

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-23

September 28, 2012

ALBERTA CORPORATE HUMAN RESOURCES

Case File Number F5333

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that Alberta Corporate Human Resources (“CHR”) had improperly collected from Alberta Justice and Solicitor General (“JAG”) her personal information contained in three letters, and had improperly provided LifeMark Occupational Services/LifeMark Health Services (“LifeMark”) with this personal information, 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 CHR had the authority to collect the Complainant’s personal information, under section 33(c) of the Act, as the information related directly to and was necessary for an operating activity of CHR. 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 collected by CHR from JAG provided CHR 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 CHR had the authority to collect the Complainant's personal information indirectly from JAG, rather than directly from her. Section 34(1)(n) of the Act authorizes the indirect collection of personal information if it is collected for the purpose of managing or administering personnel of the Government of Alberta.

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

Conversely, the Adjudicator concluded that CHR's disclosure of most of the Complainant's personal information to LifeMark had contravened the Act.

The Adjudicator found that CHR did not have the authority to disclose most of the Complainant's personal information in the letters on the basis of a purpose consistent with collection under section 40(1)(c). The letters discussed the Complainant's entitlement to WCB benefits, as well as details about her injuries, symptoms, prior visits to medical professionals, past treatments and prognosis. While the collection of the foregoing information enabled CHR to provide advice and assistance to JAG, CHR's disclosure to LifeMark, of almost all of this information, had no reasonable and direct connection to CHR's specific purpose of arranging a functional capacity examination of the Complainant, and was not necessary for CHR to perform its statutory duty of assisting JAG in that particular regard.

The Adjudicator noted that the disclosure of the Complainant's personal information in the Letters was for the purpose of managing or administering a personnel matter within the terms of section 40(1)(x) of the Act, and also arguably for the purpose of determining the Complainant's suitability or eligibility for a program (i.e., the employer accommodating her into a position) within the terms of section 40(1)(l). However, the Adjudicator found that CHR had disclosed far more information than was necessary to enable it to carry out the foregoing purposes in a reasonable manner, and had therefore contravened section 40(4). LifeMark was carrying out a relatively limited assessment of the Complainant's functional capacity, and CHR did not establish that it was required to disclose so many details about the Complainant in order for LifeMark to carry out the assessment.

The Adjudicator ordered CHR to stop disclosing the Complainant's personal information in contravention of Part 2 of the Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 1(n), 1(n)(i), 1(n)(vi), 1(n)(vii), 1(n)(viii), 33, 33(a), 33(c), 34, 34(1)(n), 39(1)(a), 39(4), 40, 40(1), 40(1)(c), 40(1)(d), 40(1)(l), 40(1)(x), 40(4), 41, 41(a), 41(b), 67(1)(a)(ii), 72 and 72(3)(e); *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 98-002, F2006-018, F2006-019, F2007-019 and F2012-22.

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 (“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 (the “Public Body” in this inquiry, or alternatively “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 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 CHR had improperly collected her personal information in the Letters from JAG, and had improperly provided LifeMark with this personal information, thereby contravening the *Freedom of Information and Protection of Privacy Act* (the “Act”). She also complained that JAG had improperly disclosed her personal information to CHR. The Complainant’s complaint against JAG became the subject of Case File Number F5332.

[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 F5333, by form dated March 15, 2011. The Complainant also requested an inquiry, by form dated November 8, 2010, into Case File Number F5332, being her complaint against JAG. The inquiries into the two matters were held jointly. For the purpose of Case File Number F5333, being the present matter, JAG participated as an affected party, as contemplated by section 67(1)(a)(ii) of the Act.

[para 5] The Complainant’s complaint against JAG is addressed in Order F2012-22, issued concurrently with this Order.

II. INFORMATION AT ISSUE

[para 6] The information that the Complainant alleges to have been improperly collected by CHR, and then improperly provided to LifeMark, 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.

III. ISSUES

[para 7] The Notice of Inquiry, dated June 21, 2011, set out the following two issues:

Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

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

[para 8] In her rebuttal submissions, the Complainant raises the possibility that other individuals, whether internal or external to CHR or to JAG, have seen her personal information. I will not be addressing this concern in this Order. First, the Complainant has raised it very late in the process. Second, she has not sufficiently substantiated her concern in order for CHR to respond to it and in order for me to address it. With respect to additional disclosures of her personal information, the Complainant merely speculates that others might have seen her personal information.

[para 9] 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 ISSUES

[para 10] In inquiries involving the alleged unauthorized collection, use or 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 collected, used or disclosed, and the manner in which that personal information was collected, used or disclosed; the public body then has the burden to show that its collection, use or 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).

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

1. Did the Public Body collect the Complainant’s personal information?

[para 11] 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 12] CHR acknowledges that it collected the three Letters from JAG. I find that they 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)].

2. Did the Public Body have the authority to collect the Complainant’s personal information?

[para 13] Under Part 2 of the Act, a public body may collect an individual’s personal information in accordance with one or more of the purposes or circumstances set out in section 33. Section 33 reads, in part, as follows:

33 No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,

...

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

[para 14] CHR submits that its collection of the Complainant's personal information was required in order to fulfill CHR's mandate of managing personnel of the Government of Alberta, and specifically to provide occupational health services in relation to the Complainant. It explains that the three Letters were collected from JAG because the Complainant had requested a return to her previous employment position, which led to JAG's request that the FCE be arranged by CHR.

[para 15] An operating activity of CHR, within the terms of section 33(c), is to advise and assist employing government departments in human resource matters. CHR notes that it 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 16] Under section 33(c), a public body may collect personal information if it relates directly and is necessary for the operating program or activity in question. For the reasons that follow, I find that CHR's collection of the Complainant's personal information in the three Letters related directly and was necessary for the activity of advising and assisting JAG in a human resource matter involving the Complainant.

[para 17] CHR was authorized to collect from JAG 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 CHR and within JAG work together on employment-related matters, and both sets of staff are human resources agents of the Government of Alberta as the overall employer. Further, it has been stated that a public body is entitled to considerable latitude in deciding that the collection of personal information is necessary in a given case, and that its decision should not be interfered with unless patently unreasonable (Order 98-002 at para. 152; F2006-018 at para. 18). Here, I find that the Complainant's personal information in the Letters was connected to the human resource matter in question.

[para 18] The three Letters collected by CHR from JAG 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, and that CHR therefore collected the information, in order for CHR to understand JAG's need for the assessment of the Complainant that it was requesting.

[para 19] 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 20] I conclude that CHR collected the Complainant's personal information in the three Letters for an authorized purpose under section 33(c) of the Act, as the information related directly to and was necessary for an operating program or activity of CHR.

[para 21] A collection of personal information by a public body is also authorized, under section 33(a), if the collection of the information is expressly authorized by an enactment of Alberta. CHR and JAG note 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 22] 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,

CHR collected the information because JAG took the step of disclosing it to CHR. In any event, I do not need to determine whether the exchange of information in this case fell within the terms of section 7 of the *Public Service Act*, and therefore was expressly authorized by an enactment within the terms of section 33(a) of the FOIP Act. I have already found that CHR was authorized to collect the Complainant's personal information in the Letters under section 33(c).

[para 23] The collection of personal information must also be carried out in accordance with section 34 of the Act, which sets out whether personal information may be collected indirectly, or must be collected directly from the individual in question. I find that CHR's collection of the Complainant's personal information in the Letters, indirectly from JAG, complied with section 34. Section 34(1)(n) states that a public body must collect personal information directly from the individual the information is about unless, among other possibilities, the information is collected for the purpose of managing or administering personnel of the Government of Alberta.

[para 24] I conclude that CHR did not collect the Complainant's personal information in contravention of Part 2 of the Act.

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

1. Did the Public Body disclose the Complainant's personal information?

[para 25] I found earlier in this Order that the three Letters consist of the Complainant's personal information. CHR acknowledges that it provided the Letters to LifeMark.

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

[para 26] 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,

...

(l) for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit,

...

(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 27] CHR essentially submits that it had the authority to disclose the Complainant's personal information under section 40(1)(c) – although it refers instead to section 39(1)(a), as will be explained below. It alternatively submits that it had the authority to disclose the Complainant's personal information under section 40(1)(l) or 40(1)(x).

[para 28] The Complainant argues that CHR 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 a use consistent with the purpose of collection

[para 29] CHR submits that it had the authority to provide the three Letters to LifeMark on the basis that it was for a use consistent with the purpose for which the Letters were collected from JAG, within the terms of section 39(1)(a). Sections 39(1)(a) and 39(4) read as follows:

39(1) A public body may use personal information only

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

...

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 30] In referring to section 39(1)(a), CHR characterizes its treatment of the Letters, after collecting them from JAG, as a "use" of the Complainant's personal information, further noting that LifeMark is deemed to be an employee of CHR within the meaning set out in section 1(e). Section 1(e) states that an "employee" in relation to a

public body includes a person who performs a service for the public body under a contract or agency relationship with the public body. CHR essentially characterizes the treatment of personal information within or internal to a public body as a use.

[para 31] However, I characterize what occurred in this case as a disclosure of the Complainant's personal information by CHR to LifeMark. Even if the exchange of information within a public body might be characterized as a use of information, LifeMark is a third party vis-à-vis CHR. The definition of "employee" in section 1(e) is for the purpose of interpreting other provisions of the Act, in that it applies wherever the term "employee" appears. The definition does not mean that every "employee" of a public body is to be considered an actor that is internal to the public body. In this case, LifeMark is a third party service provider. In any event, little turns on whether there was a use or a disclosure of the Complainant's personal information by CHR, given that sections 40(1)(c) and 40(4), regarding the authority to disclose, are identical to sections 39(1)(a) and 39(4), regarding the authority to use. Moreover, section 40(1)(c) nonetheless contemplates an eventual use of personal information, as occurred by LifeMark, in that it authorizes a disclosure for the purpose of a use.

[para 32] I turn now to the question of whether CHR's disclosure of the three Letters to LifeMark was for a purpose consistent with CHR's collection of the three Letters from JAG. Section 41 of the Act reads as follows:

41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

[para 33] Section 41(a) requires that there be a reasonable and direct connection between the purpose for which a public body initially collected personal information, and the purpose for which it subsequently uses or discloses it. In addition, section 41(b) states that the use or disclosure must be necessary for performing the statutory duties of the public body that uses or discloses the information, or for operating its legally authorized program.

[para 34] As discussed earlier in this Order, CHR has the mandate, broadly speaking, of advising and assisting government departments in human resource matters. Indeed, this is one of its statutory duties under the *Public Service Act*. However, when deciding whether the purpose of a use or disclosure of personal information is the same as or consistent with the purpose of collection, one should examine the specific purpose; otherwise, a public body would have too wide a latitude to use and disclose personal

information simply by characterizing the purposes broadly enough (Order F2006-018 at para. 67).

[para 35] CHR submits that its provision of the three Letters to LifeMark was for a purpose that was consistent with collection of the Letters, “that being to provide the service LifeMark Health was contracted to do for CHR”. The service that LifeMark was contracted to carry out was the FCE. In other words, the specific purpose for which CHR disclosed the Complainant’s personal information to LifeMark was to enable LifeMark to perform the FCE on the Complainant. Conversely, the specific purpose for which CHR collected the three Letters from JAG was to provide advice and assistance to JAG, by determining whether the FCE was warranted and then to arrange it.

[para 36] The Letters discuss the Complainant’s entitlement to WCB benefits, as well as details about her injuries, symptoms, prior visits to medical professionals, past treatments and prognosis. While collection of the foregoing information enabled CHR to provide advice and assistance to JAG, I find that disclosure of the information to LifeMark was not necessary in order for CHR to actually arrange, and obtain the results of, the FCE. LifeMark was carrying out a relatively limited assessment, namely an assessment of the Complainant’s functional capacity and, for reasons explained more fully later in this Order, LifeMark did not require so many details about the Complainant’s medical condition, or anything about her WCB claims, in order to carry out the FCE.

[para 37] I also find that disclosure of the Complainant’s personal information in the Letters had no reasonable and direct connection to CHR’s specific purpose of arranging the FCE. There was, at most, an indirect connection. In collecting all of the Complainant’s personal information from JAG, CHR was determining whether an FCE was appropriate in the particular case. Once the FCE was determined to be appropriate, CHR’s disclosure of the Complainant’s personal information to LifeMark was then reasonable only to the extent that CHR needed to disclose the information in order to actually arrange the FCE.

[para 38] I conclude that CHR’s disclosure of the Letters to LifeMark was not consistent with the purpose for which they were collected from JAG, within the terms of section 41 of the Act. CHR’s disclosure of most of the Complainant’s personal information in the Letters was therefore not authorized under 40(1)(c) [or alternatively, CHR’s use of most of that information was not authorized under section 39(1)(a)]. I say “most” because disclosure of a small amount of the Complainant’s personal information, as contained in the Letters, was for a purpose consistent with the initial purpose of assisting JAG and arranging the FCE. In order to actually arrange the FCE and obtain the results, CHR was required to disclose some of the Complainant’s personal information, such as the general nature of her injuries and the reason for requesting the assessment. However, this limited amount of information was already included on the Referral Form for Medical Assessments that CHR provided to LifeMark.

[para 39] I explain, in greater detail, why I find that CHR disclosed too much of the Complainant's personal information to Life Mark when I discuss section 40(4) of the Act below. Many of the considerations in reference to section 41 and 40(4) overlap, in that both sections refer to a disclosure being "reasonable" and "necessary".

(b) Disclosure on the basis of consent

[para 40] While CHR did not squarely raise the application of section 40(1)(d) of the Act, it notes that, on May 19, 2009 and July 31, 2009, the Complainant signed two forms prepared by LifeMark entitled "Consent to Assessment". In those forms, the Complainant indicated her understanding that the assessment may consist of the collection of a "health history (the collection of information regarding past illnesses, lifestyle questions and other health information)". CHR argues that this authorized it to provide the injury history, as contained in the three Letters, to LifeMark. However, I do not interpret the Consents to Assessment in the same manner. The Complainant was acknowledging that LifeMark may collect certain information from her in the course of the FCE, not from CHR. This is apparent from the forms' reference to the assessment itself "consisting" of the collection of such information (in addition to consisting of a "physical examination" and/or "functional examination"). In other words, the forms are contemplating what might occur in the course of the assessment as between the Complainant and LifeMark, not at some prior point in time as between CHR and LifeMark.

[para 41] Therefore, to the extent that CHR is arguing that it had the authority to disclose the three Letters under section 40(1)(d), I find that it did not have such authority.

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

[para 42] CHR alternatively submits that it had the authority to disclose the three Letters to LifeMark for the purpose of managing or administering personnel of the Government of Alberta, within the terms of section 40(1)(x) of the Act. As I explain in Order F2012-22, section 40(1)(x) authorized the disclosure of the three Letters by JAG to CHR, essentially on the basis that the human resources staff in JAG and CHR were working together to address employment-related matters involving the Complainant. However, for reasons explained in this Order, the need to exchange information as between JAG and CHR does not, in turn, mean that CHR is authorized to pass along the same information to LifeMark.

[para 43] For the purpose of managing or administering personnel, section 40(1)(x) authorized CHR to disclose to LifeMark some of the Complainant's personal information, such as her job description, a "Physical Demands Analysis" and limited information about the nature of the Complainant's injuries included on the Referral Form for Medical Assessments. The Complainant does not complain about disclosure of this information. As for the other information that CHR disclosed to LifeMark in the Letters, it may have been for the purpose of managing or administering a personnel matter

involving the Complainant, but CHR disclosed too much of the Complainant's personal information for that purpose, as explained in this Order further below.

(d) Disclosure for the purpose of determining or verifying suitability or eligibility for a program or benefit

[para 44] CHR alternatively submits that it had the authority to disclose the three Letters to LifeMark for the purpose of determining or verifying the Complainant's suitability or eligibility for a program or benefit, within the terms of section 40(1)(l) of the Act. The accommodation of an employee into a particular position is arguably a "program" within the terms of section 40(1)(l), and CHR may be viewed as gathering information from LifeMark, by way of the FCE, in order to advise and assist JAG in its determination of whether and how to accommodate the Complainant.

[para 45] I am therefore prepared to find that CHR also had the authority to disclose some of the Complainant's personal information to LifeMark for the purpose of determining her suitability or eligibility for a program within the terms of section 40(1)(l). However, this authority would essentially be repetitive or redundant to CHR's authority to disclose the Complainant's personal information for the purpose of managing or administering personnel within the terms of 40(1)(x). Whether CHR's disclosure to LifeMark is characterized as one for the purpose of accommodating the Complainant, or one for the purpose of administering an aspect of her employment more generally, the conclusions that follow in this Order would be the same. In short, the disclosure may have been for an authorized purpose or purposes, but too much of the Complainant's personal information was disclosed, contrary to section 40(4), as will now be discussed.

(e) Disclosure only to the extent necessary

[para 46] 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 47] 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 on 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. I review the relevant submissions of CHR, and of JAG, below.

[para 48] I have noted that CHR had the authority to disclose the Complainant's personal information for the purpose of managing or administering personnel under section 40(1)(x), and also arguably for the purpose of determining the Complainant's suitability or eligibility for a program under section 40(1)(l). In respect of both of these purposes, CHR was arranging for the FCE to be carried out by LifeMark. When arranging a medical consultant review or examination, such as an FCE, the document entitled "Medical Consultant Services", prepared by CHR, contemplates that the human resources employee in the employing department or ministry will provide CHR with the employee's job description and the Physical Demands Analysis. The document indicates that these, in turn, will be provided by CHR to LifeMark. Indeed these formed part of the referral package sent to LifeMark in the Complainant's case, and as already noted, she has no concerns regarding their inclusion in the package.

[para 49] An earlier version of the Medical Consultant Services document (found under Tab 4 of the submissions of JAG) also states that CHR will forward "any further information provided by the ministry, directly to LifeMark". This indication should not have been applied or interpreted literally. While I have found that the collection of the three Letters by CHR from JAG was authorized under the Act, this does not automatically mean that CHR was then authorized to disclose the three Letters to LifeMark. I note that, in a subsequent version of the Medical Consultant Services document (found under Tab 17 of the submissions of JAG), the reference to CHR forwarding to LifeMark whatever information that it receives from the employing department has been removed.

[para 50] As explained earlier in this Order, the role of CHR is to advise and assist departments in their management of human resource matters. CHR is a specialized human resources office that is entitled to know certain information about a particular employee, as disclosed by the employing department, but CHR is then expected to use its knowledge and expertise to determine the extent to which the information may be known by others. In other words, while there is some latitude regarding the exchange of information between employing departments and CHR, given that CHR is the central human resources arm of the Government of Alberta and is therefore essentially an extension of the department's own human resources office, the ability of CHR to disclose information to outside parties is more circumscribed. Here, while CHR was authorized to collect from JAG the detailed background relating to the Complainant's injuries and WCB claims, it was incumbent upon CHR to determine the extent to which it was necessary for any of this information to be disclosed to LifeMark for the purpose of the FCE itself, rather than simply pass along the information because CHR had received it from JAG. I find that doing the latter resulted in a contravention of section 40(4).

[para 51] I also note that the "Referral Form for Medical Assessments", prepared by LifeMark and completed by CHR, states that "a copy of all relevant medical information if available" should be included. Again, however, it is up to CHR to determine what is, in fact, relevant for the purpose of the particular medical consultant service being requested. For the reasons set out below, CHR has not established that LifeMark needed

to know the Complainant's detailed medical information, or anything about her WCB claims, in order to carry out the FCE.

[para 52] CHR argues that the three Letters gave LifeMark necessary background information to allow for clarification and understanding of the Complainant's medical limitations and to assist in ensuring an accurate and thorough medical assessment. CHR says that the practitioner completing the assessment needs to know the context of the injuries, the need for the assessment, and the background relating to the injuries previously sustained. CHR adds that, if the practitioner does not know the injury history, this can place the employee at risk of injury in the course of the examination.

[para 53] The foregoing does not persuade me that CHR was authorized to disclose the three Letters to LifeMark. CHR is able to include the reason for the requested examination, the nature of the injuries previously sustained and other necessary context directly on the "Referral Form for Medical Assessments" given to LifeMark. Indeed, CHR did so in the Complainant's case. The lower half of the Referral Form advised the consultant carrying out the FCE that the Complainant had suffered injuries to each shoulder and briefly described those injuries. If CHR believed that more detail about the injuries was required, it could have and should have provided that additional detail without attaching the whole of the Letters including information that was, in my view, not relevant to carrying out the FCE. As for the consultant's need to know the Complainant's injury history, for the purpose of the FCE generally as well as to avoid further injury to the Complainant, I additionally note that the Complainant would have been in a position to provide that information at the FCE herself.

[para 54] I find that almost all of the content of the Letter of May 1, 2008 from the WCB to the Complainant did not have to be disclosed to LifeMark in order for the FCE to be carried out. The Letter addresses the Complainant's entitlement to WCB benefits, and CHR has not explained why the consultant performing the FCE would have to know this information. While the foregoing Letter briefly mentions the nature of the Complainant's workplace injury that occurred on January 14, 2008, this information was already included by CHR on the Referral Form. The Letter of July 22, 2008 from the WCB to the Complainant likewise contains information about her WCB benefits that the consultant performing the FCE did not need to know, in my view, for the purpose of carrying out the assessment.

[para 55] The second Letter from the WCB additionally contains details about the Complainant's injuries, symptoms, prior visits to medical professionals, past treatments and prognosis. The Letter of October 29, 2008 from the Complainant's orthopaedic surgeon contains similar information. However, for reasons explained earlier, CHR could have and should have provided only the relevant and necessary information to LifeMark, rather than including the entire Letters in the referral package. In this particular case, I also question why so many details about the Complainant's medical condition needed to be provided to LifeMark at all.

[para 56] In its submissions, CHR occasionally refers to a “fit for work” assessment being performed on the Complainant. However, the Referral Form and the two Consents to Assessment indicate that an FCE was conducted. The Complainant submitted information indicating that an FCE “examines an employee’s physical tolerance related to strength, endurance, speed and flexibility”. Given the apparent nature and purpose of an FCE, I fail to see how the consultant performing it on the Complainant required the detailed medical information set out in the Letter from her orthopaedic surgeon, or in the Letter of July 22, 2008 from the WCB. The consultant was carrying out a relatively limited assessment. I make no comment on what information a consultant might require for the purpose of a different type of medical examination.

[para 57] For its part, JAG submits that, absent the complete information contained in the Letters included in the referral package sent from CHR to LifeMark, the Complainant could be placed at further risk, as treating professionals would have no historical context on which to base treatment. However, the consultant with LifeMark was not providing treatment to the Complainant, but rather carrying out an FCE. JAG also refers to situations where an employer might ask about the prognosis for an employee’s recovery, request an independent medical assessment, or ask whether treatment that the employee is taking (as opposed to his or her current functioning) will affect the ability to perform job duties. Again, however, none of the foregoing was the situation in this case, and I need not address, for the purpose of the present inquiry, what information might be required by a medical consultant in these different kinds of situations.

[para 58] JAG also cites an employer’s right to request medical prognosis information to accommodate an employee’s return to work. While JAG, with the advice and assistance of CHR, was responsible for accommodating the Complainant’s return to work, LifeMark was not itself responsible for deciding how the Complainant might be accommodated. Rather, it was engaged to provide the results of an FCE so that JAG could then make a decision regarding accommodation. In my view, for the purposes of the FCE, LifeMark needed to receive only the Complainant’s job description, the Physical Demands Analysis, and the relatively limited information about the nature of her injuries already included directly on the Referral Form for Medical Assessments.

[para 59] Further, even if LifeMark was assisting in the determination of the Complainant’s suitability or eligibility for a program (i.e., the employer accommodating her into a position) within the terms of section 40(1)(l), it was not actually making that determination. It was simply reporting findings and opinions, regarding the Complainant’s functional capacity, back to CHR and JAG for their consideration. The personal information of the Complainant that LifeMark needed in order to carry out the FCE was accordingly circumscribed. The same reasoning holds in respect of CHR’s disclosure of the Complainant’s personal information for the purpose of managing or administering personnel within the terms of 40(1)(x). While LifeMark may have been assisting CHR, which was in turn assisting JAG, the role of LifeMark was limited to carrying out the FCE.

[para 60] Finally, the fact that CHR requested the FCE on behalf of JAG does not mean that CHR was authorized to forward to LifeMark all of the information that JAG had given to CHR. If JAG had arranged the FCE itself, and had disclosed the three Letters to LifeMark directly, I would similarly have found that JAG disclosed more information than was necessary to arrange and obtain the FCE in a reasonable manner, within the terms of section 40(4). While CHR's collection of the Complainant's personal information from JAG was for the purpose of assisting JAG, part of the assistance, in my view, should have been to determine what information then needed to be disclosed to LifeMark in order for it to actually carry out the FCE.

[para 61] I conclude that, while disclosure of the Complainant's personal information in the Letters was for the purpose of managing or administering a personnel matter within the terms of section 40(1)(x) of the Act, and was also arguably for the purpose of determining the Complainant's suitability or eligibility for a program within the terms of section 40(1)(l), CHR has not established that it was necessary, within the terms of section 40(4), to disclose to LifeMark all of the Complainant's personal information in the three Letters. I therefore find that CHR did not comply with section 40(4).

[para 62] Although I have found that a limited amount of the information in the Letters was properly summarized by CHR on the referral form that it provided to LifeMark – and I have raised the possibility that a small amount of additional information, as contained in the Letters, might have been appropriately summarized there – I need not specifically set out the information in the Letters to which I am referring. Regardless, CHR disclosed far more of the Complainant's personal information than was necessary to enable it to carry out, in a reasonable manner, the purposes for which the information was disclosed.

[para 63] Given all of the foregoing, I conclude that CHR has not met its burden of establishing that its disclosure of the Complainant's personal information to LifeMark was in accordance with Part 2 of the Act.

V. ORDER

[para 64] I make this Order under section 72 of the Act.

[para 65] I find that the Public Body, being CHR, had the authority to collect the Complainant's personal information in the Letters under section 33(c), as the information related directly to and was necessary for an operating program or activity of the Public Body. I also find that the Public Body was authorized to collect the Complainant's personal information indirectly from JAG, as the information was collected for the purpose of managing or administering personnel of the Government of Alberta under section 34(1)(n). I conclude that the Public Body did not collect the Complainant's personal information in contravention of Part 2 of the Act.

[para 66] I find that the Public Body did not have the authority to disclose, to LifeMark, almost all of the Complainant's personal information in the Letters. While disclosure of the Complainant's personal information was for the purpose of managing or

administering a personnel matter within the terms of section 40(1)(x) of the Act, and also arguably for the purpose of determining the Complainant's suitability or eligibility for a program within the terms of section 40(1)(l), CHR disclosed more information than was necessary to enable it to carry out the foregoing purposes in a reasonable manner within the terms of section 40(4). I therefore conclude that the Public Body disclosed the Complainant's personal information in contravention of Part 2 of the Act. Under section 72(3)(e), I order the Public Body to stop disclosing the Complainant's personal information in contravention of Part 2.

[para 67] I further order the Public Body to notify me and the Complainant, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order. In this particular inquiry, it is sufficient for the notification to indicate the Organization's acknowledgement of my order in the preceding paragraph.

Wade Riordan Raaflaub
Adjudicator