

Information and Privacy Adjudicator

Decision

**Request for Access to Information under
*The Personal Health Information Act***

Manitoba Ombudsman Case number: 2013-0419

Issued March 23, 2015

Reference Concerning Psychological Test Materials

1. This reference deals with the release to a patient of certain psychological tests administered to a patient by a psychologist.
2. Under Section 48.1 of the Personal Health Information Act (the “Act”), the Manitoba Ombudsman (the “Ombudsman”) may ask the Information and Privacy Adjudicator to review a matter where the Ombudsman has given a recommendation to a health professional and that health professional has refused to implement the Ombudsman’s recommendation.
3. On October 27th, 2014 the Ombudsman made a recommendation to a psychologist (the “Psychologist”) that the Psychologist provide copies of certain records to a patient (the “Complainant”) who had requested them.
4. On November 12th, 2014 the Ombudsman received a response from the Psychologist refusing to implement the Ombudsman’s recommendation for certain reasons.
5. On November 19th, 2014 the Ombudsman made a request to the Information and Privacy Adjudicator for review of the Psychologist’s refusal to implement his recommendation. When making the request for review, the Ombudsman also advised that he wished to be a party to the review as contemplated by Section 48.5 (3) of the Act.
6. On December 3, 2014 I advised the Ombudsman, the Psychologist and the Complainant (the “Parties”) that I had received the request for review and that the review would be based on written submissions from the Parties. I also advised the Parties that I was considering whether to send notice under Section 48.2 of the Act to certain others who might be affected by this review. I invited the Parties to make submissions on that issue of notice to others or on any other technical, procedural or jurisdictional issues of concern to them. In that correspondence I also established a time table for their submissions.

7. I did receive input from the Parties on who should receive notice and after considering those submissions, I notified the Parties that I would send notice to the three organizations that produced the records in question and who asserted copyright protection with respect to those materials (the “Copyright Holders”).

8. I also advised the Parties of my decision not to notify the Psychologist Association of Manitoba (“PAM”). I made that determination because I am of the view that PAM are not a body that is “affected” by this decision. While PAM will almost certainly have an interest in the outcome of this review, they are not directly affected by it.

9. No procedural or jurisdictional issues were raised by the Parties.

10. The issue before me has to do with certain psychological tests that the Psychologist administered to the Complainant. The Complainant wanted copies of her test results and while the Psychologist is willing to provide copies of the Complainant’s answers, it was generally agreed that those wouldn’t be meaningful without copies of the test questions themselves.

11. The Psychologist was unwilling to provide those tests for several reasons. She believed they were protected by a copyright which prohibited their release. She also believed that providing the Complainant with copies of the tests would breach the Code of Professional Conduct of her professional body, PAM. Finally, she had a concern that if the test results were made public their utility would be undermined.

12. The Complainant made a complaint to the Ombudsman under Section 39 (1) of the Act and the Ombudsman conducted an investigation which led to the report issued on October 27th, 2014.

13. That report contained two recommendations as follows:

- (a) ...that the Psychologist provide the Complainant with a copy of those records still at issue in her patient file...

- (b) In providing the Complainant with a copy of the records still at issue in her patient file, our office recommends that the Psychologist make the Complainant aware of the restrictions on the use of her personal health information insofar as it contains materials that are subject to copyright as set out in subsection 32.1 (2) of the Copyright Act.

14. The Ombudsman's recommendations are based on the provisions of the Act. The Ombudsman determined that the tests do contain personal health information of the Complainant and as such, unless there was a specific exemption in the Act or in some other statute, the tests must be provided to the Complainant.

15. The Psychologist took the position that she was bound by her contractual obligation and professional responsibility and could not provide copies of the test without a court order. While she was prepared to allow the Complainant supervised access to the records, she did not feel she could provide the Complainant with copies of the tests requested.

16. Submissions were received from two of the three Copyright Holders and those submissions were circulated to the Parties.

17. Section 48.7 of the Act puts the onus on the trustee (in this case the Psychologist) to prove that the refusal was justified. As such the Psychologist made her submission first and copies of that submission were given to the other Parties. The Ombudsman responded to that submission and the Psychologist replied to that response from the Ombudsman. The Complainant asked for a short extension of time to make her submission and I approved her request for that extension. She provided her submission and the Psychologist replied to that submission as well.

18. On February 9th, 2015 I notified the Parties and the Copyright Holders that pursuant to Section 48.6 of the Act, I was extending the period for completion of my review by 60 days.

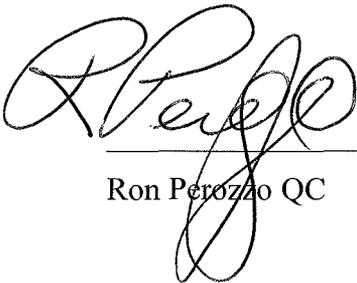
19. Having considered the matter and reviewed the very helpful submissions of all of the Parties, I have concluded that the records must be provided to the Complainant subject to certain conditions.

20. I make that decision because there is a requirement in the Act that records of this nature be provided and the Act contains no exemption for copyright material. I was persuaded by the submission of the Ombudsman that the lack of an exemption for copyright material was not merely an oversight and I take note of the Freedom of Information and Protection of Privacy Act, which was passed by Manitoba's Legislative Assembly at the same time, and does contain exclusions for copyright materials.

21. In making this decision I note that the Psychologist was caught in a very difficult dilemma. In my view, she did exactly as she should have which was to refuse to release the records in question without an order with the force of law specifically directing her to release them. The Act gives my orders the force of law and allows conditions to be placed on the release of the material.

22. I make the following orders:

- (a) I order the Psychologist to provide to the Complainant all of the material at issue as set out in the report of the Ombudsman dated October 27th, 2014.
- (b) I order that the Complainant not copy or in any way reproduce the material and not circulate or publish any of it with the one proviso that should she wish to, she can disclose this material to another health professional or to her legal counsel.



Ron Perozzo QC