



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

ORDER P-533

Appeals P-9300203, P-9300204, P-9300205 and P-9300207

Ministry of Health



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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received four requests under the Freedom of Information and Protection of Privacy Act (the Act) from an agent who purported to act on behalf of four individuals who are patients in a psychiatric institution. The agent is a patient at the same facility. These requests seek personal information respecting the four patients compiled while these individuals were incarcerated in the psychiatric institution. The requests are very broad in nature, covering periods from eight to 17 years and encompassing records located in many program areas.

The four patients each provided the Ministry with a letter of authorization granting the agent the authority to make the request and to proceed with any appeal to the Commissioner's office which might result from the request.

For three of the requests (which led to Appeals P-9300203, P-9300204 and P-9300205), the Ministry wrote directly to the patients and indicated that, owing to concerns about patient confidentiality, it was not prepared to honour these authorizations. The Ministry then asked the patients to verify in writing that they wished to proceed with their requests on the basis that any information located would be released to them directly. No responses were received from the patients with the result that the Ministry declined to further process these requests.

For the request which lead to Appeal P-9300207, the Ministry processed the request and then issued a decision letter in which it advised the patient that it would not honour the authorization. In the same correspondence, the Ministry offered to provide the responsive records to the patient directly. In a subsequent telephone call, however, the agent advised the Ministry that the patient would only accept delivery of the decision letter through the agent and that any documentation otherwise received would be returned.

The agent then appealed the Ministry's decisions not to accept the authorizations which had been signed by the patients.

The sole issue for determination in these appeals is whether the Ministry acted reasonably in refusing to accept the authorizations purportedly granted by the patients to have the appellant act as their agent.

SUBMISSIONS/CONCLUSIONS:

In addressing this issue, it will be necessary for me to consider section 52(14) of the Act and section 3(3) of Regulation 460 made under the Act. Section 52(14) reads as follows:

The person who requested access to the record, the head of the institution concerned and any affected party may be represented by counsel or an agent.

Section 3(3) of Regulation 460 states that:

The head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it.

In the representations provided, the appellant maintains that the authorizations executed by the patients conform in all respects to the requirements of section 52(14) of the Act. The appellant points out that each authorization confers upon the appellant the right to receive the personal information pertaining to the patient. Finally, the appellant notes that the individual authorizations were witnessed by a third party.

In its representations, the Ministry states that its decision not to accept the authorizations was based on a number of considerations. First, the Ministry emphasizes that the information being sought in each appeal is extremely sensitive in nature and deals with patient histories compiled over many years. To amplify this point, the Ministry points out that certain types of records pertaining to individuals incarcerated in provincial psychiatric hospitals are governed by the Mental Health Act which precludes one patient from having access to the personal information of other patients.

Second, the Ministry has expressed concern about the contents of several clauses contained in each authorization which stipulate that the institution is not to contact the patient directly and that all communications concerning the request and any subsequent appeal are to be directed to the agent only. The Ministry also points out that three of the patients whose personal information is at issue in this appeal never confirmed that they wished to receive the documentation and that the fourth purportedly refused to accept direct delivery of the documents.

For all of these reasons, the Ministry submits that there is reason to doubt that the authorizations signed by the patients were provided in a "free and voluntary" fashion. The Ministry has indicated, however, that it would be prepared to process the three remaining requests and to disclose the information to the patients directly. The Ministry points out, in this respect, that the individual patient would then have the option to pass the information to another patient should the individual wish to do so.

It will now be necessary for me to more closely examine the contents of the authorizations and the circumstances under which they were executed. Each authorization contains similar language about the extent of the authority which the patient grants to the agent. The authorization specifically instructs the Ministry to "disclose personal information of mine to my agent(s)" and adds that "this authorization is for the purposes of processing this request and any subsequent IPC/O appeal resulting from this request."

The authorizations also include the following clauses:

I also wish to stipulate that all verbal communication and written correspondence (including any records being disclosed), associated with this request be addressed specifically, explicitly and exclusively as follows:- [name and address of agent provided]

I will not accept nor respond to any communication or correspondence relating to this request which are directed towards me contrary to my wishes.

In order to decide these appeals, I must balance the right of an individual to be represented by an agent under section 52(14) of the Act against an institution's obligation under section 3(3) of Regulation 460 to verify the identity of an individual seeking access to his or her personal information and, by implication, whether or not an agent, purportedly acting on behalf of an individual, is properly authorized to obtain such information.

These issues have been commented upon in two previous orders issued by the Commissioner's office. Order M-71 involved the situation where an individual purportedly authorized an agent to file an access request for the individual's personal information. In interpreting the scope of section 52(14) of the Act, former Assistant Commissioner Tom Mitchinson made the following comments:

In my view, it is the Board's responsibility to take whatever steps are required to confirm that a person who purports to be acting as agent for another individual has the requisite authority to act in this capacity. If proper authorization cannot be obtained, and the Board has concerns that release of the requested information might constitute an unjustified invasion of privacy then, in my view, the Board has an obligation under section 21 of the [Municipal] Act to notify the individual whose personal information is at issue and provide him or her with an opportunity to provide representations prior to any decision of the Board regarding disclosure of any relevant records.

In that appeal, Assistant Commissioner Mitchinson found that sufficient evidence had been provided to establish that the agent was duly authorized to act on behalf of the individual to whom the personal information related.

I agree with the manner in which Assistant Commissioner Mitchinson has characterized the general obligation of institutions in situations such as these. I believe, however, that it would ordinarily be more appropriate for institutions to deal with concerns about the validity of authorizations as preliminary issues rather than being required to issue third party notices under section 28 of the Act.

This is the approach which I adopted in Order P-455. In that appeal, the requester sought access to sensitive personal information relating to his adult daughter. The requester provided the institution with an authorization supported by an affidavit through which the daughter purportedly authorized her father to make the request for the records. As in the present case, the requester specified that all communications with his daughter should be made in writing and sent only to his address.

In that order, I addressed the validity of the authorization in the following fashion:

[IPC Order P-533/September 10, 1993]

Having considered all of the evidence available to me and having regard to the particularly sensitive nature of the records at issue, it is my view that the documents provided by the appellant do not allow me to conclude that the appellant has the requisite authority to act on behalf of his daughter.

On this basis, I upheld the institution's decision not to accept the authorization in question.

The purpose of section 52(14) of the Act is to allow persons to rely on the expertise of counsel or agents to obtain information under the provisions of the Act. Where an access request involves general records, there is no need for an institution to make inquiries respecting the sufficiency of any authorizations which it may have received. Where, however, the subject matter of the request involves personal information of a principal and an institution has a concern that the agent who has made such a request lacks the requisite authority to do so, the institution has the obligation to make whatever inquiries it considers reasonable to satisfy itself that the authorization is proper.

In determining whether the Ministry acted reasonably in refusing to accept the authorizations provided by the patients, I have placed particular weight on the following considerations. First, the personal information being sought is very sensitive in nature and was compiled over extended periods of time. Second, the clauses in the agreement which purport to prevent the Ministry from making direct contact with the patients effectively preclude the Ministry from complying with its obligations under section 3(3) of Regulation 460. Third, the fact that no response to the Ministry's correspondence was received from three of the patients involved in these appeals is also a source of concern.

Finally, I would note that the records at issue in these appeals are being sought from areas of an institution responsible for the care and treatment of particularly vulnerable individuals. In these cases, institutions must take special care to ensure that authorizations are provided in a free and voluntary manner.

Taking all of these considerations into account, I find that the Ministry acted reasonably in refusing to accept the authorizations purportedly granted by the patients to the agent. Having reached this conclusion, however, I wish to point out that the approach which the Ministry

applied to assess the validity of the authorizations was flawed. Rather than taking an a priori position that the authorizations provided by the patients were invalid, Ministry officials ought to have discussed this subject with the patients involved before determining whether or not to accept the authorizations. That approach should be adopted should subsequent requests of this nature be received.

For the purposes of the present appeals, it is clear that the Ministry has experienced considerable difficulty in discerning, in a direct and reliable fashion, the actual views of the patients with respect to the processing of their requests. For this reason, I believe that it would be prudent for any further transactions pertaining to these requests to occur between the Ministry and the patients directly. The patients are then free to share the information which they receive with whomever they choose.

ORDER:

1. I order the Ministry to make all reasonable efforts to contact the patients whose personal information is the subject of Appeals P-9300203, P-9300204 and P-9300205 within 30 days of the date of this order to ascertain from them directly whether they wish to proceed with their access requests.
2. In the event that the patients confirm that they wish to proceed with these requests, I order the Ministry to issue the required decision letters directly to the patients within 30 days of the date that the requisite confirmations under provision 1 of this order have been obtained. In addition, should the Ministry make the decision to release any personal information at this point in time, I order that such information be provided to the patients directly.
3. I order the Ministry to advise the patient whose personal information is the subject of Appeal P-9300207 of the contents of this order and to advise the patient that the Ministry remains willing to provide the personal information in question directly to that patient.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ September 10, 1993