



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

ORDER M-787

**Appeal M_9400497
(Reconsideration)**

East York Health Unit



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BACKGROUND:

On March 9, 1995, I issued Order M-484, which involved a request for information from the East York Health Unit (the EYHU) by an access parent about his daughter. Subsequent to the circulation of this order, this office received comments from various individuals which raised difficult questions about access to information concerning the health, education and welfare of children by access parents. Because of the potentially broad ramifications of Order M-484 in relation to these issues, I decided to reconsider my decision in Order M-484.

A Notice of Reconsideration which summarized both the issues raised by the original appeal and the reconsideration was sent to the EYHU, the requester and the custodial parent, who were the original parties to the appeal. Given the complexity of the issues, I also sought representations from organizations with an interest or some expertise in the area, namely the Office of the Children's Lawyer, Justice for Children and Youth, the Family Law Section of the Canadian Bar Association (Ontario), Management Board of Cabinet, the Ministry of Community and Social Services, the Ministry of Health, the Ministry of Education and Training, the Ontario Public School Boards Association, the Ontario Separate School Trustees' Association, and Jeffrey Wilson (a lawyer with recognized expertise in the subject matter). Representations were received from the custodial parent, the requester, the Office of the Children's Lawyer, Justice for Children and Youth, the Family Law Section of the Canadian Bar Association and the Ministry of Health. The EYHU relies on the representations which it submitted during the original appeal.

I appreciate the effort these organizations went to in offering their perspective on the issues, and the representations they provided were extremely helpful to me in making my decision in this case. Given their different perspectives and approaches to the issues, however, I have not referred specifically to the contents of representations submitted by each organization.

NATURE OF THE APPEAL:

The appeal arose from a request made under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to information in the custody of the EYHU which relates to the health of the requester's five year old child. The requester was in the midst of a divorce action with the child's mother, in which custody of the child was an issue. The mother had custody of the child and the father had access to the child pursuant to an interim order of the court. Although the information requested referred 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 (now the appellant) appealed the EYHU's decision to deny access.

DISCUSSION:

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an identifiable individual. I have reviewed the records at issue and I find that they contain the personal information of the appellant, the appellant's child, and the child's mother. 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. The information relating to the child pertains to the physical and mental health of the child.

Section 14(1)(d) of the Act provides:

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

under the Act of Ontario or Canada that expressly authorizes the disclosure.

In Order M-484, I found that neither section 12(1) of O. Reg. 57/92 made under the Independent Health Facilities Act nor section 1(1)(10) of O. Reg. 856/93 made under the Medicine Act met the requirements of section 14(1)(d) in the circumstances of the appeal. Nothing in the new representations leads me to conclude that there are grounds to alter my decision in relation to these two provisions.

Further, I concluded in Order M-484 that the Divorce Act takes precedence over the Children's Law Reform Act and that, therefore, the Children's Law Reform Act was not relevant in the circumstances of the appeal. Again, in my view, nothing in the new representations provides grounds for changing my decision in this regard.

This appeal requires me to interpret the relationship between section 14(1)(d) of the Act and section 16(5) of the Divorce Act, which reads:

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.

The appellant submits that it could not rationally or reasonably be claimed that a five year old child has a privacy interest as against his or her parents, absent issues of child abuse. He argues that there is a societal and public interest in having informed and caring parents with respect to issues of health, education and welfare of each and every child. He submits that the Divorce Act and the Children's Law Reform Act are very specific insofar as they indicate that an access parent has the right to make inquiries and to be given information as to the health, education and welfare of the child, and that this right exists notwithstanding the lack of co-operation which may exist from the custodial parent. He submits that section 16(5) of the Divorce Act would be rendered useless by an interpretation which holds that the section is not wide enough to authorize the inquiry and disclosure.

The EYHU submits that this provision of the Divorce Act is meant to govern relations between spouses and section 16(5) only entitles a spouse to be given such information **from the other spouse** and not from third parties such as the EYHU. I disagree with this interpretation. The section does not expressly exclude access from third parties and, in my view, it was not Parliament's intention in drafting this section that the access parent's only source of information about the child would be the custodial parent.

The child's mother has also submitted representations which I have reviewed in detail. In the interests of preserving her privacy, I will refrain from referring to the specifics of her representations in this order. However, I do note that, despite her objection to disclosure in this case, she indicates that she agrees in principle to equal access by both parents and was very co-operative in the past, giving consent to all involved to disclose information about the child to the appellant.

I have reviewed the representations of the parties as they relate to the interpretation and application of section 14(1)(d) of the Act and section 16(5) of the Divorce Act. In my view, notwithstanding the new representations, the interpretation of section 14(1)(d) of the Act, as reflected in Order M-484, should stand. However, I believe that there is room in this case for a reconsideration of the application of the interpretation of section 14(1)(d) which I applied in Order M-484 to the provision in question, section 16(5) of the Divorce Act.

The Ministry of Health submits that section 16(5) of the Divorce Act is sufficient to invoke the application of section 14(1)(d) of the Act. The Ministry indicates that section 16(5) lists explicitly certain classes of personal information, and that it would not be possible to draft a completely comprehensive provision listing every possible type of personal information without continuously revising the provision as it was interpreted.

I find this argument persuasive. Section 16(5) does use the words "health, education and welfare" to describe the information to be disclosed. I agree that it would have been difficult for Parliament to be more specific in describing the information or stating who was to make the disclosure, since the list could be very lengthy and it would be very difficult to foresee every possible disclosure scenario. To accept the EYHU's position would, in my view, frustrate the legislative intention of the section which was, I believe, to ensure that access parents retain the right to be apprised of certain types of information about the child. Accordingly, I find that section 16(5) does contain a sufficient degree of specificity to invoke the application of section 14(1)(d) of the Act.

The EYHU submits that even if it is found that the records may be disclosed pursuant to section 14(1)(d), section 14(1)(f) would prohibit such disclosure. The EYHU indicates that section 14(1)(f) states that the personal information may be disclosed except "if the disclosure does not constitute an unjustified invasion of personal privacy". The EYHU submits that, based on the criteria outlined in sections 14(2) and (3) of the Act, the disclosure of these records would indeed constitute an unjustified invasion of personal privacy.

In my view, the EYHU has misread section 14(1) of the Act, and I do not accept its position. Section 14(1) prohibits the disclosure of personal information, except in certain circumstances

listed under the section. Simply stated, if the exception contained in section 14(1)(d) applies, the mandatory exemption from disclosure does not (Order M-8).

Finally, the EYHU submits that in this situation, the appellant is attempting to obtain access to these records not on behalf of the child but for his own collateral purposes and, therefore, the records should not be disclosed. The EYHU submits that, by virtue of section 16(8) of the Divorce Act, when a decision is made pursuant to section 16(5) of the Divorce Act, the best interests of the child must be paramount. Section 16(8) of the Divorce Act states:

In making an order under s. 16, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

In my view, section 16(5) of the Divorce Act indicates that only the court can limit the access parent's right as established in this section. If the Court has not ordered limitations on the access parent's rights under section 16(5), disclosure to the access parent of personal information which relates to education, health and welfare of the child is expressly authorized under section 14(1)(d).

ORDER:

1. I order the EYHU to disclose to the appellant the personal information contained in the records which relates to the health, education and welfare of the child on or before **July 18, 1996** but not earlier than **July 12, 1996**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the EYHU to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ June 13, 1996