

## Snooping on the Sick

### **New Ontario legislation puts Big Brother's eye at the keyhole, threatening to destroy patient confidentiality**

by Sonu Gaiind

Years ago, when I became a physician, I swore that "What I may see or hear in the course of treatment *I will keep to myself*." Every physician who has sworn the Hippocratic Oath for the past 2,500 years has likewise pledged to honour the privacy of their patients' lives. Unfortunately, recent legislation introduced by the Ontario government may soon make it legally difficult, if not impossible, for us to uphold our moral duty.

On Dec. 7, the Ontario government introduced Bill 159, the Personal Health Information Privacy Act. While its purpose is ostensibly "to protect the confidentiality and security of personal health information and privacy of the individual", in reality Bill 159 represents an unprecedented intrusion into the private lives of Ontario citizens.

The Bill grants several groups access, *without patient authorization*, directly to the medical records of individuals. Section 32 of the Bill allows researchers access to personal, identifiable health information without patient consent. Section 33 gives heads of penal institutions similar access to patient records, as does Section 30 for various other individuals and groups. In each case, the Bill indicates that the physician "may" provide patient information without the patient's consent (and presumably even knowledge).

While disturbing, I could perhaps sleep at night knowing that I, and I hope most of my colleagues, would simply refuse to reveal patient information without the patient's consent. Unfortunately, Section 31 of the Bill deprives us of the luxury of conscientious objection, by granting the Minister of Health the authority to "direct" a physician, or other "health-information custodian" to disclose identifiable patient information to the minister or his or her delegate. Ironically, "direct" is used as an indirect way of saying "force"; in case we don't understand, Subsection 31:7 tells us that "a person to whom a direction is issued in accordance with this section shall comply with it."

Even more disturbing than the intrusion of patient privacy, however, is the danger Bill 159 poses in undermining the very tenets of health care. The doctor-patient relationship is based on trust: Patients come to their doctor with intimate, embarrassing, or sensitive information, and they come hoping for some relief of suffering. Without confidence in confidentiality, sensitive information cannot be shared; without accurate information, proper diagnosis and treatment cannot occur.

As a psychiatrist, I know this to be true, especially for patients suffering emotionally. The exploration of disturbing emotional issues, fears, and fantasies requires a strong sense of security in the therapeutic setting. As the Canadian Psychiatric Association has stated, "Without confidentiality there can be no trust; without trust there can be no therapy." What happens to trust when patients know that an anonymous ministry official could have access to their personal thoughts and emotions? Will they share their true fears and fantasies? Would you?

As Canadians, we recognize the importance of universally accessible health care. One element of accessibility is confidentiality: Once we loosen the barriers to third-party accessibility of private medical information, we raise barriers to health care for those with difficult, sensitive problems.

Beyond undermining effective treatment, invasions of privacy of the doctor-patient relationship can themselves harm the patient. The Supreme Court of Canada recognized this in its 1999 judgment in *R. v. Mills*, writing: "In cases where a therapeutic relationship is threatened by disclosure of private records, security of person and not just privacy is implicated."

And what will government do with patients' personal information? Bill 159 professes that the minister may need such information for assisting in "management of the health-care system". However, through OHIP the ministry already has the ability to track demographic information, such as diagnoses, treatments, and services provided, as well as a variety of other factual and historical data. In reality, the intimate details of patients' private lives serve no legitimate purpose in "managing the health-care system". Nor is the gross intrusion of patient privacy afforded by Bill 159 justified as a means of investigating fraudulent billing practices. OHIP already has the means to investigate the legitimacy of services that have been billed; a court-ordered subpoena can already produce any records a judge deemed relevant to an investigation.

What about giving access to others, such as researchers? Can that, too, be justified as contributing to a greater good? While that road may be paved with good intentions, it, too, leads somewhere we should not go. The fundamental principle regarding health-care information is that it belongs to the patient -- not to the physician, nor the government, nor any other health-care agency. Even if the information is to be used for research purposes, the patient's consent must be obtained if any identifying information is to be disclosed.

Admittedly, circumstances arise when we cannot maintain absolute confidentiality; a physician may be obligated to disclose information if failure to do so would result in physical harm. And courts can already order disclosure of records without consent. Mechanisms exist for those extraordinary situations that warrant such measures. It is essential that nonconsensual disclosure occur via an impartial, arm's-length judicial process, rather than simply at the ministry's discretion.

The issue of privacy is fundamental to how we function as a society. Keeping in mind that patients routinely divulge to their doctor information they have never shared even with loved ones, we should consider the words of Janna Malamud Smith, who wrote: "Little in life is as precious as the freedom to say and do things with people you love that you would not say or do if someone else were present. And few experiences are as fundamental to liberty and autonomy as maintaining control over when, how, to whom, and where you disclose personal material." Pierre Trudeau told us that the state "has no place in the bedrooms of the nation". Should we now invite it into our minds?

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