



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

ORDER P-374

Appeals P-910590, P-911122, P-910956, P-910989,
P-910991 and P-911137

Ministry of Health



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

INTERIM ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received six separate requests under the Freedom of Information and Protection of Privacy Act (the Act) from care-givers employed by the Kingston Psychiatric Hospital. Each request was for access to:

Any and all information concerning myself that may be in the possession of the Psychiatric Patients Advocate Office at Kingston Psychiatric Hospital, or at the Provincial Psychiatric Patients Advocate's Office in Toronto, Ontario.

For the purposes of responding, the Ministry divided each request into two parts: part 1, which dealt with correspondence files in the Provincial Psychiatric Patient Advocate Offices in Kingston and Toronto; and part 2, which dealt with advocate client files at the Kingston Psychiatric Hospital.

As far as part 1 was concerned, the Ministry responded by indicating that no responsive records existed for four of the requests, and released certain records or parts of records for the other two requests. None of the requesters appealed these decisions.

For part 2, the Ministry denied access to all responsive records, stating:

... These files contain information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of a patient in a psychiatric hospital as defined by the Mental Health Act. As such, these records are not covered by the Freedom of Information and Protection of Privacy Act, pursuant to Clause 65(2)(b).

Each requester appealed the Ministry's decision to deny access. Because the requests, responses by the Ministry, and records themselves are sufficiently similar in nature, I have decided to process the six appeals together in one order.

Attempts to settle the appeals through mediation were unsuccessful, and notice that an inquiry was being conducted to review the Ministry's decisions was sent to the six appellants, the Ministry, and the Psychiatric Patient Advocate Office (the PPAO). Representations were received from all parties.

The records consist of 50 pages of notes culled from certain client advocate files (the PPAO records) in which the name of any one of the six appellants is mentioned.

The sole issue to be determined at this stage of the six appeals is whether the PPAO records fall within the scope of section 65(2)(b) of the Act. If I find that they do, then the records are excluded from the scope of the Act and the appeals would be resolved on that basis. If they do not qualify under section 65(2)(b), then the Ministry will be required to consider the PPAO records under the substantive provisions of the Act, and determine whether these records should be released to the appellants.

Section 65(2) of the Act reads as follows:

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.

Before proceeding with a discussion of section 65(2)(b), I thought it would be helpful to briefly touch on the function of the PPAO and the role its advocates perform.

The PPAO operates a client-instructed advocacy program in psychiatric hospitals throughout the province. According to the PPAO:

[E]stablished in 1983 as a quasi-independent program of the Ministry of Health, our office has worked to uphold the rights and promote the self-determination of patients in the ten Provincial Psychiatric Hospitals.

...

The patient advocates' five point mandate is as follows:

1. to advance the legal and civil rights of psychiatric patients in all provincial psychiatric hospitals by means of both individual case work and systemic advocacy.
2. to inform the patient, family, hospital staff, and the community about patients' legal and civil rights.
3. to assist, facilitate (self-advocacy) and help resolve the complaints made by psychiatric patients by

providing an avenue for resolution through negotiation according to the patient's instructions.

4. to investigate alleged incidents and to assess institutional and systemic responses to these incidents.
5. to refer patients, when necessary, to outside community advocacy resources such as community organizations, lawyers, or physicians who may offer a second opinion (First Report of PPAO, 1884).

Advocates work closely with individual patients, assisting them to understand and enforce their rights under the health care system. Advocates maintain files containing information concerning their dealings with each patient who is a client, and it is records from these files which are at issue in these appeals.

The appellants submit that they have a right of access to any personal information about themselves contained in PPAO records, in accordance with the provisions of sections 47 and 48 of the Act. In their view, PPAO records do not fall within the scope of section 65(2)(b), and should be treated in the same manner as any other records in the custody or under the control of the Ministry. The appellants point out that they do not want access to personal information of the patients or any treatment details, only those parts of the PPAO records which contain their own personal information.

The PPAO submits that patients are assured of absolute confidentiality in their dealings with advocates, and that "[T]his confidential relationship is the cornerstone of the trust and confidence that clients place in our programme." As a matter of PPAO policy, patients have a right of access to their own advocate files, subject to any information which relates to the patient's clinical record, which is governed by the access provisions of the Mental Health Act (the MHA). The PPAO maintains that the information contained in PPAO records is primarily about the patients, and that the inclusion of these records within section 65(2)(b) does not prejudice the rights of the appellants. According to the PPAO, PPAO records themselves never leave the file, and the only time information from a record would be conveyed to anyone else is when a patient instructs the advocate to proceed further with a matter. If this involves a complaint about a patient's care-giver, then the hospital administration is notified, and the care-giver would have the right to request access under the Act to any records in the custody of the hospital administration.

The Ministry supports the PPAO's position, and submits that PPAO records fall within the scope of section 65(2)(b). In the Ministry's view, section 65(2)(b) should be read broadly to include records which relate to patient treatment issues at the psychiatric hospital, but don't form part of an individual patient's clinical record. In the Ministry's view, section 65(2)(b) is intended to include records which are broader than strictly "clinical" records, but which relate to the treatment and care of patients.

In determining whether or not PPAO records fall within the scope of section 65(2)(b), I think it is important to consider section 65(2) as a whole. 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. Under section 65(2)(a), "clinical records", as defined by clause 29(1)(a) of the MHA are specifically excluded from the Act, but are generally accessible to the patient under the MHA. Although what constitutes a "clinical record" is apparently less certain than would appear on the surface, it is accepted by all parties in these appeals that PPAO records do not form part of a patient's "clinical record" for the purposes of subsection (a).

Subsection (b) is less specific in its wording, 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.

All parties are in agreement that PPAO advocates are not care-givers, do not form part of a psychiatric patient's treatment team, and do not make clinical determinations regarding patients. As such, I feel that records which the advocates maintain do not have a sufficient clinical purpose, nature or value to properly fall within the scope of section 65(2)(b). According to the PPAO, one of the key distinctions between advocates and hospital care-givers is that advocates do not always necessarily act in what they feel are the best interests of the patient; rather, they are partisan allies of patients, and take instructions from clients, in a manner analogous in some sense to a solicitor-client relationship. This distinction is significant and, in my view, supports

the position that PPAO records do not have a clinical purpose, nature or value, and are different in nature from the category of clinical-related records which have been removed from the jurisdiction of the Act under section 65(2)(b).

One final point is worth mentioning. As noted earlier, the MHA includes a scheme whereby a psychiatric patient can obtain access to the information contained in his or her clinical record, subject to certain restrictions which are outlined in the MHA. However, the MHA does not extend this alternative access scheme to records which fall under section 65(2)(b), or to personal information of individuals other than the patient. The more broadly section 65(2)(b) is interpreted, the more types of records which could contain personal information of individuals other than psychiatric patients would be excluded from the scope of the Act. In my view, it would be inconsistent with the underlying principles of the Act to interpret section 65(2)(b) in a way which would deny psychiatric patients the statutory right of access to their own personal information contained in records which qualify under that section, or would create a broad category of records which were inaccessible to anyone under either the Act or the MHA.

Having carefully considered the issues and the representations of all parties, I find that the PPAO records do not fall within the scope of section 65(2)(b) of the Act.

ORDER:

1. I order the Ministry to provide each of the appellants with a proper decision letter regarding access to the PPAO records within 20 days from the date of this interim order.
2. The Ministry is further ordered to advise me in writing within five days of the date on which the decisions are made and to provide me with a copy of the Ministry's decision letters. These notices and copies of decision letters 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: _____
Tom Mitchinson
Assistant Commissioner

_____ December 3, 1992