

Decision No. 29/09

Reference No. HRRT 2/09

BETWEEN

H G

Plaintiff

AND

TARANAKI DISTRICT
HEALTH BOARD

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle	Chairperson
Ms S Ineson, QSM	Member
Dr A D Trlin	Member

HEARING: 12 October 2009 (New Plymouth)

APPEARANCES:

Plaintiff in person.
Mr A Laurenson for defendant.
Ms K Evans & Mr S Thomas for Privacy Commissioner.

DATE OF DECISION: 11 November 2009

DECISION

Preliminary

[1] This is a claim under Rule 6 of the Health Information Privacy Code, which is issued by the Privacy Commissioner under s.46 of the Privacy Act 1993 ('the Act').

[2] The plaintiff has asked for access to personal information that the defendant holds about him. The defendant has given access to the information, but not in the way the plaintiff wants. In refusing to give access in the way requested, the defendant relies on s.27(1)(d) (disclosure likely to endanger the safety of any individual) and/or s.29(1)(c) (after consultation with medical practitioner, disclosure thought to be likely to prejudice the physical or mental well being of the individual requesting it) of the Act.

Suppression of name/ identifying details

[3] As appears from what follows, this case includes reference to sensitive and personal health information about the plaintiff. At the commencement of the hearing we asked the plaintiff if he wanted any orders to protect his anonymity. He did. There was no objection by the defendant or the Privacy Commissioner. In our assessment it is clear beyond argument that in this case the plaintiff's interest in protecting his privacy outweighs any public interest in disclosure of his identity.

[4] As a result, and pursuant to s.107(3)(b) of the Human Rights Act 1993, we have ordered:



[a] There is to be no publication of the plaintiff's name, or of any other details that might serve to identify him in connection with this litigation;

- [b] The plaintiff is to be referred to as 'H G' in the intituling to this decision (those are not his real initials); and, out of an abundance of caution,
- [c] The Tribunal's file in this matter must not be searched by anyone other than the parties or their counsel without the written permission of the Chairperson of the Tribunal first having been obtained.

These orders all have permanent effect.

Background

[5] The plaintiff has a long history of mental disorder. He has also suffered brain injuries as a result of at least two significant accidents.

[6] On 20 March 2005 the plaintiff was admitted to the defendant's psychiatric ward for compulsory treatment. Putting aside various attempts he made to remove himself from the ward, he remained there on that basis until 7 June 2005. The information access request with which we are concerned in this case relates to the information that the defendant holds about the plaintiff in respect of that period.

[7] The plaintiff made a request for access to the information in or about May 2007. It was not refused, but the defendant's Clinical Director of Mental Health and Addiction Services ('the Clinical Director') clearly had concerns about simply photocopying the information and posting it off to the plaintiff. As a result the defendant's then Quality and Risk Manager ('the Risk Manager') offered to arrange a meeting that would be attended by himself, the Clinical Director and the plaintiff so that they could go through the information on the file together.

[8] The meeting took place on 3 July 2007. Its purpose was to provide support to the plaintiff as he was viewing the content of the file, and so that the Clinical Director in particular would be on hand to assist him to understand what it contained, and to answer any questions. To the best of our knowledge at that stage none of the information on the file had been edited or redacted. The defendant was willing to let the plaintiff see everything on the files, but under supervision as noted.

[9] We have not seen the relevant file, but we understand that it is made up of a reasonably substantial volume of paper, including at least 158 separate documents – altogether occupying perhaps one full Eastlight folder. We also understand that the documents on the file include names of people who were involved in providing health services to the plaintiff during his time under compulsory care in 2005, and of others who have provided information to the defendant as well.

[10] The plaintiff's meeting with the Clinical Director and Risk Manager on 3 July 2007 was not satisfactory from his point of view. It lasted only 20 minutes or so before the plaintiff left. However the plaintiff made it clear that what he wanted was a copy of the file, rather than to have to sit looking through the documents under supervision.

[11] After the meeting the plaintiff returned to his home which was by then in Auckland. He made contact with a clinical psychologist who he was seeing at that time. At his request she wrote to the defendant asking for a copy of the file to be delivered to her. A full copy of the file was sent to her on 7 August 2007. Although the details are not altogether clear, it seems that over a period of weeks the psychologist met with the plaintiff on various occasions to go through the files with him. But she did not give him the files or any copies and, by October 2007, she had returned the files to



the defendant. She told the defendant's Risk Manager that the plaintiff had become fixated about staff members of the defendant, and about the content of the files. She asked to be notified before any decision to release copies of the files to the plaintiff.

[12] The plaintiff filed a complaint with the Office of the Privacy Commissioner in or about October 2007. It was that complaint which has ultimately given rise to this proceeding. Our task, therefore, is to evaluate the decisions made by the defendant in 2007, when it refused to provide copies of what was on the files to the plaintiff.

Relevant statutory provisions

[13] The defendant accepts that, being an information access case, it carries the burden of establishing that either one or more of the exceptions upon which it relies apply: see s.87 of the Act. For that reason the defendant filed its evidence in advance of the Tribunal hearing before the plaintiff, and the defendant was also first to provide its evidence at the hearing. The essential point that emerged from the evidence was that the clinical opinion available to the defendant at the time it dealt with the plaintiff's information access request in 2007 was that to provide a copied set of the relevant papers to the plaintiff would likely have a negative impact on his well-being, and could seriously affect his mental health. The plaintiff was described as having a history of impaired understanding, with a tendency to develop his own interpretations of information and become negatively fixated on people and events. Thus, although the defendant thought it appropriate to make the information available for the plaintiff to see under supervision, it was concerned that if he had the information at home with him he would have time to study it, that he might then dwell upon it and misunderstand it, and that he might act on his mistaken impressions and concerns in a way that could be detrimental not only to himself but also to others.

[14] The defendant accepts that, for the purposes of the Act, its failure to provide the information in copied form as the plaintiff has asked is in effect a refusal to provide access to the information at all. That is notwithstanding that it was, and has always been, willing to have an appropriate person meet with the plaintiff to go through the information with him (although for completeness we should say that the defendant's current Clinical Director no longer considers it appropriate to provide access to the file even on a supervised basis without some editing, and removal of names, and the like). The reason for the defendant's concession is that s.42(2) obliges an agency to make information available in the way preferred by the requester, unless certain circumstances apply. In a case where an agency refuses to provide information in accordance with s.42(1) of the Act in the way preferred by the requester, for example, s.66(2)(a)(ii) makes it clear that there is an interference with the plaintiff's privacy as a result. The net effect of these provisions in this case is that the defendant was obliged to provide the plaintiff with full copies of the relevant information just as he had asked, unless to do so would prejudice interests protected by s.27, 28, and /or 29 of the Act.

[15] The defendant relies on both s.27(1)(d) and s.29(1)(c). Section 27(1)(d) sanctions a refusal to disclose information if disclosure would be likely to endanger the safety of any individual. The argument under this provision in this case was that to provide copies to the plaintiff might result in him harming himself or others. But in our view it is possible to deal with this case by reference to s.29(1)(c) of the Act only, and



we think it preferable for us to do so. We therefore limit our decision to the application of s 29(1)(c) of the Act in the circumstances. That section provides:

"(1) An agency may refuse to disclose any information requested pursuant to principle 6 if—

...

(c) After consultation undertaken (where practicable) by or on behalf of the agency with an individual's medical practitioner, the agency is satisfied that—

(i) The information relates to that individual; and

(ii) The disclosure of the information (being information that relates to the physical or mental health of the individual who requested it) would be likely to prejudice the physical or mental health of that individual . . ."

[16] There is no doubt that the information at issue relates to the individual who requested it. Nor is there any doubt that it is information that relates to his mental health. The real question that the defendant had to consider was whether and to what extent disclosure of the information in the form requested would be likely to prejudice the physical or mental health of the plaintiff.

[17] The evidence makes it very clear that, at the time the defendant made its decision not to provide copies of the file to the plaintiff, its clinical assessment was that the provision of copies would be likely to prejudice the plaintiff's mental health. Furthermore, it is also clear that by the time the Privacy Commissioner began to investigate the matter in or after October 2007 that conclusion was one that had been reached after consultation with the plaintiff's psychologist in Auckland (who, for present purposes) was a medical practitioner to the plaintiff within the meaning of the opening words of s.29(1)(c).

Assessment

[18] The plaintiff presented his case in an effective and respectful way at the hearing. He was helpfully supported by an occupational therapist who has been involved with his care over a long period of time. He also produced a letter from a social worker who has been familiar with his case for many years. He explained that his situation has improved considerably since 2005, and his time under compulsory treatment in the psychiatric ward of the New Plymouth hospital. He says he is no longer a drug user. Overall, it was the plaintiff's position that releasing copies of the information on his file to him no longer poses whatever threat there may have been in 2005 when he was treated by the defendant, or even in 2007 when his information access request was made.

[19] The reality, however, is that our task is to evaluate what was done by the defendant in 2007. The plaintiff did not put any evidence before us to create any real doubt about the the clinical assessment made by the defendant of him at that time (and with which the plaintiff's then psychologist obviously agreed). As Mr Laurensen submitted, there is no basis for us to reject the evidence given for the defendant in that



Conclusion


[20] We therefore find that the defendant had grounds under s.29(1)(c) of the Act when it refused to provide the plaintiff with copies of the relevant records in 2007. The claim can and should be dismissed on that basis alone. There is an order accordingly.

[21] Neither the defendant nor the Privacy Commissioner seek costs.


Mr R D O'Connell
Chairperson


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HUMAN RIGHTS REVIEW TRIBUNAL


A Trlin
Member


Ms S Ineson QSM
Member