

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDERS F2020-01

February 7, 2020

ALBERTA HEALTH SERVICES

Case File Number 003829

Office URL: www.oipc.ab.ca

Summary: The Complainant complained to the Commissioner that Alberta Health Services (AHS) had disclosed his personal and health information to the Lethbridge Police Department contrary to the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) when an employee of AHS made a complaint about the Complainant's behavior to the Lethbridge Police Service and provided it with records regarding the Complainant. The Complainant attached a report he had obtained from the Lethbridge Police Service to substantiate his complaint.

The adjudicator determined that the FOIP Act applied to the complaint. She determined that the disclosure was done for the purpose of mitigating the risk of imminent harm to the mental and physical health of employees and was authorized by section 40(1)(ee) of the FOIP Act. The adjudicator also determined that AHS had not disclosed any more personal information than was reasonable necessary for meeting its purpose in disclosing the information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 40, 59, 69, 72; *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 31 – 45, 58

Authorities Cited: AB: Orders F2012-01

I. BACKGROUND

[para 1] On August 8, 2016, the Complainant complained to the Commissioner that Alberta Health Services (AHS) had disclosed his personal and health information to the Lethbridge Police Department when an employee of AHS made a complaint about the Complainant's behavior to the Lethbridge Police Service and provided it with records regarding the Complainant. The Complainant attached a report he had obtained from the Lethbridge Police Service to substantiate his complaint. The name of the employee of AHS had been redacted from the report.

[para 2] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Complainant requested an inquiry. The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

[para 3] The parties exchanged submissions. After I read the submissions of the parties, I wrote the parties to inform them that I considered the issues for inquiry to have been misstated. I said:

On August 8, 2016, the Complainant complained to the Commissioner that Alberta Health Services (AHS) had disclosed his personal and health information to the Lethbridge Police Department when an employee, or employees, of AHS made a complaint about the Complainant's behavior to the Lethbridge Police Service and provided it with information from AHS's files about incidents involving the Complainant. The Complainant attached an occurrence report created by the Lethbridge Police Service as evidence to support of his complaint. This report indicates that Alberta Health Services employees from the renal unit provided the Lethbridge Police Service with "12 inches of binders" as "background information" on the Complainant.

The Commissioner agreed to conduct an inquiry in relation to the complaint. The file was originally opened under the authority of the *Health Information Act (HIA)*, given that the Complainant complained that his health information had been disclosed. However, the notice of inquiry cites only the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

New Issues

The occurrence report the Complainant submitted for the inquiry establishes that an employee, or employees, of the AHS renal unit provided AHS records containing information about the Complainant to the Lethbridge Police Service. However, it is unclear from the evidence before me whether they did so under the authority of AHS or whether this was done without it. The evidence and argument of AHS does not address this point. The name(s) of the employee or employees was severed under section 17 of the FOIP Act, which suggests that the employee (or employees) could have been acting in a personal capacity, rather than as a representative of AHS. If so, then the question of whether the employee or employees of the renal unit had the authority to disclose AHS records containing the Complainant's personal or health information to the Lethbridge Police Service is raised by the Complainant's complaint. I have therefore added the following questions to the inquiry:

1. Was the disclosure of the Complainant's personal or health information done with the authorization of AHS? If it was not, did AHS take appropriate measures, under the

FOIP Act or the HIA, as appropriate, to protect the Complainant's personal or health information from the risk of unauthorized disclosure?

To the extent that there is any evidence before me as to what was disclosed to the Lethbridge Police Service, other than that it was information about the Complainant and his conduct while attending the hospital for health services, it appears likely that at least some of the information disclosed was the Complainant's health information. I arrive at this conclusion on the basis that the Complainant was only permitted to attend the hospital to obtain health services. Any information about the Complainant's visits to the hospital, then, could have been collected in the course of providing health services or the Complainant receiving such services. The records may also include information about the Complainant's health, the kinds of health services he was receiving, and how health services would be provided. If so, the information would be health information within the terms of section 1 of the HIA. I recognize that AHS argues that the information disclosed was not from a patient chart; however, the fact that a record is not placed on a chart would not exclude its contents from the HIA if the subject matter is about a patient's health, or the health services that were or will be provided to the patient.

As it appears possible that at least some of the information about the Complainant that was disclosed is health information, I have decided it is necessary to add the following issues to the inquiry:

2. **Does the record contain health information as defined in section 1(1)(k) of the HIA?**
3. **If it is health information, and the disclosure was done under the authority of AHS, did AHS disclose the Applicant's health information in contravention of Part 5 (Division 1, ss. 31-45) of the HIA?**

Finally, I note that the Lethbridge Police Service was provided "12 inches of binders" of background information regarding the Complainant. I also note that AHS contacted the Lethbridge Police Service to indicate it did not want to pursue the matter it had raised with the police and sought the return of this information. Assuming that the FOIP Act applies, the question arises as to whether AHS's disclosure was in compliance with section 40(4) of the FOIP Act. Although this question is encompassed by the general question of whether AHS contravened Part 2 of the FOIP Act when it disclosed the Complainant's health information, I am unable to locate arguments from AHS in relation to section 40(4). I have therefore decided that it is appropriate to remind the parties that both section 40(1) and 40(4) should be addressed when addressing the question of whether the disclosure to the Lethbridge Police Service complied with the FOIP Act (assuming that the FOIP Act applies). If the HIA applies to the disclosure, then the question of whether the disclosure complies with section 58 of the HIA arises.

4. **Did AHS disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act, specifically, sections 40(1) and / or 40(4)?**
5. **If the HIA applies, did AHS disclose the Complainant's health information in compliance with section 58 of the HIA?**

[para 4] I subsequently obtained an unredacted copy of the Lethbridge Police Service report and provided it *in camera* to the Public Body so that it had sufficient information to answer the questions and respond to the complaint.

[para 5] The Public Body provided additional submissions and an affidavit sworn by the employee who made the complaint to the Lethbridge Police Service *in camera*. I determined that these submissions should be accepted *in camera* as they would identify

the name of the employee, which the Lethbridge Police Service had decided to redact from the record under section 17.

[para 6] When the head of a public body decides information must be severed under the FOIP Act, section 59(3) requires the Commissioner or her delegate to take every reasonable precaution to avoid disclosing that information. In order to maintain the confidentiality of the employee's identity and comply with section 59(3), I accepted submissions from the Public Body without sharing them with the Complainant. Section 69(3) of the FOIP Act authorizes this process, as it establishes that the parties to an inquiry are not entitled to have access to the submissions of another party or to comment on them.

II. ISSUES

Issue A: Was the disclosure of the Complainant's personal or health information done with the authorization of AHS? If it was not, did AHS take appropriate measures, under the FOIP Act or the HIA, as appropriate, to protect the Complainant's personal or health information from the risk of unauthorized disclosure?

Issue B: Does the record contain health information as defined in section 1(1)(k) of the HIA?

Issue C: If it is health information, and the disclosure was done under the authority of AHS, did AHS disclose the Applicant's health information in contravention of Part 5 (Division 1, ss. 31-45) of the HIA?

Issue D: Did AHS disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act, specifically, sections 40(1) and / or 40(4)?

Issue E: If the HIA applies, did AHS disclose the Complainant's health information in compliance with section 58 of the HIA?

III. DISCUSSION OF ISSUES

Issue A: Was the disclosure of the Complainant's personal or health information done with the authorization of AHS? If it was not, did AHS take appropriate measures, under the FOIP Act or the HIA, as appropriate, to protect the Complainant's personal or health information from the risk of unauthorized disclosure?

[para 7] The *Freedom of Information and Protection of Privacy Act* (the FOIP Act) governs the collection, use, and disclosure of personal information by public bodies, such as AHS. However, AHS is also a "custodian" within the terms of the *Health Information Act* (HIA). The HIA governs the collection, use, and disclosure of health information by custodians. As AHS is both public body and custodian, and the FOIP Act and the HIA

contain different standards regarding the collection, use, and disclosure of information, it is necessary to determine which Act applies.

[para 8] Section 4 of the FOIP Act establishes that the FOIP Act applies to all information in the custody or control of a public body, with the exception of certain types of records, which it enumerates. One such exception is subject 4(1)(u), which states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(u) health information as defined in the Health Information Act that is in the custody or under the control of a public body that is a custodian as defined in the Health Information Act.

[para 9] If information is health information, and it is in the custody or control of a public body that is a custodian, then the FOIP Act does not apply to the information, but the HIA does. AHS is a public body that is a custodian as defined in the HIA, within the terms of section 4(1)(u). As a result, if the information it has severed is health information, the HIA, rather than the FOIP Act, applies to the information.

[para 10] Section 1(1)(k) of the HIA defines the term “health information” for the purposes of the Act. It states:

1(1) In this Act,

(k) “health information” means one or both of the following:

(i) diagnostic, treatment and care information;

(ii) registration information [...]

[para 11] “Diagnostic, treatment and care information” is defined by section 1(1)(i) of the HIA. This provision states, in part:

1(1)(i) “diagnostic, treatment and care information” means information about any of the following:

(i) the physical and mental health of an individual;

(ii) a health service provided to an individual, including the following information respecting a health services provider who provides a health service to that individual [...]

(iii) the donation by an individual of a body part or bodily substance, including information derived from the testing or examination of a body part or bodily substance;

(iv) a drug as defined in the Pharmacy and Drug Act provided to an individual;

(v) a health care aid, device, product, equipment or other item provided to an individual pursuant to a prescription or other authorization;

(vi) the amount of any benefit paid or payable under the Alberta Health Care Insurance Act or any other amount paid or payable in respect of a health service provided to an individual,

and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record;

Section 1(n) of the FOIP Act defines “personal information” as “information about an identifiable individual”.

[para 12] The evidence before me establishes that an employee of AHS provided three binders of the Complainant’s correspondence written to AHS to the Lethbridge Police Service. The purpose of these disclosures of the Complainant’s personal information was to obtain an assessment as to whether the Complainant posed a threat to AHS employees and whether the Lethbridge Police Service could provide any advice to assist AHS to mitigate any risk it identified. The information discussed did not include information gathered in the course of providing medical services or information about the Complainant’s health or treatment.

[para 13] From AHS’s evidence, I am satisfied that the legislation that governs this complaint is the FOIP Act. I make this finding on the basis that the information disclosed to the Lethbridge Police Service is recorded information about the Complainant as an identifiable individual. I am also satisfied that this information is not “health information” within the terms of the HIA, as it is neither “diagnostic, treatment and care information” nor “registration information” within terms of that Act.

[para 14] I also find that the disclosure was authorized, rather than unauthorized, as the employee who disclosed the information had responsibilities in relation to both the information disclosed, and employee safety, which was the reason for which Complainant’s personal information was disclosed.

Issue B: Does the record contain health information as defined in section 1(1)(k) of the HIA?

[para 15] I have already found that the Complainant’s health information was not disclosed and that the FOIP Act governs the disclosure.

Issue C: If it is health information, and the disclosure was done under the authority of AHS, did AHS disclose the Applicant’s health information in contravention of Part 5 (Division 1, ss. 31-45) of the HIA?

[para 16] I have already found that the Complainant’s health information was not disclosed and that the FOIP Act governs the disclosure.

Issue D: Did AHS disclose the Complainant’s personal information in contravention of Part 2 of the FOIP Act, specifically, sections 40(1) and / or 40(4)?

[para 17] Section 40 states, in part:

40(1) A public body may disclose personal information only

[...]

(ee) if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize

(i) a risk of harm to the health or safety of a minor, or

(ii) an imminent danger to the health or safety of any person [...]

[...]

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 18] In Order F2012- 01, the adjudicator interpreted section 40(1)(ee). He stated at paragraph 29:

For section 40(1)(ee) of the Act to authorize the disclosure of personal information, the following three requirements must be met: (i) the head of a public body must have reasonable grounds to believe that (ii) there is an imminent danger to the health or safety of someone and that (iii) the disclosure will avert or minimize that danger. For clarity, the phrase “believes, on reasonable grounds,” qualifies both aspects of section 40(1)(ee) that follow. It is not only sufficient for the head of the public body to believe, on reasonable grounds, that the disclosure will avert or minimize an imminent danger, but it is also sufficient for the head to believe, on reasonable grounds, that there is an imminent danger to the health or safety of any person in the first place. In other words, there does not actually have to be an imminent danger – the head needs only to reasonably believe that one exists – although I will return to the meaning of “imminent danger” below.

[para 19] The adjudicator continued his analysis at paragraphs 37 – 38 of that order, stating:

Given the context, and in order to lend some practicality to the application of section 40(1)(ee), I agree with the Public Body that the reference to “danger” includes a risk to the health or safety of others. Further, it is not necessary for death, serious injury, physical harm or property damage to

be the potential result, as health and safety may be at stake in ways short of these outcomes. For instance, health and safety may be jeopardized by way of exposure to abusive or offensive language that causes distress or emotional disturbance in others.

As for what the word “imminent” means in the context of section 40(1)(ee), the danger or risk must, in my view, be anticipated to happen in the relatively near future, but the danger or risk does not have to be immediate or on the verge of transpiring. Although the Legislature chose quite strong language, the requirement for “imminent danger” is tempered by the section’s other reference to a belief “on reasonable grounds”. It would be virtually impossible for a public body to rely on the provision if it were necessary for there to be, as argued by the Complainant, an urgent situation of clear peril or a close to unavoidable disaster. To expect a public body to wait for such a situation to arise risks jeopardizing the health and safety of others, contrary to the very purpose of section 40(1)(ee). When balancing the privacy of an individual against the health or safety of others, it is appropriate to err on the side of protecting health and safety. Having said this, there remains a safeguard with respect to protecting privacy, in that a disclosure to avert or minimize an imminent danger must only be to the extent necessary, and done in a reasonable manner, in accordance with section 40(4).

[para 20] In the foregoing order, the Adjudicator determined that the public body was authorized by section 40(1)(ee) to disclose the complainant’s personal information to the local RCMP detachment as a safety precaution. Macklin J. found the Adjudicator’s analysis to be reasonable and denied judicial review of F2012-01 in an oral, unreported decision.

[para 21] I agree with the reasoning of the adjudicator in Order F2012-01 and will adopt it in this order. I turn now to the question of whether AHS has established that it disclosed the Complainant’s personal information under the authority of section 40(1)(ee).

[para 22] The employee who disclosed the Complainant’s personal information to the Lethbridge Police Service swore an affidavit documenting the reasons for providing the Complainant’s correspondence to the Lethbridge Police Service. As I accepted the affidavit *in camera*, I cannot reproduce it in this order. However, I am satisfied that the employee provided the Complainant’s correspondence to the Lethbridge Police Service for the purpose of averting a foreseeable risk of harm to the mental and physical health of employees. The view that the Complainant was a potential risk to health and safety was based on numerous verbal altercations involving the Complainant and employees, and the Complainant’s correspondence to employees, which could reasonably be viewed as threatening, even though the Complainant may not share this perception of events or his correspondence. To conclude, I find that AHS reasonably considered there to be a risk of imminent harm to the mental and physical health of its employees and the disclosure was made to avert or minimize that harm.

[para 23] I turn now to the question of whether the disclosure complies with the requirements of section 40(4). Cited above, section 40(4) limits the amount of personal information a public body may disclose for an authorized purpose to only that information necessary for meeting its purpose in a reasonable manner.

[para 24] In this case, given the passage of time, AHS has not been able to provide all the information that was provided to the Lethbridge Police Service. However, I am satisfied from the affidavit of the employee that only records considered necessary to enable the Lethbridge Police Service to assess the risk of harm were provided. While three binders of information might appear excessive at first glance, I understand that the volume of correspondence was one of the factors that the employee considered relevant to the risk of harm.

[para 25] To conclude, I find that the Public Body's disclosure was authorized by section 40(1)(ee) and the disclosure met the terms of section 40(4).

Issue E: If the HIA applies, did AHS disclose the Complainant's health information in compliance with section 58 of the HIA?

[para 26] I have already found that the Complainant's health information was not disclosed and that the FOIP Act governs the disclosure.

V. ORDER

[para 27] I make this Order under section 72 of the Act.

[para 28] I confirm that AHS's disclosure of the Complainant's personal information to the Lethbridge Police Service complied with the requirements of Part 2 of the FOIP Act.

Teresa Cunningham
Adjudicator