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

ORDER PO-2936

Appeal PA08-365

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NATURE OF THE APPEAL:

The sole issue to be resolved in this order is whether records that the Ontario Public Guardian and Trustee (OPGT) disclosed to the appellant are responsive to a narrowed request that she made under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

By way of background, the appellant originally submitted a broad request under the *Act* to the OPGT for the following information:

> Re: Request for a Copy of All Information in All files in Possession of the [OPGT] related to [my mother].
>
> Attached as requested is a copy of the Certificate of Appointment of [me] as Estate Trustee for the Estate of [my mother] – Deceased.
>
> … I am [her] daughter, next-of-kin in Canada and along with my husband was her power of attorney until her death. The files are required to pursue the interests of the Estate and those like [my mother] who suffer from disabilities which is the only reason the [OPGT] contain any files for [my mother]. There should, therefore, be no reason to withhold any information contained in any [OPGT] files for compassionate grounds. I also confirmed that we require a copy of all information contained in all the files that come under the jurisdiction of the [OPGT].

The OPGT located 5,625 pages of responsive records. It then issued a decision letter to the appellant that granted her partial access to these records. Specifically, it disclosed 1,669 pages of records to her, some in whole and others in part.

However, it denied access to the remaining records, either in whole or in part, pursuant to the discretionary exemptions in sections 13(1) (advice to government), 14(1)(b) (law enforcement investigation) and 19 (solicitor-client privilege); the mandatory exemption in section 21(1) (personal privacy), read in conjunction with the presumption in section 21(3)(a) (medical history) and the factor in section 21(2)(h) (supplied in confidence); and the discretionary exemption in 49(b) (personal privacy) of the *Act*.

The appellant appealed the OPGT's decision to the Information and Privacy Commissioner of Ontario (IPC). The OPGT provided both the appellant and the IPC with the following description of the records:

Pages	Description of File	Description of Record
1 to 457	Client File	Legal records, medical records, email, correspondence
458 to 1007	Treatment Decision File	Legal records, medical records, email, correspondence
1008 to 4726	Allegation/Investigation File	Legal records, medical records, email, correspondence

Pages	Description of File	Description of Record
4727 to 5625	Litigation/Counsel File	Legal records

To resolve the issues in this appeal, I issued notices of inquiry to both the OPGT and the appellant and received representations in response. In her representations, the appellant asked that two specific records be provided to her. In particular, she cited a letter that she received from the former OPGT, Louise Stratford, dated December 10, 2007 and asked for the following records:

1. A copy of the order referred to in line 7 of paragraph 3 on page 1 of Ms. Stratford's letter …

2. The Certificate of Incapacity reputedly signed by Dr. LePage that saw the [OPGT] become the statutory guardian and referred to in the first sentence of page two of the letter from [Ms. Stratford] …

In a further email to the IPC, the appellant stated that she would like to narrow the records at issue in Appeal PA08-365 to only those two records:

> In the broader public interest I am prepared to withdraw my request to access all files held by the [OPGT] to concentrate only on the documents currently requested from the [OPGT], Mr. Ken Goodman, due to the impact of their non-release on vulnerable members of the Ontario community and the Estate of [my mother] – Deceased.

In response, I sent a letter to the appellant, confirming that she was withdrawing her request for access to the records at issue in Appeal PA08-365, except for the above two records. The letter further stated:

> … Based on the information that I have received from both yourself and the OPGT, it appears that these two records are the following:

- Certificate of Incapacity to Manage One's Property under Subsection 54(4) of the [*Mental Health Act*], dated November 4, 1999 (page 104 of the records at issue)

- Decision of the Consent and Capacity Board [CCB], dated October 20, 2005 (pages 4753-4754 of the records at issue)

After receiving this letter, however, the appellant sent an email to both the IPC and OPGT stating that the CCB decision of October 20, 2005 is not the record cited in line 7 of paragraph 3 on page 1 of Ms. Stratford's letter, because is "not an order to the [OPGT]." She further submits that "Ms. Stratford claims in her letter dated December 10, 2007 to have received an order from the [CCB] for their involvement as treatment decision maker which occurred in late 1999."

I then issued a supplementary notice of inquiry to the OPGT. In response, the OPGT sent a revised decision letter to the appellant, along with a copy of the records that it believes are responsive to her narrowed request. In addition, it submitted representations to the IPC that explain why these are the responsive records.

Finally, I issued a supplementary notice of inquiry to the appellant, along with a copy of the OPGT's representations. In response, the appellant submitted representations in which she asserts that the records she received from the OPGT "do not constitute the records requested under Appeal PA08-365."

In short, the sole issue that must be resolved is whether the records that the OPGT disclosed to the appellant are responsive to her narrowed request.

DISCUSSION:

RESPONSIVENESS OF RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

Consequently, in deciding whether the records that the OPGT disclosed to the appellant are responsive to her narrowed request, it must be determined whether these records "reasonably relate" to that request. In making this determination, I will consider the wording of the

appellant's narrowed request, the representations submitted by the parties, and the substance of the records that the OPGT disclosed to the appellant.

Record 1: Copy of order

In her narrowed request, the appellant describes the first record she is seeking as:

> A copy of the order referred to in line 7 of paragraph 3 on page 1 of Ms. Stratford's letter …

The passage from Ms. Stratford's letter that refers to the order sought by the appellant is as follows:

> As you are aware, our initial involvement as treatment decision maker for your mother came about because you did not, as your mother's attorneys for personal care, follow an order made by the board to consent to a specific plan of treatment that the Board found to be in your mother's best interests. The next ranked substitute decision maker, also chose not to follow the Board's order. *As a result, and in compliance with the provisions of the Health Care Consent Act, 1996, my Office was ordered to make the decision.* This order did not remove you as attorneys for personal care but rather displaced you as the decision maker for that specific treatment proposal on the basis that you were not meeting your legal obligation to make decisions in the manner specified by law and to comply with the order of the Board. It should be noted that our Office was not a party to the proceeding before the Board and does not have any discretion to decline to follow its orders. (Emphasis added.)

The OPGT disclosed the following CCB decision and reasons to the appellant, which it submits are responsive to the first part of her narrowed request:

- Decision of the CCB, dated November 26, 1999 (page 1796 of the records at issue);
- Reasons for decision, dated December 1, 1999 (pages 1797-1814 of the records at issue); and
- Supplementary reasons for decision, dated January 18, 2000 (pages 1816-1829 of the records at issue)[1]

The appellant disagrees that this 1999 CCB decision is responsive to the first part of her narrowed request. She submits that it is not the "order" referred to in line 7 of paragraph 3 on page 1 of Ms. Stratford's letter.

For the reasons that follow, I find that the CCB decision of November 26, 1999 and the subsequently released reasons and supplementary reasons for decision, are responsive to the first part of the appellant's narrowed request.

[1] The OPGT also disclosed the CCB decision of October 20, 2005 (pages 4753-4754 of the records at issue) to the appellant but acknowledges that it is not responsive to the appellant's narrowed request because "the order referred to in Paragraph 3, line 7 of Louise Stratford's letter seems to refer to a decision made before October 20, 2005."

The CCB decision of November 26, 1999 resulted from an application by a physician who was treating the appellant's mother. His application was made under section 37(1) of the *Health Care Consent Act* (the *HCCA*) to determine whether the substitute decision makers (the appellant and her husband) had complied with the rules for substitute decision making prescribed in section 21 of the *HCCA*.

The CCB decision of November 26, 1999 stated, in part:

> The [CCB] has determined that the substitute decision makers named above, jointly and severally,
>
> [x] HAVE NOT complied with the principles for substitute decision making set out in the [*HCCA*] and directs the substitute decision makers to: CONSENT TO THE ADMINISTRATION OF ANTI-PSYCHOTIC & ANTI-SIDE EFFECT MEDICATION AS PROPOSED BY [the appellant's mother's] TREATING PHYSICIAN FROM TIME TO TIME.
>
> The substitute decision makers shall comply with the [CCB's] directions by 4:00 p.m, Dec. 3, 1999. If the substitute decision makers do not comply with the [CCB's] directions within the time specified by the [CCB], they, jointly and severally, shall be deemed not to meet the requirements for substitute decision making as they are set out in section 20(2) of the [*HCCA*].

The appellant submits that this decision is not responsive to the first part of her narrowed request because it did not "order" the OPGT to give consent to the treatment proposed by her mother's physician, as suggested in Ms. Stratford's letter.

I agree that the CCB decision of November 26, 1999 did not explicitly order the OPGT to give consent to the treatment proposed by a physician of the appellant's mother. In fact, there is no reference to the OPGT in the order provisions of this decision. Instead, it appears that the OPGT's giving of consent came about as a result of this decision.

In its representations, the OPGT describes what happens if a substitute decision maker does not comply with a CCB order to give consent to treatment:

> … If the substitute decision makers do not consent to this treatment, the next ranked individual capable of giving consent pursuant to section 20(1) of the *HCCA* is contacted to consent to the respective treatment. If none of the ranked individuals consent to the treatment, the OPGT is contacted and is requested to consent to the treatment specified.

According to Ms. Stratford's letter, the appellant and her husband (who were substitute decision makers) did not comply with the CCB decision of November 26, 1999, and neither did the "next ranked substitute decision maker." The appellant's representations include evidence that shows how the OPGT then became involved. She has included a copy of a letter, dated December 23,

1999, from the Team Leader of the OPGT's Treatment Decision Unit to a physician treating the appellant's mother. The letter shows that this physician contacted the OPGT, which then made a decision to give consent to the proposed treatment. The OPGT's letter to this physician states, in part:

> I am writing as a follow up to our conversation of December 16, 1999 in which you requested that the [OPGT] give consent to treatment on behalf of [the appellant's mother].
>
> I understand that you have found [the appellant's mother] incapable with respect to the proposed treatment, that to the best of your knowledge there are no other higher ranked decision makers available, willing and capable with respect to the treatment, and that you are asking for a substitute decision from the [OPGT] as the treatment maker of last resort.
>
> This letter confirms the [OPGT's] consent given to the following treatment:
>
> ….
>
> This consent expires on February 22, 2000.

The test that I must apply in determining whether the CCB decision of November 26, 1999 and subsequently released reasons are responsive to the first part of the appellant's narrowed request is whether these records "reasonably relate" to that part of her request.

Despite the wording in Ms. Stratford's letter, this CCB decision did not explicitly order the OPGT to give consent to the treatment proposed by a physician of the appellant's mother. However, the evidence before me shows that the OPGT's giving of consent came about as a result of this decision. In these circumstances, I find that the CCB decision of November 26, 1999 and subsequently released reasons "reasonably relate" to the first part of the appellant's request and are therefore responsive records.

Record 2: Certificate of Incapacity

In her narrowed request, the appellant describes the second record she is seeking as:

> The Certificate of Incapacity reputedly signed by Dr. LePage that saw the [OPGT] become the statutory guardian and referred to in the first sentence of page two of the letter from [Ms. Stratford] …

The passage from Ms. Stratford's letter that refers to the Certificate of Incapacity sought by the appellant is as follows:

> Your Continuing Power of Attorney for Property ('CPOA') was temporarily suspended because a Certificate of Incapacity was issued for your mother under the *Mental Health Act*. This Certificate was lawfully issued under that statute as the statute does not prohibit the issuance of such a Certificate even if there is a CPOA in place.

The OPGT disclosed the following record to the appellant, which it submits is responsive to the second part of her narrowed request:

- Certificate of Incapacity to Manage One's Property under Subsection 54(4) of the [*Mental Health Act*] (Form 21), dated November 4, 1999 and signed by Dr. Lepage (page 104 of the records at issue)

The appellant submits that this one-page record is not responsive to the second part of her narrowed request because it does not "meet the definition of a certificate of incapacity that could be used under the *Mental Health Act* to takeover the assets of [my mother] in November, 1999." She further states that the certificate "constituted more than the one page provided …"

I have reviewed the record that the OPGT disclosed to the appellant. In my view, this record is clearly responsive to the second part of her request. The Certificate of Incapacity (Form 21) relates to the appellant's mother, contains Dr. Lepage's signature and is dated November 4, 1999. Although the appellant claims that this record should be more than one page in length, the blank Certificate of Incapacity form available on the Ontario government's "Central Forms Repository" website is also only one page in length.[2]

I find, therefore, that the Certificate of Incapacity disclosed to the appellant by the OPGT "reasonably relates" to the second part of her request and is a responsive record.

ORDER:

I uphold the OPGT's decision and dismiss the appeal.

Original signed by: December 20, 2010
Colin Bhattacharjee
Adjudicator

[2] www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?openform&ENV=WWE&NO=014-6440-41