ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-15

May 7, 2013

ALBERTA HEALTH

Case File Number F5835

Office URL: www.oipc.ab.ca

Summary: An individual requested access to documents regarding a complaint he had made to Alberta Health (then Alberta Health and Wellness) (the Public Body), including "all relevant correspondence related to the complaint." The Applicant clarified that he would not require all the documents if he was provided with the "complete unaltered final report" of an investigation that may have resulted from the complaint about one physician. The Public Body released records responsive to the Applicant's request, but it refused to confirm or deny the existence of any additional records regarding the complaint pursuant to section 12(2)(a) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

The Applicant requested a review of the Public Body's decision to refuse to confirm or deny the existence of a record.

The Adjudicator did not accept the Public Body's application of section 12(2) to refuse to confirm or deny the existence of responsive records, and ordered the Public Body to respond to the Applicant without relying on this provision.

The Adjudicator provided an Addendum to this Order to the Public Body. This Addendum contains a discussion which must be kept confidential pursuant to section 59(3)(b) of the Act.

Statutes Cited: AB: *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, ss. 9, 11, 12, 39, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 20, 59, 72.

Authorities Cited: AB: Orders 96-019, 99-010, F2006-012, F2010-017.

I. BACKGROUND

[para 1] An individual requested access to documents regarding a complaint he had made to Alberta Health (then Alberta Health and Wellness) (the Public Body), including "all relevant correspondence related to the complaint." The Applicant clarified that he would not require all the documents if he was provided with the "complete unaltered final report" of an investigation that may have resulted from the complaint regarding one physician. The Public Body released records responsive to the Applicant's request (copies of correspondence sent to or by the Applicant), but it refused to confirm or deny the existence of any additional records regarding the complaint pursuant to section 12(2)(a) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

[para 2] The Applicant requested a review of the Public Body's decision to refuse to confirm or deny the existence of a record. Mediation was authorized, but did not resolve the Applicant's issue and an inquiry was requested.

II. INFORMATION AT ISSUE

[para 3] The issue in this inquiry is whether the Public Body may refuse to confirm or deny the existence of a record. Therefore there are no records at issue, whether or not there were additional records responsive to the Applicant's request.

III. ISSUE

[para 4] The Notice of Inquiry issued November 13, 2012 provides the sole issue at inquiry as follows:

> **Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?**

IV. DISCUSSION OF THE ISSUE

Preliminary Issue

[para 5] The Public Body provided two open submissions and one closed (*in camera*) submission. Most of the reasons for my decision relate to arguments the Public Body provided in its open submissions. However, I have provided an Addendum to this order, which will be provided to the Public Body only, to address the reasons for my decision that relate to, and may reveal, the arguments the Public Body provided in its closed submission. Any reasons that may reveal whether any responsive records exist are also

provided in the Addendum. Section 59(3)(b) prohibits me from disclosing whether records exist in circumstances in which the public body has refused to confirm or deny the existence of responsive records:

> *59(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose*
>
> > *(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*
> >
> > *(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.*

Should this Order be judicially reviewed, this office will provide the Court with a copy of the Addendum.

Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?

[para 6] The Public Body relied on section 12(2)(a) to refuse to confirm or deny the existence of the records. This section states:

> *12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> > *(a) a record containing information described in section 18 or 20, or*
> >
> > *...*

[para 7] In its initial submission, the Public Body provided very general arguments as to its application of section 12(2)(a) and section 20(1)(a) and (d) to the matter at inquiry.

[para 8] In Order F2006-012, former Commissioner Work applied a purposive interpretation to section 12(2)(a):

> Earlier orders of this Office have said that section 12(2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest.
>
> …The sensible purpose for both provisions [sections 12(2)(a) and (b)] … is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason,

> but not otherwise… This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

(at paras. 18 and 21)

[para 9] The Public Body argues that "the requested records, if they exist, could have affected a law enforcement matter as defined in s. 20(1)(a) and reveal the existence of a confidential informants (sic) per s. 20(1)(d) of FOIP." These provisions state the following:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm a law enforcement matter,*
>
> *…*
>
> *(d) reveal the identity of a confidential source of law enforcement information,*
>
> *…*

[para 10] "Law enforcement" is defined in section 1(h) of the Act, as follows:

> *1(h) "law enforcement" means*
>
> *i) policing, including criminal intelligence operations,*
>
> *ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
>
> *iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 11] The allegations made by the Applicant against a physician involved extra billing of patients. The Public Body states that extra billing for insured services is prohibited under sections 9, 11 and 12 of the *Alberta Health Care Insurance Act*:

> *9(1) No physician or dentist who is opted into the Plan who provides insured services to a person shall charge or collect from any person an amount in addition to the benefits payable by the Minister for those insured services.*
>
> *(2) If a physician or dentist contravenes subsection (1), the Minister may,*
>
> *(a) in the case of a first or subsequent contravention, send a written warning to the physician or dentist,*
>
> *(b) in the case of a 2nd or subsequent contravention, refer the contravention to the College or the Alberta Dental Association and College, as the case may be, and*

(c) in the case of a 3rd or subsequent contravention, order that, after a date specified in the order, the physician or dentist is deemed to have opted out of the Plan for the period specified in the order.

(3) An order under subsection (2)(c) shall, prior to the effective date of the order, be served personally or by registered mail on the physician or dentist affected by the order.

…

11(1) No person shall charge or collect from any person

(a) an amount for any goods or services that are provided as a condition to receiving an insured service provided by a physician or dentist who is opted into the Plan, or

(b) an amount the payment of which is a condition to receiving an insured service provided by a physician or dentist who is opted into the Plan

where the amount is in addition to the benefits payable by the Minister for the insured service.

(2) Subsection (1) does not prohibit the charging or collecting of an amount paid for non-insured health or pharmaceutical goods or services where the charging or collecting of that amount is not otherwise prohibited under this Act or the Hospitals Act and a physician or dentist reasonably determines that it is necessary to provide the non-insured health or pharmaceutical goods or services before the insured service is provided.

(3) If a person receives an amount in contravention of subsection (1), the Minister may recover that amount in a civil action in debt as though that amount were a debt owing from the person to the Crown in right of Alberta.

(4) Where the Minister recovers any amount under subsection (3), the Minister shall reimburse the person who was charged the amount.

12(1) A physician or dentist who is opted into the Plan and provides insured services to a person in circumstances where the physician or dentist knows or ought reasonably to know that the person is being charged an amount in contravention of section 11 shall not receive the payment of benefits from the Minister for those insured services.

(2) Section 9(2) applies where a physician or dentist contravenes subsection (1).

[para 12] The Public Body has the ability to conduct an audit or examination of billing practices of a health care practitioner (practitioner) under section 39, which states in part:

39(1) A person employed in the administration of this Act who is expressly authorized to do so by the Minister may, for the purpose of conducting an examination and audit of the claims for or payments of benefits relating to health services provided by a practitioner or group of practitioners,

(a) enter the premises of the practitioner or group of practitioners, and

> *(b) examine and audit any books, accounts, patient records or other records that are maintained by or on behalf of the practitioner or group of practitioners.*

[para 13] Former Commissioner Clark defined "investigation" as "to follow up step by step by patient inquiry or observation; to trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry" (Order 96-019, at para. 15). The Public Body's authority to examine or audit a practitioner's records relating to billing practices meets this definition of "investigation." Further, extra billing for insured services may be subject to sanction by the Public Body, including an order made by the Minister that the practitioner is excluded from participating in the legislated health benefit plan (section 9(2)(c)). I therefore agree with the Public Body that an investigation into prohibited billing practices falls within "law enforcement" as defined in section 1(h)(ii) of the FOIP Act.

Section 20(1)(a)

[para 14] Section 20(1)(a) has been interpreted as applying to specific, ongoing matters (Order F2006-012, at para. 25). If this requirement is met, the public body applying the exception must also meet the following "harms" test in order to determine whether there is a reasonable expectation of harm that would result from the disclosure as to the existence of the requested information:

a. there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
b. the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
c. the likelihood of harm must be genuine and conceivable.

(see Order F2010-017, at para. 69)

[para 15] Were the Public Body to make arguments in its open submissions to address whether there is an ongoing investigation, this would defeat the point of refusing to confirm or deny the existence of responsive records. I will address in the Addendum to this Order whether this element of section 20(1)(a) is satisfied. I can say here that if there exists a final report, as requested by the Applicant, this may suggest that an investigation into the subject matter has been completed, in which case section 20(1)(a) would not apply (that said, a subsequent appeal or other related process may indicate that the matter is ongoing).

[para 16] With respect to the harms test, the Public Body argued that extra-billing investigations are complaint-based, initiated by patients or staff/colleagues of the practitioner being investigated. It states that disclosing even the existence of investigation records could erode public confidence in the Public Body and lead to fewer individuals making complaints to the Public Body. It also argues that revealing the existence of records and therefore an investigation could impede the Public Body's

ability to gather additional evidence from a practitioner's patients. These arguments indicate that revealing the existence of the type of records requested by the Applicant could have a "chilling effect" on the Public Body's ability to investigate extra-billing issues.

[para 17] The Public Body states that once it ascertains that an investigation into a practitioner's billing practices is warranted, the next steps are:

> To typically review the targeted health care practitioner's claim history and determine other patients who may have been extra billed for the same items. The [Public Body] will then contact those patients to ask if they were extra billed by the health care practitioner in question.

[para 18] The Public Body states that if a practitioner knew that an investigation into extra-billing was occurring, the practitioner "could terminate relationships with patients and other health care workers who he suspect[s] of co-operating with the [Public Body] as either retribution or to avoid further offences." The Public Body also argues that a practitioner may approach other professionals who work with the practitioner about not cooperating in an investigation and that "[the other professionals'] concern is for their livelihood and ongoing professional relationships."

[para 19] Terminating relationships, by itself, is not relevant to the consideration of whether disclosure would harm the investigation. Likewise, it is unclear to me how a practitioner avoiding further offences – i.e. not committing further offences – will harm an investigation into past billing practices.

[para 20] The Public Body's main argument seems to be that if a practitioner is aware that he or she is being investigated for extra-billing, he or she may contact all patients who may have been inappropriately billed in an attempt to convince the patients not to cooperate with the investigation. It states that

> If the physicians involved know the full extent of the jeopardy they face, the physicians in question will leverage their relationships with potential witnesses to the point that witnesses will be unwilling to co-operate with the [Public Body]. It is not easy for persons to terminate relationships with physicians and simply move to new ones. The physicians involved are specialists which makes moving to a new physician even more difficult. It is mere speculation on the part of the Applicant as to how easy a patient can find an alternate specialist.

[para 21] If an investigation by the Public Body into possible extra-billing by practitioners is, as the Public Body seems to indicate, almost entirely dependent on the cooperation of patients (and possibly staff or colleagues), then the ability of a practitioner to persuade patients (and staff or colleagues) into not participating could foreseeably harm the investigation.

[para 22] However, without some evidence to support this argument, the Public Body's argument fails the "genuine and conceivable" part of the harms test. The Public Body has

not provided sufficient support for its notion that a practitioner being investigated for extra-billing would likely resort to the type of bullying tactics outlined in the Public Body's arguments so as to put the investigation in jeopardy.

[para 23] In other contexts in which harm to an investigation is claimed as a reason for withholding information, there may be concerns about the destruction of evidence if the existence if an investigation is disclosed. However, the Public Body has not made this argument. Further, the Public Body's explanations of its investigation process indicates that it does not rely on the practitioner's own documentation when conducting the investigation (other than documentation already submitted to the Public Body by the practitioner when requesting for payment for insured services). Consequently there does not seem to be a concern about the possibility of harm to the investigation due to a practitioner destroying evidence of extra-billing.

[para 24] The Public Body argues that "disclosing the existence of the requested records prior to any decision by the [Public Body] and the Attorney General of Alberta as to how to proceed in this matter, will give the practitioners in question an ability to raise arguments concerning the ability to a fair trial/legal proceeding…" I am not clear how the disclosure would raise concerns about a fair hearing such that the investigation could be harmed.

[para 25] Many of the Public Body's remaining arguments relate to harms that may result from disclosing the *contents* of the type of records requested by the Applicant. For example, the Public Body states that "a 'final report' would by [its] very nature reveal the list of potential complainants or informants who have contacted the [Public Body] about the conduct of a particular health care practitioner." However, this argument does not address at all how acknowledging the *existence of* a final report (or other correspondence relating to an investigation) would reveal the identity of complainants or informants.

[para 26] The Public Body has not persuaded me either in its open or *in camera* submissions, that confirming or denying the existence of responsive records could lead to any of the harms its suggests by reference to section 20(1)(a). Even where the Public Body has pointed to a cause and effect relationship between the disclosure as to the existence of records and the harm suggested, the Public Body has failed to persuade me that the likelihood of that harm is genuine and conceivable and not mere speculation.

Section 20(1)(d)

[para 27] In order for section 20(1)(d) to apply, the Public Body must establish that (i) law enforcement information is involved, (ii) there is a confidential source of law enforcement information, and (iii) the information in question could reasonably be expected to reveal the identity of that confidential source (Order 96-019).

[para 28] A confidential source is someone who supplied law enforcement information to a public body on the implicit or explicit assurance that his or her identity will remain secret (see Order 99-010). I have found that an investigation by the Public Body into

extra-billing is a law enforcement investigation for the purposes of section 20(1) of the FOIP Act. A complainant – whether a patient, colleague, or other person – who provides information to the Public Body regarding such an investigation would therefore be a source of law enforcement information.

[para 29] The Public Body argues that disclosing the existence of an investigation could indirectly lead to the disclosure of the identity of complainant name(s), and that the acknowledgement of responsive records may prompt a practitioner to reasonably ascertain which staff members or fellow professionals complained. It is not clear how the *existence* of a final report (as opposed to the contents) would allow a practitioner to determine who or what may have complained or initiated an investigation. The Public Body has acknowledged that an investigation may proceed based on a complaint by a patient, staff member or colleague; it also seems possible that an insurance company may also make a complaint to the Public Body about billing practices of a practitioner. This appears to be a rather large pool of potential complainants in any given case.

[para 30] Further, the Public Body has not provided me with any evidence that the identity of a complainant is kept confidential in the course of an extra-billing investigation.

[para 31] Arguments made by the Public Body concerning

- the Applicant's interest in the outcome of the investigation (if there was one),
- whether the outcome of an investigation into extra-billing would be made public if charges are laid against a practitioner, and
- whether there is a public interest in knowing if a certain practitioner has improperly billed patients,

are not relevant to the discussion of whether confirming or denying the existence of responsive records would harm a law enforcement investigation (or reveal the identity of a confidential source of law enforcement information).

Conclusions regarding the application of section 12(2)(a)

[para 32] I do not accept the Public Body's reasons, in either its open or closed submissions, for refusing to confirm or deny the existence of the requested records pursuant to section 12(2). While I cannot reveal the details of the Public Body's *in camera* submissions (those which I address in the Addendum to this Order), I can provide general reasons for rejecting those arguments. Similarly to the arguments in the Public Body's open submissions, I have found the arguments provided in the *in camera* submission to be speculative. Further, the arguments provided are more relevant to a consideration of whether the disclosure of the *type* of information normally found in extra-billing investigation records would be subject to an exception to disclosure under the FOIP Act; the issue in this inquiry in contrast, is whether the disclosure as to the *existence* of such records would be contrary to the Act.

[para 33] For these reasons, as well as those given in the Addendum to this Order, I conclude the Public Body improperly refused to confirm or deny the existence of responsive records.

V. ORDER

[para 34] I make this Order under section 72 of the Act.

[para 35] I order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

[para 36] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator