***ORIGINAL TEXT IN FRENCH***

**COMMISSION D'ACCÈS À L'INFORMATION DU QUÉBEC**

**File:** 1019538-J

**Date:** January 26, 2021

**Member:** M^tre^ Philippe Berthelet

**LANA MILLS-SOWCHUCK**

Applicant

c.

**CENTRE UNIVERSITAIRE DE SANTÉ MCGILL**

Public Body

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**DECISION**

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APPLICATION FOR REVIEW pursuant to section 27 of the *Act respecting health services and social services*[1].

## OVERVIEW

[1] The applicant approached the Commission d'accès à l'information (the Commission) because the McGill University Health Centre (the MUHC) had partially refused her request for access.

[2] She requested the patient file of her deceased father, starting in 1953, relating to treatment received at the Allan Memorial Hospital. She noted, when making her request for access, that she was part of a group (SAAGA) considering a class action for victims of brainwashing.

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[1] CQLR, c. S-4.2, the AHSS.

[3] Although the MUHC admits that the applicant is an heir within the meaning of section 23 of the AHSS, it maintains that the information it is refusing to provide is not necessary for the exercise of her rights within the meaning of that section.

[4] In addition, it invokes the fact that the information in question is personal information protected by the *Act respecting access to documents held by public bodies and the protection of personal information.*[2]

[5] For her part, the applicant maintains that the fact of claiming that her deceased father is part of the group designated in the class action is sufficient to obtain access to the requested information.

[6] She adds that it is not up to the MUHC to decide what part of the information is relevant to the legal action.

[7] The dispute therefore raises the following questions:

- Has the applicant shown that the requested information is necessary to exercise a right conferred upon her in her capacity as an heir?

- Can the MUHC invoke restrictions under the *Act respecting Access*?

[8] The Commission concludes that the father's patient record is accessible to the applicant.

## HAS THE APPLICANT SHOWN THAT THE REQUESTED INFORMATION IS NECESSARY TO EXERCISE A RIGHT CONFERRED UPON HER IN HER CAPACITY AS AN HEIR?

## ANALYSIS

*The interpretive framework*

[9] Section 19 of the AHSS confirms the confidential nature of a patient's medical record. This is followed by an 18-paragraph list of situations in which the information in a patient's medical record may be communicated without the patient's consent.

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[2] CQLR, c. A-2.1 (the *Act respecting access*).

> 19. **The record of a user** is confidential and **no person may have access** to it except with the consent of the user or the person qualified to give consent on his behalf. Information contained in a user's record **may, however, be communicated without the user's consent:**
>
> 1° on the order of a court or a coroner in the exercise of the functions of office;
>
> 2° at the request of the local service quality and complaints commissioner under section 36, of a medical examiner under the third paragraph of section 47, of a review committee referred to in section 51 or one of its members under the second paragraph of section 55, of a regional service quality and complaints commissioner under section 69, of a council of physicians, dentists and pharmacists or of an expert from outside the institution that the council calls on under the second paragraph of section 214;
>
> 3° [...]
>
> 18° in the cases and for the purposes set out in subsection 1.1 of section 18 of the Health Insurance Act (chapter A-29);
>
> [Emphasis added]

[10] It is self-evident that the instances listed in these 18 paragraphs will be interpreted restrictively, as provided for in the rules of interpretation.

[11] The cases provided for in section 23 give a right of access to the record of a deceased user. Therefore, the legislator grants a right of access to certain designated people, provided they meet the criteria shown.

> 23. The heirs, legatees by particular title and **legal representatives** of a deceased user **are entitled to be given communication** of information contained in his record **to the extent that such communication is necessary for the exercise of their rights in such capacity**. The same applies to the person entitled to the payment of a benefit under an insurance policy on the life of the user or under a pension plan of the user.
>
> The spouse, ascendants or direct descendants of a deceased user are entitled to be given communication of information relating to the cause of death of the user, unless the deceased user entered in writing in his record his refusal to grant such right of access.

> The holder of parental authority is entitled to be given communication of the information contained in the record of a user under 14 years of age even if the user is deceased. However, that right of access does not extend to information of a psychosocial nature.
>
> Notwithstanding the second paragraph, persons related by blood to a deceased user may be given communication of information contained in his record to the extent that such communication is necessary to verify the existence of a genetic or hereditary disease.
>
> [Emphasis added]

*Eligibility conditions*

[12] Having established this, the eligibility conditions for access to the medical records of a deceased patient are set out in the first paragraph of section 23, cited above. They are as follows:

1. Have the qualities indicated: heir, legatee by particular title or legal representative of a deceased patient.

2. Act in the exercise of their rights in that capacity.

3. To obtain information that is necessary to them.

*The quality of legal representative*

[13] The MUHC accepts the applicant's status as an heir. This is not in dispute.

*The exercise of her rights in that capacity*

[14] What are the rights that the applicant wishes to exercise?

[15] This is not in dispute. The MUHC accepts that the applicant is a party to a class action, the motion for which[3] was eventually filed in January 2019.

[16] When she made her request for access on July 19, 2018, jointly with her sister, the applicant described her right as follows:

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[3] Exhibit filed by the applicant after the hearing, D-2.

> We would like to retrieve our Father's medical records, from 1953 onward, from his involvement with Dr. Cameron at the Allan Memorial Hospital. **We are involved in a class action suit with the group SAAGA Brainwashing victims of the Canadian Government**.
>
> (Emphasis added)

[17] In the MUHC's document request form, she also stated that the action was imminent (upcoming).

*Information that is necessary for the exercise of a right*

[18] This is the true question to be decided.

*The search*

[19] The officer in charge of access said she repeated the exercise after receiving the application for review.

[20] She found documents relating to several hospitalization episodes at the Allan Memorial Hospital: three admissions in 1953 (two of which were for depression) and another in 1960, also for depression, plus several outpatient visits.

[21] Although the applicant had obtained several documents through two prior requests for access, the MUHC did not take this into account and treated the request as if it was the only one.

[22] The Commission therefore received all the father's medical records in their entirety, in confidence.

*The information in dispute*

[23] This is not the first time the MUHC's archives have been solicited for documents relating to the controversial treatments administered by Dr. Cameron.

[24] When the MUHC receives a request relating to the type of recourse in which the applicant is involved, it provides the information of patients who were subjected to the depatterning therapy administered by Dr. Cameron or other physicians, among other things through electroshock therapy carried out twice a day for thirty consecutive days, and through injections of insulin to place the patient in a coma, between 1950 and 1965.

[25] The officer in charge of access said the information relating to the applicant's father's hospitalizations in 1953 was provided in its entirety, since it was a result of Dr. Cameron's interventions and treatments.

[26] The MUHC will therefore exclude all medical information that is not from the period concerned or is not relevant to the depatterning therapy.

[27] As a result, information on hospitalizations resulting from physical problems will not be provided.

[28] Specifically, the officer in charge of access refused to provide any information other than that resulting from the 1953 hospitalization because it does not concern the treatments administered by Dr. Cameron or other physicians, i.e. the depatterning treatments.

[29] She gave the example of the MUHC refusing to provide information on the applicant's father's hospitalization in 1960, in the psychiatric ward, because the data did not relate to Dr. Cameron's treatments.

[30] In the Commission's opinion, the criteria used by the MUHC to decide whether or not certain information is necessary for the exercise of a right, in this case the legal recourse mentioned by the applicant when she made the request for access, cannot be limited solely to the period or nature of the treatments to which the person was subjected. This position distorts the recourse to section 23 of the AHSS.

[31] Although the class action filed as evidence post-dates the request for access, and although the Commission's review must be limited to the facts as they were at the time of the request for access, the evidence shows that the class action was imminent, since the members of the SAAGA group were seeking legal counsel to represent them.

[32] In the Commission's opinion, it is not up to the MUHC to analyze the causal link between the treatment undergone and the information requested.

[33] The assessment of relevance is up to the person who states, as the applicant did in this case, his or her intention to take legal action.

[34] Although the treatments administered after the 1953 hospitalization do not show that the applicant's father received Dr. Cameron's controversial treatments, what about their consequences for the person's physical or

emotional state, for example the father's hospitalization in 1960 for psychiatric treatment?

[35] Is it not reasonable to leave it up to the applicant, and eventually to her legal counsel, to decide on the information's relevance, in order to analyze her chances of success in the class action that was imminent at the time the request for access was made?

[36] Evaluation of this information cannot be separated from the exercise of the rights announced by the applicant in her request for access.

[37] As the Superior Court stated in *Roy* v. *CISSS de Chaudière-Appalaches*[4], the very nature of the right of access provided for in section 23 of the AHSS is the basis of an information search, and is always linked to an evaluation of the chances of success, this evaluation being a significant and often essential component of the exercise of a right:

> [45] The Court does not agree with this rigid and limitative approach to the heir's exercise of a right:
>
> a) By definition, **the request to communicate the hospital record –** whether ultimately authorized or not – is the basis of an information search, and **is always related to the evaluation of the chances of success**.
>
> b) **Can it be claimed that legal counsel's evaluation of an action's chances of success is not a significant (and sometimes essential) component of the exercise of the client's right?**
>
> c) Can the applicant be validly criticized for **not providing enough material details on the future action**, when he or she does not have any part of the case to hand and is not a stakeholder to the medical assessments?
>
> d) The confidentiality of the record – need it be said – is a principle established for the benefit of the patient and not of the establishment; the patient herself demonstrated her trust in her husband to the point that she appointed him as her mandatary [reference omitted] and entrusted him with the position of liquidator [reference omitted]; when the request comes from the person whose privacy is to be protected, perhaps some flexibility is required.

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[4] *Roy* v. *CISSS de Chaudière-Appalaches*, 2017 QCCS 3243, translation from the original French.

> e) As it is currently applied, this extra-judicial criterion is very far from the criterion that would be used in a judicial context, where the Supreme Court of Canada requires the Court to exercise its discretionary power more broadly "based on the level of relevance and the importance of the information requested to the question in dispute" [reference omitted].
>
> (Emphasis added)

[38] This is similar to the comments made by Doray[5], with which the Commission agrees, concerning the purpose of section 23 of the AHSS:

> **This exception was provided for in law** precisely to allow the heirs to **know whether or not the establishment committed a fault likely to engage its civil liability** and, where applicable, to institute a judicial recourse. We feel it is difficult to accept that the legislator wanted heirs to institute their recourse first, without really knowing whether or not the establishment has committed a fault, because it would be their only way of obtaining the deceased patient's record!
>
> (Emphasis added)

[39] From the time when, as in this case, the applicant shows that she is a party to an imminent recourse, the subject of which is clearly defined, the Commission is of the opinion that the necessary character of the requested information for the exercise of a right is established.

[40] This being so, the MUHC also invoked, not in its response but when sending the disputed information to the Commission, the imperative restrictions in sections 53, 54, 59 and 88.1 of the *Act respecting access*, which in its opinion oblige it not to provide the information in question on the grounds that it is protected personal information.

[41] This leads us to the following question:

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[5] Raymond DORAY with contributions from Loïc BERDNIKOFF, Accès à l'information: *Loi annotée, jurisprudence, analyse et commentaires*, Cowansville, Éditions Y. Blais, 2003, p. 363, no. 461. Translation from the original French.

## CAN THE MUHC INVOKE THE RESTRICTIONS ARISING FROM THE *ACT RESPECTING ACCESS*?

[42] The answer is no. The reasons are presented below.

[43] The rule set out in section 28 of the AHSS sets aside the provisions of the *Act restricting access* that would limit a right of access provided for in the AHSS. If we begin by looking at the terms of this section:

> 28. Sections 17 to 27.3 apply notwithstanding the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

[44] The use of the term "notwithstanding" in this section demonstrates the legislator's intention, namely to counter the preponderant nature of the *Act respecting access*. Section 168 of the *Act respecting access* sets out the rule of interpretation applicable to any subsequent act that is contrary to it:

> 168. The provisions of this Act prevail over any contrary provision of a subsequent general law or special Act unless the latter Act expressly states that **it applies notwithstanding this Act.**
>
> [Emphasis added]

[45] The Commission is of the opinion that the rights of access to a patient's record and their exceptions are primarily prescribed by the AHSS. The Court of Québec, in *Centre d'hébergement et de soins de longue durée de Longueuil* v. *Manigat*[6], also affirms that section 28 of the AHSS sets aside the general regime of the *Act respecting access.*[7]

[46] The Commission has since followed the Court of Québec's decision.[8]

[47] In fact, it is the dominant position of the Commission, based on a survey of the Commission's decisions carried out by Duplessis:[9]

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6 2000 CanLII 17394.

7 See paragr. 13 to 17.

8 See recently: *Y* c. *CISSS de l'Outaouais (Services multidisciplinaires)*, 2020 QCCAI 153; *Perry* v. *CIUSSS de l'Ouest-de-l'Île-de-Montréal*, 2019 QCCAI 463; *S.R.* v. *CISSS de la Montérégie Centre*, 2019 QCCAI 135; *Tokarewicz* v. *CIUSSS du Centre-Sud-de-l'Île-de-Montréal*, 2019 QCCAI 174.

9 Yvon Duplessis, *Accès à l'information, Santé et services sociaux*, 4.2.2, Wolters Kluwers, 2020, (IntelliConnect). Translation from the original French.

> [¶4 066] This section (section 28 of the AHSS) has the effect of excluding the patient records of health and social services network establishments from the application of the *Act respecting access to documents held by public bodies and the protection of personal information*. **The *Act respecting health services and social services* is the sole text governing access to patient records. It therefore takes precedence over the *Act respecting access*** (X. v. Hôpital Sainte-Justine, CAI, no. 04 18 34, February 20 2006, Jacques Saint-Laurent, par. 34; J.F. v. Hôpital Charles-Lemoyne, CAI, No. 08 05 00, August 6 2009, Jacques Saint-Laurent, 2009 QCCAI 162, par. 15; A.P. v. CSSS Bécancour-Nicolet-Yamaska, CAI, No. 08 14 60, December 11 2009, Jean Chartier, [2010] CAI 5, AZ-50592027, 2010EXP-296, 2009 QCCAI 270, par. 26; K.G. v. Centre de santé et de services sociaux de Saint-Jérôme, CAI, No. 08 14 37, January 27 2010, Guylaine Henri, [2010] CAI 44, AZ-50602904, 2010EXP-929, 2010 QCCAI 27, par. 20; G.B. v. Centre de santé et de services sociaux de Saint-Jérôme, CAI, No. 08 16 41, May 7 2010, Guylaine Henri, [2010] CAI 164, AZ-50639485, 2010EXP-1982, 2010 QCCAI 132, par. 19, F.N. v. Centre jeunesse de la Mauricie et du Centre-du-Québec, CAI, No. 10 12 68, January 27 2012, Alain Morissette, 2012 QCCAI 31, par. 54).
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> (Emphasis added)

[48] The decision[10] of the Commission invoked by the MUHC did not consider the preponderant nature of section 28 of the AHSS. It is therefore appropriate to set it aside.

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[10] *Déry* v. *CHSLD de la Côte boisée inc.*, 2019 QCCAI 229.

**FOR THESE REASONS, THE COMMISSION:**

[49] **GRANTS** the application for review;

[50] **ORDERS** the MUHC, within thirty days of receiving this decision, **TO SEND** to the applicant the complete patient record of her father.

**PHILIPPE BERTHELET**
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