

**HR-2011-2072-A (Employment and Social Welfare Department v A)**

**Court:** Norwegian Supreme Court

**Judges:** Normann, Stabel, Indreberg, Arnesen, Matningsdal

**Length:** 3,674 words (10 pages)

**Summary:**

The case concerned whether a patient had a right to appeal against an order directed to his physician to disclose the patient's medical records as part of an audit into the doctor's practice. The order was made under § 28 of the Public Administration Act. The Court concluded that the disclosure order was a procedural decision necessary for the audit. Although the patient has a right to privacy to prevent the unlawful disclosure of personal information; this right is not absolute and is rebuttable (see § 3-6 Patients' Rights Act).

**Full text of judgement:**

(1) Justice Normann: This case concerns the question whether a patient has the right to appeal against an order addressed to his doctor about the disclosure of medical records, see § 28 Public Administration Act and whether the patient has the right to access these documents, see § 18 Public Administration Act.

(2) On 14 May 2007, the Labour and Welfare Administration Agency of Central Norway (hereafter NAV) ordered the physician, Dr. Sjur Agdestein, to disclose the complete medical records of twelve patients for a specified period, including A. The order was issued pursuant to § 21-4 Health Insurance Act, as part of routine audit of Dr. Agdestein's business. NAV officials collected a copy of records by visiting at Dr. Agdestein's office. Dr. Agdestein appealed the order to the Labour and Welfare Agency which, on 24 August 2007, rejected the appeal.

(3) A's lawyer, Mr Rune Østgård, appealed the same order on 1 June 2007. A claimed that the decision to obtain patient records was an "individual decision" - an

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administrative decision relating to the rights or duties of one or more specified persons – as defined under § 2 Public Administration Act. The Labour and Welfare Agency dismissed the case on 7 June 2007. In reaching this decision, the Agency emphasised that A was not a party to the case. The grounds for the Agency's decision are as follows:

”The relevant patient records were obtained in connection with the audit of the physician's practice. As outlined in our letter from 14 May 2007, the request for medical records was not made to A as part of an audit of his health insurance benefits. Rather, the order was directed towards his physician as part of a broader audit. The order did not concern A or his health insurance benefits directly. A central element of § 2 Public Administration Act is that ‘a decision is directed, or otherwise directly concerns an individual’. An audit of the doctor's business is a matter concerning the relationship between NAV and the doctor involved. Neither the audit nor the outcome of the audit will have any direct impact on the patient and the patient is therefore deemed not to be party to this case. If the review of a prior record shows that there is reason to look closely at A's individual health insurance benefits, it may be necessary to commence a case against the individual patient. It will then be given special notice. At this time, any rights as given under the Public Administration will be respected.”

(4) A lodged an appeal on the same day to the NAV Appeals Board but the NAV Appeals Board affirmed the initial decision on 24 August 2007. It was held that the order is not an individual decision as defined under §2 Public Administration Act “as there was no decision which determined the rights or obligations of A”. It was further determined that the patient did not have right to appeal the order under the special provision in the § 14 Public Administration Act which provides a limited right to appeal to those who are required to provide information.

(5) A's lawyer, Mr Østgård, requested, on 27 August 2007, access to the medical records to obtain further information. NAV rejected the request on 4 September 2007 under both § 2 and 18 Public Administration Act. In relation to the latter provision, NAV referred to the decision of 7 June 2007 and the appellate decision of 24 August 2007 where it was held that A was not a party to the case.

(6) When a further appeal was lodged on 10 September 2007, the case was brought before the Ombudsman. The complaint also included other patients whose medical records were part of the disclosure order.

(7) After obtaining the report from NAV, the Ombudsman issued a statement on 17 December 2008 (Somber-2008-18):

“The order is clearly a decision rendered in the exercise of public authority. It must also be considered that the order affects the patients’ rights, specifically their right to protection against the dissemination of personal information. The order was given, according to NAV, exclusively for the audit of the physician's practice. Patients will not be parties in any subsequent case between NAV and the doctor. There are no legal guarantees in place to protect the rights of the patients in any subsequent cases. The argument that the order is a mere procedural decision is, therefore, not persuasive. The order must therefore be considered an independent action against patients and must be regarded as an individual decision that they may appeal against.

...

Based on the current state of the law, it must be concluded that the requirement to disclose medical records in connection with the audit of the health professionals' business is an individual decision in relation to the patients to whom the information relates. It is important that the patient's legal position in such cases is handled in an expedient and efficient manner.

I request that NAV, in accordance with the above statements, ensures that the complaint from the relevant patients will be assessed again. Furthermore, I ask the Directorate to ensure that future practice in this area be conducted in accordance with my expressed views.”

(8) On 22 October 2009, A issued a writ against NAV in Inderøy District Court, Norway, in order to have his two rejected appeals from 24 August 2007 and 4 September 2007 overturned. A also requested judgement for access to the file regarding the order from 14 May 2007 and the decision rejecting the appeal of the collection of patient records. NAV argued that the initial decisions should be upheld.

(9) On the basis of a report from NAV to the Parliamentary Ombudsman's office expressing opinion on, among other things, changes to the Health Insurance Act, the Ombudsman affirmed, in a letter dated 8 January 2010, his earlier findings.

(10) The District Court ruled on 27 April 2010 as follows:

“1. NAV Complaints and Appeals Mid-Norway's decision in Case 3669-3676/07 24.08.2007 shall be repealed.

2. NAV Control Mid-Norway's decision 09/04/2007 in Case 07/10 477 shall be repealed.
3. The case is dismissed in respect of section 3 of the claimant's case with respect to requirement that the court shall determine the extent of access rights.
4. Each party bears its own costs of the case.”

(11) NAV appealed to Frostating Court of Appeal. Written submissions were provided prior to the full hearing, in accordance with the Trial Procedure Act § 29-16, fifth paragraph. The Court of Appeal judgement from 2 March 2011 (LF-2010-92937) dismissed NAV's appeal, but no compensation for costs were awarded.

(12) The NAV has appealed the matter to the Supreme Court.

(13) The appellant, NAV, has stated in brief:

(14) The order for disclosure of medical records is not determinative regarding the patient's rights as outlined under § 2 Public Administration Act.

(15) The Public Administration Act is based on a fundamental distinction between substantive orders and procedural rulings. The clear legal principle is that procedural decisions are not individual decisions. This follows from the Public Administration Act and has a solid grounding in Norwegian legal theory.

(16) There are no circumstances in this case to suggest that there should be exceptions to this general rule. Data provided by order for the purposes of an audit will often affect third parties but not to the extent of an individual decision under § 2 Public Administration Act.

(17) Weighing the interests involved suggests that the 'individual decision' concept does not extend to the circumstances in this case. The patient's right to privacy is protected to a considerable extent by the NAV Act §§ 7, 16, the Patient Rights Act § 3-6 and the Personal Data Act § 20.

(18) A's legal right to privacy is not sufficiently affected by the disclosure order to be considered an individual decision. Individual decisions are a central concept in administrative law and any extension of the term beyond its current limits will likely have unforeseen consequences.

(19) Even if the Supreme Court were to conclude that the order was an individual decision, the respondent is not party to the case and therefore cannot in any case require disclosure by reference to the Public Administration Act § 18.

(20) The NAV has submitted that the appeal shall be upheld.

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(21) The respondent, A, has, in brief, asserted:

(22) The Court of Appeal's judgement is correct in its reasoning and outcome.

(23) It is incorrect to regard the order against A's doctor as a procedural decision.

Although the order is directed against the doctor, it is also determinative for the patient's "rights" as the term is used in § 2 of the Public Administration Act.

(24) The preparatory works to the Public Administration Act, read in context, show that there is no clear answer the question of what should be considered a procedural decision.

(25) The disclosure of medical records is nevertheless a serious violation of the doctor's and patient's rights which has meets all the criteria of an individual decision, regardless of whether it is labelled as a procedural decision.

(26) Orders for disclosure of records can potentially reduce the value of the records as a tool for the physician in treating his/her patients. A patient may not wish to provide his/her doctor with all the relevant information in a matter for fear that the records will be disclosed at a later date to third parties.

(27) Medical records are the patient's property and medical confidentiality is derived, in part, from the patient's proprietary rights. The weighing of interests to which the NAV refers is entirely peripheral in relation to the assessment of whether there is an individual decision in a particular case, especially involving the forfeiture of proprietary rights.

(28) The other rules to protect patient's interests are not sufficient. Confidentiality provisions under the NAV Act have serious shortcomings, and there is a risk of leaks. And even if the doctor has the right of appeal under the § 14 Public Administration Act, he/she may not always appeal. Appeal rights under § 14 Public Administration Act are also narrower than the right of appeal under § 28 Public Administration Act.

(29) If the Court finds that the order is an individual decision, the state has not disputed that A has a legal interest. It is submitted that A is also party to the case, and that he thus may require access to documents as outlined under § 18 Public Administration Act.

(30) The Public Administration Act is based on the general principles of law which have particular meaning and importance in determining the legality or otherwise of exercise of public authority. There is a general principle that the state must justify the

significant impact on its citizens and that citizens be given the right to inspect and to defend their rights.

(31) A, has entered the following statement:

"1 The appeal is dismissed.

2. NAV is to pay all of A's costs for the various stages of court proceedings. "

(32) My view on the matter:

(33) I find that the appeal should be upheld in favour of NAV.

(34) The relevant decision meant that the respondent's doctor had a duty to disclose a copy of the complete medical records of 12 patients. For patients, the decision had thus an indirect impact upon them as the doctor was under a legal obligation to provide access to their medical records.

(35) The doctor had the right to appeal under § 14 Administration Act - an appeal right which he made use of. The question is whether the individual patient has the right to appeal.

(36) If there is an individual decision, the patient will have the right to appeal, see the Public Administration Act § 28(1) which states that decisions can be appealed by a party or other person with legal interest. Individual decisions under § 2 Public Administration are defined as "a decision made in the exercise of public authority which the rights or obligations the rights or duties of one or more specific individuals". There is no doubt that this matters deals with the exercise of public authority. The central question is whether the order can be said to be "decisive" regarding A's rights as a patient.

(37) The order to disclose the medical records was included as part of an audit into A's physician. The audit aimed to determine whether the doctor had been guilty of malpractice that could provide the basis for professional sanctions against him. The audit could thus result in an individual decision against the doctor and the collection of medical records was a necessary pre-cursor to any such decision. In my view, one is then faced with a procedural decision. A disclosure order relating to an audit may be given at any time which does appear to indicate a lack of legal certainty for the patient involved, however, this fact alone does not mean that the issuing of such a disclosure order represents an individual decision in relation to the patient (see Stub, Journal of Law 2008 page 36 et seq (TFR-2008 to 35, Lovdata note) on page 64-65).

(38) The legislative history of the Public Administration Act shows there is a distinction between individual decisions and procedural rulings. In explanatory materials to the legislation, the Parliament stated, with reference to Public Administrative Law Committee's report page 207-208, that an individual decision is a "decision which is of substantive importance in the outcome of the matter," while procedural decisions are decisions that are made "during the proceedings." As examples of decisions that cannot be regarded as individual decisions, the Public Administrative Law Committee gave as examples – decisions which determine a deadline, a decision to collect information and the decision to conduct an audit.

(39) The explanatory materials to the Act are based on the principle that procedural rulings generally cannot be appealed separately, see the Public Administrative Law Committee's report on page 272. §14 of the Public Administration Act authorizes admittedly a special right of appeal, but this is - as I have mentioned – only reserved for those who are required to provide information, in this case A's physician.

(40) Following the amendment to the Public Administration Act in 1977, there is a persuasive argument that an order to provide information is not an individual decision. Under the amendment, §14 of the Public Administration Act was moved from the Chapter IV – regarding preparation of cases regarding individual decisions – to Chapter III regulating general rules relating to proceedings. According to explanatory materials to the Act, it may be appropriate to characterize an order to provide information as an individual decision in the case of an individual action against the person, but not if the order is made in the preparation of another case. The Ministry, therefore, admitted the original location of § 14 in Chapter IV was misleading, see Ot.prp.nr.3 (1976-1977) page 69.

(41) In theory, it is also assumed that the decisions which form part of the audit of a matter are not normally regarded individual decisions, see Eckhoff / Smith, Administrative Law 9 Edition page 281 and Woxholth, Public Administration, 5th edition page 66 and related texts.

(42) As I see the matter, it may in certain circumstances be appropriate to consider procedural decisions as individual decisions. There is not sufficient legislative history to clearly state which decisions are covered by one or the other category. The question in the present case turns on whether the interests of the patients are of such importance that the disclosure order should be considered as an individual.

(43) This assessment must be made in light of the individual patients' right to confidentiality in order to prevent the spread of highly sensitive personal information. The patients' right to privacy and confidentiality is a fundamental right which is enshrined in the confidentiality provision in § 21 of the Health Personnel Act. Any violations of the right to confidentiality can have serious consequences for health care professionals, see Health Personnel Act Chapter 11 and Norwegian Criminal Code § 144.

(44) The patients' right to protection against the dissemination of personal information is however not absolute and can be overturned under certain circumstances, see the Patients' Rights Act, § 3-6. § 23(6) of the Health Personnel Act provides that this right does not prevent "the disclosure of medical information in accordance with rules established by law or pursuant to law when it is expressly stated or clearly provided that the confidentiality shall not apply."

(45) It is stated expressly in the Insurance Act § 21-4 that the disclosure order made by NAV to A's doctor did rebut the right of confidentiality. This provision has been subsequently amended with effect from 1 January 2009 and is now included in new §21(4)(c). This formal change does not affect the facts of this case.

(46) In this context it is important that the NAV's executive officers are required to handle all medicals records confidentially. However, this confidentiality requirement does not prevent NAV officers from ensuring "details are available to other employees within the office to the extent necessary for any on-going or future audit", see NAV Act § 7, see § 16.

(47) From these provisions, I conclude that the Parliament has carefully considered the conflicting considerations that apply in cases where there is a necessity to rebut a patient's presumptive right to confidentiality.

(48) Furthermore, the Parliament has recently considered NAV's audit processes pursuant to the rights of patients and did not conclude that such audits represent an individual decision with its associated appeal rights. In connection with amendments to the Insurance Act in 2009, the Parliament highlighted the rising problem of social security fraud. Several consultative bodies have argued the need to balance effective control measures against the interests of privacy and due process for the patient. The question of whether the disclosure of patient information should be considered as an individual decisions with all related consequences was not directly addressed, cf



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Ot.prp.nr.76 (2007-2008) especially page 32-33. The question was also not an issue for the Privacy Commission in the legislative proposal “NOU 2009:1 Individual and integrity”, in particular in Chapter 16 which analyses the issue of privacy in health care.

(49) These reviews show that the patient's right to confidentiality does not extend further than those actions required by law. Further, the disclosure of medical records may only occur in so far as is necessary and the information is to be handled by as few individuals as possible in order to minimise the risk of accidental dissemination. This implies, in my view that the disclosure order was not determinative in the sense of §2 Public Administration Act.

(50) I emphasize further that the patient's rights are safeguarded through other rules, see the notification provisions of the Personal Data Act § 18 and Patient Rights Act § 3-6 third paragraph. In the explanatory materials to these pieces of legislation, strict guidelines are laid out for handling information in social security matters including the storage, shredding and archiving of information obtained pursuant to the Insurance Act § 21-4, see R21-00-2-J09.

(51) The relationship between the appeal provisions of the Public Administration Act is also to be regarded as a disclosure order rather than an individual decision. It would in my opinion seem incorrect if the patient should be accorded the right to appeal the three-week deadline for appeals under the Public Administration cf. § 28 § 29, while the doctor - that the extradition request was aimed at - have a complaint longest period of three days, see § 14

(52) I also refer to the subject of the matter of the complaint. The NAV requested the disclosure of information which was deemed “necessary” for audit purposes, see the National Insurance Act § 21-4 and the current provision in § 21-4c, second paragraph. NAV is given a wide discretionary power to determine which information must be disclosed for auditing purposes. The patient, however, will have great difficulty in establishing that his/her information is not necessary to the case without access to the other patients' records. Therefore, any appeal rights given to the patient will be of limited use to the overall audit.

(53) The decisions that the Public Administration Acts covers are broad in nature. The objectives of predictability and effectiveness indicate the Parliament’s intention to share necessary information in groups rather than assessing on a case by case basis

on whether an individual's right to confidentiality has been rebutted or not. In my opinion, it cannot be concluded that the disclosure order can be described as an individual decision, see Ot.prp.nr.27 (1968-1969) page 10.

(54) I have concluded that the disclosure order cannot be said to be "decisive" for A's "rights" in the sense the term is used in § 2 of the Public Administration Act. The appeal must therefore be upheld.

(55) The NAV did not seek legal costs for the Supreme Court.

(56) I find the following:

The NAV's appeal is upheld and the original disclosure order stands.

(57) Judge Stack: I concur with the reasons outlined above.

(58) Judge Indreberg: I concur.

(59) Acting Judge Arnesen: I concur.

(60) Judge Matningsdal: I concur.

(61) After the vote, the Supreme Court handed down the following judgement:

The NAV's appeal is upheld and the original disclosure order stands.