

# ALBERTA

## INFORMATION AND PRIVACY COMMISSIONER

### ORDER 2001-012

March 16, 2001

#### ALBERTA MENTAL HEALTH BOARD

Review Number 1924

**Office URL:** <http://www.oipc.ab.ca>

**Summary:** The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the Alberta Mental Health Board (the “Public Body”) for access to his patient records created during his two brief admissions as an involuntary patient at Alberta Hospital Edmonton. The Public Body refused access. The Assistant Information and Privacy Commissioner found that the *Mental Health Act* applied to those records, and not the FOIP Act. Consequently, the Assistant Commissioner found that he had no jurisdiction over the records. The Applicant could not get access to the records under the FOIP Act.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 5, 5(2), 6(1), 6(2), 17; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, ss. 15(2)(m) (section number before amended by Alta. Reg. 216/99), 15(2)(f) (section number after amended by Alta. Reg. 216/99); *Health Information Act*, S.A. 1999, c. H-4.8 (not yet in force); *Mental Health Act*, S.A. 1988, c. M-13.1, ss. 1(c), 1(d), 17, 17(1)(b), 17(4), 17(6), 17(6)(a), 17(10), 17(11); *Mental Health Regulation*, Alta. Reg. 309/89, ss. 2(1), 2(1)(a),

**Authorities Cited: AB:** Orders 99-034, 2000-002.

**Cases Cited:** *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4<sup>th</sup>) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4<sup>th</sup>) 585 (N.B. C.A.).

## I. BACKGROUND

[para 1.] For brief periods in both 1995 and 1997, the Applicant was involuntary admitted to Alberta Hospital Edmonton under the authority of the *Mental Health Act*, S.A. 1988, c. M-13.1. On April 14, 2000, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the Provincial Mental Health Advisory Board, now the Alberta Mental Health Board (the “Public Body”) for “complete, total & absolute uninhibited access to my complete & total patient health records”.

[para 2.] The Public Body provided access to five pages of records, but refused access to all other records, under the combined effect of section 5 of the FOIP Act, section 15(2)(m) of the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the “FOIP Regulation”), and section 17(4) of the *Mental Health Act*.

[para 3.] On June 9, 2000, the Applicant requested a review of the Public Body’s decision under the FOIP Act. Mediation was authorized but was not successful. The matter was set down for a written inquiry. The Public Body and the Applicant provided written submissions.

[para 4.] The Office of the Information and Privacy Commissioner requested that the Public Body produce the records for the inquiry. The Public Body refused, on the grounds that the Information and Privacy Commissioner (the “Commissioner”) had previously established in Order 2000-002 that he had no jurisdiction over records that were subject to the *Mental Health Act*.

[para 5.] The Commissioner’s Office and the Public Body decided that the Court of Queen’s Bench should hear the matter of the Commissioner’s right to require production of the records. Before that matter was scheduled for a hearing, the Commissioner was informed that the *Health Information Act*, S.A. 1999, c. H-4.8, would be in force by the end of January 2001. It was clear that the Commissioner had jurisdiction over the Applicant’s records if the Applicant were to make an access request under the *Health Information Act*. Therefore, the Commissioner’s Office agreed to adjourn the Court of Queen’s Bench hearing.

[para 6.] Subsequently, the Commissioner was informed that the *Health Information Act* would not be proclaimed in force until after the provincial election scheduled for March 12, 2001. Furthermore, the Applicant wished to have his rights determined under the FOIP Act. Consequently, the Commissioner decided to proceed with the inquiry under the FOIP Act.

## II. RECORDS AT ISSUE

[para 7.] The records at issue are those records created during the Applicant’s brief 1995 and 1997 involuntary admissions to Alberta Hospital Edmonton. Because of the

unresolved dispute between the Commissioner's Office and the Public Body over the Commissioner's jurisdiction to require production of the records, the actual records are not before this inquiry.

[para 8.] However, this inquiry is able to proceed on the basis of the subject matter of the records and the evidence regarding the manner in which the records were created.

### III. ISSUES

[para 9.] There are two issues in this inquiry:

A. Does section 5(2) of the FOIP Act apply, so that I do not have jurisdiction over the Public Body's refusal to give the Applicant access to the records?

B. If section 5(2) of the FOIP Act does not apply and I do have jurisdiction, did the Public Body properly refuse to disclose the records, as provided by section 17 of the FOIP Act?

### IV. DISCUSSION OF THE ISSUES

#### **ISSUE A: Does section 5(2) of the FOIP Act apply, so that I do not have jurisdiction over the Public Body's refusal to give the Applicant access to the records?**

##### **1. General**

[para 10.] 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 11.] 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 do not have jurisdiction to apply the FOIP Act.

[para 12.] 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 withheld 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?**

[para 13.] The Public Body says that the information withheld falls within section 17(4) 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)(f) of the FOIP Regulation. The Public Body misquoted the FOIP Regulation as being section 15(2)(m), which was the number of the provision before the FOIP Regulation was amended by Alta. Reg. 216/99.

[para 14.] Section 15(2)(f) of the FOIP Regulation reads:

*15(2) The following prevail despite the Freedom of Information and Protection of Privacy Act:*

...

*(f) Mental Health Act and the regulations made under it...*

[para 15.] Section 17(4) of the *Mental Health Act* reads:

*17(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 16.] The Public Body says that the records at issue are the Applicant's personal health/medical records relating to the Applicant's admissions at Alberta Hospital Edmonton. Alberta Hospital Edmonton is a "diagnostic and treatment centre". Consequently, any information in those records would fall within section 17(4) of the *Mental Health Act*.

[para 17.] In Order 2000-002, the Commissioner reviewed the definition of “diagnostic and treatment centre” contained in section 17(1)(b) of the *Mental Health Act*. He said that the definition included a “facility”, defined in section 1(c) of the *Mental Health Act* to mean a facility designated under the regulations to the *Mental Health Act*. Section 2(1)(a) of the *Mental Health Regulation*, Alta. Reg. 309/89 designates Alberta Hospital Edmonton as a “facility”. Therefore, Alberta Hospital Edmonton is a diagnostic and treatment centre for the purposes of section 17 of the *Mental Health Act*.

[para 18.] The records pertain to the Applicant’s admissions at Alberta Hospital Edmonton, which is a diagnostic and treatment centre. Therefore, I have no difficulty finding that the records are maintained in a diagnostic and treatment centre for the purposes of section 17(4) of the *Mental Health Act*.

[para 19.] 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 20.] The Applicant was admitted to Alberta Hospital Edmonton as an involuntary patient. The Applicant provided me with the two admission certificates from his 1995 admission. Section 1(d) of the *Mental Health Act* defines “formal patient” to mean “a patient detained in a facility pursuant to 2 admission certificates or 2 renewal certificates”. Section 2(1) of the *Mental Health Regulation* says that the facilities (such as Alberta Hospital Edmonton) are designated for the “care, observation, examination, assessment, treatment, detention and control of persons suffering from mental disorder”. Therefore, I have no difficulty finding that the Applicant was receiving diagnostic and treatment services in a diagnostic and treatment centre, namely, Alberta Hospital Edmonton.

[para 21.] Having made these findings, I conclude that all the requirements of section 17(4) of the *Mental Health Act* have been met.

[para 22.] However, there are exceptions to section 17(4). Section 17(6)(a) provides:

*17(6) Notwithstanding subsection (4) or any other law, the Minister or any person authorized by the Minister, a board, an employee of a board or a physician may disclose any diagnosis, record or information relating to a person receiving diagnostic and treatment services in a centre*

*(a) to the person to whom the diagnosis, record or information relates or his legal representative...*

[para 23.] I find that the Applicant’s personal health/medical records relating to his admissions at Alberta Hospital Edmonton fall within the exception to section 17(4) of the *Mental Health Act*, namely, section 17(6)(a), because those records meet the requirement

of being a “diagnosis, record or information relating to a person receiving diagnostic and treatment services in a centre”.

[para 24.] Section 15(2)(f) of the FOIP Regulation specifically provides that the *Mental Health Act* prevails despite the FOIP Act. Therefore, I must now decide whether there is an inconsistency or conflict between the FOIP Act and section 17(6)(a) of the *Mental Health Act*.

### **3. Is there an inconsistency or conflict between the FOIP Act and section 17(6)(a) of the *Mental Health Act*?**

[para 25.] In Order 99-034, the Commissioner 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. (4<sup>th</sup>) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4<sup>th</sup>) 585 (N.B. C.A.).

[para 26.] Section 6(1) of the FOIP Act gives an applicant a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant. Section 6(2) of the FOIP Act says that the right of access does not extend to information excepted from disclosure under the FOIP Act. In summary, these access provisions of the FOIP Act allow a right of access, subject to limited exceptions.

[para 27.] What inconsistency or conflict exists between the access provisions of the FOIP Act and section 17(6)(a) of the *Mental Health Act*, when section 17(6)(a) also allows a person such as the Applicant to have access to his diagnosis, record or information?

[para 28.] I find that the *Mental Health Act* sets up its own scheme for disclosure that is inconsistent or in conflict with access provisions of the FOIP Act.

[para 29.] For example, section 17(6) is a discretionary (“may”) provision for providing access to a diagnosis, record or information. The persons listed in section 17(6) can decide to give access or not. The only limitation on that decision is a proper exercise of discretion. Consequently, the right of access set out in section 6(1) of the FOIP Act (which is subject to limited exceptions under the FOIP Act, as set out in section 6(2)), is inconsistent or in conflict with the discretionary decision set out in section 17(6)(a) of the *Mental Health Act*.

[para 30.] Furthermore, if access is refused under the FOIP Act, an applicant may ask the Commissioner to review the decision. The Commissioner may order access. That process under the FOIP Act is in conflict with section 17(10) and section 17(11) of the *Mental Health Act*, which provide that the recourse for refusing to provide access is an application to a court for an order directing access.

[para 31.] Therefore, I find that the access provisions of the FOIP Act are inconsistent or in conflict with the access provisions contained in section 17(6)(a) of the *Mental Health Act*.

#### **4. Conclusion under section 5(2) of the FOIP Act**

[para 32.] Section 5(2) of the FOIP Act applies to the Applicant's personal health/medical records relating to his admissions at Alberta Hospital Edmonton, as provided by section 17(6)(a) of the *Mental Health Act*. Consequently, the FOIP Act does not apply to those records, and I have no jurisdiction over the Public Body's refusal to give the Applicant access to those records. The Applicant cannot get access to those records under the FOIP Act.

#### **ISSUE B: If section 5(2) of the FOIP Act does not apply and I do have jurisdiction, did the Public Body properly refuse to disclose the records, as provided by section 17 of the FOIP Act?**

[para 33.] As I have decided that section 5(2) of the FOIP Act applies and that I do not have jurisdiction, I find that I also do not have jurisdiction to decide whether the Public Body properly refused to disclose the records, as provided by section 17 of the FOIP Act.

#### **V. ORDER**

[para 34.] Section 5(2) of the FOIP Act applies to the Applicant's personal health/medical records relating to his admissions at Alberta Hospital Edmonton, as provided by section 17(6)(a) of the *Mental Health Act*. Consequently, the FOIP Act does not apply to those records, and I have no jurisdiction over the Public Body's refusal to give the Applicant access to those records. The Applicant cannot get access to those records under the FOIP Act.

[para 35.] As I have decided that section 5(2) of the FOIP Act applies and that I do not have jurisdiction, I find that I also do not have jurisdiction to decide whether the Public Body properly refused to disclose the records, as provided by section 17 of the FOIP Act.

Frank Work, Q.C.  
Assistant Information and Privacy Commissioner