NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-098
10-178-4
May 19, 2011

BACKGROUND

On November 8th, 2010, I received a request from the Applicant in this matter requesting that I review the refusal of the Stanton Territorial Health Authority to provide him with a copy of the minutes of meeting of the hospital's "Mortality and Morbidity Committee" (M & M Committee) in connection with a particular event involving a member of the Applicant's immediate family.

The public body refused to disclose the record, claiming that the *Evidence Act* created a statutory prohibition preventing the disclosure of both information addressed by the Committee and documentation prepared by the Committee.

I asked for and received input from the public body outlining their reasons for refusing to disclose the record in question. The public body's submissions were shared with the Applicant and the Applicant was invited to provide further comment or submissions but no response was received.

THE PUBLIC BODY'S SUBMISSIONS

In its submissions, the public body argued that the Mortality and Morbidity Committee's mandate is to carry out quality assurance activities. This involves the examination and evaluation of patient care provided within a hospital for the purpose of continually improving the quality of care provided to patients. This includes, they say, the review of adverse events or outcomes in order to identify potential improvements in patient care. In these circumstances, they argue, the Committee meets the definition of "committee" in section 13(a) of the *Evidence Act*. They further argue that section 14 of the *Evidence Act* recognizes the importance of these quality assurance objectives by legislatively carving out a "zone of protection" for the work carried out by hospital quality assurance committees in that section 14 imposes a mandatory

statutory prohibition against disclosure of a qualifying committee's proceedings and documentation in legal proceedings.

Although the public body recognizes that section 4(2) of the *Access to Information and Protection of Privacy Act* gives that Act precedence over other statutes, including the *Evidence Act*, they point out that the priority only kicks in when there is a conflict between the two Acts. They further argue that, in this case, there is no conflict because section 15 of the *Access to Information and Protection of Privacy Act* allows the public body the discretion to refuse access to any record that is subject to any type of privilege available at law.

The argument is made that there is a common law privilege that attaches to confidential communications. They point out that the members of the M &M Committee participate in the Committee under the expectation and assurance that its proceedings will remain confidential. They say that the guarantee of confidentiality is essential to the full and frank exchange of opinion that is needed to achieve the M & M Committee's goal of improving the quality of patient care.

THE LEGISLATION

The relevant sections of the *Evidence Act* have changed since the Applicant requested her review and, in fact, since the public body provided me with their submissions. The public body relies on Sections 13 and 14 of the *Evidence Act* prior to March 4th, 2011, which provided as follows:

> 13. In this section and in sections 14 and 15,
>
> "Board of Management" means a Board of Management established under subsection 10(1) of the Hospital Insurance and Health and Social Services Administration Act;
>
> "committee" means
> (a) a committee that is established or designated by the Minister responsible for the Medical Profession Act or a Board of Management and, for the purpose of improving medical or hospital care or medical practice in a hospital,
>
> (i) carries out or is responsible for studying, investigating or evaluating the hospital practice or hospital care provided by health care professionals in the hospital, or

(ii) studies, investigates or carries on medical research or a program, and

(b) a subcommittee of a committee referred to in paragraph (a);

"legal proceedings" means an inquiry, arbitration, inquest or civil proceeding in which evidence is or may be given and includes a proceeding before a tribunal, board or commission, but does not include

(a) a proceeding before a Board of Management,

(b) a hearing or appeal respecting the conduct or competence of a health care professional before

(i) a Board of Inquiry established by or under the Medical Profession Act, the Midwifery Profession Act, the Dental Profession Act or the Pharmacy Act, or

(ii) a board or body connected with the professional association of the profession to which the health care professional belongs, or

(c) a proceeding before a court that is an appeal, review or trial de novo of any of the matters referred to in paragraph (a) or (b);

"witness" includes any person who, in the course of legal proceedings,

(a) is examined orally for discovery,

(b) is cross-examined on an affidavit made by that person,

(c) answers any interrogatories,

(d) makes a statement as to documents, or

(e) is called on to answer any question or produce any document, whether under oath or not.

14. (1) A witness in legal proceedings, whether a party to them or not,

(a) shall not be asked nor be permitted to answer, in the course of legal proceedings, a question as to a proceeding before a committee; and

(b) shall not be asked to produce nor be permitted to produce, in the course of legal proceedings, a document made by a committee that was prepared exclusively for the purpose of being used in the course of, or arising out of, any study, investigation, medical research or program, the dominant purpose of which is to improve medical or hospital care or medical practice in a hospital.

Amendments to the *Evidence Act* which came into force on March 4, 2011 change matters slightly. The amendments add two new definitions to section 13 and an addition to section 15 which is relevant to this particular situation as follows:

> "quality assurance activity" means a planned or systematic activity the purpose of which is to study, review, investigate, assess or evaluate the provision of health services, either ongoing or case specific and with a view to the improvement of
>
> (a) medical or hospital care,
>
> (b) the provision of services in the territorial health system,
>
> (c) medical research, or
>
> (d) any program carried on in respect of health services;
>
> "quality assurance record" means a record of information in any form that is produced by or for a quality assurance committee in the course of, or for the purpose of, its performance of a quality assurance activity.
>
> 15(2) A quality assurance committee or any of its members shall not disclose a quality assurance record, unless the disclosure is,
>
> (a) in the case of a committee that is established or whose members are designated by the Minister responsible for the Medical Profession Act, to that Minister;
>
> (b) in case of a committee that is established or whose members are designated by a Board of Management, to that Board of Management;
>
> (c) in the discretion of a committee, to a professional association; or
>
> (d) in the discretion of a committee, to any other person in relation to a quality assurance activity.
>
> (3) Where a quality assurance committee discloses a quality assurance record, the committee shall ensure that the manner of disclosure does not permit the identification, in any manner, of the person whose condition or treatment has been studied evaluated or investigated.
>
> (4) A person who receives a quality assurance record under subsection (2) shall not disclose the record unless
>
> (a) the disclosure is for the purpose of advancing medical research or medical education; and

(b) the disclosure is in accordance with subsection (3).

The Public Body further relies on Section 15(a) of the *Access to Information and Protection of Privacy Act*, which states:

15. The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of privilege available at law, including solicitor-client privilege;

Also important is section 4(2) of the *Access to Information and Protection of Privacy Act* which provides that:

(2) If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act.

DISCUSSION

Although I understand the logic of the Public Body's reliance on the *Evidence Act*, I do not think that the provisions referred to by the public body in support of its refusal to disclose the requested information apply to a Request for Information pursuant to the *Access to Information and Protection of Privacy Act.* Although I am satisfied that the M & M Committee is a "committee" as defined in section 13 of the *Evidence Act*, I am not satisfied that an Access to Information Request under the *Access to Information and Protection of Privacy Act* qualifies as a "legal proceeding" or that the person who responds to such a Request for Information is a "witness" as that term is defined in the *Evidence Act.* Section 14 of the *Evidence Act* only prohibits a "witness" from providing evidence about the work of a committee in "a legal proceeding". The prohibition against disclosing the information in question, therefore, does not apply in this case.

That said, it seems to me that the new amendments to the *Evidence Act* may be more on point. The minutes of the M & M Committee meeting are, no doubt, a record of information produced by a quality assurance committee in the course of the performance of a quality assurance activity. The new provisions of the *Evidence Act* prohibits the disclosure of such a record

except to certain narrowly defined persons. In my opinion, this brings the new provisions of the *Evidence Act* in potential conflict with the *Access to Information and Protection of Privacy (ATIPP) Act .* However, as noted by the public body, section 4 of the *Access to Information and Protection of Privacy Act* provides that in the case of a conflict between two pieces of legislation, the *ATIPP Act* takes precedence unless the other legislation expressly provides otherwise. The new provisions of the *Evidence Act* do not provide otherwise. This means that, in order to avoid disclosing the record in question, the public body must bring the document within one of the discretionary or mandatory exemptions of the *ATIPP Act*.

Under the *ATIPP Act*, the public body claims a discretionary right to refuse disclosure of the minutes in question based on a common law privilege pursuant to section 15(a) of the *Access to Information and Protection of Privacy Act*.

This exact issue was considered by the Ontario Superior Court of Justice in 2002 in the case of *Steep v. Scott,* 2002 CanLII 53248 (ON SC). In that case, Justice Egan discusses the application of a common law privilege to "quality assurance reports" or "peer review evaluations" of a hospital. At paragraph 5 of that decision, he states:

> The four conditions necessary to establish common law privilege were first articulated by Wigmore and subsequently adopted by the Supreme Court of Canada in *Slavutych v. Baker* (1975)[1976] 1 S.C.R. 254 at p. 260, 55 D.L.R. (3d) 244 as follows:
>
> 1. The communications must originate in a confidence that they will not be disclosed;
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered;
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation

In *R. V. Gruenke* [1991] 3 S.C.R. 264 at p. 286, 67 C.C.C. 93d) 289, the Supreme Court of Canada reviewed the Wigmore tests. The Supreme Court distinguished between two

categories of privilege. For one class of privilege, there is a *prima facie* presumption that the privileged information is inadmissable in a court proceeding once it has been established that the privilege exists. Solicitor/client privilege falls into this category. The other class of privilege is what the Supreme Court referred to as a "case-by-case" privilege. As noted by Justice Egan in the *Steep* case:

> In this category, there is a *prima facie* assumption that the communications are not privileged. The case-by-case analysis involves the application of the Wigmore test to determine whether the communications should be privileged in particular cases.
>
> Therefore, in the case at bar, the existence of a "quality assurance privilege" must be determined in the particular circumstances and evidence before me. Whether such a privilege has or has not been recognized previously may be of limited value considering the case-by-case analysis required having regard to the Wigmore test.

In the *Steep* case, Justice Egan was prepared to accept, based on the evidence before him, that the communications in question arose in confidence and were prepared for quality assurance purposes. The evidence before the court was that the doctor who prepared the report in question told the people he interviewed that their discussions would be confidential and when he prepared his report he thought it would be kept confidential, in keeping with the normal practices at the hospital. The Judge further accepted that the relationship between medical staff and quality assurance committees depended on open and candid communication that only comes from the knowledge that such communications will be held in confidence. Furthermore, he found that

> the free exchange of information, promoted by confidentiality, goes to the very core of successful quality assurance reviews leading to the improvement of quality care. It is in the public interest that hospital care and services are effectively assessed and improved to ensure a continuously improving quality of health care.

Based on this analysis, he accepted that the report in question met the first three tests of the Wigmore case. He noted, however, that as a result of the Supreme Court of Canada's decision in *R. V. Gruenke, supra*, he was required to examine the particular circumstances of the case before him. He reviewed and distinguished a number of other cases which considered whether or not a common law privilege applied in various situations. Justice Egan indicated that, on each set of facts, it is necessary to consider what would be the benefit to the Applicant from the disclosure of the documents or, put another way, what prejudice would be caused to them in the documents were not disclosed. He outlined a number of factors that should be considered in determining that issue, including:

a) whether hospital records are available;
b) whether the individuals alleged to have been responsible for the injury are available to be examined under oath;
c) whether some or all of the information sought is available by other means;
d) if some or all of the information sought is not available by other means, and it is relevant, how important is the information to the Applicant's needs

In the end, Justice Egan was satisfied that the fourth test had been met in the case before him.

I have had the benefit of being able to review the record being requested. It is a one page record. Using the same analysis as that used by Justice Egan, however, I am not satisfied that the record meets the criteria for a privilege . In the *Steep* case, the records in question involved a detailed report prepared by a hospital employee outlining the facts and circumstances about a particular case after a review of the hospital records, interviews with medical personnel and a review of other correspondence. In the case before me, we are talking about the written minutes of a meeting at which an event was discussed. The information in the minutes is very minimal. There is nothing in the record that would reveal any details of the incident or of the nature of the discussion that took place. Although I would be prepared to accept that the details of the discussion that took place at the meeting in which this matter was considered would meet the first part of the Wigmore test (that the communication originated in a confidence that it would not be disclosed) the record in question does not, in fact, reflect those discussions except to indicate that they took place. If the record contained more detail, statements made, specific conclusions reached, or recommendations for change, it is far more likely that I would accept the premise that the communication represented by the

minutes was intended to be confidential. The fact is, however, that there is none of that in the record. I am not, therefore, convinced that any of the tests outlined in Wigmore have been met.

RECOMMENDATIONS

I recommend that the record be disclosed, but with the chart number redacted.

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner

.