

**Information
and Privacy
Commissioner
of Ontario**

**Comments of the
Information and Privacy
Commissioner of Ontario
on Bill 84**



**Brian Beamish
Commissioner
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Bill 84, the *Medical Assistance in Dying Statute Law Amendment Act, 2017* (Bill 84), proposes to amend various statutes in response to the federal *Criminal Code* legislation permitting those who meet certain eligibility criteria to request and obtain medical assistance in dying.

The Office of the Information and Privacy Commissioner of Ontario (IPC) wishes to focus on a single aspect of Bill 84. The bill proposes to amend the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act* (the *Acts*), to provide that these statutes do not apply to identifying information relating to medical assistance in dying. “Identifying information” is defined in Bill 84 to include information that identifies persons or **facilities** that provide services relating to medical assistance in dying and persons receiving such services.

The IPC objects to the exclusion of information that identifies facilities providing services related to medical assistance in dying (facilities) from the application of the *Acts*. The rationale for this objection and the amendments proposed by the IPC are summarized in this submission.

RATIONALE FOR AMENDMENTS

Excluding information that identifies facilities from the application of the *Acts*:

- hinders transparency, accountability and meaningful public debate,
- is inconsistent with the transparency purpose of the *Acts*, and
- is not based on any evidence of harm.

Hinders Transparency, Accountability and Meaningful Public Debate

The public’s “right to know” is a fundamental principle of freedom of information legislation. Providing members of the public with access to information that identifies facilities will promote transparency, accountability and meaningful public debate, which are essential to the proper functioning of a democracy. Ontarians should have the right to know what facilities are and are not providing publicly funded services, including those relating to medical assistance in dying.

Making information about facilities available to the public will, as a practical matter, assist individuals in making choices about where they may receive services as well as highlight any barriers to receiving, and any deficiencies in accessing, these publicly funded services. This transparency will assist in preventing incidents similar to the one endured recently by a resident of British Columbia who experienced an “excruciating transfer” after the hospital to which he had been admitted refused his request for medical assistance in dying.¹ It will also enhance

¹ <http://news.nationalpost.com/news/canada/b-c-man-faced-excruciating-transfer-after-catholic-hospital-refused-assisted-death-request>

the ability of the public to scrutinize whether these publicly funded services are being offered in a fair and equitable manner regardless of geographic and socio-demographic factors.

Further, as a practical matter, it is not only desirable, but inevitable, that over the course of time, the identities of facilities will become generally known.

Inconsistent with the Transparency Purpose of the Acts

One of the key purposes of the *Acts* is to provide the public with a right of access to information under the custody or control of institutions, which include both public and private hospitals and municipally run long-term care homes, in accordance with the principles that information should be available to the public and any exemptions from the right of access must be limited and specific and clearly justified. As a general rule, the IPC closely scrutinizes any legislative changes that reduce the public's right to know.

No evidence has been provided, including evidence of harm, that would justify a broad exclusion from the right of access to information that identifies facilities.

As currently drafted, the proposed provisions would exclude from the *Acts* statistics relating to a particular facility, such as the number of medically-assisted deaths performed at that facility, as well as the policies and procedures with respect to medical assistance in dying implemented by a particular facility, as providing such information would identify a facility providing these services.

No Evidence of Harm

In support of the amendments to the *Acts*, the Ministry of Health and Long-Term Care (the Ministry) indicated that opponents of medically assisted death "may use aggressive tactics to express their criticism in a way that results in a perceived threat of harm/danger to people or facilities."

The Ministry did not provide evidence that identifying facilities could reasonably be expected to endanger the security of buildings in which these services are provided, or the life or physical safety of those working in or visiting such facilities.

The IPC's survey of other jurisdictions that have legalized medical assistance in dying did not find evidence of endangerment when information about the identity of facilities is publicly accessible. The IPC canvassed Belgium, the Netherlands, Oregon, and Quebec, all of which have legalized medical assistance in dying. With the exception of Oregon, we have not found any provisions similar to those proposed in Bill 84 preventing the public from accessing information that identifies facilities. Belgium and the Netherlands have had legalized regimes for medical

assistance in dying since 2002. Despite making inquiries, the IPC has not been able to find any reports of violence or threats of violence as a result of information being made available about the identities of facilities that provide such services.

In any event, where there is sufficient evidence to believe that a threat may exist, the Acts already give institutions the discretion to refuse a request for access and, in certain circumstances, to refuse to confirm or deny the existence of a record to which the request relates. For example, sections 14 and 20 of the *Freedom of Information and Protection of Privacy Act* provide, in part:

14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

...

(e) endanger the life or physical safety of a law enforcement officer or any other person;

...

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

...

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

...

20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.²

As a result, where there is evidence that a facility may be under threat, access to information identifying that facility may be denied.

Broad exclusions from the Acts, such as the ones proposed in Bill 84, can prevent the public from accessing information that poses no health or safety risk. For example, in 2012, the Ministry denied a freedom of information request for province-wide statistics on the number of claims and amounts billed for abortion services. It did so on the basis of the abortion records exclusion in section 65(5.7) of the *Freedom of Information and Protection of Privacy Act*,³ even though disclosure of this information posed no health or safety risk. In fact, the

² Similar provisions exist in the *Municipal Freedom of Information and Protection of Privacy Act*.

³ That decision was upheld by my office in Order PO-3222.

Ministry ultimately disclosed this information outside the scope of the statute after the requester commenced a court application.

Finally, the IPC notes that access to information should not be limited in order to stifle legitimate and peaceful protest. The right to protest and express criticism of government decisions is an integral component of any democracy and is protected by section 2 of the *Canadian Charter of Rights and Freedoms*, which guarantees everyone freedom of expression, peaceful assembly and association.

IPC PROPOSED AMENDMENTS

The IPC recommends that Bill 84 be amended as follows:

3. Section 65 of the *Freedom of Information and Protection of Privacy Act* is amended by adding the following subsections:

...

(12) In subsection (11),

“identifying information” means information that identifies ~~a person or facility~~ **an individual who received or provided medical assistance in dying** or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify **such an individual** ~~a person or facility~~;

4. Section 52 of the *Municipal Freedom of Information and Protection of Privacy Act* is amended by adding the following subsections:

...

(6) In subsection (5),

“identifying information” means information that identifies ~~a person or facility~~ **an individual who received or provided medical assistance in dying** or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify **such an individual** ~~a person or facility~~;



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