

Ad IDEM

CANADIAN MEDIA LAWYERS ASSOCIATION

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We have read the submissions of Fred Vallance-Jones and agree with all of the concerns. Our submissions will focus on the sections of Bill 89 which, in our opinion, may conflict with the principles of the Canadian Charter of Rights and Freedoms.

The CMLA concerns relate to three issues: (1) Bill 89 potentially captures almost all health information; (2) Bill 89 creates barriers to journalists who are gathering and reporting on matters of public interest; (3) Bill 89 includes sanctions that are exceptionally punitive and which will have a chilling effect on media organizations.

Bill 89 An Act Respecting the Collection, Use, Disclosure and Retention of Personal Health Information

Submissions from the Canadian Media Lawyers Association / Ad IDEM

December 6, 2010

In Bill 89, the definition of "personal health information", is derivative of the definition of "identifying information" (section 3(1)).

"Identifying information" means information that identifies an individual or, where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify an individual.

The problem with the phrase "or with other information" is that it is not limited to public information. Virtually any anonymous information, when combined with sufficient "other information" can lead to identification and would, thus, be captured by the restrictions of Bill 89.

If "identifying information" is construed too broadly, then virtually all information about health care in the province would be covered. This would prevent individuals or the media from being able to lawfully inquire into matters of public interest related to the care received by a particular person, or the overall functioning of the health system.

CMLA recommends that s. 3(1) be re-drafted so that "identifying information" means:

- (a) information that actually identifies an individual; or
- (b) information that alone or in conjunction with commonly known public information is likely to identify a particular individual.

Further, section 106, which defines offences under the Act, applies to all "health information", not only "personal health information". The distinction is obviously significant: it captures any information, whether personal or otherwise, that may relate to health. "Health information" is not defined in the Act.

It is noted that Ontario's Personal Health Information Protection Act, which was the model for

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INTRODUCTION

The Canadian Media Lawyers Association (CMLA) requests that you accept these submissions regarding Bill 89 and its potential impact on the practice of journalism and freedom of expression.

We have read the submissions of Fred Vallance-Jones and agree with all of his concerns. Our submissions will focus on the sections of Bill 89 which, in our opinion, may conflict with the principles of the *Canadian Charter of Rights and Freedoms*.

The CMLA concerns relate to three issues: (1) Bill 89 potentially captures almost all health information; (2) Bill 89 creates barriers to journalists who are gathering and reporting on matters of public interest; (3) Bill 89 includes sanctions that are exceptionally punitive and which will have a chilling effect on media organizations.

In short, CMLA is concerned that Bill 89, as it is currently worded, may result in unconstitutional restrictions on freedom of the press.

I. BILL 89 RESTRICTS MEDIA ACCESS TO MATTERS OF PUBLIC IMPORTANCE

A. Bill 89 is Broad and Captures a Significant Amount of Information

In Bill 89, the definition of "personal health information", is derivative of the definition of "identifying information" (section 3(1)).

"identifying information" means information that identifies an individual or, where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify an individual.

The problem with the phrase "or with other information" is that it is not limited to public information. Virtually any anonymous information, when combined with sufficient "other information" can lead to identification and would, thus, be captured by the restrictions of Bill 89.

If "identifying information" is construed too broadly, then virtually all information about health care in the province would be covered. This would prevent individuals or the media from being able to lawfully enquire into matters of public interest related to the care received by a particular person, or the overall functioning of the health system.

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Further, section 106, which defines offences under the Act, applies to all "health information", not only "personal health information". The distinction is obviously significant; it captures any information, whether personal or otherwise, that may relate to health. "Health information" is not defined in the *Act*.

It is noted that Ontario's *Personal Health Information Protection Act*, which was the model for

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Bill 89, uses the phrase “*personal health information*” rather than “*health information*”, thus avoiding the problem of issues discussed above.

72. (1) *A person is guilty of an offence if the person,*

(a) *wilfully collects, uses or discloses personal health information in contravention of this Act or its regulations;*

CMLA recommends that section 106 be amended to read: “personal health information” in place of “health information.”

B. Section 43 – Express Consent Required to Release Information to Media

1. Express Consent is not a viable standard in health situations

Section 43 specifically requires express consent to release personal health information to the media; in this section, the media is listed along with fund-raising organizations and market research for commercial purposes.

In the provision of health services, there are many instances where it is not possible or practical to obtain express consent. Under Bill 89, the media will not be able to obtain the personal health information, even relatively benign information, concerning a person’s condition, without his or her express consent.

Further, there are no provisions for next of kin to consent to the release of information in situations where a person is unable to provide consent themselves. This is particularly problematic as the *Act* extends to health information about deceased individuals, from whom express consent could never be obtained.

The requirement of express consent to release personal health information, of any and all types, to the media is an exceptional restriction on a journalist’s ability to gather information on matters of public interest.

2. Bill 89 restricts a journalist’s access to information regardless of the steps they can take to protect a health care consumer’s privacy interests

The CMLA is concerned that section 43 imposes an unnecessary barrier to the work of the news media. By specifying that absent express consent, the media are a prohibited recipient of information, Bill 89 will have a chilling effect on all conversations between journalists and custodians of health information (personal or otherwise).

The news media has the responsibility, upon receiving information of any kind, to determine whether or not the information is a matter of public interest. Journalists must abide by both professional ethics and legal restrictions with regards to what is reported and how it is reported.

Bill 89 controls media not at the level of what is reported or how it is reported to the public, but rather, whether a journalist can request or receive information, at all. This Bill strikes at the foundation of news-gathering.

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By way of example, even if a media organization intends to anonymize its story, absent express consent, a journalist cannot receive personal health information and may be sanctioned for requesting any health information, simply because the request, itself, amounts to a contravention of the Act.

In expressly restricting the ability of journalists to gather and assess information without patient consent and under threat of serious sanctions, Bill 89 goes far beyond what is required to protect the privacy of health care consumers.

Consider the recent automobile accident that took place on Halifax's Spring Garden Road, which resulted in serious injury to a pedestrian or the incident where a worker was injured in a fall at the new RCMP headquarters being constructed in Dartmouth. In order to gather information to report on these stories, it is likely that the journalist would have received sufficient information, from co-workers, friends, employers or family members, to identify the individuals involved.

Once a journalist is able to identify a person, seeking a medical status update amounts to requesting personal health information. Bill 89 would prevent a custodian from revealing the health information of the people injured in these events without the express consent of the patients, notwithstanding the public interest in such information.

Consequently, because of the nature of routine journalistic work, a reporter could not even receive health information, even when in the actual story, as was the case in both examples, the identity of the individual would be confidential.

The Ontario *Act* does not specifically require express consent for disclosure of personal health information to the media.

CMLA recommends that section 43(e) should be removed entirely.

C. Bill 89 Should Permit Disclosure to Media Under Section 37

Section 37 of the proposed Bill gives a custodian the discretion to reveal to family members or someone with a "close personal relationship" general information about the presence, location and general condition of an individual so long as the disclosure is not contrary to the express request of the individual.

This is precisely the type of information that journalists typically require to report on a matter of public interest, such as the care of a person who has a public profile, or person who is receiving treatments as a result of an event or incident that is newsworthy, such as an industrial accident or violent crime.

Unlike Bill 89, section 38(3) of the Ontario Act provides a custodian with discretion to disclose general health information about an individual to any person regardless of their relationship to the individual.

(3) A health information custodian that is a facility that provides health care may disclose to a person the following personal health information relating to an individual who is a patient or a resident in the facility if the custodian offers the individual the option, at the first reasonable opportunity after admission to the facility, to object to such disclosures and if the individual does not do so:

1. *The fact that the individual is a patient or resident in the facility.*

- 2. The individual's general health status described as critical, poor, fair, stable or satisfactory, or in similar terms.
- 3. The location of the individual in the facility. 2004, c. 3, Sched. A, s. 38 (3).

The CMLA recommends that section 37 be expanded:

- (a) to "any person"; or
- (b) to specifically include the media.

II Bill 89 Criminalizes Standard Journalistic Practices

A. The Supreme Court of Canada recognizes the importance of investigative reporting

The Supreme Court of Canada has long recognized the important role that media plays in our democratic society and has protected the Constitutional rights of journalists and news organizations to access and report upon matters of public interest.

Moreover, it has been recognized that the Constitutional right to freedom of expression is the right not only to express information and opinions, it is also the right to receive such information. The restrictions in Bill 89 not only affect the *Charter* rights of journalists to gather and report news, they also affect the rights of the public to receive this information.

In a unanimous 2010 decision, *Globe and Mail v. Canada (Attorney General)*, the Supreme Court of Canada made strong statements about the importance of allowing journalists freedom to investigate and report on matters of public concern. Specifically, the Court found that media should not be subjected to the same legal constraints as others in the community and should not be liable for breaches of the law by sources who provide information.

Moreover, there are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process.

The sanctions and restrictions contained in Bill 89 will have a chilling effect on a journalist's professional obligation to investigate and report on matters of public importance. We caution the Committee that they are likely contrary to the *Charter*-protected right to freedom of expression.

B. Section 106(b) is Ambiguous and Could be Interpreted to Criminalize News Gathering

106 *A person is guilty of an offence if the person*

(b) *wilfully gains or attempts to gain access to health information in contravention of this Act or the regulations*

This section is ambiguous: it is unclear whether a person's intent (wilfulness) is related to the act of accessing or attempting to access information, or whether the intent is in knowing that the attempt to access information is in contravention of the Act.

Asking a nurse or doctor a question about another individual's condition is a plain attempt to "gain access to health information". If it turns out that the patient has not expressly given

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permission to disclose information to the media, then Section 106 (b) could be invoked: the journalist has wilfully attempted to gain health information and, due to the absence of express consent, accessing or attempting to access that information is in contravention of the act.

The ambiguity in section 106(b) should be resolved so that reporters are not criminalized for standard journalistic practices. The mere request for information should not be penalized, only actions that intentionally contravene the Act. (i.e. where a journalist knows that a person has not consented to the release of information and attempts to circumvent this to access information by other means.)

It is noted that the Ontario Act does not contain any equivalent of s. 106(b).

CMLA recommends that section 106(b) be:

(a) deleted in its entirety, or

(b) amended to read: gains or attempts to gain access to personal health information in a manner that wilfully contravenes this Act or the Regulation.

CONCLUSIONS

While the CMLA acknowledges the objective of Bill 89, we are concerned that the cumulative effect of sections 3(1), 43 and 106, as currently worded, significantly impact standard journalistic practices and may breach the *Charter* protected freedom of expression in section 2(b).

Furthermore, by obstructing the public and the press's democratic right to investigate and communicate about the provision of health care by publicly regulated professionals and institutions, Bill 89 shields these institutions from scrutiny. This ultimately undermines the Minister's intention of working "*to provide better health care for Nova Scotia families.*"

The CMLA requests that the Law Amendments Committee consider the recommendations made within these submissions to bring Bill 89 within Constitutional standards and to ensure that Nova Scotians are able to receive important information about the functioning of our province's health care system.

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