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

ORDER P-389

Appeal P-910091

Ministry of Community and Social Services

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INTERIM ORDER

The Ministry of Community and Social Services (MCSS) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to two psychiatric reports prepared at the Peterborough Civic Hospital concerning the requester's client. The requester is uncertain how these records came into the possession of MCSS, but assumes that her client consented to their release to MCSS in support of an application for social assistance benefits. The requester states that the purpose of requesting access to the records is to consider whether to appeal a decision of MCSS to the Social Assistance Review Board.

MCSS denied access to the records, claiming that they fall outside the scope of the Act by virtue of section 65(2). The requester appealed the decision.

The records at issue are photocopies of a two-page letter dated October 23, 1983, from a psychiatrist at the Peterborough Civic Hospital to another physician, concerning the appellant's client; and a two-page psychiatric assessment dated March 20, 1984, prepared by a psychologist at the same hospital, and also concerning the appellant's client.

Mediation was not possible, and notice that an inquiry was being conducted to review the decision of MCSS was sent to MCSS and the appellant. Representations were received from both parties. It was subsequently determined that the Ministry of Health (MOH) should be added as an affected party to the appeal and provided with an opportunity to submit representations, and a supplementary Notice of Inquiry was sent to MCSS, the appellant and MOH. Representations were received from MOH, and further representations were submitted by the appellant.

Although the appellant raises a number of issues in her representations, I will first consider whether the records fall outside the scope of the Act by virtue of section 65(2). This section states:

> This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,
>
> (a) is a clinical record as defined by subsection 35(1) of the Mental Health Act; or
>
> (b) contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.

In Order P-374, I made the following general comments regarding section 65(2):

> It would appear to me that section 65(2) was included in the Act for two reasons:
> to acknowledge the extra sensitivity of records relating to the care and treatment of psychiatric patients; and to recognize the separate access and privacy scheme for psychiatric patient records under the MHA [the Mental Health Act]. Under section 65(2)(a), "clinical records", as defined by clause 29(1)(a) [now section 35(1)] of the MHA are specifically excluded from the Act, but are generally accessible to the patient under the MHA.

In my view, in order for a record to fall within the scope of section 65(2)(a), it must be in respect of a psychiatric patient, and it must be a "clinical record" as defined by section 35(1) of the Mental Health Act (the MHA).

I shall first consider whether the records are in respect of a psychiatric patient.

Section 1 of the MHA states, in part:

> "psychiatric facility" means a facility for the observation, care and treatment of persons suffering from mental disorder, and designated as such by the regulations.

MCSS states in its representations that both records were compiled by doctors of the Department of Psychology at the Peterborough Civic Hospital, which has been designated as a "psychiatric facility" by regulation under the MHA.

The records were created after the appellant's client was examined at the hospital as an out-patient. Section 35(1) of the MHA defines psychiatric patient as:

> "patient" includes former patient, **out-patient**, former out-patient and anyone who is or has been detained in a psychiatric facility. (emphasis added)

Accordingly, I am satisfied that the records are "in respect of a psychiatric patient".

I will now consider whether the requested records are "clinical records" as defined by section 35(1) of the MHA.

Section 35(1) defines clinical record as the: "clinical record compiled in a psychiatric facility in respect of a patient, and includes part of a clinical record".

The representations provided by MCSS do not specifically address the issue of whether the records are "clinical records".

The appellant acknowledges that the records may have been her client's "clinical records" when in the custody or under the control of the Peterborough Civic Hospital, but states that:

> ... Once the document has left the control of the [psychiatric facility] in which it was compiled, it loses its protection under the Mental Health Act and section 65(2) of the Freedom of Information and Protection of Privacy Act has no application.

The representations provided by MOH appear to support the appellant's view, and state:

> ... the original clinical record is always the responsibility of the officer in charge of the facility where it was compiled ...
>
> ... a distinction should be made between clinical records and copies of clinical records ... only the original clinical record compiled by a psychiatric facility is a clinical record within the meaning of the [MHA].

There is no dispute that the records at issue in this appeal are in the custody and control of MCSS. I accept the representations of MOH and the appellant, and find that the records are not "clinical records" as defined by the MHA and, therefore fall outside the scope of section 65(2)(a) of the Act.

MOH goes on to submit that a copy of a "clinical record", although not a "clinical record" for the purpose of subsection (a), falls within the scope of section 65(2)(b) of the Act.

In Order P-374, I made the following comments regarding section 65(2)(b):

> Subsection (b) is less specific in its wording [than subsection (a)], and can be interpreted in a number of ways. However, it is important to note that records which fall under section 65(2)(b) are not covered by the alternative access scheme contained in the MHA. I feel that in order to be consistent with the purposes of the Act, subsection (b) should be read restrictively. To find otherwise would exclude a broad range of psychiatric patient records from access by a patient under either the MHA or the Act. In my view, in order for a record to fall within the scope of section 65(2)(b), it must contain the types of information listed in the

section, it must be in respect of a psychiatric patient, and it must have a clinical purpose, nature or value.

In my view, the two subsections of section 65(2) were included in the Act to address two distinct categories of records which relate to psychiatric patients:

1) "clinical records" and

2) records which are not "clinical records" as defined by the MHA, but which fall within the description provided by section 65(2)(b).

MOH appears to be suggesting that an original "clinical record" would qualify under subsection (a), and a copy of the same record, although no longer a "clinical record" for the purposes of subsection (a), would nonetheless automatically satisfy the requirements of subsection (b). I do not accept this interpretation of section 65(2).

In order for a copy of a "clinical record" to fall within this scope of section 65(2)(b), it must satisfy the requirements of the three-part test established in Order P-374. It must:

(1) contain the types of information listed in section 65(2)(b); **and**

(2) be in respect of a psychiatric patient; **and**

(3) have a clinical purpose, nature or value.

In my view, a copy of a "clinical record" as defined by the MHA would, by its nature, satisfy the first two requirements, but the third requirement would depend on the circumstances of a particular appeal. In the present case, the records have been removed from the clinical setting, and are being maintained by MCSS for a non-clinical purpose. In my view, in order to satisfy the third part of the test, an institution must establish that the reason for having the records in its custody or control has a clinical purpose, nature or value; the fact that the original reason for creating or compiling the records may have had a clinical purpose, nature or value, in my view, is not sufficient to satisfy the requirements of section 65(2)(b). Having reviewed the representations submitted by MCSS and MOH, in my view, the requirements for the third part of the test under section 65(2)(b) have not been established, in the circumstances of this appeal.

Therefore, I find that the two records do not fall within the scope of sections 65(2)(a) and/or (b) of the Act.

In her representations, the appellant submits that section 65(2) of the Act violates the Canadian Charter of Rights and Freedoms and the Ontario Human Rights Code. Because I have found that section 65(2) does not apply to the records at issue in this appeal, it is not necessary for me to consider these submissions.

ORDER:

1. I order MCSS to provide the appellant with a proper decision letter regarding access to the records within 20 days from the date of this interim order.

2. MCSS is further ordered to advise me in writing within five days of the date on which the decision is made and to provide me with a copy of the decision letter. The notice and copy of the decision letter should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1

Original signed by: December 22, 1992
Tom Mitchinson
Assistant Commissioner