

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-002

July 6, 2000

ALBERTA MENTAL HEALTH BOARD

Review Number 1561

I. BACKGROUND

[para 1.] A member of the Applicant's family was apprehended under the ostensible authority of the *Mental Health Act*, S.A. 1988, c. M-13.1, and made an involuntary patient at Alberta Hospital Edmonton. The Applicant subsequently discovered that information about the Applicant's previous medical history was on the family member's file at Alberta Hospital Edmonton.

[para 2.] On February 23, 1999, the Applicant made a complaint to my Office, which I have summarized as follows:

- The Applicant's personal medical file was obtained and used by staff at Alberta Hospital Edmonton.
- The Applicant is not and has never been a patient at Alberta Hospital Edmonton or of any of the doctors at Alberta Hospital Edmonton.
- Statements made by certain named individuals made it apparent that someone at Alberta Hospital Edmonton had specific and detailed knowledge of the Applicant's medical history.
- The Applicant has never signed any release form for the Applicant's medical history, or any release form at any time, nor has the Applicant ever discussed the Applicant's medical history with any member of the staff at Alberta Hospital Edmonton.

[para 3.] Under section 51(2)(e) of the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”), I authorized an investigation into the matter.

[para 4.] When the investigation report was completed, the Applicant did not agree with the recommendations. On November 29, 1999, the Applicant requested a review under section 62 of the FOIP Act.

[para 5.] For the purposes of the FOIP Act, the issue was whether the Alberta Mental Health Board (the “Public Body”) violated Part 2 of the FOIP Act in relation to the Applicant’s information. The Applicant specifically alleged that the Public Body violated sections 32 (collection), 33 (manner of collection), 34 (accuracy), 36 (protection), 37 (use) and 38 (disclosure).

[para 6.] The Public Body is a provincial health board under section 17(1)(a) of the *Regional Health Authorities Act*, S.A. 1994, c. R-9.07, and section 2(a) of the *Alberta Mental Health Board Regulation*, Alta. Reg. 286/94. Under section 3(c) of that regulation, the Public Body has been given the responsibility for delivering or coordinating the delivery of mental health services in Alberta.

[para 7.] The matter was set down for a written inquiry. I received initial written submissions and rebuttal submissions from both the Public Body and the Applicant.

[para 8.] The Public Body’s initial written submission raised the issue of whether I had jurisdiction to conduct a review. The Public Body’s view was that the information fell within section 17 of the *Mental Health Act*, which prevails despite the FOIP Act, as provided by section 5(2) of the FOIP Act and section 15(2)(m) of the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the “FOIP Regulation”).

[para 9.] My Office exchanged the parties’ submissions, except for the information that the Public Body submitted *in camera* for the inquiry.

[para 10.] The Applicant wanted access to the information submitted *in camera* by the Public Body. I determined that the Applicant was not entitled to have access to or to comment on that information, as provided by section 66(3) of the FOIP Act.

[para 11.] I held the inquiry on February 16, 2000 and concluded it on March 2, 2000, at which time I made my decision. On April 11, 2000, the Applicant requested that my Office conduct an investigation under

section 86 of the FOIP Act in relation to statements the Public Body made in the investigation under section 51(2)(e) of the FOIP Act and in the Public Body's submission for the inquiry.

[para 12.] I then considered the matter of whether my Office should proceed with an investigation under section 86 and whether I should hold this Order in abeyance, pending the investigation. I subsequently decided not to proceed with an investigation and informed the Applicant accordingly. My reasons are as follows.

[para 13.] The Applicant's rebuttal submission had raised the issue of section 86, and had set out in detail what the Applicant believed were the discrepancies in the Public Body's various statements. Consequently, the matter of those alleged discrepancies was already before me in the inquiry.

[para 14.] In an inquiry, I test the evidence and decide issues of credibility. To the extent that any of the Public Body's statements were relevant to my decision, I determined the accuracy of those statements as part of the inquiry. For example, I looked for and found corroborating evidence in other documents that were before the inquiry. Consequently, it is not necessary to conduct a separate investigation into those statements.

[para 15.] In any event, most of the Public Body's statements to me were not relevant to my decision because my decision in this case turned primarily on the documentary evidence and an interpretation of the law.

[para 16.] This Order proceeds on the basis of the FOIP Act as it existed before the amendments to the FOIP Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 17.] As this inquiry concerns a complaint under Part 2 of the FOIP Act, the records themselves are not directly at issue.

III. ISSUES

[para 18.] The preliminary issue in this inquiry is:

A. Is section 5(2) of the FOIP Act engaged in this case, such that I do not have jurisdiction over the Applicant's complaint that the Public

Body violated Part 2 of the FOIP Act in relation to the Applicant's information?

[para 19.] If I determine that section 5(2) is not engaged and that I do have jurisdiction, the issue to be decided is:

B. Did the Public Body violate Part 2 of the FOIP Act in relation to the Applicant's information?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Is section 5(2) of the FOIP Act engaged in this case, such that I do not have jurisdiction over the Applicant's complaint that the Public Body violated Part 2 of the FOIP Act in relation to the Applicant's information?

1. General

[para 20.] Section 5(2) of the FOIP Act reads:

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[para 21.] Section 5(2) delineates the FOIP Act's application. Section 5(2) permits another "enactment" (a statute or regulation), or a provision of the enactment, to prevail despite the FOIP Act. Section 5(2) is jurisdictional because, if another enactment or a provision of it "prevails" despite the FOIP Act, I have no jurisdiction to apply the FOIP Act.

[para 22.] Section 5(2) requires that I first decide whether the information falls within another enactment or a provision of it that expressly provides that the enactment or provision of it prevails despite the FOIP Act. If so, I must then decide whether there is an inconsistency or conflict between a provision of the FOIP Act and the other enactment or a provision of it. If there is an inconsistency or conflict, that enactment or a provision of it prevails despite the FOIP Act.

2. Does the information fall within another enactment or a provision of it that expressly provides that the enactment or a provision of it prevails despite the FOIP Act?

a. Of what information does the Applicant complain?

[para 23.] I have reviewed two records that contain information the Applicant says is on the family member's file at Alberta Hospital Edmonton.

[para 24.] The first record is a document entitled "Mental Health Assessment", which is an initial medical assessment of the Applicant, completed by a psychiatry resident on November 23, 1994. That record is on paper having the headings "Alberta Health", and "Mental Health Division, Edmonton Region".

[para 25.] The second record is entitled "Progress Notes", which are the notes of the psychiatrist who was treating the Applicant, dated January 13, 1995. That record is on paper having the same headings as the Mental Health Assessment record, except that the title "Mental Health Assessment" has been stroked out and the title "Progress Notes" substituted.

[para 26.] The two foregoing records contain information about the Applicant's health and health care history and medical opinions about the Applicant. I have determined that that information falls at least within section 1(1)(n)(vi) and section 1(1)(n)(viii) of the FOIP Act, respectively, and is the Applicant's personal information.

[para 27.] The Public Body also provided me with two records that were on the Applicant's family member's file. The two records set out below contained the information of which the Applicant complains:

(i) a "Community Response Assessment progress note" having the logo and title of Alberta Hospital Edmonton, dated November 17, 1998, written by a Community Response Team member; and

(ii) a "Clinical Progress Notes Continuation Sheet" having the logo and title of Alberta Hospital Edmonton, written by a physician who accompanied the Community Response Team when the Applicant's family member was apprehended, indicating an admission date of November 19, 1998.

[para 28.] The Clinical Progress Notes Continuation Sheet refers generally to information contained in the Mental Health Assessment. The Community Response Assessment progress note says specifically

that the Community Response Team member was able to access an old file on the Applicant. The Community Response Team member goes on to summarize some of the information contained in the Mental Health Assessment and the Progress Notes.

[para 29.] The Public Body also said: “Reports from [the Applicant’s] previous file and the Community Response Team report were included in [the Applicant’s family member’s] inpatient file.”

[para 30.] However, the Public Body argues that the information contained in the Mental Health Assessment and the Progress Notes (the “Applicant’s information”) falls within section 17 of the *Mental Health Act*, which prevails despite the FOIP Act, as provided by section 5(2) of the FOIP Act and section 15(2)(m) of the FOIP Regulation.

[para 31.] Section 15(2)(m) of the FOIP Regulation reads:

15(2) The following Acts and the regulations made under them prevail despite the Freedom of Information and Protection of Privacy Act:

...
(m) Mental Health Act;

...

[para 32.] Does the Applicant’s information fall within section 17 of the *Mental Health Act*, as the Public Body claims?

[para 33.] The relevant parts of section 17 of the *Mental Health Act* read:

17(2) The board of a diagnostic and treatment centre shall cause a record to be kept of the diagnostic and treatment services provided to every person in the diagnostic and treatment centre.

(3) For the purpose of assessing the standards of care furnished to persons in a diagnostic and treatment centre or improving mental health care facilities or procedures or enforcing the Crown’s right of recovery under Part 5 of the Hospitals Act or for any other purpose considered by the Minister to be in the public interest, the Minister or any person authorized in writing by the Minister may require that all or any of the following be sent to the Minister or any person designated by the Minister:

(a) medical and other records in a centre;

(b) extracts from and copies of those records:

(c) diagnoses, charts or information available in respect of any person receiving diagnostic and treatment services in a centre.

(4) Information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them shall be treated as private and confidential information in respect of the person receiving diagnostic and treatment services in the centre and shall be used solely for the purposes described in subsection (3), and the information shall not be published, released or disclosed in any manner that would be detrimental to the personal interest, reputation or privacy of that person or that person's attending physician or any other person providing diagnostic or treatment services to that person.

[para 34.] Section 17(2) of the *Mental Health Act* is a requirement for a “board”, as defined in section 17(1)(a), to keep records of diagnostic and treatment services. In Order 99-034, I accepted that a “record of diagnostic and treatment services” under the *Hospitals Act*, R.S.A. 1980, c. H-11, would include information about diagnoses, reports of consultations, and orders for treatment. I adopt that interpretation for the purposes of the *Mental Health Act*.

[para 35.] I will discuss section 17(3) later in this Order. It is not relevant here.

[para 36.] Section 17(4) is the confidentiality provision. Section 17(4) prohibits access to “information obtained from records maintained in a diagnostic and treatment centre”, in respect of a person receiving diagnostic and treatment services in the centre.

[para 37.] I regard the words “information obtained from records maintained in a diagnostic and treatment centre”, as set out in section 17(4), to be broader than the words “record...of the diagnostic and treatment services”, as set out in section 17(2). A “record of the diagnostic and treatment services” is part of, but does not comprise the whole of, “information obtained from records maintained in a diagnostic and treatment centre”. For a similar interpretation of equivalent wording

contained in the *Hospitals Act*, see *Kiedynk v. Doe 1* (1991), 79 Alta. L.R. (2d) 72 (Alta. Q.B.), cited in Order 99-034.

[para 38.] Since the confidentiality provision of section 17(4) is relevant in this case, I must determine whether the Applicant's information is "information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them...in respect of the person receiving diagnostic and treatment services in the centre".

b. Were the records maintained in a "diagnostic and treatment centre"?

[para 39.] The Public Body says that the Mental Health Assessment and the Progress Notes are records that are contained in files located in three places: the Admitting and Clinical Records department of Alberta Hospital Edmonton; the Community Living Program ("CLiP") medical records department location (which I take to be and will refer to as the "CLiP clinic", based on Appendix B of the Public Body's submission); and a Mental Health clinic.

[para 40.] The Public Body provided the following explanation about how the Mental Health Assessment and the Progress Notes, as well as other information about the Applicant, came to be maintained in those three locations.

[para 41.] The Public Body says that the Applicant initially saw a psychiatry resident and later the treating psychiatrist at a Mental Health clinic. On the Applicant's last consultation, the Applicant saw the treating psychiatrist at the CLiP clinic. The treating psychiatrist provided consultation services to both the Mental Health clinic and CLiP.

[para 42.] The Public Body explained that CLiP is an outpatient program of Alberta Hospital Edmonton's Community Psychiatry Program. According to the Public Body, the original CLiP file was kept at the CLiP medical records department location. Copies of the CLiP file were transferred to Alberta Hospital Edmonton for storage according to established practice. The Public Body says that inpatient and outpatient records of Alberta Hospital Edmonton, including CLiP records, are managed by Alberta Hospital Edmonton's Admitting and Clinical Records department.

[para 43.] The Public Body further says that, to provide continuity of service, the Mental Health clinic and the CLiP clinic shared the Mental Health Assessment and the Progress Notes.

[para 44.] Moreover, the Public Body says that, in December 1994, the treating psychiatrist referred the Applicant to Alberta Hospital Edmonton for testing. The Applicant says he went for a CAT scan. A file was opened for this testing referral. A note from the psychiatrist outlining the Applicant's involvement with the Mental Health clinic and CLiP was also entered into the file at Alberta Hospital Edmonton.

[para 45.] Are any of Alberta Hospital Edmonton, the CLiP clinic or the Mental Health clinic a "diagnostic and treatment centre"?

[para 46.] Section 17(1)(b) of the *Mental Health Act* defines "diagnostic and treatment centre" as follows:

17(1) In this section,

...
(b) "diagnostic and treatment centre" or "centre" means a place established by the Minister pursuant to section 49(a) or (b) and includes a facility that is not an approved hospital under the *Hospitals Act*, a hospital under the jurisdiction of a provincial health board under the *Regional Health Authorities Act*;
...

[para 47.] The definition of "diagnostic and treatment centre" includes a "facility". "Facility" is defined in section 1(c) of the *Mental Health Act* to mean a place or part of a place designated in the regulations as a facility.

[para 48.] Facilities are "designated" under section 2(1) of the *Mental Health Regulation*, Alta. Reg. 309/89. Section 2(1)(a) of the *Mental Health Regulation* designates Alberta Hospital Edmonton as a "facility".

[para 49.] Therefore, as Alberta Hospital Edmonton is a "facility" designated in the *Mental Health Regulation*, it is also a "diagnostic and treatment centre" for the purposes of section 17(1)(b) of the *Mental Health Act*. Since the Mental Health Assessment and the Progress Notes were maintained in the Admitting and Clinical Records department of Alberta Hospital Edmonton, I find that those records were maintained in a diagnostic and treatment centre.

[para 50.] The CLiP clinic and the Mental Health clinic are not designated as "facilities" in section 2(1) of the *Mental Health Regulation*.

[para 51.] CLiP is nevertheless an outpatient program of Alberta Hospital Edmonton's Community Psychiatry Program. Consequently, it could be argued that the CLiP clinic is part of Alberta Hospital Edmonton.

[para 52.] However, in case I am wrong in this interpretation because the CLiP clinic itself has not specifically been designated as a "facility", I have also considered whether the CLiP clinic, as well as the Mental Health clinic, could be a separate diagnostic and treatment centre for the purposes of section 17(1)(b) of the *Mental Health Act*.

[para 53.] Section 17(1)(b) says that a diagnostic and treatment centre means a place established by the Minister pursuant to section 49(a) or (b) of the *Mental Health Act*.

[para 54.] Section 49(a) and (b) of the *Mental Health Act* read:

49 The Minister may do anything he considers advisable for preventing circumstances that may lead to mental disorder and distress and for promoting and restoring mental health and well-being and, without limiting the generality of the foregoing, may

(a) establish and operate places for the observation, examination, care, treatment, control and detention of persons suffering from mental disorder,

(b) make available diagnostic and treatment centres to provide mental health services, including in-patient services, clinical services in the community, community residential services, rehabilitation services, consultation, public education, research and prevention, in various locations in Alberta,
...

[para 55.] Section 4(1) of the *Mental Health Regulation* establishes certain kinds of diagnostic and treatment centres under section 49(b) of the *Mental Health Act*. The CLiP clinic and the Mental Health clinic are not among the diagnostic and treatment centres established under section 4(1) of the *Mental Health Regulation* and section 49(b) of the *Mental Health Act*.

[para 56.] The *Mental Health Regulation* does not say whether any diagnostic and treatment centres have been established under section 49(a) of the *Mental Health Act*. However, the similarity of wording between section 2(1) of the *Mental Health Regulation* (“The following places are designated for the care, observation, examination, assessment, treatment, detention and control of persons suffering from mental disorder...”) and section 49(a) of the *Mental Health Act* (“establish and operate places for the observation, examination, care, treatment, control and detention of persons suffering from mental disorder”) suggests that facilities designated under section 2(1) of the *Mental Health Regulation* may be included in the category of diagnostic and treatment centres established under section 49(a).

[para 57.] Nevertheless, I do not believe that section 49(a) of the *Mental Health Act* encompasses diagnostic and treatment centres that are designated facilities, for the following reasons.

[para 58.] First, section 2(1) of the *Mental Health Regulation* does not specifically say that “designated” facilities are diagnostic and treatment centres “established” under section 49(a) of the *Mental Health Act*. There appears to be some significance to the different words “designated” and “established”. I note that, with one exception, designated facilities appear to be hospitals, including several “approved hospitals” under the *Hospitals Act*.

[para 59.] Second, section 17(1)(b) of the *Mental Health Act* sets out two categories of diagnostic and treatment centres established under either section 49(a) or (b), then uses the words “and includes a facility”. The words “and includes” indicate that a facility is a diagnostic and treatment centre, but that a facility is not a diagnostic and treatment centre established under section 49(a) or (b). That interpretation is supported by section 53(1)(d) of the *Mental Health Act*, which reads:

53(1) The Lieutenant Governor in Council may make regulations

...

(d) respecting charges and expenses and liability for charges and expenses with respect to the conveyance, observation, examination, admission, treatment, care, accommodation and maintenance of a person in a facility or in a place referred to in section 49(a) or (b) [emphasis added].

[para 60.] Finally, if section 49(a) of the *Mental Health Act* were intended to include designated facilities, there would be no need to mention facilities separately in section 17(1)(b). Furthermore, section 49(a) could be worded to establish and operate “places”, including “facilities”, rather than its current wording to establish and operate “places”.

[para 61.] Therefore, I find that section 49(a) of the *Mental Health Act* establishes diagnostic and treatment centres other than designated facilities.

[para 62.] In summary, I believe that the legislation provides for three kinds of diagnostic and treatment centres: (i) facilities, (ii) diagnostic and treatment centres established under section 49(a) of the *Mental Health Act*, and (iii) diagnostic and treatment centres established under section 49(b) of the *Mental Health Act*.

[para 63.] In my view, section 49(a) of the *Mental Health Act* is a general provision intended to encompass all those places (other than designated facilities and places under section 49(b)) established by the Minister at which a person may obtain mental health services, as set out in the introductory part of section 49.

[para 64.] The Applicant was examined and diagnosed at the CLiP clinic and at the Mental Health clinic, which are places at which a person may obtain mental health services. Consequently, I find that the CLiP clinic and the Mental Health clinic are “diagnostic and treatment centres” established by section 49(a) of the *Mental Health Act*.

[para 65.] As the Mental Health Assessment and the Progress Notes were maintained at the CLiP clinic and at the Mental Health clinic, I find that those two records were maintained in a diagnostic and treatment centre.

c. Was the information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them?

[para 66.] CLiP originally obtained the Mental Health Assessment and the Progress Notes from the Mental Health clinic. The Public Body says that those records were shared between the Mental Health clinic and the CLiP clinic, to ensure continuity of service to the Applicant during the time the Applicant was receiving treatment. Consequently, it can be said that information was obtained from records maintained in the Mental Health clinic in the first instance.

[para 67.] After the Applicant's file was closed in June 1995, the Public Body says that the Mental Health clinic did not release any record or information about the Applicant to anyone external to the Public Body. The documentary evidence at Tab G of the Public Body's submission supports the Public Body's statement.

[para 68.] The Community Response Assessment progress note says specifically that the Community Response Team member was able to access an old file on the Applicant. In the Community Response Assessment progress note, the Community Response Team member summarizes some of the information contained in the Mental Health Assessment and the Progress Notes.

[para 69.] According to the Public Body, the Community Response Team is a service of Alberta Hospital Edmonton's Community Psychiatry Program, and operates under CLiP.

[para 70.] The Public Body's submission says that the Community Response Team member requested and obtained a portion of the Applicant's records. "Medical records", which I take to be the CLiP medical records department location (the CLiP clinic) released the Mental Health Assessment and the Progress Notes.

[para 71.] The documentary evidence points to the Community Response Team member having obtained information from records maintained in the CLiP medical records department location (the CLiP clinic).

[para 72.] Therefore, I also find specifically that the Community Response Team member obtained information from records maintained in the CLiP clinic, which is a diagnostic and treatment centre. Alternatively, that person obtained information from persons having access to records maintained in the CLiP clinic.

[para 73.] If CLiP is part of Alberta Hospital Edmonton, I would find that the Community Response Team member obtained information from records maintained in Alberta Hospital Edmonton, on the basis that CLiP is a program under the auspices of Alberta Hospital Edmonton. Alternatively, that person obtained information from persons having access to records maintained in Alberta Hospital Edmonton.

d. Was the Applicant receiving diagnostic and treatment services in the centre?

[para 74.] The Public Body and the Applicant both state that the Applicant received some diagnostic services at Alberta Hospital Edmonton, the CLiP clinic and the Mental Health clinic.

[para 75.] The documentary evidence is that the Applicant received diagnostic services at the Mental Health clinic and the CLiP clinic. Both the Public Body and the Applicant state that the Applicant saw the treating psychiatrist at the Mental Health clinic and once at the CLiP clinic.

[para 76.] In particular, the documentary evidence at Tab E of the Public Body's submission supports the finding that the Applicant received diagnostic services at the CLiP clinic. There is a "Progress Note" indicating that the Applicant saw the treating psychiatrist at the CLiP clinic on March 30, 1995. There is a further "Outpatient Contact/Progress Note" of the treating psychiatrist, dated June 14, 1995, and appearing on paper having the Alberta Hospital Edmonton logo. The treating psychiatrist checked the "clinic" box in the "contact location" area of that form.

[para 77.] The Applicant argues that a person must be or have been a patient at Alberta Hospital Edmonton for the *Mental Health Act* to apply to the information. The Applicant says that the Applicant is not now and has never been a patient at Alberta Hospital Edmonton. Therefore, in the Applicant's view, the Applicant's information does not fall within the *Mental Health Act*.

[para 78.] By never having been a "patient" at Alberta Hospital Edmonton, I take the Applicant to mean that the Applicant has never been committed voluntarily or involuntarily to Alberta Hospital Edmonton.

[para 79.] To find that a person was receiving diagnostic and treatment services in a diagnostic and treatment centre, for the purposes of section 17(4) of the *Mental Health Act*, I do not believe that the person has to have been a "patient" at Alberta Hospital Edmonton.

[para 80.] Section 1(i) of the *Mental Health Act* defines "patient" to mean "a person who is admitted to a facility [emphasis added] as an in-patient, or as an out-patient for diagnosis [sic] or treatment services, or both". "Formal patient" is defined in section 1(d) to mean "a patient detained in a facility [emphasis added] pursuant to 2 admission certificates or 2 renewal certificates". These two defined words appear to

be used primarily in relation to “facilities”. I have said that Alberta Hospital Edmonton is a facility.

[para 81.] I agree that the Applicant has never been a “formal patient” of Alberta Hospital Edmonton. However, the Applicant would have been a “patient” of Alberta Hospital Edmonton by reason of receiving diagnosis [sic] services (a CAT scan) as an out-patient. It could also be said that the Applicant was a patient of Alberta Hospital Edmonton when receiving out-patient diagnostic services at the CLiP clinic.

[para 82.] On the other hand, I must also consider whether the Applicant was “a person receiving diagnostic and treatment services” in the diagnostic and treatment centre. That wording, which is not defined in the *Mental Health Act*, is used only in the context of section 17 and section 49(a) and (b). I have said that section 49(a) and (b) establish “diagnostic and treatment centres”, other than “facilities”.

[para 83.] Given the definition of “patient” and “formal patient”, I have decided that “a person receiving diagnostic and treatment services” in the diagnostic and treatment centre must be given a broader interpretation than “patient” or “formal patient”.

[para 84.] Therefore, for section 17 to apply, the Applicant does not have to have been a “patient” (that is, committed voluntarily or involuntarily) at Alberta Hospital Edmonton. The Applicant need only have been a person receiving diagnostic and treatment services in a diagnostic and treatment centre, for section 17 to apply.

[para 85.] The Applicant also received diagnostic services at the CLiP clinic and the Mental Health clinic, which I have said are diagnostic and treatment centres. Therefore, the Applicant was a person receiving diagnostic and treatment services in a diagnostic and treatment centre.

[para 86.] If CLiP is part of Alberta Hospital Edmonton, then I would find that the Applicant was receiving diagnostic services in Alberta Hospital Edmonton, on the basis that “in the centre” (that is, Alberta Hospital Edmonton) in section 17(4) of the *Mental Health Act* could be interpreted as referring to any program under the auspices of the centre (that is, CLiP). The definition of “patient”, which also refers to out-patients who receive diagnosis [sic] or treatment services, would support this interpretation.

e. Conclusion

[para 87.] The Applicant’s information was information obtained from records maintained in a diagnostic and treatment centre or from persons

having access to them, in respect of the Applicant's receiving diagnostic and treatment services in the centre. As a specific example, the Community Response Team member obtained information from records maintained in the CLiP clinic, or from persons having access to them, in respect of the Applicant's receiving diagnostic services in the CLiP clinic.

[para 88.] Therefore, the Applicant's information falls within section 17(4) of the *Mental Health Act*. Section 15(2)(m) of the FOIP Regulation specifically provides that the *Mental Health Act* prevails despite the FOIP Act.

[para 89.] Consequently, I must now decide whether there is an inconsistency or conflict between a provision of the FOIP Act and the *Mental Health Act* or a provision of it. If there is an inconsistency or conflict, the *Mental Health Act* would prevail despite the FOIP Act, and I would have no jurisdiction to apply the FOIP Act to the Applicant's complaint.

3. Is there an inconsistency or conflict between a provision of the FOIP Act and the *Mental Health Act* or a provision of it?

a. General

[para 90.] The Applicant complains that the Public Body collected, used and disclosed the Applicant's information in violation of Part 2 of the FOIP Act. Therefore, it is necessary to decide whether the following provisions of the FOIP Act are inconsistent or in conflict with the *Mental Health Act*: section 32 (collection), section 37 (use) and section 38 (disclosure).

[para 91.] In Order 99-034, I said that the terms "inconsistent" or "in conflict with" refer to a situation where two legislative enactments cannot stand together, that is, compliance with one law involves breach of the other: see *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4th) 585 (N.B. C.A.).

b. Collection

[para 92.] The Applicant says that the Applicant's information was collected in violation of the collection provisions contained in section 32 of the FOIP Act.

[para 93.] The Public Body says that section 17(2) of the *Mental Health Act* is its authority to collect the Applicant's information.

[para 94.] I disagree with the Public Body. Section 17(2) is a requirement to keep records, and nothing more. It is not authorization to collect personal information.

[para 95.] However, there is a larger issue before me. The Mental Health clinic, the CLiP clinic and Alberta Hospital Edmonton came to have the Applicant's information before October 1, 1995, when the FOIP Act came into force in Alberta. Furthermore, the Alberta Mental Health Board did not become a public body for the purposes of the FOIP Act until October 1, 1998. As Part 2 of the FOIP Act, which includes collection, did not come into force for the Public Body until October 1, 1998, I have no jurisdiction to deal with a collection of the Applicant's information that occurred before October 1, 1998.

[para 96.] However, the Applicant's argument appears to be that the November 1998 accessing of the Applicant's information and placing that information on the family member's file at Alberta Hospital Edmonton is a "collection" for the purposes of section 32 of the FOIP Act.

[para 97.] I do not agree with the Applicant's contention.

[para 98.] I have found that the Community Response Team member accessed the Applicant's information in November 1998. The Public Body says that that person is an employee of the Public Body.

[para 99.] "Collection" and "access" are not synonymous. "Collection" must refer to a public body's having obtained the personal information in the first instance. "Access" in this context must refer to the internal retrieval of that information.

[para 100.] Each "access" of personal information within a public body is not a new "collection" for the purposes of section 32 of the FOIP Act. Nor is there a new collection within programs of a public body that share the personal information, as here.

[para 101.] Therefore, there is no "collection" of the Applicant's information in this case.

[para 102.] Having decided that there is no "collection" of the Applicant's information, I do not find it necessary to consider whether there is an inconsistency or conflict between a provision of the FOIP Act and the *Mental Health Act* as to collection.

c. Use

[para 103.] The Applicant says that the Applicant's information was used in violation of the provisions for which information may be used, contained in section 37 of the FOIP Act.

[para 104.] Section 17(4) of the *Mental Health Act* says that the information obtained from records maintained in a diagnostic and treatment centre "shall be used solely [emphasis added] for the purposes described in subsection (3)". Section 17(3) then sets out the only uses to which the information may be put.

[para 105.] In my view, section 17(3) contains its own complete scheme for use. Consequently, section 37 of the FOIP Act is inconsistent or in conflict with section 17(3) of the *Mental Health Act* because section 37 specifies other uses to which the information may be put.

[para 106.] Therefore, section 17(3) of the *Mental Health Act* prevails over section 37 of the FOIP Act.

d. Disclosure

[para 107.] The Applicant says that the Applicant's information was disclosed in violation of the provisions under which personal information may be disclosed, contained in section 38 of the FOIP Act.

[para 108.] Section 17(4) of the *Mental Health Act* is a general prohibition against publishing, releasing, or disclosing in any manner information obtained from records maintained in a diagnostic and treatment centre, in respect of the person receiving diagnostic and treatment services in the centre.

[para 109.] In *Lindsay v. D.M.*, [1981] 3 W.W.R. 703 (Alta. C.A.), the Court of Appeal concluded that the purpose of a similar provision in the *Mental Health Act* as it existed then was to protect the privacy of the patient.

[para 110.] The general prohibition in section 17(4) is qualified. Disclosure is prohibited only if it is detrimental to the personal interest, reputation or privacy of that person or that person's attending physician or any other person providing diagnostic or treatment services to that person. In other words, disclosure may occur if it would not be detrimental to the personal interests, reputation, or privacy of those persons listed.

[para 111.] Sections 17(5.1) to (9) sets out some exceptions to disclosure. However, I believe that section 17(4) and sections 17(5.1) to (9) create their own complete scheme for disclosure.

[para 112.] Consequently, section 38 of the FOIP Act is inconsistent or in conflict with section 17(4) of the *Mental Health Act* because section 38 specifies other ways in which personal information may be disclosed. Given the complete scheme for disclosure under the *Mental Health Act*, the fact that section 38 may contain some similar disclosure provisions as do sections 17(5.1) to (9) is not sufficient to find that there is no inconsistency or conflict. The same reasoning applies to any provisions contained in section 38 for which section 17 is silent.

[para 113.] Therefore, section 17(4) of the *Mental Health Act* prevails over section 38 of the FOIP Act.

[para 114.] I note with interest that the Alberta Court of Queen's Bench has said that, where information falls within the *Mental Health Act*, an internal disclosure of such information within a public body is not a disclosure that would contravene section 17: see *Re Aldag* (July 23, 1991), Doc. No. 9103-07349 (Alta. Q.B.).

4. Conclusion under section 5(2)

[para 115.] The Applicant's information falls within section 17(4) of the *Mental Health Act*. The *Mental Health Act* is listed in section 15(2)(m) of the FOIP Regulation as prevailing despite the FOIP Act. The use and disclosure provisions contained in Part 2 of the FOIP Act are in conflict with the use and disclosure provisions contained in section 17 of the *Mental Health Act*. In such a case, section 15(2)(m) of the FOIP Regulation says that the *Mental Health Act* prevails despite the FOIP Act.

[para 116.] Therefore, section 17 of the *Mental Health Act* prevails despite Part 2 of the FOIP Act as to use and disclosure of the Applicant's information. Consequently, section 5(2) of the FOIP Act is engaged, and I do not have jurisdiction over the Applicant's complaint as to use and disclosure of the Applicant's information under Part 2 of the FOIP Act.

[para 117.] As I have determined that there is no collection of the Applicant's information in this case, I do not find it necessary to decide whether the *Mental Health Act* prevails over the FOIP Act as to collection of the Applicant's information.

5. Amendments to the *Mental Health Act*

[para 118.] The *Health Information Act*, S.A. 1999, c. H-4.8, was passed in December 1999, but is not yet in force as of the date of this Order. Section 119 of that Act extensively amends section 17 of the *Mental Health Act*.

[para 119.] For example, section 17(4) of the *Mental Health Act* is repealed. The following subsection is added:

17(1.1) Except as permitted or required under this Act, the Minister, a person authorized by the Minister, a board, an employee of a board or a physician may disclose health information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them only in accordance with the Health Information Act.

[para 120.] I mention this amendment because, when it comes into force, it will likely change the interpretation I have given to section 17 of the *Mental Health Act* in this Order.

ISSUE B: Did the Public Body violate Part 2 of the FOIP Act in relation to the Applicant's information?

[para 121.] As I have determined that I have no jurisdiction over the Applicant's complaint as to use and disclosure of the Applicant's information, I have no jurisdiction to decide whether the Public Body violated Part 2 of the FOIP Act as to use and disclosure of the Applicant's information.

[para 122.] As I have determined that there is no collection of the Applicant's information in this case, I do not find it necessary to decide whether the Public Body violated Part 2 of the FOIP Act as to the collection of the Applicant's information.

[para 123.] Having made these findings, I do not find it necessary to consider section 33 (manner of collection), section 34 (accuracy) or section 36 (protection) of the FOIP Act.

V. ORDER

[para 124.] I make the following Order under section 68 of the FOIP Act.

Issue A: Jurisdiction over the Applicant's complaint

[para 125.] The Applicant's information falls within section 17(4) of the *Mental Health Act*. Section 17 of the *Mental Health Act* prevails over Part 2 of the FOIP Act as to use and disclosure of the Applicant's information. Consequently, section 5(2) of the FOIP Act is engaged, and I do not have jurisdiction over the Applicant's complaint as to use and disclosure of the Applicant's information under Part 2 of the FOIP Act.

[para 126.] As I have determined that there is no collection of the Applicant's information in this case, I do not find it necessary to decide whether the *Mental Health Act* prevails over the FOIP Act as to collection of the Applicant's information.

Issue B: Violation of Part 2 of the FOIP Act

[para 127.] As I have determined that I have no jurisdiction over the Applicant's complaint as to use and disclosure of the Applicant's information, I have no jurisdiction to decide whether the Public Body violated Part 2 of the FOIP Act as to use and disclosure of the Applicant's information.

[para 128.] As I have determined that there is no collection of the Applicant's information in this case, I do not find it necessary to decide whether the Public Body violated Part 2 of the FOIP Act as to the collection of the Applicant's information.

[para 129.] Having made these findings, I do not find it necessary to consider section 33 (manner of collection), section 34 (accuracy) or section 36 (protection) of the FOIP Act.

Robert C. Clark
Information and Privacy Commissioner