ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDERS F2008-012, H2008-003

October 30, 2008

CARITAS HEALTH GROUP

Case File Numbers 3833, 3863, H1718

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request for a copy of a letter and an email containing his personal information from Caritas Health Group (the Public Body). He requested that the Commissioner review the Public Body's failure to provide the records and also complained that the Public Body had disclosed his personal information, contrary to the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Adjudicator determined that the FOIP Act applied and that the *Health Information Act* (HIA) did not because the records at issue were created for human resources purposes and not for the purpose of providing health services to an individual. The Adjudicator found that it would not be an unreasonable invasion of a third party's personal privacy to disclose the personal information in the records to the Applicant, but for the name of a patient. The Adjudicator found that sections 18 and 27 of the FOIP Act did not apply to the Records. The Adjudicator ordered the Public Body to disclose the records to the Applicant, but for the name of a patient that appeared in the letter.

The Adjudicator found that the Public Body did not disclose the personal information of the Applicant contrary to Part 2 of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 11, 15.1, 17, 18, 27, 40, 72; *Health Information Act* R.S.A. 2000, c. H-5 ss. 1, 11, 16, 34, 37, 37.1, 37.2; *Hospitals Act* R.S.A. 2000 c. H-12 s. 17; *Interpretation Act* R.S.A. 2000, c. I-8 s. 1

Authorities Cited: AB: Orders 99-009, 99-028, F2004-032, H2005-001, F2005-017, F2006-006

Cases Cited: *Innovative Health Group Inc. v. Calgary Health Region*, [2006] 384 A.R. 378; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515; *Named Person v. Vancouver Sun* 2007 SCC 43; *Dudley v. Doe*, [1997] A.J. No. 847

I. BACKGROUND

[para 1] Caritas Health Group is a Public Body under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) and a Custodian under the *Health Information Act* (HIA). For ease of reference, I will refer to the Caritas Health Group as the Public Body in this Order. The Applicant is both an applicant and a complainant in this case. However, I will refer to him only as the Applicant.

[para 2] On July 5, 2006, the Applicant, who is an employee of the Public Body, made a request to the Public Body for a copy of an email written by Dr. B and sent to Doctor C. He requested the information from the Public Body under the *Personal Information Protection Act*. The request states:

> The Medical Staff Bylaws provide that a copy of any written complaint is to be provided to the doctor in question.
>
> Regardless of whether or not you categorize the letter as a letter of complaint or letter of concern, Section 24(1) of the Personal Information Protection Act… provides access to personal information about an individual. Please consider this to be a formal request under section 24(1) of the Personal Information Protection Act to provide me, on behalf of (the Applicant), with a copy of any correspondence of concern or complaint involving or made regarding (the Applicant).

[para 3] The email contains a letter attachment written by Doctor A. Both the email and the letter were sent by Doctor B to Doctor C, who is the Chief of Staff at a hospital under the Public Body's jurisdiction.

[para 4] The Applicant complained to the Commissioner that the Public Body had not responded to his request. He also complained that Dr. C had told an employee of the Public Body that Dr. C had received a letter of complaint about the Applicant. The latter complaint was assigned inquiry number 3833 by this Office.

[para 5] The Public Body replied to the Applicant's request for the letter on October 22, 2006. The Public Body stated:

> As we discussed today, I was not able to obtain the information you requested with regard to the FOIP Act. I apologize for that. If you wish further investigation on this issue, I suggest you contact the Office of the Privacy Commissioner…

[para 6] On October 23, 2006, the Applicant requested review of the Public Body's October 22, 2006 decision to deny access to the record. This request was assigned inquiry numbers H1718 and 3863 by this Office.

[para 7] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The parties provided initial and rebuttal submissions.

[para 8] Doctors A and B were identified as potentially affected parties as information about them as identifiable individuals is contained in the letter and the email. However, neither Doctor A nor B chose to participate.

[para 9] The Applicant submitted a letter dated February 27, 2008 written to him by the Chief of Staff (Doctor C) into evidence. I accepted this letter *in camera*.

II. RECORDS AT ISSUE

[para 10] An email sent January 25, 2006 and a letter attachment dated January 20, 2006 are at issue. The email was written by Doctor B and the letter attachment was written by Doctor A.

III. ISSUES

[para 11] A Notice of Inquiry for Case Files #3863 and H1718 dated February 28, 2008 identifies the following issue in addition to the other issues, set out below:

> 1. Does the record contain health information as defined in section 1(1)(k) of the *Health Information Act*?

[para 12] As answering the question of whether the record contains health information as defined by section 1(1)(k) of HIA would not necessarily mean that HIA applies in relation to the Applicant's access request, I will instead address the following issue instead of the first question stated in the Notice of Inquiry:

Issue A: Does the *Health Information Act* (HIA) apply to the records and information?

[para 13] I will then answer the following questions as applicable.

Issue B: Did the Custodian properly apply section 11(2) of the *Health Information Act* to the Records and Information?

Issue C: Does section 17(1) of the *Freedom of Information and Protection of Privacy Act* (personal information) apply to the records / information?

Issue D: Did the Public Body properly apply section 18(1)(a) and section 18(3) of the *Freedom of Information and Protection of Privacy Act* (individual health or safety to the records / information?

Issue E: Did the Public Body disclose the Applicant's information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act*?

[para 14] Finally, the Public Body raised the argument that section 27 applies to the records at issue in its submissions. I will therefore address the following issue:

Issue F: Does section 27 apply to the records and information?

IV. DISCUSSION OF ISSUES

Issue A: Does the *Health Information Act* (HIA) apply to the records and information?

[para 15] The records at issue, an email and a letter attachment, contain the personal opinions of Doctors A and B, their names and the names of other physicians at the hospital, personal information about the Applicant, and information about a patient. The name of the patient and his condition and treatment are detailed in the letter attachment.

[para 16] The Public Body argues that the FOIP Act applies to all the information in the records but for the patient information contained in the letter, which it argues is governed by HIA. The Public Body relies on Orders F2005-017 and H2005-001 for this position.

[para 17] The Applicant argues that HIA applies to the record at issue on the basis that the record contains health information within the meaning of HIA.

[para 18] Section 1(1)(k) of HIA defines "health information". It states:

> *1(1) In this Act,*
> *(k) "health information" means any or all of the following:*
> *(i) diagnostic, treatment and care information;*
> *(ii) health services provider information;*
> *(iii) registration information;*

[para 19] Section 1(1)(i) of HIA defines the meaning of "diagnostic, treatment and care" in that Act. It states, in part:

> *1(1) In this Act,*
>
> *(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…
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;

[para 20] Under section 1(1)(o) of HIA, the name, business title, and gender of a health services provider is health services provider information. Both diagnostic, treatment and care information and health services provider information are health information within the meaning of section 1(1)(k) of HIA.

[para 21] Section 1(n) of the FOIP Act defines "personal information". It states:

1 In this Act:
(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,
(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,
(iii) the individual's age, sex, marital status or family status,
(iv) an identifying number, symbol or other particular assigned to the individual,
(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,
(vi) information about the individual's health and health care history, including information about a physical or mental disability,
(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,
(viii) anyone else's opinions about the individual, and
(ix) the individual's personal views or opinions, except if they are about someone else;

[para 22] Section 17(4)(a) of FOIP establishes a presumption that disclosure of personal information that is medical information is an unreasonable invasion of a third party's personal privacy. It states:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*

[para 23] There is some overlap between the kinds of information that the FOIP Act and HIA address. In addition, both statutes provide a right of access to individuals to make a request for their own information.

[para 24] Section 15.1 of the FOIP Act explains when access requests made under that Act are deemed to be requests under HIA. It states:

> *15.1(1) If a request is made under section 7(1) for access to a record that contains information to which the Health Information Act applies, the part of the request that relates to that information is deemed to be a request under section 8(1) of the Health Information Act and that Act applies as if the request had been made under section 8(1) of that Act.*
>
> *(2) Subsection (1) does not apply if the public body that receives the request is not a custodian as defined in the Health Information Act.*

[para 25] Section 16 of HIA explains when an access request made under that Act is to be deemed a request for a record under the FOIP Act. It states, in part:

> *16(1) If a written request is made under section 8(1) for access to a record that contains information to which the Freedom of Information and Protection of Privacy Act applies, the part of the request that relates to that information is deemed to be a request under section 7(1) of the Freedom of Information and Protection of Privacy Act and that Act applies to that part of the request as if it had been made under section 7(1) of that Act…*
>
> *(3) This section does not apply if the custodian that receives the request is not a public body as defined in the Freedom of Information and Protection of Privacy Act.*

As noted above, the same information may fall under both the FOIP Act and HIA Whether section 15.1 of the FOIP Act applies so that a request for information is deemed to have been made under HIA depends on the request itself and whether the public body is a custodian as defined by HIA. The effect of sections 15.1 of the FOIP Act and section 16 of HIA is to allow public bodies who are also custodians to address different parts of access requests under the appropriate legislation, so that an applicant is not required to make more than one request. However, if a public body is not a custodian within the meaning of HIA, then only the FOIP Act applies, even though the information in the custody or under the control of the public body might otherwise be health information under HIA.

[para 26] The Public Body is both a custodian under HIA and a public body under the FOIP Act. The Applicant is a health service provider under HIA, but is also an individual who has requested records containing what is his personal information under the FOIP Act. The patient information contained in the letter is potentially "diagnostic, treatment and care information", or "health information" under the HIA, but is also personal information within the meaning of sections 1(n) and 17(4)(a) of the FOIP Act. Further, the name of the Applicant, as it appears in the records, is potentially "health service provider" information, or "health information", within the meaning of HIA, but is also "personal information" as defined by section 1(n) of the FOIP Act.

[para 27] As noted above, both HIA and the FOIP Act contain provisions that allow a request for information contained in a record to which the other Act applies to be deemed a request for a record under the other Act. In the circumstances of the present case, the records contain information that could fall within the scope of either Act.

[para 28] In Orders F2005-017 and H2005-001, the Commissioner explained the importance of examining the context of information when deciding whether the FOIP Act or HIA applies. He said:

> The context in which the information is collected must be considered when determining whether the records contain health information under HIA, or alternatively, personal information under FOIP; I must consider "the surroundings that colour the words" (*Bell Express Vu).* If the information is health information under HIA, the information is carved out of FOIP. I have previously described the proper approach to the categorization of information and the interface of HIA and FOIP in Order F2004-005 and H2004-001 (paras 77-90); there is no need to repeat that discussion here.

[para 29] However, if I adopt this approach to this inquiry, the result would be that HIA would direct the information to be considered under the FOIP Act, while the FOIP Act would require that the information be considered under HIA. Given that section 15.1(2) of the FOIP Act states that section 15.1(1) does not apply in a situation where a public body is not a custodian, it would appear that the intent of the legislature in enacting section 15.1 was not to deprive the FOIP Act of jurisdiction over information that also meets the definition of health information under HIA. In my view, an applicant's request determines which Act applies. Section 15.1 of the FOIP Act and section 16 of HIA indicate that deeming process applies to "*the part of the request that relates to that information*" and not to the information itself. The Applicant's request in this case cannot be treated as a request for information under HIA because section 7 of HIA permits access requests only for one's own health information.

[para 30] In the present case, I find that even though the Applicant originally cited PIPA when making his request, he made an access request under the FOIP Act. Caritas Health Group is not an organization under PIPA, but a Public Body under the FOIP Act. The Applicant requested copies of the email and the letter attachment because these records contained his personal information. He did not request his health information. The only information in these records about the Applicant that could be considered health information would be his name, gender, and title. However, I do not consider this information to be the Applicant's own health information within the meaning of section

1(1)(k) of HIA. Rather, this information is his personal information within the meaning of section 1(n) of the FOIP Act.

[para 31] In my view, health service provider information within the meaning of section 1(1)(o) of HIA is health information under section 1(1)(k) only when the health service provider information forms part of a patient's health information. Otherwise, the definition of "health information" in HIA would be artificial, in the sense that it would include stand alone information about health service providers, which is not health information as that term is generally understood. I draw support from this reading from the fact that whenever the term "health services provider information" appears in the Act, outside the definitions, it is in the context of patient information and patient treatment. For example, section 34 establishes that patient consent is required before health information, including health service provider information, may be disclosed, unless sections 37, 37.1, 37.2, or 37.3 apply, in which case, patient consent is not required to disclose information about the patient's health service provider. Sections 37.1, 37.2 and 37.3 do include provisions establishing health service provider consent is not required before health service provider information is disclosed. However, these provisions appear intended to clarify that health service provider consent is not required in the circumstances contemplated by these provisions, rather than to suggest that health service provider information is the health service provider's own health information and thereby requires consent before disclosure.

[para 32] *Innovative Health Group Inc. v. Calgary Health Region*, [2006] 384 A.R. 378, the Alberta Court of Appeal commented on the purpose of HIA:

> The legislation is intended to protect individual privacy as regards health information: s. 2(a). Another of its purposes is to prescribe rules for the collection and use of health information "which are [intended] to be carried out in the most limited manner and with the highest degree of anonymity that is possible in the circumstances": s. 2(c). Although s. 2(b) contemplates appropriate sharing and accessing of health information, that sharing and accessing is for the purpose of providing "health services" and managing the health system. "Health services" means publicly-funded services: *HIA*, s. 1(1)(m)(I). Taken together, these provisions underscore the importance of patient privacy and demonstrate that the *HIA*'s thrust is publicly-funded services.

[para 33] In contrast, section 2(c) of the FOIP Act indicates that a purpose of that legislation is

> *…to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body…*

[para 34] The Applicant has not requested health information collected for the purpose of providing health services or to manage the health system. Rather, he has requested a right of access to his own personal information. I disagree with the Public Body that the patient information in the letter can be addressed under HIA. Section 15.1 of the FOIP Act, cited above, indicates that when a record contains information to which HIA applies, the part of the request relating to that information is deemed to be a request under HIA. However, in the current case, the Applicant made an access request for

records containing his personal information within the meaning of the FOIP Act. He did not make a request for his own health information under HIA. Section 15.1 of the FOIP Act applies only when the request itself can be divided into parts or can be characterized as a request for the individual's health information. In this case, the Applicant did not request his health information and no part of his request can be construed as a request for his health information. Consequently, section 15.1 does not apply.

[para 35] The Applicant's access request cannot be treated as a request for health information under the HIA because section 7 of HIA permits access requests only for one's own health information. The Applicant has requested his own personal information, which happens to include information about the condition and treatment of another individual. HIA does not create the ability to make an access request for the health information of another individual. Section 7 of the FOIP Act does contemplate that requests can be made for records that include the personal information of third parties, while section 17 of the FOIP Act ensures that a third party is protected from an unreasonable invasion of personal privacy in the event that a record containing the third party's personal information is responsive to an access request. Specifically, section 17(4)(a) creates a presumption that disclosure of medical information about an identifiable individual is an unreasonable invasion of the individual's personal privacy. In my view, the existence of this provision supports the interpretation that the FOIP Act applies to personal information that is also health information.

[para 36] For these reasons, I find that the *Freedom of Information and Protection of Privacy Act* applies to the email, the letter attachment, and to all the information contained in both these records.

Issue B: Did the Custodian properly apply section 11(2) of the *Health Information Act* to the Records and Information?

[para 37] I have found that the FOIP Act applies to the access request and consequently, to the records at issue. As a result, section 11(2) of HIA does not apply to the records and information.

Issue C: Does section 17(1) of the *Freedom of Information and Protection of Privacy Act* (personal information) apply to the records / information?

[para 38] As noted above, "personal information" is defined in section 1(n) of the FOIP Act. Section 17 prohibits disclosure of a third party's personal information if the disclosure of personal information would be an unreasonable invasion of personal privacy. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if…

> *(c) an Act of Alberta or Canada authorizes or requires the disclosure…*

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> *(d) the personal information relates to employment or educational history,*
> *(g) the personal information consists of the third party's name when*
> *(i) it appears with other personal information about the third party, or*
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether…

> *(c) the personal information is relevant to a fair determination of the applicant's rights…*
> *(e) the third party will be exposed unfairly to financial or other harm,*
> *(f) the personal information has been supplied in confidence,*
> *(g) the personal information is likely to be inaccurate or unreliable,*
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> *(i) the personal information was originally provided by the applicant.*

[para 39] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1).

[para 40] When certain types of personal information are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy under section 17(4). A public body must consider and weigh the factors set out in section 17(5), and other relevant circumstances, when determining whether a disclosure would be an unreasonable invasion of the personal privacy of a third party. In *University of Alberta v.*

Pylypiuk, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5), and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

Burden of proof for s. 17

[para 41] Section 17 has a two-fold burden of proof. A public body has the initial burden to show that section 17 applies to the personal information withheld, pursuant to section 71(1) of the Act. The burden then shifts to the applicant to show that disclosure would *not* be an unreasonable invasion of the third party's personal privacy.

Presumptions

[para 42] When information falls under one of the provisions in section 17(4) of the Act, disclosure of the personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Section 17(4) creates a presumption only. A Public Body must then consider the factors under section 17(5), as these factors may outweigh the presumption. It is also important to note that section 17(5) is not an exhaustive list, and that other relevant factors weighing for or against disclosure may be considered.

[para 43] The Public Body argues that section 17 of the FOIP Act requires it to withhold the records at issue, as releasing the information would be an unreasonable invasion of the personal privacy of the authors of the records and the employees named in the records. It argues that the Medical Staff Bylaws (Bylaws) only require that complaints be provided to an employee who is the subject of a complaint. It categorizes the records at issue as "letters of concern" and notes that the Bylaws do not require disclosure of letters of concern.

[para 44] The Applicant argues that the records at issue constitute a complaint and that the Public Body is required, by its own Bylaws, to disclose the complaint to him. He argues that the Public Body is trying to circumvent the complaint process in the Bylaws by characterizing the records at issue as concerns, rather than complaints. He provided *in camera* affidavit and letter evidence that his employment with the Public Body was affected by the concerns of his colleagues that had been reported to the management of the Public Body.

The email

[para 45] Doctor B states in the email that he is writing to Doctor C in confidence. The email documents a conversation he had with the Applicant, the experiences of other colleagues in relation to the Applicant, and contains the author's personal opinions about the Applicant.

[para 46] The email contains the name and email address of Doctor A, the name of Doctor C, the name of Doctor A, and the names of four other physicians.

[para 47] Under section 1(n) of the FOIP Act, personal opinions about someone else are not the personal information of the person whose opinion it is. In Order F2006-006 the Adjudicator noted:

> A third party's personal views or opinions about the Applicant - *by that reason alone* - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the *substance* of the view or opinion of a third party about the Applicant is not third party personal information, but the *identity* of the person who provided it is third party personal information.

Consequently, paragraphs 5 and 6 on the second page, which express opinions about the Applicant, are not Doctor B's personal information, but the Applicant's. As a result, these paragraphs cannot be withheld under section 17. However, the fact that Doctor B holds this opinion, is his personal information.

[para 48] The remainder of the email is personal information of third parties under the Act, as it contains Doctor B's perspectives and interpretations of situations, or contains references to other identifiable individuals. Because this personal information consists of the names of individuals in association with other personal information about them, this personal information falls under section 17(4)(g). As a result, the presumption that disclosing this information is an unreasonable invasion of personal privacy is raised.

[para 49] As noted above, the presumption is rebuttable. The list of factors is section 17(5) is not exhaustive, and other factors may be considered to rebut or support the presumption.

[para 50] I consider the Bylaws to be a relevant factor under section 17(5). They are made under the authority of section 17 of the *Hospital Act*, which states, in part:

> *17(1) The board of an approved hospital*
>
> *(a) shall require the preparation and adoption of bylaws by its medical staff governing the organization and conduct of the medical staff practising in the hospital and the procedures whereby the medical staff must make recommendations to the board concerning the appointment, re-appointment, termination or suspension of appointment of, and the delineation of hospital privileges of, members of the medical staff…*

(6) Bylaws under this section must provide for

(a) the adoption of rules governing the day to day management of medical affairs in the hospital and the amendment or replacement of those rules from time to time as the need arises, and must provide that the rules become effective only on their approval by the board;

(b) a procedure for the review of decisions made by the medical staff or the board pertaining to or affecting the privileges of members of the medical staff;

(c) a procedure to ensure that all applications for appointment to the medical staff reach the board in the time prescribed in the bylaws, whether or not the appointment is recommended by the medical staff;

(d) a procedure to ensure that the board gives notice to an applicant for an appointment to the medical staff within a reasonable time of the decision of the board as to whether the application has been accepted;

(e) mechanisms to ensure that the board considers medical staff input respecting patient care and that medical staff have input into strategic planning, community needs assessment, facility use management and quality assurance activities of the board;

(f) mechanisms to promote ethical behaviour, evidence-based decision making and participation in continuing medical education by medical staff.

(7) The board and the medical staff shall comply with bylaws under this section.

[para 51] The Bylaws indicate that they are passed in order to assign responsibility, define authority, and describe accountability of all officials and organizational units of the Medical Staff of the Caritas Health Authority. The provisions of the Bylaws addressing complaints state:

7.3 Complaints

7.3.1 Upon receipt of a complaint with respect to the conduct, competency or qualifications of a Member, the complaint shall forthwith be reviewed by the Chief of Staff.

7.3.2 A copy of a written complaint, or the substance of the complaint where received verbally shall immediately be provided to the Member in question.

7.3.3 The Chief of Staff may elect to take steps to dismiss the complaint if, in his or her opinion, it is frivolous, vexatious, and clearly without merit.

> 7.3.4. If, in the view of the Chief of Staff, there appears to be some merit in the complaint, he or she will conduct a preliminary investigation into the complaint in consultation with the relevant Site Leader or designate…

[para 52] Under section 1(1)(c) of the *Interpretation Act*, a bylaw is a regulation. Consequently, the Bylaws are not an Act of Alberta for the purposes of section 17(2)(c). The Bylaws are a regulation that requires immediate disclosure of a complaint about a member's conduct, competency or qualifications to the member complained of. The fact that a regulation authorizes disclosure of information is a factor that may be considered when weighing whether disclosure of personal information would be an unreasonable invasion of personal privacy of a third party under section 17(5).

[para 53] The Public Body argues that the email is a "letter of concern" and not a complaint. However, the email is addressed to Doctor C, who is the Chief of Staff at a hospital, and contains information that could be considered information falling under section 7.3.1. In my view, it was open to Doctor C to consider the email a complaint under section 7.3.1 and to provide the email to the Applicant under section 7.3.2. Consequently, while Doctor C decided not to consider the email a complaint, he was authorized by a regulation to treat it as a complaint and to provide it to the Applicant. The fact that a regulation of Alberta authorizes disclosure of the email to the Applicant is a factor that weighs in favor of disclosure under section 17(5).

[para 54] If personal information is relevant to a fair determination of an applicant's rights, then this is a factor that weighs in favor of disclosing the information under section 17(5)(c). I interpret the term "fair" to refer to administrative fairness. The two basic requirements of administrative fairness -- the right to know the case to be met and the right to make representations, are set out in Jones and DeVillars, *Principles of Administrative Law*:

> The courts have consistently held that a fair hearing can only be had if the persons affected by the tribunal's decision know the case to be made against them. Only in this circumstance can they correct evidence prejudicial to their case and bring evidence to prove their position. Without knowing what might be said against them, people cannot properly present their case. But knowing the case that must be met is not enough, of course; the opportunity to present the other side of the matter must also be allowed. (Jones and DeVillars, Principles of Administrative Law Third Edition (Scarborough: Thomson Canada Ltd. 1999) p. 260

If the personal information would assist an applicant to know the case to be met and to make representations in relation to a decision being made about the applicant's rights, then that is a factor weighing in favor of disclosure.

[para 55] As the Public Body notes, in Order 99-028, the former Commissioner said:

> In Order P-312 (1992), the Ontario Assistant Commissioner stated that in order for the Ontario equivalent of section 16(3)(c), (now 17(5)(c), to be a relevant consideration, all four of the following criteria must be fulfilled:

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 56] As noted above, section 17 of the *Hospitals Act* creates the authority to make the Bylaws. Consequently, all decisions made and actions taken under the Bylaws are done so with delegated legislative authority. Under the Bylaws, an appointment to the Medical Staff carries with it privileges and rights to provide health care services to patients within Caritas facilities. Consequently, a decision to limit, suspend, or terminate an appointment is a decision to limit, suspend or terminate privileges and rights. I find that principles of administrative fairness apply to the Public Body's complaints and reappointment processes, as these processes are addressed in the Bylaws and affect statutory rights.

[para 57] As noted in the Background of this Order, the Applicant submitted a letter written by Doctor C dated February 27, 2008 and addressed to him into evidence and I accepted this evidence *in camera*. The third paragraph of this letter indicates that the Applicant's reappointment has been affected by concerns of colleagues that were brought forward. As noted above, the Public Body characterizes the email as a letter of "concern". The letter of February 27, 2008 also contains information that could be interpreted as referring to the information in the email. This letter also indicates that if the Applicant chooses to challenge the decision made in the letter, the Applicant may do so by following the procedures set out in the Capital Health and Caritas Medical Staff Bylaws and Rules.

[para 58] I find that the letter of February 27, 2008 contains a decision about the Applicant's privileges and reappointment. In particular, the letter suggests that the decision relating to the Applicant's reappointment is based, in part, on the information contained in the email, given the reference to concerns and the similarities in the information they contain. Consequently, a fair determination of the Applicant's rights requires that the Applicant know the substance of the concerns and allegations on which the decision regarding his reappointment was based. Further, the February 27, 2008 letter indicates that the Applicant may challenge the decision it contains. In my view, the personal information in the email would be necessary for the Applicant to prepare for his challenge of this decision. Providing the Applicant with the personal information in the email would serve this purpose. I therefore find that section 17(5)(c) applies and is a factor that weighs strongly in favour of disclosure.

[para 59] If personal information is supplied in confidence within the meaning of section 17(5)(f) of the FOIP Act, then this is a factor that weighs in favor of finding that disclosure would be an unreasonable invasion of personal privacy.

[para 60] As noted above, Doctor B indicates in the email that he is writing in confidence. However, Doctor B, as site leader and a member of the medical staff, is required to be aware of the Bylaws. He would therefore be aware that the email he wrote could be construed as a complaint. Moreover, he sent the email to Doctor C who is given the sole responsibility under the Bylaws of investigating complaints and assisting in dispute resolution.

[para 61] I find that while the author of the email requested confidentiality, he was aware, or should have been aware, that if the Chief of Staff took official action under the Bylaws, the email would be disclosed to the Applicant. I also find that the purpose in writing the email was to request that the Chief of Staff take action as an employer. Taking action as an employer could only be done under the Bylaws. I therefore find that while the author of the email requested confidentiality, he did not have a reasonable expectation of confidentiality.

[para 62] In weighing these factors, I find that the fact that the Applicant requires the personal information in the email for a fair determination of his rights and the fact that a regulation of Alberta authorizes disclosure of the email outweigh the presumption in section 17(4) and any expectation of confidentiality held by the email's author.

The Letter Attachment

[para 63] Unlike the email, Doctor A does not indicate in the letter that it is intended to be confidential. The letter is addressed to Doctor B. The letter documents an encounter with the Applicant that involved a patient. Doctor A names the patient and some information about the patient's condition in order to document the incident. The letter also contains information about the Applicant and refers to "concerns". Doctor B attached this letter to his own email and sent it to Doctor C.

[para 64] I find that the name of Doctor A, his experiences, and his opinions, except when they are about others, are his personal information and that section 17(4)g) applies. I note that the first sentence of the final paragraph is an opinion about the Applicant. Consequently, it is not the personal information of Doctor A, but the Applicant, and cannot be withheld under section 17.

[para 65] I also find that the name of a patient and his medical condition, and the names of other clinicians are personal information. As the name of the patient appears in relation to his medical history, diagnosis, condition, and treatment, I find that the presumption in section 17(4)(a) -- that it is an unreasonable invasion of personal information to disclose individually identifying medical information -- applies to that information. As the names of the other clinicians are accompanied by other information about them, I find that the presumption in section 17(4)(g), -- that it is an unreasonable invasion of personal privacy to disclose the name of an individual in the context of other personal information about the individual -- applies to that information.

[para 66] While Doctor C decided not to treat the letter attachment as a complaint, I find that it was open to Doctor C, as Chief of Staff, to consider it a complaint under section 7.3.1 and to follow the complaints process in relation to it. Consequently, a regulation of Alberta authorizes disclosure of the letter attachment.

[para 67] I also find that it is probable that the decision in Doctor C's letter of February 27, 2008 is based, in part, on information contained in the letter attachment. I make this finding because of the similarity of the information contained in the letter attachment and the February 27, 2008 letter. As with the email, I find that the personal information contained in the letter attachment, other than the identity of the patient, is relevant to a fair determination of the Applicant's rights in relation to reappointment and that this is a factor that weighs strongly in favor of disclosure.

[para 68] I find that the author of the letter attachment had no expectation that the information in the letter would be kept confidential. I make this finding because the letter was written to document an event for a person in authority so that the person in authority could investigate this matter and speak with the parties involved. Further, the hospital Bylaws required that the letter be provided to the Applicant in the event that Doctor C considered the letter to be a complaint. The final sentence of the letter attachment supports this interpretation.

[para 69] I find that the fact that a regulation of Alberta authorizes disclosure and the fact that the personal information contained in the letter attachment is relevant to a fair determination of the Applicant's rights outweighs the presumptions in section 17(4)(g) in this case. I therefore find that disclosing the letter attachment to the Applicant, but for the name of the patient whose personal information is contained in the letter, would not be an unreasonable invasion of the personal privacy of Doctor A or the other clinicians named in the letter.

[para 70] I do not find that the presumption in section 17(5)(a) in relation to the patient information is outweighed by section 17(4)(g) or by the other factors I have considered. The patient information is highly detailed and was apparently collected, used, and disclosed by Doctor A for a purpose that the patient was unaware of and had not consented to. The identity of the patient and the procedure being performed are irrelevant to a determination of the Applicant's rights. Rather, the situation and events giving rise to the letter are relevant. As the patient does not appear to have been informed that the details of his medical procedure would be documented and entered into a letter of complaint or concern and provided to others, I find that disclosing his name in relation to the diagnosis and procedure documented in the letter would be an unreasonable invasion of personal privacy.

[para 71] However, the name of the patient can be severed from the letter within the meaning of section 6(2) of the FOIP Act so that the patient cannot be identified. The remaining information in the letter would enable the Applicant to understand the case to be met and to respond to it without revealing personal information about the patient as an identifiable individual.

[para 72] For these reasons, I find that section 17(1) of the FOIP Act does not apply to the records at issue, but for the name of a patient contained in the letter.

Issue D: Did the Public Body properly apply section 18(1)(a) and section 18(3) of the *Freedom of Information and Protection of Privacy Act* (individual health or safety to the records / information?

[para 73] Section 18 states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> > *(a) threaten anyone else's safety or mental or physical health, or*
> > *(b) interfere with public safety.*
>
> *(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a physician, a regulated member of the College of Alberta Psychologists or a psychiatrist or any other appropriate expert depending on the circumstances of the case, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety.*
>
> *(3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health.*

[para 74] The Applicant argues that section 18 does not permit a Public Body to withhold information that is merely sensitive. Rather, he argues, a Public Body must provide evidence that the threat and disclosure of information are connected and that there is a probability that the threat in question will occur if the information is disclosed.

[para 75] In its arguments, the Public Body argued that both sections 18(1) and 18(3) apply. The Public Body provided an affidavit *in camera* to support its contention that disclosing the records at issue would harm the safety, mental or physical health of two employees.

[para 76] Doctor C provided an *in camera* affidavit which states that he believes section 18 applies. His rationale is based on his personal assessment of the Applicant and his view that there is a possibility that disclosure of the records could result in a complaint to a regulatory body.

[para 77] In Order 99-009, the former Commissioner explained the necessary elements of what is now section18. He said:

> In Order 96-004, I said that where "threats" are involved, the Public Body must look at the same type of criteria as the harm test referred to in Order 96-003, in that (i) there must be a causal connection between disclosure and the anticipated harm; (ii) the harm must constitute "damage" or "detriment", and not mere inconvenience; and (iii) there must be a reasonable expectation that the harm will occur.
>
> Consequently, for section 17(1)(a) to apply, (now section 18(1)(a)), the Public Body must show that there is a threat, that the threat and the disclosure of the information are connected, and that there is a reasonable expectation that the threat will occur if the information is disclosed.

[para 78] In Order F2004-032, the Adjudicator found that a Public Body cannot rely on speculation and argument that harm might take place, but must establish a reasonable expectation that harm would result from disclosure before it can rely on section 18.

[para 79] Similarly, in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 the Court said:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.
>
> The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm."

[para 80] Although the Public Body provided affidavit evidence, I find that the affidavit evidence contains conjecture only in relation to the threat of possible mental or physical harm. This conjecture is contradicted by the February 27, 2008 letter from Doctor C to the Applicant. As this letter was submitted by the Applicant and received by this office *in camera,* I cannot disclose its contents in detail. However, the effect of this letter is to reappoint the Applicant. The fact that Doctor C reappointed the Applicant indicates that he does not consider the possibilities he outlines in paragraph 11 of his applicant to be at all likely. If disclosing the letter and the email to the Applicant could lead to the result set out in paragraph 11 of the affidavit, it is highly unlikely that Doctor C would employ the Applicant for any length of time.

[para 81] In addition to conjecture about potential mental or physical harm, the primary threat that the Public Body envisions would result from disclosure is that a complaint could be registered with a regulatory body. The Public Body did not explain what it is about the information at issue that would lead to that result. In any case, I do not find that the act of filing a complaint with a regulatory body can be construed as a threat to anyone's safety, or physical or mental health, within the meaning of section 18.

[para 82] Finally, the Public Body has not established that an individual provided information about a threat to an individual's safety or mental or physical health for the purposes of section 18(3). Certainly, the records themselves do not contain any information meeting this description.

[para 83] For these reasons, I find that the Public Body has not established that section 18 applies to the records and information.

Issue E: Did the Public Body disclose the Applicant's information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act*?

[para 84] The Applicant complained that the Doctor C disclosed information contained in the email and the letter attachment to a colleague who has no formal role in management of the department and that this disclosure was contrary to Part 2 of the FOIP Act.

[para 85] The Public Body argues that subsections 40(1)(b) and 40(1)(h) of the FOIP Act authorized this disclosure. These subsections state:

> *40(1) A public body may disclose personal information only…*
>
> *(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17…*
>
> *(h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member...*

[para 86] The Public Body argues that Doctor C confirmed the existence of the letter to the colleague only in order to assure her that he was addressing her concerns about the Applicant, as was his obligation as Chief of Staff. Further, the Public Body argues that this disclosure is sanctioned by the Bylaws because the Bylaws require medical staff to ensure that high professional and ethical practice standards are practiced and maintained, and that this disclosure would allow the colleague to ensure that such standards are practiced.

[para 87] Doctor C provided affidavit evidence to establish his reasons for disclosing the fact that he had received a letter about the Applicant.

> On or about January 25, 2006, I received an e-mail with an attached letter expressing concerns about (the Applicant). The letter was not treated as a complaint, did not lead to an investigation, and has not been placed on (the Applicant's) personnel file at the hospital.
>
> Article 7.3 of the Caritas Medical Staff Bylaws sets out the procedure to be followed if a complaint is received. A copy of the complaint must be given to the member, and I must follow the procedure for reviewing, investigating, dismissing, or forwarding the complaint to the Chief Clinical Officer for disciplinary action.
>
> On or about March 24, 2006 (the colleague) telephoned me to discuss a concern about (the Applicant). (The colleague) stated that she was aware that a letter of concern had been sent to me. I confirmed the existence of the letter, but did not discuss the contents of the letter in any way.
>
> I confirmed the existence of the letter so I could assure (the colleague) that I was aware of and was addressing the concerns regarding (the Applicant), as is my obligation as chief of staff.

[para 88] In essence, Doctor C confirmed that he had received a letter from a staff member which contained the staff member's concerns about the Applicant.

[para 89] It is important to note that the FOIP Act applies to recorded information only. As noted above, personal information is defined in the Act as "recorded information about an identifiable individual". Section 40 of the FOIP Act, set out above, governs the disclosure of recorded personal information by public bodies. Section 40 does not apply to the disclosure of information that is not recorded.

[para 90] I find that there is no evidence to suggest that Doctor C provided a copy of the email and letter attachment, which both contain the Applicant's personal information, to the colleague. Instead, Doctor C confirmed the existence of these records. Confirming the existence of records is not a disclosure of recorded information about an identifiable individual. Consequently, Doctor C did not disclose personal information within the meaning of the FOIP Act.

[para 91] For these reasons, I find that the Public Body did not disclose the Applicant's personal information in contravention of Part 2 of the FOIP Act.

Issue F: Does section 27 apply to the records and information?

[para 92] Section 27 explains when a Public Body may withhold privileged information and when it must withhold this type of information. It states, in part:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege…*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body…*

[para 93] The Public Body did not respond to the Applicant's access request and consequently did not apply any exceptions in order to withhold the records. However, as any privilege attaching to the records in this case would belong to third parties, the Public Body would be prohibited from disclosing the records if privilege does in fact apply to them. I will therefore consider whether the records and information are privileged, as argued by the Public Body.

[para 94] The Public Body argues that the records are protected by confidential informant privilege, and, in the alternative, case by case privilege.

[para 95] Case by case privilege is established when the four Wigmore criteria are met. These four criteria are:

1. The communications must originate in a confidence that they will not be disclosed

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[para 96] The Applicant argues that the records at issue were not created for a law enforcement purpose and that there was no sense of compelling urgency to the situation in which they were written for the purposes of extending have not been met to establish case by case privilege. Further, the Applicant argues that the Public Body has not established the necessary confidence required by the first and second Wigmore criteria because the Bylaws require disclosure of complaints.

[para 97] In *Named Person v. Vancouver Sun*, 2007 SCC 43 the Supreme Court of Canada discussed the history of confidential informant privilege and the public policy reasons behind it. The Court said:

> Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers.
>
> A useful summary of the rule was set out by Cory J.A. (as he then was) in his decision in *R. v. Hunter* (1987), 57 C.R. (3d) 1 (Ont. C.A.), at pp. 5-6, and adopted by McLachlin J. (as she then was) in her reasons in this Court's decision in *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 9:
>
> > The rule against non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the importance of the role of informers in the solution of crimes and the apprehension of criminals. It was recognized that citizens have a duty to divulge to the police any information that they might have pertaining to the commission of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed, both for his or her own protection and to encourage others (emphasis in the original) to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.
>
> This passage usefully recognizes the dual objectives which underlie the informer privilege rule. Not only does the ban on revealing the informer's identity protect that informer from possible retribution, it also sends a signal to potential informers that their identity, too, will be protected. Without taking away from the particular protection afforded by the rule to an individual informer in a given case, we must emphasize the general protection afforded by the rule to *all* informers, past and present.

In the present case, the records at issue were prepared for a supervisor, rather than the police. Further, the records do not contain any information pertaining to crimes.

[para 98] In *Dudley v. Doe*, [1997] A.J. No. 847, cited by the Applicant, the Court was asked to extend informant privilege to a letter that had been written to a college to

express concern that the plaintiff would not be a satisfactory social worker. Sanderman J. noted that confidential informant privilege has been extended to persons who provide information to bodies other than the police about child abuse. However, the Court specifically declined to extend informant privilege to vague and general assertions about the ability of another person to do his or her job, partly because of the lack of urgency in the assertions. The Court then considered whether the Wigmore principles applied. The Court decided that the third Wigmore criterion was not met for the following reason:

> An attack upon character from a hiding place that cloaks the identity of the attacker is not the type of relationship that should be fostered unless there is a compelling and obvious reason for the attack. This factual situation falls far short of the granting of this type of protection by the Court.

[para 99] I find that there is no sense of compelling urgency in the letters or about the information they contain to warrant extending the application of confidential informant privilege to them. In essence, the email and the letter document the opinions of Doctors A and B developed over a period of time. The position of the Public Body is that it took no action in relation to the letter and the email. While I have found that this is not probable, the Public Body's position that it did not take any action indicates its views as to the significance of the letters. I agree with the Applicant that this position argues against any urgency relating to the information they contain.

[para 100] Further, I agree with the Applicant that the Wigmore criteria have not been met to establish case by case privilege.

[para 101] The first criterion is not met in relation to the email or the letter attachment as the communications did not originate in confidence. As noted elsewhere in this Order, any expectations of confidentiality held by Doctors A and B were not reasonable, as these records could have been disclosed to the Applicant under the Bylaws.

[para 102] The second criterion is not met because the Bylaws require an open and transparent complaint resolution process when addressing disputes between Members. Maintaining confidentiality would undermine this process and therefore the relation between Members.

[para 103] Section 2.2 of the Bylaws explains that a purpose of the Bylaws is to assign responsibility and describe the accountability of officials and organizational units. Further, the complaint process in the Bylaws is intended to promote fairness and accountability through transparency. I therefore find that the making of confidential complaints or expression of concerns about other members between a Member and the Chief of Staff is not a relationship that should be "sedulously fostered", for the purposes of the third criterion, as this would have the effect of undermining the transparency and accountability required by the Bylaws and by the *Hospitals Act*.

[para 104] As I have found that there was no reasonable expectation of confidentiality and that the relationship between a confidential complainant and the Chief

of Staff is not one that should be sedulously fostered, I find that the Wigmore fourth criterion is not met.

[para 105] For these reasons, I find that section 27 does not apply to the records and information.

V. ORDER

[para 106] I make this Order under section 72 of the FOIP Act.

[para 107] I order the head of the Public Body to disclose the email dated January 25, 2006 in its entirety.

[para 108] I order the head of the Public Body to disclose the attached letter dated January 20, 2006 to the Applicant, but to sever the name of the patient from this record.

[para 109] I confirm that the Public Body did not disclose the personal information of the Applicant in contravention of Part 2 of the Act.

[para 110] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

_____
Teresa Cunningham
Adjudicator