

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2012-22

September 28, 2012

## ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F5332

Office URL: [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Complainant complained that Alberta Justice and Solicitor General (“JAG”) had improperly disclosed to Alberta Corporate Human Resources (“CHR”) her personal information contained in three letters, thereby contravening the *Freedom of Information and Protection of Privacy Act* (the “Act”). The letters consisted of the Complainant’s detailed medical information and information about claims that she had made to the Workers’ Compensation Board (the “WCB”).

The Adjudicator found that JAG had the authority to disclose the Complainant’s personal information under section 40(1)(x) of the Act, on the basis that the disclosure was for the purpose of managing or administering personnel. CHR is responsible for advising and assisting government departments in human resource matters and, in this particular case, JAG had sought CHR’s advice and assistance by requesting an assessment of the Complainant’s functional capacity so as to determine her ability to perform her previous job functions. The letters disclosed by JAG to CHR provided the latter with relevant background information about the Complainant’s injuries and how they had impacted her employment, as well as about her WCB claims, so that CHR could advise JAG on whether the assessment was an appropriate or the best course of action, insofar as the Complainant’s injuries, accommodation and employment were concerned.

The Adjudicator also found that JAG disclosed the Complainant’s personal information in the letters only to the extent necessary to enable it to carry out the authorized purpose in a reasonable manner, in accordance with section 40(4). The letters consisted of

information regarding the way in which the Complainant's injuries had previously affected her ability to perform her job functions, the extent to which her injuries were due to her employment, the steps taken by JAG to accommodate her in an alternate position, and her past medical treatment and prognosis. Disclosure of all of this information enabled JAG to obtain the human resource advice and assistance that it was seeking, in that it enabled CHR to determine whether the assessment of the Complainant's functional capacity was warranted and to go about arranging it.

The Adjudicator accordingly concluded that JAG's disclosure of the Complainant's personal information to CHR had not contravened the Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 1(n)(vi), 1(n)(vii), 1(n)(viii), 40, 40(1), 40(1)(c), 40(1)(d), 40(1)(i), 40(1)(x), 40(4), 67(1)(a)(ii) and 72; *Public Service Act*, R.S.A. 2000, c. P-42, ss. 4(1), 5, 6(1)(a) and 7. **CAN:** *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.

**Authorities Cited:** **AB:** Orders F2006-019, F2007-019 and Order F2012-23; Investigation Report 2001-IR-006.

## I. BACKGROUND

[para 1] The Complainant was employed as a legal assistant with Alberta Justice and Attorney General, which is now known as Alberta Justice and Solicitor General (the "Public Body" in this inquiry, or alternatively "JAG"). The Complainant suffered an injury to her left shoulder when she tripped on stairs at work on August 22, 2005. The injury was addressed by the Workers' Compensation Board (the "WCB"). JAG subsequently accommodated the Complainant into a unit clerk/receptionist position beginning September 18, 2006, which was a modified job to enable her to work within the restrictions of her left shoulder difficulties. On January 14, 2008, the Complainant submitted another claim to the WCB in respect of an injury to her right shoulder, on the basis that the height of her desk was not properly set for her ergonomically.

[para 2] In approximately April 2009 (the relevant "Referral Form for Medical Assessments" is undated), JAG sought to obtain an assessment of the Complainant's functional capacity so as to determine her ability to perform her previous job functions as a legal assistant. On behalf of JAG, Alberta Corporate Human Resources ("CHR") arranged for the Complainant to attend a functional capacity examination ("FCE") carried out by LifeMark Occupational Services/LifeMark Health Services ("LifeMark"). When requesting the assessment, JAG provided CHR with three letters, as described in the next part of this Order (the "Letters"), which CHR then attached to the Referral Form provided to LifeMark.

[para 3] In correspondence dated April 6, 2010, the Complainant complained that JAG had improperly disclosed to CHR her personal information contained in the Letters,

thereby contravening the *Freedom of Information and Protection of Privacy Act* (the “Act”). She also complained that CHR had improperly collected her personal information in the Letters, and had improperly provided this personal information to LifeMark. The Complainant’s complaint against CHR became the subject of Case File Number F5333.

[para 4] The former Commissioner authorized a portfolio officer to investigate and try to settle the Complainant’s complaints. This was not successful, and the Complainant requested an inquiry into Case File Number F5332, by form dated November 8, 2010. The Complainant also requested an inquiry, by form dated March 15, 2011, into Case File Number F5333, being her complaint against CHR. The inquiries into the two matters were held jointly. For the purpose of Case File Number F5332, being the present matter, CHR participated as an affected party, as contemplated by section 67(1)(a)(ii) of the Act.

[para 5] The Complainant’s complaint against CHR is addressed in Order F2012-23, issued concurrently with this Order.

## **II. INFORMATION AT ISSUE**

[para 6] The information that the Complainant alleges to have been improperly disclosed by JAG is that contained in a letter dated May 1, 2008 from the WCB to her (which had been copied to JAG as her employer), in a letter dated July 22, 2008 from the WCB to her (which had likewise been copied to JAG), and in a letter dated October 29, 2008 from an orthopaedic surgeon to the Complainant’s family physician. This last letter had been provided to JAG by the Complainant’s union on her behalf.

[para 7] In a letter to this Office dated December 6, 2011, JAG sought clarification as to whether the two letters from the WCB were the subject of the Complainant’s complaint as against JAG. In a letter dated December 8, 2011 to all parties, I responded that the Complainant was to clearly indicate, in her initial submissions, whether she was only concerned about JAG’s disclosure of the doctor’s letter of October 29, 2008, or whether she was also concerned about other records or information disclosed by JAG.

[para 8] While the Complainant was not clear in her initial submissions, she indicated in her rebuttal submissions that she still had a complaint against JAG, in addition to a complaint against CHR, regarding the disclosure of the information in the Letters from the WCB. In any event, in its own initial submissions, JAG had already decided to address its disclosure of all three Letters.

## **III. ISSUE**

[para 9] The Notice of Inquiry, dated June 21, 2011, set out the following issue:

Did the Public Body disclose the Complainant’s personal information in contravention of Part 2 of the Act?

[para 10] In her rebuttal submissions, the Complainant raises concerns about the use of her personal information by JAG for the purpose of a decision on its part to terminate her employment. She also raises the possibility that other individuals, whether internal or external to JAG or to CHR, have seen her personal information. I will not be addressing any of these concerns in this Order. First, the Complainant has raised them very late in the process. Second, she has not sufficiently substantiated her concerns in order for JAG to respond to them and in order for me to address them. She suggests that her termination was based on information improperly provided to JAG following her FCE, whereas her termination letter, dated September 14, 2010, cites “current and ongoing absences, restrictions and resistance to accommodation” as the reasons for her termination. With respect to additional disclosures of her personal information, the Complainant merely speculates that others might have seen her personal information.

[para 11] The Complainant also alleges that certain of her rights and freedoms under the Canadian Charter were infringed. She writes that the release of her personal information without her consent “is a violation of my privacy and my disability status”. To the extent that the Complainant is saying that she suffered inequality or discrimination based on her disability, I have no jurisdiction to address this. To the extent that she is saying that the Charter accords her a right to privacy, the Act itself already accords her this right, in that it prohibits a public body from collecting, using or disclosing her personal information unless one of the grounds of authority set out in the Act is established. In other words, I have taken the Complainant’s privacy rights into account, whether characterized as deriving from the Act or deriving from the *Canadian Charter of Rights and Freedoms*.

#### **IV. DISCUSSION OF ISSUE**

##### **Did the Public Body disclose the Complainant’s personal information in contravention of Part 2 of the Act?**

[para 12] In inquiries involving the alleged unauthorized disclosure of personal information, the initial burden of proof normally rests with the complainant, in that the complainant has to have some knowledge, and adduce some evidence, regarding what personal information of his or hers was disclosed, and the manner in which that personal information was disclosed; the public body then has the burden to show that its disclosure of the personal information was in accordance with the Act (Order F2006-019 at para. 51; Order F2007-019 at paras. 8 and 9).

##### **1. Did the Public Body disclose the Complainant’s personal information?**

[para 13] Section 1(n) of the Act reads, in part, as follows:

*1(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,*

...

*(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*

...

[para 14] I find that the three Letters consist of the Complainant's personal information, as defined above. The Letters contain the Complainant's name [as set out in section 1(n)(i)], information about her health and health care history [as set out in section 1(n)(vi)], information about her employment history [as set out in section 1(n)(vii)], and others' opinions about her [as set out in section 1(n)(viii)].

[para 15] JAG acknowledges that the Letters contain the Complainant's personal information, and that it disclosed the Letters to CHR.

## **2. Did the Public Body have the authority to disclose the Complainant's personal information?**

[para 16] Under Part 2 of the Act, a public body may disclose an individual's personal information in accordance with one or more of the purposes or circumstances set out in section 40. Section 40 reads, in part, as follows:

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

...

*(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*

*(d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,*

...

*(i) to an officer or employee of a public body or to a member of the Executive Council, if the disclosure is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or member to whom the information is disclosed,*

...

(x) *for the purpose of managing or administering personnel of the Government of Alberta or the public body,*

...

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

[para 17] The Public Body submits that it had the authority to disclose the Complainant's personal information under sections 40(1)(c), 40(1)(i) and 40(1)(x).

[para 18] The Complainant argues that JAG did not have the authority to disclose her personal information because she did not give it permission to do so. However, obtaining an individual's consent, as contemplated by section 40(1)(d), is only one of the ways in which a public body can have the authority to disclose the individual's personal information. A public body is authorized to disclose personal information, in the absence of the individual's consent, on the basis of any of the other purposes or circumstances set out in section 40(1).

(a) Disclosure for the purpose of managing or administering personnel

[para 19] JAG submits that "managing or administering personnel" includes various functions of a public body, such as those relating to staffing, classification and compensation, occupational health and safety, training and development, and payroll (see Investigation Report 2001-IR-006 at p. 18 or para. 87). It notes that CHR is established under section 4(1) of the *Public Service Act*, that section 5 specifies the appointment of a Public Service Commissioner, and that under section 6(1)(a), the Commissioner and therefore also staff of CHR have the duty to "advise and assist departments in the conduct of departmental human resource activities". One of the areas in which CHR provides services for government departments is workplace health, which includes medical consultant services, as described in a document submitted by JAG entitled the same, "Medical Consultant Services".

[para 20] In view of the foregoing, JAG explains that services are provided by CHR to the internal human resources offices of employing departments in order to assist in the management of employee medical issues, particularly in those instances in which an employee's medical condition may be affecting his or her performance or ability to carry out job functions. JAG says that, in this case, a further medical assessment of the Complainant's condition was required in order to clarify the impact of her medical condition on her ability to perform the full duties of her previous position as legal assistant. JAG submits that this required an exchange of information with CHR in the course of which JAG was authorized to provide the three Letters to CHR. JAG says that it disclosed the three Letters to CHR for the purpose of making "an informed and responsible decision" in respect of the Complainant's ability to return to her previous role as legal assistant.

[para 21] I find that JAG was authorized, within the terms of section 40(1)(x) of the Act, to disclose to CHR the Complainant's personal information in the Letters because it was relevant to CHR's determination of whether and how to go about requesting the FCE. Given CHR's role of providing advice and assistance to employing departments, it requires relatively detailed knowledge of whatever human resource matter is being addressed. As framed by CHR, CHR is "the central human resources arm of the Government of Alberta". In other words, human resources staff within JAG and within CHR work together on employment-related matters, and both sets of staff are human resources agents of the Government of Alberta as the overall employer. Provided that the information being exchanged is in some way connected to the human resource matter in question, I believe that an employing department and CHR should be given latitude in their determination of what information is needed by CHR in order to fulfill its role and responsibility of advising and assisting the department.

[para 22] The ability of JAG and CHR to exchange human resources information about the Complainant is supported by section 7 of the *Public Service Act*, which reads as follows:

*7 The Commissioner and any officers of Corporate Human Resources designated by the Commissioner for the purpose are entitled to access to the records and files of every department for the purpose of examining them and taking extracts from them or making copies of them when the records relate to human resource matters of that department or contain statistical information that is in the Commissioner's opinion required by the Commissioner for the purpose of enabling the Commissioner to carry out the Commissioner's duties under this Act and the regulations.*

[para 23] While section 7 authorizes CHR to take the step of accessing human resources information held within an employing department such as JAG – whereas, in this case, JAG took the step of disclosing information to CHR – the section demonstrates that CHR is entitled to know the human resources information of government employees. Section 7 states that CHR has the authority to access the necessary human resources information "for the purpose of enabling the Commissioner to carry out the Commissioner's duties". As already discussed, one of the duties of the Public Service Commissioner and therefore CHR is to advise and assist government departments in employee-related matters, including those relating to workplace health and the accommodation of injured employees.

[para 24] In this case, the three Letters disclosed by JAG to CHR provided CHR with background information about the Complainant's injuries and how they had impacted her employment, as well as about her WCB claims. It is my understanding that CHR would have reviewed all of this information for the purpose of advising JAG on whether the FCE was an appropriate or the best course of action, insofar as the Complainant's injuries, accommodation and employment were concerned. JAG wrote, in a memorandum included with its submissions, that CHR reviews the employing department's request for the particular assessment along with the available medical

information about the employee to determine, for instance, whether the situation warrants the additional expense of carrying out further examination of the employee's condition and its job implications. In this particular case, JAG says that it provided the detailed information contained in the Letters to CHR in order to explain its need for the assessment of the Complainant that it was requesting.

[para 25] I accept this rationale. The medical information about the Complainant in the Letter from her orthopaedic surgeon and in the Letters from the WCB – which included information as to how the Complainant's injuries had affected her ability to perform her job functions – served the purpose of explaining or justifying JAG's request for CHR to arrange the FCE. The information about the Complainant's WCB claims and benefits in the Letters from the WCB – which included information regarding the extent to which the Complainant's injuries were due to her employment, indicated a leave of absence due to her injury, listed steps taken by JAG to accommodate her in an alternate position, and outlined her past medical treatment and prognosis – served the purpose of enabling CHR to determine whether the FCE was warranted, or whether other approaches might be taken to address the Complainant's injuries, accommodation and employment with JAG. As noted by CHR, the WCB Letters indicated that the Complainant was fit to work but with some restrictions. Again, this was relevant information for CHR to consider in fulfilling its role of advising and assisting JAG.

[para 26] As I have found that JAG had the authority to disclose to CHR the Complainant's personal information in the Letters for the purpose of managing or administering personnel under section 40(1)(x) of the Act, it is not necessary for me to decide whether JAG also had authority under sections 40(1)(c) and 40(1)(i).

(b) Disclosure only to the extent necessary

[para 27] Under section 40(4) of the Act, a public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes for which the information is disclosed in a reasonable manner.

[para 28] JAG submits that the Complainant's personal information in the Letters was provided to CHR to enable JAG, as the Complainant's employer, to obtain a current medical analysis of the Complainant's condition. JAG further argues that, in order to achieve this objective, it needed to provide as complete a picture as possible for the purpose of assessing the Complainant's ability to return to work as a legal assistant. JAG essentially submits that it had the authority, within the terms of section 40(4), to provide CHR with the Complainant's medical and employment background, as set out in the three Letters, so that CHR could then obtain a better assessment of the Complainant's functional capacity by way of the FCE carried out by LifeMark.

[para 29] Conversely, the Complainant argues that an independent medical examination, such as the FCE in this case, is an evaluation performed by a doctor who is not involved in the employee's care in order to establish if and how medical issues will impact the employee's ability to perform his or her job duties. In referring to a doctor not



involved in the employee's care, the Complainant appears to be suggesting that the three Letters disclosed by JAG to CHR had the effect of improperly influencing the results of the FCE carried out by LifeMark. She further writes that the FCE should have been carried out "without prejudice", and that the disclosure of her detailed medical information and the information about her WCB claims to LifeMark "tainted" the process. I take the Complainant to be arguing that LifeMark did not require the information in the Letters for its own particular purpose of carrying out the FCE.

[para 30] For clarity, the question in this inquiry is whether section 40(4) was met when JAG disclosed the three Letters to CHR, not whether section 40(4) was met when CHR provided the three Letters to LifeMark. This other question is addressed in Order F2012-23.

[para 31] I have essentially already explained, in the preceding part of this Order, that JAG disclosed the Complainant's personal information to CHR to the extent necessary to enable JAG to carry out an authorized purpose in accordance with section 40(4). First, JAG had the authority to disclose the Complainant's information for the purpose of requesting a medical assessment of the Complainant so as to determine whether she was able to perform particular job functions, which is an aspect of managing or administering personnel within the terms of section 40(1)(x). Second, in requesting the FCE, JAG provided CHR with relevant information, as found in the Letters, regarding the way in which the Complainant's injuries had previously affected her ability to perform her job functions, the extent to which the Complainant's injuries were due to her employment, the steps taken by JAG to accommodate her in an alternate position, and her past medical treatment and prognosis. Disclosure of all of this information was necessary, and carried out in a reasonable manner, so as to enable JAG to obtain human resource advice on whether the FCE should be carried out, and to obtain assistance from CHR in arranging it. On my review of each of the three Letters, I see no superfluous or extraneous information that the Public Body arguably should have redacted on the basis that its disclosure to CHR might be contrary to the Act.

[para 32] I conclude that JAG disclosed the Complainant's personal information in the Letters only to the extent necessary to enable it to carry out an authorized purpose in a reasonable manner, in accordance with section 40(4).

## **V. ORDER**

[para 33] I make this Order under section 72 of the Act.

[para 34] I find that the Public Body, being JAG, had the authority to disclose the Complainant's personal information in the Letters under section 40(1)(x) of the Act, on the basis that the disclosure was for the purpose of managing or administering personnel of the Public Body. I also find that the Public Body disclosed the Complainant's personal information only to the extent necessary to enable it to carry out the authorized purpose in a reasonable manner, in accordance with section 40(4).

[para 35] I conclude that the Public Body did not disclose the Complainant's personal information in contravention of Part 2 of the Act.

Wade Riordan Raaflaub  
Adjudicator