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AJD v Royal Prince Alfred Hospital — a consideration of use and disclosure of health information of a parent contained in a child's medical record

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AJD v Royal Prince Alfred Hospital[1]

Medical records held for the two children of AJD (the Applicant, who remained anonymous) were released to the father of the children (the father) by their treating hospital, the Royal Prince Alfred Hospital (the Respondent), upon the father's request.[2] These medical records contained information regarding the Applicant's health.[3] The Applicant sought an internal review[4] and upon a finding that the decision did not breach NSW state privacy laws,[5] applied to the NSW Civil and Administrative Tribunal (the Tribunal) for external review of the Respondent's conduct under the Privacy and Personal Information Protection Act 1998 (NSW) (the PPIP Act) and the Health Records and Information Privacy Act 2002 (NSW) (the HRIP Act).[6]

Background[7]

The Applicant and the father were divorced, but had equal parental responsibilities for the children.[8] The father, as the authorised representative of the children (both being under the age of 18 years)[9] lodged a request with the Respondent, for access to their medical records, with which the Respondent complied.[10] The medical records held by the Respondent in relation to the children included information regarding the Applicant's health, specifically around the time of the children's births[11] as she had delivered her two children at the Respondent's maternity unit.[12] They also included information regarding a serious and chronic illness suffered by the Applicant for which she had received treatment from the Respondent, as well as other information about her health.[13] The Applicant considered her privacy had been violated by the Respondent's disclosure of the children's medical records to the father. She alleged he was hostile towards her and used the information to pursue sole parental responsibility of the children.[14] Accordingly, the Applicant lodged a request for internal review of the conduct[15] under s 53 of the PPIP Act.[16]

The internal review conducted by the Respondent considered whether there had been any breaches of the Health Privacy Principles (the HPPs), as set out in Sch 1 of the HRIP Act, specifically HPP 5 (retention and security), HPP 10 (limits on use of health information) and HPP 11 (limits on disclosure of health information).[17] While the review acknowledged that the medical records of the children did contain health information of the Applicant, the Respondent did not consider itself to be in breach of any of the HPPs[18] as the health information was used for its primary purpose (being the provision of health services to the Applicant and her children)[19] and was of significant relevance to the ongoing care of the children.[20]

The Applicant applied to the Tribunal for external review[21] under s 55 of the PPIP Act[22] and sought a number of orders including compensation for damage suffered as a result of the alleged breaches of the HRIP Act.[23]

Issues for consideration

The Applicant contended that the release of her health information contained in the medical records of her children amounted to use and disclosure of her health information for a secondary purpose (ie, a purpose other than the purpose for which it was collected) without her consent,[24] or that alternatively her health information was used and disclosed for a directly related purpose which she could not have reasonably expected.[25] The Applicant also contended that where the Respondent was authorised to disclose the children's medical records under HHP 7, such authorisation covered only medical records containing health information belonging to the children, and that her own health information should have been redacted.[26] The Applicant further noted that she was not informed by the Respondent of their intention to disclose her health information[27] and submitted that her consent should have been sought in

accordance with the Government Information (Public Access) Act 2009 (NSW) (the GIPA Act).[28] She submitted that consultation prior to release was practicable.[29]

The Respondent argued that it was obliged to provide the medical records of the children to their father under HPP 7[30] and that this did not amount to a secondary purpose. The Respondent contended that it was not obliged to seek the Applicant's consent or notify the Applicant of the disclosure as neither the HRIP Act nor the GIPA required or permitted such notification.[31]

The Respondent further argued that it was under no obligation to redact the Applicant's health information[32] on the basis that, while some of the information disclosed was the Applicant's health information, no information was disclosed which was not also health information of the relevant child.[33] The Respondent also contended that the public interest considerations against disclosure of the Applicant's health information, such as maintaining the Applicant's privacy, could not outweigh the strength of the children's rights to access their health information.[34]

The Privacy Commissioner's submissions

The Privacy Commissioner elected to appear in the proceedings and make written submissions.[35] The Privacy Commissioner submitted that where the health information of a third party is recorded on an individual's health record, that health information should be noted separately for the purposes of identification and should be redacted before it is released to protect the privacy of the third party.[36]

The Privacy Commissioner referred to the NSW Health — Health Care Records — Documentation and Management Policy Directive (the Health Policy Directive) issued by the Ministry of Health and dated 21 December 2012. The Privacy Commissioner submitted that it is consistent with the Health Policy Directive that, while health information may overlap, it remains possible to distinguish the health information of each individual.[37] As such, it was submitted that information concerning medical events which occurred before the birth of a child cannot be considered the health information of that child and should therefore not be kept on the child's medical record.[38]

Decision

The Tribunal did not agree with the Privacy Commissioner's submissions that health information can always be attributed to one individual or another, or that events prior to the birth of the child couldn't be considered the health information of that child.[39] In the view of the Tribunal, where an individual's information was collected to provide a health service to their child, that information may also be considered the health information of the child.[40] The Tribunal noted that this will most likely be the case concerning the relevant health information of a child's parents, and can extend to a mother's conduct during pregnancy or health information that relates to an illness or hereditary condition of the child's mother or father.[41]

The Tribunal found that, to the extent that the Applicant's health information was relevant to the provision of health services to her children, her health information was the health information of both the children and the Applicant.[42] In this case, it was clear from the medical records that some of the health information was relevant to the provision of health services to the children; for example, a health service was provided to one of the children directly in relation to the Applicant's illness.[43] Accordingly, as the Respondent was obliged to release the health information of the children to their father, there was no breach of HPP 11.[44]

The Tribunal did accept the Applicant's submission that the GIPA Act had a role in determining whether health information should be released.[45] However, in these circumstances, the Tribunal viewed the public interest of the children in being able to access their own health information as overriding the Applicant's interest in being consulted prior to its release, and therefore considered consultation not reasonably practicable.[46]

The Tribunal did note the Privacy Commissioner's reference to the Health Policy Directive, and was of the view that some of the Applicant's health information, which was included in the medical records of the children, was not relevant or necessary to their care.[47] The Tribunal found that information does not take on the status of being an individual's health information merely through inclusion on their medical record, and that such health information of the Applicant that did not directly relate to the care of the children should not have been released with the children's medical records.[48]

The Tribunal considered that the Respondent's release of those parts of the children's medical records that contained the Applicant's health information, which was not also the children's health information (ie, was not relevant or necessary to their care) constituted a breach of HPP 11.[49] The Tribunal also found that the Respondent breached HPP 5 in that the Respondent failed to ensure the security of the Applicant's health information against unauthorised use and disclosure by retaining the Applicant's health information on the children's medical records.[50]

The matter was listed for a further planning meeting to determine its further progress and to hear submissions on the Applicant's case for damages.[51]

Conclusion

Although this case concerns the application of NSW privacy legislation, it provides guidance on the interpretation of "health information" in other state legislation such as the Health Records Act 2001 (Vic). Specifically, this case provides a useful demonstration of how an individual's health information may be used in relation to a third party. Importantly, the Tribunal found that health information can belong to two individuals simultaneously, and therefore, the disclosure of that health information to one of the two individuals will not amount to a breach of the privacy of the other under NSW state privacy legislation if it is relevant to the provision of a health service to that individual.

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Footnotes

1. *AJD v Royal Prince Alfred Hospital* [2014] NSWCATAD 125; BC201407198.
2. Above, n 1, at [5].
3. Above, n 1, at [6].
4. Above, n 1, at [7].
5. Above, n 1, at [8].
6. Above, n 1, at [11].
7. Above, n 1, at [3].
8. Above, n 1, at [4].
9. Above, n 1, at [51].
10. Above, n 1, at [5].
11. Above, n 1, at [6].
12. Above, n 1, at [3].
13. Above, n 1, at [6].
14. Above, n 1, at [37].
15. Above, n 1, at [7].
16. Above, n 1, at [25]. Section 53 of the Privacy and Personal Information Protection Act 1998 (NSW) gives a person aggrieved by the conduct of a public sector agency (such as the Respondent) the right to seek internal review of that conduct by that agency. By reason of subs 21(1) of the Health Records and Information Privacy Act 2002 (NSW), this right extends to conduct which is alleged to be a contravention of an HPP that applies to an agency.
17. Above, n 1, at [8]. HPP 5 provides that an agency or organisation must store an individual's personal information securely, keep it no longer than necessary and dispose of it appropriately. HPP 10 provides that an agency or organisation can only use an individual's health information for the purpose for which it was collected or a directly related purpose that the individual would expect (unless one of the exceptions in HPP 10 applies). Otherwise separate consent is required. HPP 11 provides that an agency or organisation can only disclose an individual's health information for the purpose for which it was collected or a directly related purpose that the individual would expect (unless one of the exemptions in HPP 11 applies). Otherwise separate consent is required.
18. Above, n 1, at [8].
19. Above, n 1, at [9].
20. Above, n 1, at [10].
21. Above, n 1, at [11].
22. Above, n 1, at [26]. Section 55 of the Privacy and Personal Information Protection Act 1998 (NSW) makes provision for a person dissatisfied with the findings of an agency in regard to that person's internal review application, to seek external review of the conduct that was the subject of the complaint. By reason of subs 21(2) of the Health Records and Information Privacy Act 2002 (NSW), this right of external review applies to persons who have sought internal review of conduct which is alleged to be a contravention of an HPP that applies to that agency.
23. Above, n 1, at [11].
24. Above, n 1, at [29].
25. Above, n 1, at [30].
26. Above, n 1, at [33].
27. Above, n 1, at [35].
28. Above, n 1, at [43]. Section 22(3) of the Health Records and Information Privacy Act 2002 (NSW) provides that the provisions of the Government Information (Public Access) Act 2009 (NSW) and the Privacy and Personal Information Protection Act 1998 (NSW) that impose conditions or limitations (however expressed) with respect any matter referred to in HPP 6 (information about health information held by organisations), HPP 7 (access to health information) or HPP 8 (amendment of health information) are not affected by this Act, and those provisions continue to apply in relation to any such matter as if those provisions were part of this Act. Pursuant to cl 3 of the table to s 14 of the Government Information (Public Access) Act 2009 (NSW) there is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one of the following effects: (a) reveal an individual's personal information or (b) contravene an information protection privacy principle under the Privacy and Personal Information Protection Act 1998 (NSW) or an HPP under the Health Records and Information Privacy Act 2002 (NSW).
29. Above, n 1, at [47].
30. Above, n 1, at [51].

31. Above, n 1, at [52].
32. Above, n 1, at [56].
33. Above, n 1, at [57].
34. Above, n 1, at [60].
35. Above, n 1, at [28].
36. Above, n 1, at [65].
37. Above, n 1, at [68]–[69].
38. Above, n 1, at [70].
39. Above, n 1, at [71].
40. Above, n 1, at [73].
41. Above, n 1, at [74], [75].
42. Above, n 1, at [77].
43. Above, n 1, at [76].
44. Above, n 1, at [78].
45. Above, n 1, at [82].
46. Above, n 1, at [82].
47. Above, n 1, at [83]–[84].
48. Above, n 1, at [88]–[89].
49. Above, n 1, at [92].
50. Above, n 1, at [93].
51. Above, n 1, at [95].