

LAW AND BIOETHICS

RTI v medical ethics: some questions arising from the recent decision of the Chief Information Commissioner under the RTI Act

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Medical ethics attaches the utmost priority to the confidentiality of medical records. Hence, the decision of the Chief Information Commissioner (CIC) rendered on April 10, 2015 in Case No: CIC/KY/A/2014/001348SA *Ms Jyoti Jeena v. PIO, Institute of Human Behaviour & Allied Science* (hereinafter referred to as *Jyoti Jeena*) (1), that the wife-applicant is entitled to get copies of the medical records of her estranged husband has raised many eyebrows.

What is the impact of the decision? Does it sufficiently balance public interest, sought to be preserved under the Right to Information (RTI) Act (2), with the need to maintain confidentiality, which is of the utmost importance according to medical ethics? Is the CIC opening a Pandora's Box and throwing age-old and precious ethical principles to the wind? What if a person asks for information with the intention of exposing the HIV-positive status of his/her hostile neighbour? Is the consent of the affected party not required to release such personal and sensitive information? Does this not violate the constitutional rights of the person (the husband in the case under consideration) and the law of the land? Is it legal to divulge such information without the consent of the patient concerned? Would the doctor be violating the Hippocratic Oath and medical ethics in revealing information about his/her patient to the Public Information Officer (PIO)? The questions that may be posed are numerous.

The provisions of the Right to Information Act

I attempt to approach the judgment from a purely legal perspective and in the light of earlier judicial pronouncements. First, let us consider the relevant provisions of the RTI Act. The Act overrides even the Official Secrets Act and is definitely intended to provide the citizen with information available with public authorities. An exception has been made only with regard to the items specified in Section 8 of the Act. Medical records, as such, do not find a place in Section 8, though they appear to be included in the following items covered in the Section:

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- i. 8(e). Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger **public interest** warrants the disclosure of such information;
- ii. 8(g). Information, the disclosure of which would endanger the life or physical safety of any person...;
- iii. 8(j). Information which relates to personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the Central Public Information Officer or the State Public Information Officer or the Appellate Authority, as the case may be, is satisfied that the larger **public interest** justifies the disclosure of such information.

S.11 (1) of the Act ensures compliance with the principles of natural justice by stipulating that "Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a **third party** and has been treated as confidential by that third party, he, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that he intends to disclose the information or record, or part thereof, and invite the third party to make a submission whether the information should be disclosed, and consider the same while taking the decision on the question of disclosure."

It is also provided in the same section that except in the case of trade or commercial secrets protected by the law, disclosure may be allowed if **public interest** outweighs in importance any possible harm or injury to the interests of such third party by the disclosure.

S. 2(n) of the Act defines "third party" as a person other than the citizen making a request for information and includes a public authority. As regards a wife who seeks information, the husband, whether estranged or not, in respect of whom information is sought is hence undoubtedly a third party. But what about public interest?

Public interest

The term "public interest" is not defined in the Act. Therefore, the PIOs, Appellate Authorities and Information Commissioners will need to judge each case on merit and in the light of any emerging guidance or best practice available at the time. For,

what is public interest will necessarily change over time and it will also depend on the circumstances of each case. In this connection, reference may be made to the Supreme Court (SC) decision in *Girish Ramchandra Deshpande v. Central Information Commissioner and others* reported in (2013) 1 SCC 212 (3).

In that case, the CIC had denied information pertaining to the service career and assets of the third party on the ground that the data sought was personal information, as defined in clause (j) of Section 8(1) of the RTI Act. In its judgment, the SC confirmed that the information sought was personal and that no public interest was involved, so the rejection of the application was justified.

The expression "public interest" has neither a precise definition nor a rigid meaning. It may be argued that the term "public interest" denotes an interest that serves a large section of society as opposed to a small section. Also, the information sought in the public interest should have a bearing on common questions related to the economy of the country; the moral values of society; the environment; national safety, and the like. If we go by the general meaning as used in common parlance, public interest is interest in the welfare of the general public (in contrast to the selfish interest of a person, group, or firm), and interest in which the whole society has a stake and which warrants recognition, promotion and protection by the government and its agencies. That the institution of marriage should subsist is certainly a matter of public interest and hence, the interests of the weaker gender, more precisely, of a wife in the matter of access to justice when faced with matrimonial discord, can also be taken to be a matter of public interest.

In the absence of a precise definition in the Act, only the CIC and the courts examining the propriety of the decision of the CIC can decide whether, in a given situation, personal information should be disclosed in the larger public interest. All that can be said is that the PIO must balance the competing claims of the privacy of the third party on the one hand, and the claim of public interest on the other; and then determine whether public interest outweighs the violation of a person's privacy.

In the decision under scrutiny, the appellant, through her RTI application, had sought copies of all papers, documents, records, old papers, case history records, etc, available with the Institute of Human Behaviour and Allied Science in relation to her husband, Sanjay Singh. The PIO had rejected the request on the ground that psychiatric (medical) information related to another person was exempt under section 8(1)(e). When the decision was challenged, the first appellate authority took a contrary view and directed the PIO to furnish the information. In compliance with this order, the PIO provided some information (vide letter dated October 31, 2014). Dissatisfied with the quality of information furnished, the appellant approached the CIC in a second appeal. The CIC noted that the wife was seeking information about the medical records to support her case before the matrimonial court that her husband had tortured her physically due to his mental illness. He also noted that the appellant and her brother had alleged

that her husband and his relatives had suppressed the truth about his mental health to cheat her into marriage, which proved hellish for her thereafter.

In Para 7 of the order, the CIC has referred to the decision in *Mr Surupsingh Hrya Naik v. State of Maharashtra* (AIR 2007 Bom 121) (4) but not mentioned the dictum therein or whether he was following the decision. In fact, in that case, a citizen had sought information on the facilities that had been made available to an MLA imprisoned for contempt of court; and in particular, whether the prisoner had been given air-conditioned accommodation. The High Court, after examining all the points raised by the rival parties with regard to previous decisions of the courts as also the provisions of the Medical Council of India Act (MCI), had found the following.

- i. It is within the competence of the concerned Public Information Officer to disclose such information in the larger public interest.
- ii. The provisions of the Act would prevail over the MCI Regulations regarding privacy and that the Public Information Officer can disclose even medical information, if satisfied that the larger public interest justifies such disclosure. This discretion, however, must be exercised by him, bearing in mind the facts of each case and the larger public interest; provided the records are maintained by the State, a Public Authority or a Public Body. It is only in rare and in exceptional cases and for good and valid reasons recorded in writing can the information be denied. In other words, grant is the rule and denial is the exception to be justified by reasons recorded by PIO.
- iii. The right of hearing to be given to the third party is not an empty formality. The Court also mentioned in explicit terms that under Section 19(4) of the Act, the information could not be given without giving a reasonable opportunity of being heard to the third party, and that the failure to grant the opportunity cannot be cured by the appellate authority by grant of such an opportunity before passing of the appellate order.

Since the opportunity was not given in that case, the High Court remanded the matter to the PIO, directing it to pass fresh orders after hearing the third party. What emerges from this decision is that it is a mandatory duty of the PIO to grant an opportunity of being heard to the affected third party. One thing has to be clarified straightaway: what is required is an opportunity to be heard and not his consent. Irrespective of whether the third party grants his consent, the PIO may decide to make the record available; but only after affording an opportunity to the third party to show cause against such a decision.

In the case under consideration, no such opportunity appears to have been given and to that extent the order can be said to be defective. If taken to court, it is almost certain, therefore, that the order would be set aside because of this defect. But that is another matter.

Should the RTI Act be used to get personal information about persons who are not public/government employees?

The more important question here is whether the order is flawed on account of violating the statutory provisions. According to me, it is not. The order may not be condemned on the ground that being confidential information, the contents of medical records cannot be disclosed. The larger public interest involved is the need to provide justice to the weaker gender and the need to advance the cause of justice in the matter of a litigation. Suppose the applicant had moved the matrimonial court to issue summons for the production of the medical records? That would have to be allowed subject to the examination of confidentiality; but such examination would be carried out only after the records reached the court in a sealed cover. According to me, the question under consideration is not whether the liberal provisions of the RTI Act are being exploited to snatch some records. The question is whether the grant of information to a wife under such circumstances would come within the purview of public interest. This question appears not to have been dealt with in any previous case and as such it would attract examination by the court if it reached the court by the motion of some party. The meaning given to the term "public interest" by the Supreme Court while considering the justification for maintaining a public interest litigation before constitutional courts may not justly apply to the question of whether an application under the RTI Act is in public interest or not. The context and purpose are different. Until a decision explaining the scope of the term comes from the SC or one of the High Courts, the present verdict of the CIC will certainly stand.

A critic may raise the question as to whether the scope of the present decision may be extended to cover a stranger or neighbour seeking the medical records of an individual. My answer is that such a possibility cannot be excluded. A person may want to start anti-rabies treatment after ascertaining whether his/her neighbour is affected by rabies. Another may want to initiate preventive and curative action upon learning that his/her neighbour is affected by Ebola. Are these not matters of public interest? Whether the grant of information would be justified in such cases would, therefore, depend upon the facts and circumstances.

It may be contended that the applicant could have moved the family court for summons to produce the medical papers of the husband, in which case only the judge and the parties concerned would have access to the confidential records. Of course, that could have been one option, but does it preclude the alternative remedy under the RTI Act? The answer is no, though a lot of circumspection and careful assessment of the comparative merits and consequences would be necessary in such cases. It is for this reason that we require qualified persons to deal with such matters and cannot leave it to a computer.

Changes necessary in the Act

In the context of medical ethics, this decision, certainly, is a

trend-setter. To provide greater sanctity to maintaining the confidentiality of personal data, it may be good to have more restrictions introduced through legislative intervention. This may be done through the introduction of provisions ensuring the maintenance of confidentiality or by defining and restricting "public interest".

Does the decision deviate from the objectives of the Act?

Should the RTI Act be used for situations other than its professed aims and objectives? The enactment was conceived as a result of a movement best described by the slogan "*Mera paisa, mera hisab*" (My money, my accounts). The argument was that since all government records are maintained at the cost of the tax payer, the tax payer, as the owner, has a right to access the records. The Act was intended to provide citizens with the right to "to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority". That even private information can be divulged to an applicant if it is in the hands of the public authority is clear from S.8(j) and the decision of the Bombay High Court in *Mr Surupsingh Hrya Naik v State of Maharashtra* (AIR 2007 Bom 121)(4), referred to earlier. Until the SC enters a finding to the contrary, the dictum holds good. As to the question of whether this right could be misused, taking the order under review as a precedent, the answer is that it could be to some extent, notwithstanding the fact that safeguards are already incorporated in the Act. However, this depends on the care with which the Act is applied.

Fiduciary relationship

In *Central Board of Secondary Education v. Aditya Bandopadhyay*, (2011 AIR SCW 4888) (5) the apex court touched upon the question of what exactly distinguishes a fiduciary relationship from a confidential relationship. Applying the tests therein, there can be no doubt that the records possessed by the public authority in the Jyoti Jeena case were held in a fiduciary relationship. However, S.8 (e) of the Act allows the disclosure of even such information, if it is in the larger public interest. So the question primarily is whether such larger public interest existed. According to the CIC, it did. The words of caution sounded by the SC in the case cited above that "*indiscriminate and impractical demands or directions under the RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of administration and result in the executive getting bogged down with non-productive work of collecting and furnishing information*" must be remembered while disposing of such petitions.

In my view, the real failure of the order was the denial of opportunity to the third party (the husband) and not that it directed that the medical records of the estranged husband be made available to the wife. We have to wait for a court verdict

on the matter, but that may not come unless the third party challenges the order before a constitutional court. Legislative changes would also be welcome.

Declaration

This article is a revised version of an earlier comment published online on April 28, 2015, at Livelaw.in and available from: <http://www.livelaw.in/is-rti-act-taking-away-the-sanctity-of-hippocrates-oath/>

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