therefore, in our view, section 42(e) of the Act does not apply in the circumstances of this case.

Further, while the Ministry was the funding agency for the Council and special budget requirements may have been needed by the Council in order to pay severance to an employee, we are not persuaded that in the circumstances of this case, the funding relationship required the disclosure of the complainant's specific personal information. It is also our view that had the Council wanted to arrange a secondment at the Ministry for the complainant, such an arrangement should have been made after the complainant had been made aware that she had been terminated and had provided her consent for her personal information to be disclosed to the Ministry for this purpose.

We have examined the remaining disclosure provisions of section 42 of the Act. It is our view that the Council's disclosure of the complainant's personal information to the Ministry was not in compliance with section 42 of the Act.

Conclusion: The Council's disclosure of the complainant's personal information to the Ministry was not in compliance with section 42 of the Act.

Issue C: Did the Council disclose the complainant's personal information to a local newspaper, and if so, was the disclosure in compliance with section 42 of the Act?

The complainant stated that the Council had disclosed to a local newspaper that she had been "let go". The complainant was concerned that one of the Council Members may have intentionally disclosed her personal information even though they knew that they had a responsibility to keep this information confidential.

The newspaper article was published in November 1993, the day after a Council meeting had been held in which the minutes of a "special council meeting" had been discussed. At the "special council meeting" the complainant's release as Executive Director had been discussed.

The newspaper article stated that,

The Executive director of the [named health council] has been "let go," a board member says.

The director, who did not wish to be identified, confirmed last night that [the complainant] ... was "let go" last month.

The Council stated that the newspaper article, for the most part, reiterated a news release which had been prepared by the complainant and which she had provided to the Council through her lawyer. The article consisted primarily of an interview with the complainant herself. With respect to the reference in the article to the "director" (who apparently did not wish to be identified), the Council stated that it did not know who or if a director had spoken to the newspaper. However, the Council stated that, from the beginning of the process, it had fully emphasized to all of its directors the importance of confidentiality.

We contacted two former Council Members who had resigned as a result of the complainant's departure from the Council. One of these Members advised us that he had not disclosed any information to the press regarding whether the complainant was "let go". However, the other Member stated that she had been contacted by the newspaper.

This Member stated that the newspaper reporter had informed her that the complainant had been let go. The newspaper had requested that the Member confirm this information, which she did. She stated that the newspaper reporter was clearly aware that the complainant had been released from the Council, prior to the reporter's contact with her.

While it appears that a former Council Member confirmed to the newspaper that the complainant had been let go, it is unclear if this or another "board member" initially disclosed the information. Since only Council Members were aware at that time that the complainant had allegedly been "let go", and had accepted a secondment with the Ministry, it is possible that the information in question was disclosed by a Council Member. However, based upon the available information, we were unable to establish conclusively if a Council Member had made such a disclosure.

We have, however, examined the disclosure provisions of section 42 of the Act. It is our view that if a Council Member had disclosed the complainant's personal information to the local newspaper, this disclosure would not have been in compliance with section 42.

Conclusion: We were unable to determine if the Council disclosed the complainant's personal information to the newspaper.

Issue D: Did the Council disclose the complainant's personal information during two Committee meetings and in the minutes of these meetings? If so, were these disclosures in compliance with section 42 of the Act?

The complainant stated that certain Council Members disclosed her employment and performance related personal information during two separate meetings of one of the Council's standing committees (the Committee).

The minutes from the first Committee meeting, held on November 16, 1993, stated that the Council's Interim Executive Director, appointed after the complainant's departure, had attempted to clarify the situation regarding the complainant's secondment. He stated that "when she was relieved of her duties, she was given a number of alternatives and she chose the Ministry secondment where she will continue to work in the mental health field". The minutes also noted that one Committee Member was concerned about the amount of money being spent by the Council to reach a "settlement" with the complainant. The complainant maintained that this confirmed that the Committee Member was aware that the secondment was not a secondment but rather a dismissal.

The draft minutes for the second Committee meeting, which was an Extraordinary Committee meeting held on December 8, 1993, stated that the Council's acting Chair and a Council Member had discussed the opinions of the Council and Executive Committee; that there had been performance related difficulties with the complainant, and that she had been released from her employment.

The minutes suggested, therefore, that there had been a disclosure of the complainant's personal information at the meeting. However, the Council submitted that "notes" had been taken at these meetings that were not "minutes" of these meetings. These notes had been prepared by a staff member who had been in attendance and were released before the Council had reviewed them. They had been circulated without the usual procedures being followed that would have been followed if they had been actual minutes, which would have included a review by the Council.

The Council also stated that the notes were not accurate. It explained that during the November 16, 1993 meeting, the Interim Executive Director had not disclosed that the complainant had been "relieved" of her duties, and that she had been given a number of alternatives before choosing the secondment. The Council also stated that during the December 8, 1993 meeting, neither the acting Chair nor the Council Member had indicated that there had been performance related difficulties with the complainant and that she had been released from employment. Both Council Members had only indicated that the complainant had taken a secondment with the Ministry.

The Council stated that because the notes were not formal minutes, and because it did not as a matter of procedure, review informal notes before they were distributed, it had not taken any steps to correct the notes.

The Council maintained that Council Members did not disclose the information in question. We are, therefore, unable to determine conclusively if the complainant's personal information was disclosed by the Council during the Committee meetings.

We also examined the disclosure of the complainant's personal information contained in the minutes for the Committee meetings when they were released to Committee Members.

While the Council maintained that the notes taken at the Committee meetings were not "minutes", the notes were titled and prepared as minutes by the Committee. It is our view that the notes could be considered to be minutes of the Committee meetings in question.

Even though the Council maintained that the minutes were not correct, nevertheless, the minutes contained the personal information of the complainant and were released to the Committee Members. Therefore, while the Council Members might not have disclosed the complainant's personal information at the Committee meetings, the complainant's personal information appeared in the minutes for these Committee meetings when they were released. Thus, the complainant's personal information was disclosed by the Council.

We have examined the disclosure provisions of section 42 of the Act. It is our view that the Council's disclosure of the complainant's personal information as it appeared in the minutes of the Committee's meetings, was not in compliance with section 42 of the Act.

Conclusion: We were unable to determine conclusively that the complainant's personal information was disclosed by the Council during the Committee meetings.

The Council's disclosure of the complainant's personal information as contained in the minutes of the Committee's meetings, was not in compliance with section 42 of the Act.

Issue E: Was the Council's disclosure to the public of the complainant's personal information, contained in two letters of resignation from two Council Members, in compliance with section 42 of the Act?

The complainant stated that the Council disclosed, to the public, her personal information contained in two letters of resignation from two Council Members. This included the opinions and views of the resigning Council Members about the complainant. The Council included the letters in a package provided to the public and media before a Council meeting. The letters contained personal information relating to the complainant's termination of her employment, and the personal opinions of the two Council Members about the complainant. Both letters were addressed to the Ministry and carbon copied to the Council and certain specific Council Members. One of the letters was carbon copied to two former Council Members and to the complainant.

The Council acknowledged that the two letters of resignation were included in a package made available to the public prior to a Council meeting. The Council stated that since the first resignation letter was addressed to the Minister of Health (the Minister), and copied to the Council Members, the resigning Council Member could have expected the resignation to be a public matter and that the Council "had no ability not to make it a public matter".

It was the Council's position that the Council Member who addressed the second letter to the Minister had also expected and required his letter of resignation to be made public. The Council was of the view that these letters had already been copied to a number of people and had been made public by the writers themselves.

Section 42(c) states that an institution shall not disclose personal information in its custody or under its control except " for the purpose for which it was obtained or compiled or for a consistent purpose". Further, section 43 states:

Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under clauses 41(b) and 42(c) only if the individual might reasonably have expected such a use or disclosure.

Section 42(c) and 43 of the Act would apply only if the **complainant** might reasonably have expected the disclosure of the letters containing **her** personal information to the public and media. Whether the resigning Council Members might reasonably have expected the disclosure of their letters is not a relevant factor.

It is our view that the complainant would not reasonably have expected that her personal information, as contained in these letters, would be included in a package made available to the public prior to a Council meeting. Therefore, in our view, section 42(c) of the Act does not apply in these circumstances.

In addition, it is our view that by addressing the letters to the Minister and carbon copying certain other individuals, the resigning Council Members did not make the letters "public". This is discussed in more detail under "Other Matters".

We also examined the remaining provisions of section 42. It is our view that none applied to the disclosure to the public of the complainant's personal information contained in the resignation letters. Therefore, the disclosure was not in compliance with the Act.

Conclusion: The disclosure of the complainant's personal information in the resignation letters was not in compliance with section 42 of the Act.

Issue F: Did the Council's acting Chair disclose to the Ministry that the complainant was seeking access to information under the Act, and if so, was the disclosure in compliance with section 42 of the Act?

The complainant stated that the Council's acting Chair disclosed to the Ministry that the complainant was seeking access to information under the Act. The complainant stated that this occurred on January 24, 1994, when the acting Chair responded by e-mail to the complainant about her request for access to information, and copied staff at a branch of the Ministry.

The Council stated that a request for access to information made under the Act is not personal information. The Council also stated that the complainant had sent numerous requests by e-mail to the acting Chair and that, in this case, the complainant indicated that she was requesting information and wanted to avoid the "FOI". The Council maintained that, as a result, the acting Chair did not consider the complainant's request to be a request for access to information under the Act.

As we previously stated, the complainant's name together with the fact that she had made an access request under the Act was personal information under the Act. The complainant's e-mail to the acting Chair, dated January 24, 1994, identified the subject line of the e-mail as "FOIPPA Request". The responding e-mail from the acting Chair to the complainant, which was copied to the staff at the Ministry, identified the subject line of the e-mail as "FOI Request", and the first line of the e-mail read "Thank you for your memo regarding your request for information under the FOIPPA." Therefore, in our view, by copying the Ministry in the responding e-mail, and identifying that the complainant was seeking access to information under the Act, the acting Chair disclosed the complainant's personal information.

We have examined the disclosure provisions of section 42 of the Act. It is our view that the disclosure to the Ministry that the complainant had made an access request was not in compliance with section 42 of the Act.

Conclusion: The disclosure of the complainant's personal information to the Ministry, i.e. that the complainant had made an access request, was not in compliance with section 42 of the Act.

Issue G: Was the Council's disclosure of the complainant's personal information to a Ministry employee in compliance with section 42 of the Act?

With her submissions on the draft report, the complainant provided a copy of a memorandum and notes written by the Council's Chair at that time, to the individual who became the Council's Interim Executive Director and to the individual who replaced the Chair as acting Chair. The memorandum stated that the notes had been written in the back of the Chair's day-timer and that they had been discussed with an employee of the Ministry. The notes were related to the complainant's work performance. The complainant believed that the disclosure by the Chair of

her personal information contained in the notes to the Ministry employee was contrary to the Act.

We contacted the Ministry employee. She advised us that she did not recall any conversations with the Chair regarding the complainant. She also stated that she had been the official "contact person" at the Ministry for the Council from July 1990 to approximately February 1992, before the complainant's termination in October 1993.

In its representations on this issue, the Council stated that there had been a discussion between the Chair and the Ministry employee. However, the Ministry employee was the person to whom the Council looked with respect to details surrounding a contract it was seeking. The Council stated that the Chair had contacted the employee to discuss the problems that had developed with the contract and to confirm if the Ministry wished the Council to proceed on retaining a specific consultant (the consultant). The Council submitted that given that the Ministry was funding the study associated with obtaining the contract and services of the consultant, it was reasonable to expect the Chair to consult with the Ministry.

The Council also stated that the comments about the complainant's performance recorded in the notes were not the Chair's but had been passed on to her by the consultant. In our view, this is not relevant to the issue of disclosure by the Chair to the Ministry employee.

We examined the Chair's memorandum and notes. The memorandum stated that "I also discussed these notes with...[the Ministry employee]". At the bottom of the notes was written "Call [the Ministry employee]". It is, therefore, our view that the information about the complainant's performance recorded in the Chair's notes in the day-timer was disclosed in whole or in part to the Ministry employee. It is also our view that this disclosure occurred prior to the complainant's termination.

We examined the provisions of section 42 of the Act. It is our view that none applied to the disclosure of the complainant's performance related information to the Ministry employee.

Conclusion: The disclosure of the complainant's personal information to the Ministry employee was not in compliance with section 42 of the Act.

OTHER MATTERS

As indicated previously under Issue E, the Council submitted that the letters of resignation from two Council Members had already become public by virtue of being addressed to the Minister and carbon copied to other people.

Section 37 of the Act states that:

This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

In our recent investigations, we have held that section 37 of the Act applies only where the institution complained of is the institution that is maintaining the personal information for the

purpose of creating a record available to the general public. It is our view that, while the Minister and the other individuals carbon copied on the letters were aware that the two Council Members had resigned, it cannot be said that the Council was maintaining the complainant's personal information contained in these letters, which were later disclosed in the Council meeting, specifically for the purpose of creating a record available to the general public. It is, therefore, our view that section 37 of the Act did not apply.

Further, it is our view that the Council did not need to include the resignation letters in the package made available prior to its meeting. The Council could have publicly noted the resignations without releasing the actual letters containing the complainant's personal information.

Conclusion: Section 37 of the Act was not applicable to the complainant's personal information contained in the resignation letters.

SUMMARY OF CONCLUSIONS

- The information in question was "personal information" as defined in section 2(1) of the Act.
- The Council's disclosure of the complainant's personal information to the Ministry was not in compliance with section 42 of the Act.
- We were unable to determine if the Council disclosed the complainant's personal information to the newspaper.
- We were unable to determine conclusively that the complainant's personal information was disclosed by the Council during the Committee meetings.

The Council's disclosure of the complainant's personal information as contained in the minutes of the Committee's meetings, was not in compliance with section 42 of the Act.

- The disclosure of the complainant's personal information in the resignation letters was not in compliance with section 42 of the Act.
- The disclosure of the complainant's personal information to the Ministry, i.e. that the complainant had made an access request, was not in compliance with section 42 of the Act.
- The disclosure of the complainant's personal information to the Ministry employee was not in compliance with section 42 of the Act.
- Section 37 of the Act was not applicable to the complainant's personal information contained in the resignation letters.

RECOMMENDATION

We recommend that the Council take steps to ensure that all Council Members and staff are aware of the disclosure provisions in the Act. For example, all Council Members, staff, and committee members who handle personal information should be reminded in writing of the limited circumstances under which the disclosure of personal information is permitted. Any newly appointed Council Members and staff should be similarly informed.

Within six months of receiving this report, the Council should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendation.

Original Signed by: _____
Susan Anthistle
Compliance Review Officer

December 23, 1994
Date

42. An institution shall not disclose personal information in its custody or under its control except,
- (a) in accordance with Part II;
 - (b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;
 - (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
 - (d) where disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and where disclosure is necessary and proper in the discharge of the institution's functions;
 - (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;
 - (f) where disclosure is by a law enforcement institution,
 - (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or
 - (ii) to another law enforcement agency in Canada;
 - (g) where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
 - (h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
 - (i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;
 - (j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituent's behalf or, where the constituent is incapacitated, has been authorized by the next of kin or legal representative of the constituent;
 - (k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the next-of-kin or legal representative of the employee;

- (l) to the responsible minister;
- (m) to the Information and Privacy Commissioner; and
- (n) to the Government of Canada in order to facilitate the auditing of shared cost programs.