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

ORDER P-1271

Appeal P-9500337

Ministry of Health

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NATURE OF THE APPEAL:

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 requester specified that he/she was not seeking access to the patient's clinical information, respecting his psychiatric history, assessment, diagnosis, observation, examination, care or treatment, and was content that such information be severed from the records.

The Ministry denied access to the records pursuant to sections 65(2)(a) and (b) of the Act, which removes some information pertaining to patients in a psychiatric facility from the scope of the Act. The requester appealed the Ministry's decision. The Ministry, the appellant and the patient were notified of the appeal and given the opportunity to submit representations. Representations have been received from all three parties.

RECORDS:

As a result of a previous request to the Criminal Code Review Board, the appellant has access to the patient's Disposition Orders, which outline the areas in which the hospital Administrator may exercise discretion regarding the conditions of the patient's detention and/or release. The records at issue in this appeal, which consist largely of correspondence between the Administrator and clinical staff as well as correspondence between the Administrator and local police, provide additional details regarding how the Administrator has exercised his discretion and the actual date, duration, location, conditions and purpose of the patient's temporary releases and/or day passes.

DISCUSSION:

PSYCHIATRIC PATIENT RECORDS

Section 65(2) of the Act states 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.

Section 35(1) of the Mental Health Act (the MHA), referred to in section 65(2)(a) of the Act, states as follows:

> "Clinical record" means the clinical record compiled in a psychiatric facility in respect of a patient, and includes part of a clinical record.

Section 35(1) of the MHA defines "patient" as follows:

> "Patient" includes former patient, out-patient, former out-patient and anyone who is or has been detained in a psychiatric facility.

One of the requirements of the preamble of section 65(2) is that the records must pertain to a patient in a "psychiatric facility as defined by section 1 of the [MHA]". Section 1 of the MHA defines "psychiatric facility" as one designated as such by regulation under that statute. I am satisfied that the hospital in question is so designated. I am also satisfied that the appellant was a patient of the hospital when the records were created.

The appellant submits that the requested information is not "clinical" information, but deals specifically with criminal law matters, and should not be subsumed under the classification of a clinical record.

Based on the reference to "**the** clinical record **compiled** in a psychiatric facility" (emphases added) in the definition of "clinical record" in section 35(1) of the MHA, there must be some logical connection between a document and the patient in order for it to be part of that individual's clinical record within the meaning of section 65(2)(a) of the Act and section 35(1) of the MHA.

Based on my review of the record, it is clear to me that granting an involuntary patient day passes or temporary releases is part of the care and/or treatment of the patient. While the decision to grant a day pass or temporary release rests with the hospital Administrator, the request for a pass or release is made through the treatment team. It is apparent that one of the key aspects to the exercise of the Administrator's discretion is the information he receives from the treatment team.

Accordingly, I find that the records which consist of reports by the clinical team or correspondence between the hospital Administrator and members of the clinical team qualify as clinical records, and fall outside of the scope of the Act by virtue of section 65(2).

In order P-1213, Inquiry Officer John Higgins referred to a decision of the Ontario Court (General Division) in Everingham v. Ontario (1992), 7 O.R. (3d) 291 (leave to appeal to the Court of Appeal denied at (1992), 9 O.R. (3d) 478) and found that a record does not lose its status as a "clinical record" just because it has been copied and forwarded to another institution. In Everingham, the applicants were residents of a mental health facility. The Court considered whether information derived from the applicants' clinical records could be introduced into evidence, in affidavit form, by the respondents. Parts of this evidence derived from information which had originated in the clinical record but had subsequently been provided to the Lieutenant Governor's Board of Review. The Court found that the information taken directly from the clinical records, and the information from the clinical records obtained from the Board of Review materials, should all be struck from the affidavit.

In other words, the Court found that the fact that some clinical records had left the psychiatric institution and were in the possession of some other body, did not alter their character as clinical records and the prohibitions against disclosure in section 35 of the MHA would still apply. This would also be the case for information taken from clinical records which appears in another document.

In my view, the Everingham case is relevant to the interpretation of section 65(2)(a) as it relates to the copies of the correspondence between the hospital Administrator and the police. While these records do not directly involve the members of the treatment team, they do contain information which was derived from records which I have found to be clinical records. Accordingly, I find that these records also fall within section 65(2)(a), and are excluded from the scope of the Act.

In summary, I find that all of the records at issue in this appeal are not accessible under the Act pursuant to section 65(2)(a).

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The appellant submits that section 65(2) of the Act offends sections 7 and 15(1) of the Canadian Charter of Rights and Freedoms (the Charter).

Section 7 of the Charter:

Section 7 of the Charter provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 65(2) of the Act provides that certain categories of records are not subject to the Act. Accordingly, the access to information scheme set out in Parts II and IV of the Act does not apply to records falling within the scope of section 65(2). However, even if section 65(2) of the Act did not exist, the appellant's request for access to records would be subject to the mandatory exemption at section 21 of the Act, and the procedural requirements set out in Part II of the Act. As the appellant is seeking the clinical record of another individual, which, by definition would contain the patient's personal information, the Ministry would be prohibited from disclosing it unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applied or unless section 23 applied to override the exemption. Therefore, there is at best only a possibility that the appellant ultimately would be entitled to access to the records under the Act.

Moreover, even if the Ministry was to consider disclosing the personal information of the patient, the Ministry would be obliged to notify the patient under section 28 of the Act, and provide the patient with 20 days within which to make representations on the issue of disclosure. Further, if, after hearing from the patient, the Ministry were to decide that the information should be disclosed, under section 28(8) of the Act, the disclosure could not take place unless the patient was notified of the decision and did not appeal the decision within 30 days of the notice. Should the patient exercise the right of appeal under section 50(1), the records would be withheld for an

additional period, pending determination of the appeal. Therefore, even assuming the appellant would be entitled to access to the records under the Act, it is likely that the records would not provide current information about the patient's whereabouts.

Based on the above, it is my view that the appellant has not been able to draw a sufficient causal connection between section 65(2) of the Act and any potential impairment of the appellant's right to life, liberty and security of the person. Accordingly, I find that section 65(2) of the Act does not infringe the appellant's rights under section 7 of the Charter.

Notably, the Attorney General is taking action to keep victims informed of the status of offenders and has recently announced an alternative access scheme which will not be limited by the application of section 65(2) of the Act. The province's Victim Notification System, which is scheduled to be operational in 1997, will provide information to victims on the current and pending status of their offender and will ensure victims are notified when an offender is to be released for any reason, either temporarily or permanently.

Section 15(1) of the Charter

Section 15(1) of the Charter provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The appellant submits that section 65(2) of the Act effectively prohibits an entire class of victims and potential victims from accessing information which is pertinent to their safety on the sole basis that their assailants are residing in psychiatric institutions and that the requested information is deemed to be contained in "clinical" records.

The appellant's argument under section 15(1) relates to the argument made under section 7: the appellant is essentially submitting that victims and potential victims of mentally ill offenders are prevented from accessing information vital to their safety, and that section 65(2) of the Act fails to protect victims and potential victims equally, as victims and potential victims of mentally competent offenders can avail themselves of the right of access to information under the Act.

Victims and potential victims of mentally ill offenders do not constitute a category of persons given protection under section 15(1) of the Charter. In addition, I find that this group does not fall into an analogous category to those specified in section 15(1). The disadvantages experienced by this group are not related to a personal characteristic of the victims or potential victims, but related to a personal characteristic of the offender. Further, as described above, even if section 65(2) did not exist and the Act were operational, it would not necessarily provide victims and potential victims of mentally ill offenders with current information about the whereabouts of a mentally ill offender. Accordingly, I find that section 65(2) of the Act does not violate equality rights under section 15(1) of the Charter.

ORDER:

I uphold the Ministry's decision.

Original signed by: October 7, 1996
Holly Big Canoe
Inquiry Officer