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

ORDER P-623

Appeal P-910934

Ministry of Health

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INTERIM ORDER

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a named psychiatric patient, who was detained at a psychiatric hospital as a result of having been found not guilty by reason of insanity on two charges of attempted murder. The requester was seeking access to information pertaining to the conditions of the patient's detention and/or release.

The Ministry denied access to the records pursuant to sections 65(2)(a) and (b) of the Act. The requester appealed the Ministry's decision, and a Confirmation of Appeal notice was sent to the Ministry of Health (the Ministry), asking the Ministry to provide the Office of the Information and Privacy Commissioner/Ontario (the Commissioner) with a copy of the records pertaining to the appeal. To date, a copy of the record has not been provided to the Commissioner.

Mediation of the appeal was pursued but was not successful. Notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the appellant and the patient. This appeal is now in the inquiry stage and I require all records pertaining to this appeal which are in the custody or under the control of the Ministry in order to dispose of the issues arising in the appeal.

The Ministry maintains that the records are not accessible under the Act pursuant to section 65(2) of the Act and, accordingly, the Act has no application to the records. The Ministry also indicates that section 35 of the Mental Health Act (the MHA) prohibits the Ministry from providing the records to the Commissioner. The appellant maintains that he or she is not seeking access to the patient's clinical information respecting his psychiatric history, assessment, diagnosis, observation, examination, care or treatment, and that such information could be severed from the details which are the subject of the request.

The Act does not apply to records in respect of a patient in a psychiatric facility where the record is a clinical record as defined by section 35(1) of the MHA or contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient. The relevant provision is section 65(2) of the Act, which reads:

> 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.

However, the Act provides the Commissioner with certain powers to compel the disclosure of records during the course of an inquiry, the relevant provision being section 52(4) of the Act, which reads:

> In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

The first issue which arises, then, is whether the words "This Act does not apply" in section 65(2) of the Act mean that the whole Act does not apply to these records, including the appeal process and section 52(4) of the Act.

Section 1(a)(iii) of the Act provides that one of the purposes of the Act is to provide a right of access to information in accordance with the principle that "decisions on the disclosure of government information should be reviewed independently of government". In keeping with this principle, the Legislature created an independent, expert review authority (the Commissioner) to determine issues relating to access to information.

The appeal provisions of the Act provide that any decision of the head of an institution relating to access to records can be appealed by the requester to the Commissioner. The Commissioner (or his delegate) has the statutory duty to dispose of the issues raised in an appeal, and makes decisions in respect of an appeal by issuing an order pursuant to section 54(1) of the Act, which states:

> After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the Act, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.

While the Ministry must determine at first instance whether section 65(2) applies precluding access to the requester, the Commissioner, too, must be satisfied of the relevance and application of the provision to the records upon receipt of an appeal. This duty of the Commissioner is fundamental to the effective operation of the Act, the principle of providing a right of access to information under section 1(a), and the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii).

In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).

This power to compel initially would be exercised for the limited purpose of determining whether or not the records fall within the scope of section 65(2) of the Act. If, having reviewed the records, I determine that the Ministry's claim is correctly made, pursuant to section 65(2) the records would be returned to the Ministry and the appeal would be closed, since I would not have the jurisdiction to conduct a further inquiry. However, if I determine that the Ministry's claim is not validly made with respect to some or all of the records (i.e., that section 65(2) does not apply to some or all of the records), then I will be required to proceed with the inquiry and determine the application of the Act to the records.

The Ministry also maintains that it is prohibited by section 35 of the MHA from providing the records to the Commissioner.

Sections 35 and 36 of the MHA set out a disclosure scheme in relation to clinical records of psychiatric patients (as defined in section 35(1)). Section 35(2) of the MHA contains a general prohibition against the disclosure of such clinical records, as follows:

> Except as provided in subsections (3) and (5) and section 36, no person shall disclose, transmit or examine a clinical record.

The exception to this general prohibition against disclosure relevant in this case is contained in section 35(5) of the MHA:

> Subject to subsections (6) and (7), the officer in charge or a person designated in writing by the officer in charge **shall disclose**, transmit or permit the examination of **a clinical record pursuant to a summons, order, direction, notice or similar requirement in respect of a matter in issue or that may be in issue** in a court of competent jurisdiction or **under any Act**. [emphasis added]

Section 35(8) explicitly contemplates the admission of clinical records and other psychiatric information in evidence in proceedings before "a body", and not solely before a court of competent jurisdiction.

Section 35(5) contemplates the transmittal of clinical records to courts and bodies other than courts, for the purposes of determining matters in issue before those bodies. In this case, it is necessary for me to see the records in question for the purpose of making an order which disposes of the main issue raised by the appeal, that is, whether the records fall within the ambit of section 65(2) of the Act.

Section 8 of the MHA provides:

> Every psychiatric facility has power to carry on its undertaking as authorized by any Act, but, where the provisions of any Act conflict with the provisions of this Act or the regulations, the provisions of this Act and the regulations will prevail.

This section contemplates that those charged with the administration of psychiatric facilities will adhere to the requirements of other legislation. The only exception to this general rule is where there is a conflict between the MHA and another act. In that case, the provisions of the MHA and regulations will prevail. However, in view of the provisions of section 35(5), it is my opinion that there is no conflict.

In my view, an order of the Commissioner (or his delegate) requiring production of a record fits within the ambit of section 35(5) of the MHA. I do not agree with the Ministry's position that section 35(5) prohibits the disclosure of the records at issue to the Commissioner (or his delegate). In fact, the opposite is true: the MHA would **require** a psychiatric facility to disclose the records, in the face of an order of the Commissioner (or his delegate) to produce the records, unless it can be shown that the harms described in section 35(6) and (7) would be likely to result from the disclosure.

Accordingly, I order the Ministry to produce to me by **February 25, 1994**, all records which respond to the request relating to this appeal.

Original signed by: February 3, 1994
Holly Big Canoe
Inquiry Officer