



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-484

Appeal M-9400497

East York Health Unit



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The East York Health Unit (the EYHU) received a request for access to information relating to the health of the requester's five year-old child. The requester is in the midst of a divorce action with the child's mother, in which custody of the child is an issue. Currently, the mother has custody of the child and the father has access to the child pursuant to an interim order of the court. Although the information requested refers to a time when the parents were together and had joint custody of the child pursuant to common law, the request was made after the parents had separated and commenced divorce proceedings.

The EYHU granted partial access to information regarding the child. The EYHU informed the requester that access was denied to information which related to the medical history, diagnosis, condition, treatment or evaluation, educational history, and personal recommendations or evaluations of the child pursuant to the following exemption:

- invasion of privacy - section 14(1)

The requester appealed the EYHU's decision to deny access. A Notice of Inquiry was sent to the appellant, the child's mother and the EYHU. Representations were received from the appellant and the EYHU. The Notice of Inquiry which was sent to the child's mother was returned undelivered with an indication that the mother had moved to an unknown address.

DISCUSSION:

INVASION OF PRIVACY

The appellant indicates that he is not requesting access to the personal information of the child's mother, and this information is therefore not responsive to the request and not at issue in this appeal.

I have reviewed the remaining parts of the records and I find that they contain the personal information of the appellant's child. This information relates to the physical and mental health of the child. A small portion of these records also contains the personal information of the appellant.

The appellant submits that section 14(1)(d) applies in the circumstances of this appeal. This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

under an Act of Ontario or Canada that expressly authorizes the disclosure;

The appellant submits that section 12(1) of O. Reg. 57/92 made under the Independent Health Facilities Act, section 1(1)(10) of O. Reg. 856/93 made under the Medicine Act, section 20(5) of the Children's Law Reform Act and section 16(5) of the Divorce Act all meet the requirements of section 14(1)(d) in the circumstances of this appeal.

The EYHU is not a licensee under the Independent Health Facilities Act, and therefore its provisions and regulations made under it are irrelevant in the circumstances of this appeal.

Section 1(1) of O. Reg. 856/93 made under the Medicine Act outlines actions which constitute professional misconduct for the purposes of section 51(1)(c) of the Health Professions Procedural Code. Section 1(1)(10) indicates that giving information concerning the condition of a patient or any services rendered to a patient to a person other than the patient or his or her authorized representative, except with the consent of the patient or his or her authorized representative or as required by law, constitutes professional misconduct.

In my view, the codification of actions which constitute professional misconduct cannot be said to "expressly authorize" disclosure of another individual's personal information.

The child's mother commenced divorce proceedings by way of a petition for divorce. The petition indicates that she is seeking relief, including custody, under both the Divorce Act and the Children's Law Reform Act. The appellant commenced a motion for an order granting him access under both the Divorce Act and the Children's Law Reform Act. However, section 27 of the Children's Law Reform Act states:

Where an action for divorce is commenced under the Divorce Act (Canada), any application under this Part in respect of custody or access to a child that has not been determined is stayed except by leave of the court.

Accordingly, despite the fact that both the mother and father sought custody and access under both statutes, by virtue of section 27 of the Children's Law Reform Act, the Divorce Act takes precedence over the Children's Law Reform Act. Therefore, in my view, the Children's Law Reform Act is not relevant in the circumstances of this appeal.

Section 16(5) of the Divorce Act states:

Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

In Order M-292, Inquiry Officer Anita Fineberg stated that the interpretation of the phrase "expressly authorizes" as it is found in section 14(1)(d) of the Act should mirror that of the same phrase found in section 38(2) of the provincial Freedom of Information and Protection of Privacy Act. In Compliance Investigation Report I90-29P, the following comments were made about this section:

The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] Act requires either that the specific types of personal information collected be expressly

described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

I agree with the interpretation of Inquiry Officer Fineberg, and consider it the appropriate test to apply in this case. To be fully consistent with one of the fundamental purposes of the Act, the protection of individual privacy with respect to personal information, the concept of "express statutory authorization" should be interpreted narrowly. Applying this test to section 16(5) of the Divorce Act, it is my view that the provision is too broadly worded to meet the requirements of section 14(1)(d) of the Act. While categories of personal information are identified in the section, in my view the section lacks the specificity required by section 14(1)(d).

Having found that section 14(1)(d) is not applicable in the circumstances of this appeal, the only other exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether or not disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The EYHU submits that sections 14(3)(a) (medical, psychiatric or psychological information) and 14(3)(g) (recommendations, evaluations or character references) are applicable in the circumstances of this appeal.

Section 14(2) lists factors which may be considered in determining whether or not the disclosure of personal information would constitute an unjustified invasion of personal privacy. The EYHU submits that sections 14(2)(e) (exposure to harm), (f) (highly sensitive) and (h) (supplied in confidence), all of which favour the protection of individual privacy, are relevant considerations in the circumstances of this appeal.

Aside from the arguments presented in favour of the application of section 14(1)(d), which I have not found persuasive, the appellant has not identified any considerations which would weigh in favour of disclosure of the personal information of his child.

Therefore, in the absence of any evidence or argument weighing in favour of finding that disclosure of the personal information of the appellant's child would **not** constitute an unjustified invasion of personal privacy, I find that the exception under section 14(1)(f) does not apply.

Similarly, having balanced the right of the appellant to access his personal information against the child's right to the protection of personal privacy, I find that disclosure of the personal information of the child, where it appears together with that of the appellant, would constitute an unjustified invasion of the child's personal privacy, and section 38(b) applies.

EXERCISE OF RIGHTS OF PERSONS LESS THAN 16 YEARS OF AGE

Both the EYHU and the appellant have referred to section 54(c) of the Act during the course of this appeal. Section 54(c) states that the rights and powers of individuals less than sixteen years of age may be exercised by a person who has **lawful custody** of the individual. In the circumstances of this appeal, the appellant does not currently have lawful custody of his child, nor did he at the time of the request, and, in my view, section 54(c) is not relevant.

ORDER:

I uphold the EYHU's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ March 9, 1995