ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-25 / H2012-02

October 25, 2012

ALBERTA HEALTH SERVICES

Case File Numbers F6529 and H4357

Office URL: www.oipc.ab.ca

Summary: The Applicant requested access from Alberta Health Services (AHS) to records containing information about a paternity test she and her former husband had undergone in relation to her daughter. She also requested access to the DNA samples themselves. AHS decided that the *Health Information Act* (HIA) applied to the access request. It denied the request on the basis that the paternity test contained the health information of two individuals other than the Applicant.

Before the inquiry, the Adjudicator raised the issue of whether the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) applied to the Applicant's access request. The parties made submissions regarding the issue. AHS stated that if the FOIP Act applied, then its decision was to withhold the information of the Applicant's former husband under section 17, on the basis that it would be an unreasonable invasion of the former husband's personal privacy to disclose it.

The Adjudicator decided that the HIA did not apply on the basis that a paternity test is not a health service. She also decided that the FOIP Act applied to any paper and electronic records located by AHS. However, the Adjudicator determined that DNA samples are not records under the FOIP Act and that the FOIP Act does not contain a mechanism for granting access to DNA samples in any event.

The Adjudicator found that it would not be an unreasonable invasion of the former husband's personal privacy to disclose the information in the records. She ordered the disclosure of the information in the records with the exception of one record that she found to be nonresponsive to the access request.

Statutes Cited: AB: *Health Information Act* R.S.A. 2000 c. H-5, ss. 1, 11, 34; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 7, 13, 17, 72; Health Service Regulation, Alberta Regulation70/2001 s. 3.1;

Authorities Cited: AB: Orders F2007-011, F2008-012 / H2008-003 F2009-026, F2011-001, F2012-04 / H2012-01, F2012-20

Cases Cited: *Lycka v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 245; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Carey v. Wong*, 1996 CanLII 2069 (BCCA); *Carey v. Wong*, 2008 BCSC 455

Authorities Cited:
Barber, Katherine, ed. *Canadian Oxford Dictionary*. 2nd ed. Don Mills: Oxford University Press, 2004.

I. BACKGROUND

[para 1] On May 26, 2011, the Applicant made a request to Alberta Health Services (AHS) for access to records, including DNA samples, relating to a paternity test performed at the Alberta Children's Hospital. The testing included the Applicant's DNA, her daughter's DNA, and the DNA of her former husband, who is now deceased. The Applicant obtained the written consent of her daughter to disclose the records to her.

[para 2] AHS decided that the Applicant's request for records was a request for health records under the *Health Information Act* and responded to the request under that Act. On June 23, 2011, AHS refused to disclose the records to the Applicant. The response letter states:

> Unfortunately, we must refuse to disclose these documents to you as per the requirements of section 11(2)(a) of the *Health Information Act*, as they contain personal and health information about individuals other than yourself (your daughter and your former husband). I have attached a copy of section 11(2)(a) of the *Health Information Act* for easy reference.
>
> I have been advised that there is DNA samples. However our office does not deal with providing yourself or anyone else with actual DNA samples…

[para 3] The Applicant requested that the Commissioner review AHS's decision. The Commissioner authorized a mediator to investigate and attempt to settle the matter.

[para 4] Subsequently, AHS provided the Applicant with the records, but severed some information regarding the allele length of the Applicant's former husband, in addition to information regarding the Applicant's own allele length from the records. The Public Body provided the conclusions of the report regarding the likelihood that the Applicant's former husband was the father of her daughter and a breakdown of the alleles it considered the daughter to have in common with the father. (An "allele" is one of two forms of a gene that occupy roughly the same position on a chromosome. Measuring the length of alleles enables technicians to assess the likelihood that an allele is inherited from a parent or putative parent.) However, the additional disclosure did not resolve the matter and so it was scheduled for a written inquiry.

[para 5] Once I reviewed the issues for inquiry and the records, I decided that it was possible that the Applicant's access request was subject to the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) and not the HIA. I therefore wrote AHS to find out what its decision regarding access would have been had it treated the access request as having been made under the FOIP Act.

[para 6] In response, AHS stated its view that it had properly applied the HIA to the access request. However, it stated that it would have withheld the information under section 17(1) of the FOIP Act had it considered that Act to apply. It explained that it would do so because the third party had not been deceased for more than 25 years and because AHS considered the information at issue to be medical information and therefore subject to a presumption under section 17(4).

[para 7] The Applicant and AHS exchanged initial and rebuttal submissions. I also asked questions of the parties regarding their evidence and submissions and the parties exchanged their responses with one another.

II. INFORMATION AT ISSUE

[para 8] The Custodian has withheld information of the Applicant's deceased former husband and information it considers to be "non-responsive" from the records. The records identified as being at issue are records documenting the results of a paternity test conducted in relation to the Applicant, her daughter and deceased former husband.

[para 9] The Applicant is also seeking the DNA samples that were the subject of the paternity test.

III. ISSUES

Issue A: Does the *Health Information Act* apply to the Applicant's access request and the information in the records, or does the *Freedom of Information and Protection of Privacy Act* apply?

Issue B: If the access request and the records that are the subject of it fall under the *Health Information Act,* does section 11(2) require AHS to withhold the information from the Applicant?

Issue C: If the access request and the records that are the subject of it fall under the *Freedom of Information and Protection of Privacy Act,* does section 17(1) require AHS to withhold the information from the Applicant?

IV. DISCUSSION OF ISSUES

Issue A: Does the *Health Information Act* apply to the Applicant's access request and the information in the records, or does the *Freedom of Information and Protection of Privacy Act* apply?

[para 10] In a letter dated January 16, 2012, I wrote the parties and stated the following:

> Section 1(1)(m) of the HIA defines "health services" in the following way:
>
> *1(1) In this Act,*
>
> *(m) "health service" means a service that is provided to an individual for any of the following purposes:*
> *(i) protecting, promoting or maintaining physical and mental health;*
> *(ii) preventing illness;*
> *(iii) diagnosing and treating illness;*
> *(iv) rehabilitation;*
> *(v) caring for the health needs of the ill, disabled, injured or dying,*
>
> *but does not include a service excluded by the regulations…*
>
> I note that section 1(2) of the HIA states:
>
> *1(2) Where a custodian provides services that are not health services, this Act does not apply*
>
> *a) to the custodian in respect of those other services, or*
> *b) to information relating to those other services.*
>
> While I accept that paternity testing, such as was done in this case, could be construed as "diagnostic, treatment and care information" under section 1(1)(i)(iii) of the HIA, and, for that reason, is potentially "health information" under section 1(1)(k), it is also arguable that it is not a health service as defined by section 1(m). If conducting a paternity test is not a health service, then information relating to this service would not be subject to the HIA, and would not be health information under that Act.
>
> Section 1(n) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) defines personal information for the purposes of that Act. It states, in part:
>
> *1 In this Act,*
>
> *(n) "personal information" means recorded information about an identifiable individual, including …*
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics…*
>
> Genetic information and inheritable characteristics are personal information for the purposes of the FOIP Act and are subject to that Act if in the custody or control of a public body.
>
> As Alberta Health Services is a public body under the FOIP Act, in addition to being a custodian under the HIA, it is possible that the FOIP Act applies to the information to which it has applied the HIA. The question of which of the two Acts applies must therefore be answered before I can consider the question of whether Alberta Health Services properly withheld information under section 11(2) of the HIA. As a result, this issue will be added to the inquiry.

[para 11] In its February 17, 2012 response to this letter, AHS stated:

> With regard to the application of section 1(2) of HIA, it is AHS' position that the provision of paternity testing meets the definition at section 1(1)(m)(i) of "health service" in "protecting, promoting and maintaining physical and mental health" or in the provision of general diagnostics set out in 1(1)(m)(iii). HIA provides for the exclusion of services from this definition by regulation. However, the Health Information Regulation 70/2001 does not exclude genetic testing.

[para 12] In its initial submissions, AHS stated:

> The position of AHS with regard to the applicability of HIA or FOIP has been set out in its letter to the Adjudicator dated February 17, 2012 and is marked as Attachment 1.
>
> That letter did not address Orders F2012-04 and H2012-01 dated January 26, 2012. These orders adopt the approach taken in Orders F2008-012 / H2002-006[sic] that an applicant's request determines which act applies. In other words, the HIA applies to access requests pertaining to one's own health information, if an access request is made for third party information, that request cannot be accommodated under HIA. However, the legislature would not intend such an absurd result and as such a request for third party health information (as such information also comes under the definition "personal information") should fall under FOIP.
>
> With respect, this interpretation does not take into consideration the full statutory scheme of HIA and expands the jurisdiction of the Adjudicator. In paragraph 32 and 34 of Orders F2012-04 and H2012-01 the Adjudicator states the rational for such an interpretation citing practical examples:
>
> > [32] In my view, however, this gap in the ability to make an access request for information about another individual's health creates the unfair and unfortunate result of precluding such an access request where, for example, the information of another individual is relevant to a fair determination of the applicant's rights or as argued by the Applicant in this inquiry, disclosure is desirable for the purpose of public scrutiny. Again, the FOIP Act allowed these relevant circumstances to be considered prior to enactment of the HIA, so I fail to understand why consideration of them is now precluded…
> >
> > [34] Finally, a gap in the ability to make an access request for another individual's health information under both the HIA and the FOIP Act creates the absurd result of precluding such a request where the information is in the custody or under the control of an entity that is both a custodian and a public body, but allowing it where the entity is a public body but not a custodian.
>
> It is submitted that the statutory scheme of HIA does accommodate such concerns. There are disclosure sections while protecting health information allow disclosure in limited circumstances. For example, section 3(a) which determines the scope of HIA does not limit the information otherwise available by law. While section 35 (in some instances engaged by an informal request by a third party) enumerates when health information can be disclosed without consent. With regard to the disclosure of third party health information for matters of public scrutiny this can be done by consent provisions of HIA or the exercise of rights by other persons under section 104.
>
> With regard to a public body's having possession of "health information" which is subject to a third party request of FOIP, while such information would be accessible by a third party under HIA a distinction can be made. Such information is usually collected under statutory authority (as in the WCB example) or by consent (as in the school board example). The information in such cases is limited to a claim or an issue at hand. Health information held by a custodian under HIA can relate to health information from cradle to grave. Additionally, the ability to access a third party's health information under FOIP leads to another unintended consequence. The health information held by a custodian/public body (such as AHS) in the case of a third party access request will be subject to balancing of circumstances dictated by section 17(5) of FOIP. A custodian (such [as] a physician or other health service providers) who is not a public body will not release health information to a third party (unless there is appropriate consent or authorization) given the mandatory section 11(2)(a). [my emphasis] The result will be two levels of statutory protection, an absolute one for custodians, who are not public bodies (if the requirements of section 11(2)(a) of HIA are fulfilled) and the balancing of circumstances dictated by section 17(5) by those that are. The former is an absolute protection from a third party access request, the latter a conditional one. As such it is respectfully submitted that this could not be the statutory scheme intended by the Legislature in implementing HIA.

[para 13] AHS objects to my reasoning in Order F2008-012 / H2008-003 and to the Adjudicator's reasoning in Order F2012-04 / H2012-01. I agree with the analysis in both these orders.

[para 14] Moreover, while AHS suggests that Orders F2008-012 / H2008-003 and F2012-04 / H2012-01 do not take into account the scheme of the HIA, I note that the scheme AHS attributes to the HIA does not reflect the actual scheme of the HIA. For example, AHS presents the view that a third party whose health information is the subject of an access request may consent to the disclosure of that information to a requestor. However, section 11(2)(a) prohibits a custodian from disclosing a third party's health information to a requestor, unless the requestor originally provided the information to the custodian. Section 11(2)(a) is not subject to section 34. When section 11(2)(a) requires a custodian to withhold health information from a requestor, there is no discretion to release it under the HIA, even with consent.

[para 15] AHS argues that *Lycka v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 245 is authority for its position that it may disclose health information to an individual who has made an access request even if the requestor is not the individual whom the health information is about. However, *Lycka* does not address section 11(2)(a) of the HIA, or access requests, but is a case regarding a complaint of improper collection and use of health information without consent. I find that the reasoning in that case does not support AHS's view that the health information of an individual can be disclosed with consent to a requestor who is not the subject of the information.

[para 16] In the case before me, the Applicant has requested her own information, and that of two other people. As discussed in orders F2008-012 / H2008-003 and F2012-04 / H2012-01, the HIA does not contemplate access requests for the health information of someone other than a requestor. However, in this case, I find that the issue of whether the FOIP Act or the HIA applies may be decided on the basis of my finding that a paternity test conducted for the purposes of determining the identity of a child's biological father is not a health service as defined by the HIA. Consequently, the HIA has no application. I make this finding for the reasons that follow.

[para 17] Section 1(2) of the HIA states:

> *1(2) Where a custodian provides services that are not health services, this Act does not apply*
>
> > *(a) to the custodian in respect of those other services, or*
> > *(b) to information relating to those other services.*

[para 18] Section 1(1)(m) of the HIA defines "health service" in the following way:

> *1(1) In this Act,*
> > *(m) "health service" means a service that is provided to an individual for any of the following purposes:*
> > > *(i) protecting, promoting or maintaining physical andmental health;*
> > > *(ii) preventing illness;*

> *(iii) diagnosing and treating illness;*
> *(iv) rehabilitation;*
> *(v) caring for the health needs of the ill, disabled, injured or dying,*
>
> *but does not include a service excluded by the regulations;*

[para 19] Section 1(1)(m) contains an exhaustive list of examples of health services. These services are defined as health services by reference to the purpose in providing the service. Because section 1(1)(m) is defined exhaustively, services that are provided for purposes not enumerated in this provision are excluded from its scope, and, as a consequence of the operation of section 1(2), the scope of the HIA.

[para 20] In its letter of February 17, 2012, cited above, AHS argued that paternity testing is a health service because it is provided for the purposes set out in section 1(1)(m)(i) and (iii). As AHS did not provide any further submissions for the inquiry to explain or advance its position that a paternity test is intended to "protect, promote or maintain physical and mental health", or to" diagnose and treat illness", I asked it the following question:

> Is paternity testing a health service under section 1(1)(m)? If AHS maintains its position that paternity testing is a health service, which provision of section 1(1)(m) does it fall within and how?

[para 21] AHS provided the following response:

> With regard to the application of section 1(2) of the HIA, it is AHS's position that the provision of paternity testing meets the definition of "health service" either under section 1(1)(m)(iii) or 1(1)(m)(ii). The statutory scheme of HIA is such that […] if a service comes under the general definition of […] health service it can only be excluded by regulation. A service provided by a hospital department which is not excluded by regulation would by definition be a "health service".

[para 22] Despite my request that AHS explain its view that paternity testing may be considered a health service under section 1(1)(m), it essentially restated the position that paternity testing is a health service, although this time it referred to subclauses (ii) and (iii), rather than subclauses (i) and (iii). As a result, I lack the benefit of AHS's reasons for its position that paternity testing is a health service within the terms of the provisions of section 1(1)(m).

[para 23] In my view, the purpose of a paternity test is expressed by the title of this test: a paternity test is intended to determine paternity; i.e. whether an individual is likely to be the biological father of a child or is not the biological father of a child. The purpose of this service is not among those purposes enumerated in section 1(1)(m) and is not consistent with any of them. By definition, paternity tests are not conducted to "protect, promote, or maintain physical or mental health," "to prevent illness", or "to diagnose or treat illness." Instead, paternity tests evaluate the likelihood of an individual being the biological father of a child. These tests do not diagnose or treat illness and may be ordered by a court rather than a health services provider.

[para 24] Although its reasons for arguing that a paternity test is a service consistent with the services subject to section 1(1)(m)(i), (ii), or (iii) have not been stated to me for this inquiry, I note that AHS appears to take the position that if a service is provided by a hospital department and the service is not excluded by the Health Information Regulation, the service is subject to

HIA. However, section 1(1)(m) is concerned with the purposes for providing services. That a service is provided by a hospital department is irrelevant to its application. If the service in question is not provided for a purpose or purposes set out in section 1(1)(m), which is an exhaustive provision, then the service is not a health service, regardless of whether the service is excluded by section 3.1 of the Health Service Regulation and whether the service is performed in a hospital. I find that paternity tests are not provided for the purposes enumerated in section 1(1)(m) and are therefore not subject to the HIA.

[para 25] It may be that AHS considers all forms of "genetic testing" to be "health services" as genetic testing may sometimes be conducted to diagnose genetic conditions. However, as discussed above, paternity testing, although it involves analysis of genetic information, is not done for the purpose of diagnosing genetic conditions or diseases, but of determining paternity.

[para 26] It is possible that AHS has arguments other than these to support of its position that paternity testing is a health service; however, it has not presented them for the inquiry, even though I raised this issue in my letter of January 16, 2012 and again in my letter July 11, 2012. Even if it were my role to do so, I am unable to speculate as to what other arguments could be made to support the position that a paternity test is a health service.

[para 27] As I find that the HIA does not apply, on the basis that paternity testing is not a health service, I will now consider whether the FOIP Act applies to the Applicant's access request.

[para 28] Section 1(n) defines personal information under the FOIP Act:

> *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) he individual's personal views or opinions, except if they are about someone else;*

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form. Genetic information, and inheritable characteristics, that are recorded fall within the definition of personal information.

[para 29] Section 6 of the FOIP Act creates a right of access to records containing the personal information of an applicant when those records are in the custody or control of a public body, such as Alberta Health Services. Section 6(1) of the FOIP Act states:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

If the information requested by the Applicant is recorded information, then she has a right of access to it under the FOIP Act.

[para 30] Section 1(q) of the FOIP Act defines the term "record" for the purposes of the Act. It states:

> *1. In this Act,*
>
> *(q) "record" means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records…*

"Record" is defined as a record of information in any form. This definition includes any information that is written, photographed, recorded or stored in any manner. Clearly, the paper copies of the records documenting the paternity test are records containing personal information under the Act. The question is whether the DNA samples sought by the Applicant, in addition to documents, are records that may requested under the FOIP Act.

[para 31] In a sense, DNA molecules are records of genetic information as they carry or preserve genetic information, or genes. In another sense, DNA itself may be considered to be genetic information that is being stored by AHS, given that it apparently continues to have custody of the samples. As a record is defined by section 1(q) as "information recorded or stored in any manner" one can make the argument that DNA samples are records in the custody or control of AHS, a public body. However, for the reasons that follow, I find that such an interpretation is not supported by the context created by section 1(q) or by the scheme of the FOIP Act.

[para 32] Section 1(q) enumerates specific kinds of records of information. These include "notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers". This list of specific items is then followed by the more general phrase, "any *other* information that is written, photographed, recorded, or *stored in any*

manner…" The use of the word "other" in this phrase suggests that the specific kinds of information listed in the first part of the clause are linked to the general kinds of information in the second part of the clause, in the sense that both the specific and the general terms are examples of information that "has been written, photographed, recorded or stored in any manner." "Notes, images, audiovisual recordings, x-rays, books, documents, maps drawings, photographs, letters vouchers, and papers" are therefore examples of methods of storing information within the terms of section 1(q).

[para 33] The term "store" can have the general meaning of keeping objects in storage, as is the case of the DNA samples apparently stored by AHS. However, none of the examples set out in section 1(q), which, as discussed above, are examples of methods of storing information, are methods of storing objects in this general sense. As a result, the general sense of the term "store" does not appear to be indicated by the enumerated terms of this provision.

[para 34] The verb "store" also has a more specific meaning. For example, the *Canadian Oxford Dictionary* offers the following definition of "store":

> 2. retain (data or instructions) in some physical form that enables subsequent retrieval; transfer into a memory or storage device.

In my view, this definition of "store", which relates primarily to means of storing and retrieving data, fits within section 1(q), as the items listed in this provision could be said to be "stored" in this sense of the word. The meaning imparted by use of the term "stored" is similar to the notions imparted by the terms "written, photographed and recorded", which is that some act is done that enables the information to be retained (in the second sense of the word "stored".)

[para 35] Even if I adopted an interpretation of section 1(q) such that I found that a DNA sample could be a record under the FOIP Act by virtue of its being physically stored, the Applicant's request for DNA samples is not a request that can be made under the FOIP Act. Section 6 of the FOIP Act establishes that an Applicant has a right of access to records. Section 7 of the FOIP Act explains both how access to records is to be requested and what access to records entails. This provision states:

> *7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.*
>
> *(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.*
>
> *(3) In a request, the applicant may ask*
>
> *(a) for a copy of the record, or*
>
> *(b) to examine the record.*

[para 36] Clearly, it is not possible to request, or be provided with, a *copy* of a DNA sample. In situations where it is not possible to reproduce a copy, section 13 establishes that the

alternative is for a public body to allow an applicant to examine the record. However, "examining" the record does not entail removing the record and submitting it to testing at an alternate facility, as the Applicant proposes. "Examining" under the FOIP Act does not include altering a record, which providing DNA to an applicant for further DNA testing would necessarily involve, given that enzymes are required to enable a technician to extract DNA. Rather, "examining a record" entails attending the premises of a public body and "viewing" the record, and possibly taking notes, as discussed in Order F2007-011. However, the information in DNA samples cannot be meaningfully examined simply by viewing or looking at the sample.

[para 37] As a result, even if I were to find that DNA samples are records under the FOIP Act, sections 7 and 13 do not provide for removing them from AHS's premises to submit them for further testing, which is the Applicant's purpose in requesting them. Even if submitting the samples for further analysis were not her purpose, it would not be possible to grant access to them within the terms of the FOIP Act, as the information in the DNA samples cannot be copied or examined by the Applicant as those terms are used in the FOIP Act.

[para 38] Given that there would be no ability to provide access to DNA samples, even if such samples are records, and given that the language of section 1(q) supports finding that DNA samples are not records within the terms of the FOIP Act, I find that DNA samples are not records within the context of this provision or the scheme of the FOIP Act.

[para 39] To conclude, I find that the Applicant has a right of access under the FOIP Act to copies of any paper or electronic records that she has requested in the custody or control of AHS regarding the paternity test, subject to any exceptions to disclosure. However, I find that the Applicant has no right of access under the FOIP Act to the DNA samples themselves.

Issue B: If the access request and the records that are the subject of it fall under the *Health Information Act*, does section 11(2) require AHS to withhold the information from the Applicant?

[para 40] As I have found that the FOIP Act, rather than the HIA, applies to the Applicant's access request and the records that are the subject of it, I need not answer this question.

Issue C: If the access request and the records that are the subject of it fall under the *Freedom of Information and Protection of Privacy Act*, does section 17(1) require AHS to withhold the information from the Applicant?

[para 41] Section 17 requires a public body to withhold personal information when it would be an unreasonable invasion of a third party's personal privacy to disclose the third party's personal information. This provision 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

(a) the third party has, in the prescribed manner, consented to or requested the disclosure,

…

(c) an Act of Alberta or Canada authorizes or requires the disclosure,

…

(i) the personal information is about an individual who has been dead for 25 years or more…

…

(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,

…

(g) the personal information consists of the third party's name when
(i) it appears with other 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

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(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 42] Section 17 does not say that a public body is *never* allowed to disclose third party personal information to an applicant. 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). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy. For example, section 17(2)(a) states that it is not an unreasonable invasion of personal privacy to disclose personal information if an individual has consented to the disclosure of the information in the manner prescribed by the Regulation. The Applicant argues that her former husband consented to the disclosure of the results of the paternity test to her. This argument will be addressed below.

[para 43] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and other relevant circumstances must be considered.

[para 44] 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).

[para 45] Section 17 requires a public body to withhold personal information when disclosing the information would be harmful to the personal privacy of an identifiable individual. However, it also contains provisions that establish situations when it would not be an unreasonable invasion of personal privacy to disclose personal information, such as when a provision of section 17(2) applies. I will first consider whether any of the provisions of section 17(2) apply to the information I have found to be the personal information of third parties. If the personal information severed from the records is not subject to a provision of section 17(2), and is, instead, subject to a provision of section 17(4), I will consider whether the factors set out in

section 17(5) outweigh the presumption that it would be an unreasonable invasion of personal privacy to disclose the information,.

Do the records contain personal information?

[para 46] Section 1(n)(v) establishes that the genetic information of an individual is the personal information of the individual. This provision states:

> *1 In this Act,*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

Genetic information about an identifiable individual is personal information within the terms of the FOIP Act.

[para 47] AHS withheld data from the records that the parties agree relates to the Applicant's former husband, who is now deceased. The data describes the lengths of the alleles of this individual at various loci and compares these lengths to those of the Applicant and her daughter. AHS severed the tester's conclusions regarding the length of the alleles of the former husband and may therefore be considered to have severed the genetic information of the former husband.

[para 48] The records do not contain the name of the Applicant's former husband and it would not be possible to identify the information as being about the former husband based on the records alone. However, as the Applicant's access request and submissions make clear, the Applicant is aware that the information severed from the records is the genetic information of her former husband. As a result, the information severed from the records is information about an identifiable individual.

[para 49] AHS also severed the Applicant's own genetic information from record 4. As with the information of the Applicant's former husband, this information is personal information.

Would it be an unreasonable invasion of the personal privacy of the Applicant's deceased former husband to disclose the genetic information severed from the records?

[para 50] As discussed above, section 17(2) enumerates situations in which it is not an unreasonable invasion of a third party's personal privacy to disclose information about the third party. As it seemed possible to me that the paternity test documented in the records at issue had been done with the understanding that the results would be shared between all parties, or alternatively, be required to be shared with the Applicant pursuant to an order made by a court operating under a statute, it seemed possible that either section 17(2)(a) or (c) could apply to the information in the records. I therefore asked the parties about the circumstances in which the

paternity test had been conducted and whether consents regarding the collection, use, and disclosure of the genetic information that was tested had been obtained from the parties.

[para 51] While AHS was able to locate the consent of the Applicant to exchange her information with her former husband for a test conducted in 1994, AHS was unable to locate any records regarding any consent obtained from the former husband to the collection, use, or disclosure of his genetic information. Moreover, it is unable to correlate the consent it has on file with the test and report that are the subject of the access request, given that they were prepared in 1996.

[para 52] Neither party was able to produce an order of the court regarding the collection of the genetic information that was tested, or the extent to which the information could be disclosed. The parties referred me to *Carey v. Wong*, 1996 CanLII 2069 (BCCA), which is a judgment of the British Columbia Court of Appeal finding that the Applicant's former husband was an interested party in an action, and *Carey v. Wong*, 2008 BCSC 455, a decision of the British Columbia Supreme Court which refers to an order made in 1998 for the Applicant's former husband to submit to a paternity test. However, neither case addresses the issue of whether the Applicant's former husband consented to disclose the information in the records at issue to her, or whether a court ordered the information in the records to be disclosed to her.

[para 53] I cannot conclude that any of the provisions of section 17(2) applies to the information severed from the records.

[para 54] As discussed above, the records do not contain the name of the Applicant's former husband. However, the Applicant is aware that her former husband undertook this test and is aware of the conclusions of the researchers who conducted the test. As a result, the former husband's name remains associated with the information about him in the records. Consequently, I find that the presumption set out in section 17(4)(g)(i) applies to the information in the records.

[para 55] AHS argues:

> If AHS is incorrect in its legal interpretation and the information is in fact "personal information" then it would be our position that disclosure would be an unreasonable invasion of a third party's personal privacy under section 17 of the FOIP Act. In weighing the circumstances of this case the deceased has not been dead for more than 25 years (section 17(2)(i) and the personal information at issue relates to a medical evaluation of the deceased (section 17(4)). [sic]

[para 56] AHS argues that the information in the records is a medical evaluation, and therefore subject to the presumption set out in section 17(4)(a). However, I find that the paternity test does not evaluate the medical status or state of health of any of the participants; rather, it reviews the measurements of alleles of the Applicant, her former husband, and her daughter at specific loci to evaluate the likelihood that the former husband was the father of the daughter. The calculations and conclusions in the records do not refer to medical status or the state of health of any of the participants or reveal information of that kind but determine whether the former husband could be the source of half the daughter's alleles.

[para 57] There is also tension between AHS's stated position at the inquiry and the severing it conducted on the records. If, as AHS argues, it is an unreasonable invasion of the former husband's personal privacy to disclose the information about him in the records, it is unclear why AHS disclosed as much of the former husband's personal information to the Applicant as it did. For example, although AHS withheld the columns containing the former husband's alleles, AHS disclosed the "Child AF" column to the Applicant, in addition to column p(AF). By disclosing the "Child AF" column, which refers to the alleles of a child that the tester has decided must necessarily come from the father and not the mother, and the conclusions regarding the probability of paternity, AHS disclosed which alleles belonging to the daughter were held in common by the putative father, the Applicant's former husband. Column p(AF) establishes whether the putative father's alleles are heterozygous or homozygous. By disclosing that six of these alleles are homozygous, AHS revealed the length of both of the former husband's alleles at six loci, given that the term "homozygous" refers to the situation when alleles are identical. Finally, one can learn from the information disclosed to the Applicant the tester's conclusions as to whether the former husband was likely to be the father of the Applicant's child. Essentially, the only information about the former husband not disclosed to the Applicant is the length of five of his alleles that he was not considered to have passed on to the Applicant's child.

[para 58] As I have found that the records are subject to a presumption that it would be an unreasonable invasion of the former husband's personal privacy to disclose the information in the records, and as AHS has withheld information regarding five alleles of the former husband that are not shared by the Applicant's daughter, I will consider whether the presumption that it would be an unreasonable invasion of personal privacy to disclose this information has been rebutted by the presence of relevant circumstances under section 17(5).

[para 59] I have already rejected the argument that the records contain medical information. I will now consider AHS's argument that the fact that section 17(2)(i) (the individual has not been deceased for 25 years or more) does not apply is relevant to its determination that it would be an unreasonable invasion of the Applicant's former husband's personal privacy to disclose the information in the records.

[para 60] In Order F2011-001 I said:

> The Public Body notes that the Complainant's mother died in 1996. As she has not been dead for twenty-five years, the Public Body correctly points out that section 17(2)(i) does not apply to personal information about her. If section 17(2)(i) applied, it would not be an unreasonable invasion of personal privacy to disclose the personal information and it would be unnecessary to weigh competing interests under section 17(5). However, the converse is not true: it does not follow from the fact that section 17(2)(i) does not apply that disclosure is an unreasonable invasion of personal privacy.

Essentially, the fact that an individual has not been dead for twenty-five years does not mean that it would be an unreasonable invasion of the individual's personal privacy to disclose information about the individual.

[para 61] I also found in Order F2011-001 that the privacy interests of deceased individuals diminish over time and that one must consider the privacy interests the deceased individual had

in his or her lifetime in the personal information in question when weighing considerations under section 17(5). I said:

> In my view, section 17(2)(i) acknowledges that some privacy interests may continue after the death of an individual, but that any such interests end, absolutely, after 25 years. Under section 17(5) then, relevant circumstances as to whether the presumption created by section 17(4) is rebutted when the personal information is about a deceased person, would include consideration of the kinds of privacy interests the deceased person had in the information at issue in his or her lifetime, the extent to which those interests continue to exist, whether the deceased's personal information is also the personal information of someone else, and whether there is another interest, such as a public interest, that may outweigh privacy interests or strengthen them.
>
> In Order M-50, in referring to factors relevant to determining whether it would be an unjustifiable invasion of personal privacy to disclose the personal information of an individual, the former Information and Privacy Commissioner of Ontario said:
>
> > In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.
>
> The former Information and Privacy Commissioner of Ontario considered that the fact that an individual is deceased is a factor to be weighed when deciding whether it would be an unreasonable or unjustifiable invasion of personal privacy to disclose personal information. In his view, that an individual is deceased, while only one of several factors he considered in that case, was nevertheless a factor weighing in favor of disclosure. I agree with this analysis and share the view that individual privacy interests diminish after death. If privacy interests do not diminish following death and over time, it would be entirely arbitrary for the legislature to determine that privacy rights end after twenty-five years when they do not after twenty-four years and eleven months, for example.

To determine whether it would be an unreasonable invasion of the third party's personal privacy to disclose the information withheld by the Public Body it is helpful to consider the views of the third party regarding the information, if such information is available.

[para 62] In *Carey v. Wong*, 2008 BCSC 455 the Court stated the following regarding the evidence of the former husband in relation to the paternity tests he had undertaken:

> In separate proceedings brought against [the former husband] seeking child maintenance and other relief as a result of the break up of the marriage of the plaintiff and the defendant [the former husband], [the former husband swore an affidavit on August 18, 2000, wherein he admitted that he was the father of the child for purposes of maintenance and in para. 13 of that affidavit says that paternity tests that he underwent, presumably as a result of the order of Mr. Justice Burnyeat in March of 1998, confirmed that he was the father. The affidavit of [the former husband] goes on to state that in fact 15 different tests were done to confirm that he is the father due to the plaintiff's reluctance to accept the results of the paternity tests. The implication of [former husband's] evidence is that he has been confirmed through 15 different tests to be the father of the child …. The circumstances of the parties were that he was living with the plaintiff at the time in a married relationship.
>
> An affidavit of the plaintiff sworn on November 13, 2001, confirms that there were at least seven DNA tests done of [the former husband] and that she continues to contest the results of those tests. Also in that

> affidavit the plaintiff confirms that the 1998 tests were positive that [the former husband] was the father. Notwithstanding all of that evidence and notwithstanding the order of Mr. Justice Burnyeat, the paternity test results of [the former husband] have never been produced.

The affidavit of the former husband informed the Court that he had undertaken paternity tests, such as the one contained in the records, to confirm that he was the father of the Applicant's daughter because the Applicant was reluctant to accept the results of the tests. I do not have the affidavit before me and the above excerpt is hearsay, given that the statements attributed to the former spouse were prepared for a proceeding other than this one. However, given that the source of the above excerpt is the Supreme Court of British Columbia, I find that the excerpt is likely to reflect the sworn statement of the former husband and I rely on the statement attributed to the former husband that he undertook the paternity tests to confirm that he was the father of the Applicant's daughter. One may also infer from the excerpt above that he undertook fifteen different tests for the purpose of persuading the Applicant that he was the father of her daughter, and so that the results could be produced in proceedings to which the Applicant was a party.

[para 63] I find that the purpose of undergoing paternity tests for the purpose of confirming paternity in legal proceedings indicates that the former husband anticipated exchanging the results with the Applicant. The information severed by the Public Body consists of the results of the paternity test. As the former husband underwent the paternity test for the purpose of confirming paternity, and as this purpose would not be served if he did not provide the results to the Applicant and her daughter, I find that the former husband intended that the Applicant receive the results, and that this factor weighs in favor of disclosing the information in the records to her.

[para 64] In Order F2012-020 I found the fact that personal information is known to a requestor and has been disclosed elsewhere in the records at issue is a relevant circumstance weighing in favor of disclosing personal information. With the exception of the information regarding five heterozygous alleles that the former husband did not pass on to the daughter, I find that this is also a relevant circumstance in relation to the information withheld by AHS, and weighs in favor of disclosure.

[para 65] Having reviewed the submissions of the parties and the evidence of the records, I conclude that it would not be an unreasonable invasion of the personal privacy of the former husband to disclose the information in the records to the Applicant. In arriving at this conclusion, I have taken into consideration that the former husband is deceased, and that his privacy interests may be taken to have diminished somewhat since his death. In addition, I note that his purpose in undergoing the paternity test was to confirm that he was the father of the Applicant's daughter and that he contemplated that the results would be produced in legal proceedings to which the Applicant was a party. I find that these factors outweigh the presumption created by section 17(4)(g)(i) in this case.

[para 66] Moreover, with regard to the information withheld by AHS, other than information regarding the former husband's five heterozygous alleles not held in common with the Applicant's daughter, I find the fact that AHS disclosed the information elsewhere in the records also serves to rebut the presumption that it would be an unreasonable invasion of the former husband's personal privacy to disclose the information.

The Applicant's own information

[para 67] As noted above, AHS withheld the Applicant's personal information from the records. Specifically, AHS withheld the "Mat 1" column of alleles, a column containing one half of the Applicant's alleles, from Record 4, although it did not withhold this information from Record 13.

[para 68] It is unclear why AHS severed the Mat 1 column from Record 4. While this information may serve to explain why the tester attributed some of the daughter's alleles to the former husband, rather than the mother, it does not, in and of itself, reveal anything about the former husband's genetic information. At most, this information reveals information about the Applicant and the reasoning process of the tester in arriving at his or her conclusion regarding the likelihood of paternity. While the likelihood that the former husband is the father of the daughter is the former husband's personal information, AHS has already disclosed that information. In any event, the Mat 1 column itself does not contain conclusions regarding the probability of paternity.

[para 69] As discussed in Order F2009-026, the personal information of an applicant cannot be withheld under section 17, for the reason that the application of section 17 is limited to the personal information of third parties and section 1(r) of the FOIP Act excludes an applicant from the definition of "third party".

[para 70] I find that it was not open to AHS to sever the information of the Applicant from the records.

"Non-responsive information"

[para 71] AHS also withheld information from Record 10 on the basis that it was non-responsive to the Applicant's request, in addition to containing the personal information of a third party.

[para 72] I asked AHS why it considered this record to be non-responsive to the Applicant's access request. In response, AHS stated:

> The Privacy Coordinator determined with discussions with the program area that some of the calculations were non-responsive as they dealt with other individuals unrelated to the Applicant or her husband.

Having reviewed Record 10, I am satisfied that it contains information regarding a paternity test other than the one that is the subject of the Applicant's access request. The figures in this record do not correlate with the calculations of the tester appearing in the other records. It appears that the tester performed the dilution calculations for an unrelated paternity test on the back of the record used for the dilution calculations in relation to the paternity test undertaken by the Applicant, her daughter, and her former husband, or, possibly, misfiled this record.

[para 73] I agree that the information on record 10 is nonresponsive, as it does not pertain to the paternity test that was the subject of file 44830, and which was the subject of the Applicant's access request. However, I do not agree that the information can be withheld under section 17, as

it is not possible, on the evidence before me, to identify any individuals from the information contained in record 10. As a result, while I do not confirm the decision of the Public Body to withhold record 10 on the basis of section 17, I agree that it is not responsive to the Applicant's request and find that AHS is under no duty to provide this record to the Applicant, as she has not requested it.

[para 74] In arriving at this conclusion, I note that it would have benefitted the inquiry had AHS provided the evidence of the individual, or another individual, from the program area that created the records to explain not only why record 10 was considered nonresponsive, but to provide context for the highly technical and often barely legible information in the records at issue. AHS left it to me to review the highly technical, and in some cases barely legible information in the records. I did so because of the public interest in protecting personal privacy reflected in section 17 and the fact that sometimes the records themselves will constitute evidence of a public body's reasons for applying an exception, even where, as in this case, it has not given explanations with respect to specific severed items of information. It is more properly the work of a public body to explain why it has withheld information under exceptions, not only because it has the onus as a matter of law, but because it is better placed to perform this task given its knowledge of the records, including any specialized and technical information they contain, and its ability to access this knowledge directly.

V. ORDER

[para 75] I make this Order under section 72 of the *Freedom of Information and Protection of Privacy Act*.

[para 76] I order the Public Body to provide the paper records to the Applicant in their entirety with the exception of record 10.

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Teresa Cunningham
Adjudicator