ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-50 / H2013-03

November 26, 2013

ALBERTA HEALTH SERVICES

Case File Numbers F5829, F5830, H5745

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Summary: An applicant made an access request to Alberta Health Services (the Public Body). She requested a copy of all records in the Patient Concerns Office containing information relating to her arising from a complaint she had made about Covenant Health's decision to impose visitation restrictions on her. She indicated that this request included information obtained from Covenant Health and from her mother's agent.

The Public Body located responsive records. The Public Body disclosed some information to the Applicant, but withheld other information from the Applicant under section 11 of the *Health Information Act* (the HIA), and sections 17 and 24 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant requested that the Commissioner review the adequacy of the Public Body's search for responsive records, and requested review of the decisions to sever information from the records.

The Applicant complained that the Public Body had not ensured the accuracy of her personal information when its Patient Concerns Office had made a decision regarding a complaint she had made. In addition, she complained that the Public Body had disclosed her personal information to her parents' agent in contravention of Part 2 of the FOIP Act.

The Adjudicator determined that the HIA did not apply to the information severed by the Public Body under section 11 of that Act, as the information was not health information. The Adjudicator also determined that the information severed by the Public Body under

section 17 should be disclosed to the Applicant, as it would not be an unreasonable invasion of a third party's personal privacy to do so. The Adjudicator determined that most of the information the Public Body had severed under section 24 was subject to section 24; however, she ordered the Public Body to reconsider its decision to sever the information.

The Adjudicator ordered the Public Body to conduct a new search for responsive records that would include information submitted by the Applicant's parents' agent, as it appeared likely that such records existed.

The Adjudicator confirmed that the Public Body had complied with the requirements of Part 2 of the FOIP Act when it had used the Applicant's personal information to make a decision, and when it had disclosed information about her concerns to her parents' agent.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 10,15.1, 17, 24, 35, 40, 41,72, 84; *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 11; Health Information Regulation A.R. 70/2001, s. 3; *Health Insurance Premiums Ac*t, R.S.A. 2000, c. H-6; Patient Concerns Resolution Process Regulation, A.R. 124/2006 ss. 2, 5; *Trespass to Premises Act*, R.S.A. 2000, c. T-7; *Personal Directives Act*, R.S.A. 2000, c. P-6, s. 14

Authorities Cited: AB: Orders 99-028, F2004-026, F2007-029, F2008-012, F2013-14, F2013-24 / H2013-02 **ON:** P-312

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23; *Caritas Health Group v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 186

I. BACKGROUND

[para 1] In February 2011, the Applicant requested a review by Alberta Health Services' (the Public Body) Patients Concerns Office regarding decisions made by Covenant Health to restrict her access to its facilities. Under the Patient Concerns Resolution Regulation, a person who acts on behalf of a patient, or in the interests of a patient, may submit concerns about the goods and services provided (or not provided) to a patient, to the health authority. The Public Body assigns the duty of investigating and resolving concerns to its Patient Concerns Office.

[para 2] On March 25, 2011, the Public Body's Patient Concerns Office made a decision to dismiss the Applicant's complaint regarding her visiting restrictions and the effects of these restrictions on her parents, who are patients. This decision document refers to an investigator with the Patient Concerns Office having obtained records from Covenant Health and having contacted the Applicant's parents' agent to obtain her views regarding the Applicant's complaint about her visiting restrictions. The decision document is addressed to the Applicant and identifies the name of the agent and refers to the views of the agent regarding the restrictions.

[para 3] On April 8, 2011, the Applicant made a request for access to information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Health Services. She requested a copy of all records in the Patient Concerns Office containing information relating to her. She indicated that this request included information that had been obtained from Covenant Health and from her mother's agent.

[para 4] The Public Body located records it considered responsive, but severed some information under sections 17 and 24 of the FOIP Act and section 11(2)(a) of the *Health Information Act*.

[para 5] On June 8, 2011, the Applicant made a complaint to the Commissioner that the Public Body had disclosed her personal information contrary to Part 2 of the FOIP Act when a patient relations officer provided information to her mother's agent about her review application to the Patient Concerns Office.

[para 6] The Applicant subsequently made a complaint to the Commissioner that the Public Body had not taken measures to ensure that her personal information was accurate and complete when the Patient Concerns Office made a decision regarding her review application.

[para 7] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 8] Once I noted that the Public Body had applied section 11 of the HIA to withhold information, I wrote the Public Body to raise the possibility that the HIA does not apply to the information the Public Body had severed from a briefing note (records 10 and 11) under section 11 of that Act. I asked it to make a decision under the FOIP Act regarding this information. The Public Body made a decision to withhold the information it had withheld under section 11of the HIA under section 17 of the FOIP Act also. I decided that the issue of whether the HIA applied to the information would be added to the inquiry and I notified the parties. (The Public Body also withheld this information under section 24(1)(b) of the FOIP Act, although it subsequently decided that some information in the briefing note was not subject to section 24(1)(b).)

[para 9] The parties exchanged submissions. Once I had reviewed the parties' submissions I asked the Public Body to answer questions regarding its severing. The Public Body provided answers, and the Applicant and a third party were given the opportunity to comment on them.

[para 10] On reviewing the submissions, it came to my attention that the parties had not made arguments in relation to the question of whether the HIA or the FOIP Act applied to the information withheld by the Public Body under section 11 of the HIA. The Notice of Inquiry issued by this office had omitted mention of the issue of the application of section 11 of the HIA. I wrote to the parties to invite their submissions on this issue.

[para 11] The Public Body and the Applicant provided submissions regarding the application of the HIA to the records. The Public Body requested that I postpone my decision until the judicial review of Order F2013-24 / H2013-02 has been decided. In the event that I decide to complete the inquiry, it has also provided arguments to support its decision to withhold the briefing note under section 11 of the HIA.

[para 12] For the reasons set out below, I have decided that I will decide the issue of whether the HIA or the FOIP Act applies to the briefing note (records 10 and 11) and complete the inquiry.

II. INFORMATION AT ISSUE

[para 13] The information at issue is the information severed from the records the Public Body provided to the Applicant on May 24, 2011 and on August 24, 2011.

III. ISSUES

Issue A: Does section 11 of the *Health Information Act* apply to the information the Public Body severed under this provision?

Issue B: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the *Freedom of Information and Protection of Privacy Act* (duty to assist applicants)?

Issue C: Does section 17 of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to personal privacy) apply to the information severed from the records?

Issue D: Did the Public Body properly apply section 24(1) of the *Freedom of Information and Protection of Privacy Act* (advice from officials) to the information in the records?

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

Issue F: Did the Public Body make every reasonable effort to ensure the Applicant's personal information was accurate and complete, as required by section 35(a) of the *Freedom of Information and Protection of Privacy Act* (accuracy and retention)?

IV. DISCUSSION OF ISSUES

Issue A: Does section 11 of the *Health Information Act* apply to the information the Public Body severed under this provision?

[para 14] In its submissions of October 24, 2013, the Public Body argues:

> Thank you for your letter of October 9, 2013 regarding the issue of whether the *Health Information Act* (the HIA) or the *Freedom of Information and Protection of Privacy Act* (the "FOIP") applies to records 10 and 11. Central to this issue is the interpretation of the term "health information" (for example, whether the definition of "health information' extends to information about the parents' agent). My understanding is that this issue was addressed in [Order F2013-24 / H2013-02] and is one of the issues that is now subject to a judicial review. Therefore I would respectfully request that this issue be postponed until the judicial review is concluded. Sections 77(6) of HIA and 69(6) of FOIP would allow for an extension of timelines regarding this inquiry.
>
> If this request is not granted [AHS's] position regarding records 10 and 11 is as follows:
>
> Record 10: the information severed was collected pursuant to section 20(b) of HIA for the purposes of section 27 (i.e. the provision of health services to the parents). Information about collaterals and a patient's agent and their views as to the quality of health care is necessary for the provision of care. Health information is defined in section 1(1)(k)(i) as "diagnostic, treatment and care information". The definition of this term at 1(1)(i)(ii) "means information about any of the following: (ii) a health service provided to an individual … that is collected when a health service is provided to the individual." It is submitted that "health service provided to an individual' has to be interpreted as a continuum. Health services are not isolated events but, especially in this instance, of a continuing nature 24/7. Views as to the adequacy of that care and the decisions made by a patient agent form part of that health information as treatment decisions may be affected by those decisions. If this interpretation is accepted then the information severed falls within section 11(2) of the HIA.
>
> Record 11: the information severed in the first part again is a synopsis of information that was collected under HIA. The record itself deals with issues that clearly will have an impact on the continuum of patient care inasmuch as it is a review of visitation rights to the patients concerned and whether such visits interfere with patient care. In the alternate [*sic*] the last two paragraphs of the severed records constitute actions and analysis for those actions that meet the requirements of section 24 of FOIP.

[para 15] I have decided to address these issues now, rather than wait for the outcome of the judicial review proceedings for Order F2013-24 / H2013-02. The records and severing in the present case are not identical to the records and severing that was done by the public body in Order F2013-24 / H2013-02. As a result, a decision by the Court as to whether information is subject to the FOIP Act or the HIA would not have the effect of deciding the issues in this inquiry, as the context in which information appears is different. Waiting for the judicial review process to be completed would therefore delay the outcome of the inquiry, without a compelling reason to do so. Moreover, the Public Body and the Applicant have made arguments in relation to the application of section 11 of the HIA to the records, so this is not a case in which it would be unfair to make a decision about the application of that provision.

[para 16] Section 4(1)(u) of the FOIP Act states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

(u) health information as defined in the Health Information Act that is in the custody or under the control of a public body that is a custodian as defined in the Health Information Act.

[para 17] Section 15.1 of the FOIP Act states:

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

[para 18] The application of sections 4(1)(u) and 15.1 of the FOIP Act is limited to those situations in which a custodian under the HIA, that is also a public body under the FOIP Act, has health information in its custody or control. Neither provision applies to information that is not health information under the HIA.

[para 19] Section 1(1)(k) of the HIA defines health information in the following terms:

> *1(1) In this Act,*
>
> *(k) "health information" means one or both of the following:*
> *(i) diagnostic, treatment and care information;*
> *(ii) registration information;*

[para 20] Section 1(1)(i) of the HIA defines "diagnostic, treatment and care information". This provision states, in part:

> *1(1) In this Act,*
>
> *(i) "diagnostic, treatment and care information" means information about any of the following:*
> *(i) the physical and mental health of an individual;*
> *(ii) a health service provided to an individual, including the following information respecting a health services provider who provides a health service to that individual…*
> *…*
>
> *and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record[…]*

[para 21] Section 1(1)(k) provides an exhaustive definition of "health information". To be health information, the information must be about the physical or mental health of an individual, or a health service provided to an individual, or any other information about an individual that is collected when a health sevice is being provided. The information that is collected must also be recorded in some manner in order to fall within the terms of section 1(1)(k).

[para 22] The Public Body has severed portions of a briefing note (records 10 and 11) under section 11(2)(a) of the HIA. Section 11(2)(a) provides as follows:

> *11(2) A custodian must refuse to disclose health information to an applicant*
>
> > *(a) if the health information is about an individual other than the applicant, unless the health information was originally provided by the applicant in the context of a health service being provided to the applicant[…]*

[para 23] The Public Body's theory is that the information that was withheld is health information about a person other than the Applicant, in particular that it is the health information of the parents, because it was collected for the purposes of making treatment decisions and providing care to them. (These same portions of the briefing note were also withheld under section 24(1)(b) of the FOIP Act.)

[para 24] The information severed from the briefing note consists of information about the identity of the Applicant's parents and provides context from which other information about them can be inferred. This information also includes the identity of other relatives of the Applicant, the existence of recorded information, the identity of the Applicant's parents' agent, actions and views of the parent's agent in relation to a process, an element of the history of one of the parents, a recommendation about structured visitation, an opinion of the parents' agent, and proposed actions and key messages for resolving particular issues, as well as some general policies of the Public Body. (The briefing note was initially withheld in its entirety in reliance on sections 11(2)(a) of HIA and 24(1)(b)(i) of the FOIP Act, but subsequently the greater part was released to the Applicant, with only the information in the list above severed and withheld under these provisions.)

[para 25] As already noted, to be health information, information must meet the terms of section 1(1)(k). To fall within section 1(1)(k), information must be diagnostic treatment and care information, as defined by section 1(1)(i), or registration information, which is defined by section 1(1)(u) and the Health Information Regulation. The latter category – registration information – was not relied on by the Public Body, but will be dealt with briefly in the final portion of the discussion of Issue A.

[para 26] Under section 1(1)(i), "diagnostic, treatment and care information includes the following:

- information about the physical or mental health of an individual,
- information about a health service provided to an individual (including specified information about the provider), or
- other information about an individual that is collected when a health service is provided to that individual.

I must determine whether the information severed by the Public Body under section 11(2)(a) falls under any of these categories.

Is any of the information recorded information about the mental or physical health of an individual under section 1(1)(i)(i)?

[para 27] The briefing note (consisting of pages 10 and 11) contains some information about the Applicant's parents. Possibly, this information was severed on the basis that it is information about their physical or mental health within the terms of section 1(1)(i)(i) of the HIA. I will therefore consider whether this information meets the requirements of this provision.

[para 28] One can determine from the references to the Applicants' parents in the briefing note that they have been admitted to a health care facility, but generally, one can derive little or nothing about their particular conditions. Two items of withheld information found in the third paragraph on page 11 speak more directly to the circumstances of the parents than does the rest of the information in the records.

[para 29] In my view, it is not the case that all information about a person's physical or mental health, as stated or recorded by *any* person, qualifies as information "about the physical or mental health of an individual" within the terms of the HIA. Rather, this phrase, in the context of the HIA, is qualified by the fact that it is one element in the HIA's definition of "diagnostic, treatment and care information". Under the HIA, "diagnoses, treatments and care" are provided by individuals who are health service providers. (See section 1(1)(n)). In view of this, to qualify as health information, the source or origin of information about a person's physical and mental health must be a qualified health service provider who provides diagnoses, treatments or care, and in so doing, considers and makes judgments about the person's state of physical or mental health. This is true regardless of the identity of the recorder of information. To illustrate by way of contrast, the views of an acquaintance, or some other person who is not a qualified health service provider providing a diagnosis, treatment or care to an individual, that the individual is mentally unstable, or even that the individual has a particular disease, is not "health information" within the terms of the Act.

[para 30] With respect to the general information that can be surmised from the presence of the Applicant's parents in the facility, I acknowledge that their presence there may be related to some diagnosis or conclusion about the state of their health that was made by a health service provider at some earlier point in time. However, the details and source of any such diagnosis or comment on the parents' health conditions is unknown

and cannot be inferred from the information severed from the records. Further, one can derive no more information about the parents' state of health from what was withheld from the Applicant than one can from the information that was disclosed to her. (Notably, record 5, which was provided to the Applicant without severing, contains a detailed diagnosis.) It follows that AHS must itself not have regarded information at this level of generality and uncertainty of origin as "health information".

[para 31] I turn to the first of the specific items of information in the third paragraph of record 11. It is again *possible* that this item of information reveals the views of a health care professional about the state of the health of one of the parents. However, this cannot be inferred, and AHS has provided no evidence to demonstrate that these items of information do, in fact, reveal such views. The statement is consistent with a statement of a general nature that does not require particular expertise and one which does not take into account the parent's particular state of health.

[para 32] I turn to the second item of information severed from the third paragraph, which documents a recommendation of what is referred to as "a hospital". In this case, the reference is to a recommendation and the reason for the recommendation. This information does include a comment on the potential impact on one of the parents of implementing the recommendation. I considered whether this item documented the state of mental or physical health of the parent within the terms of section 1(1)(k). However, given the preceding sentence, and other similar information in the final paragraph on the same page, I cannot conclude that the statement recorded a health professional's views about the parent's state of health. As was the case with the statement in the third paragraph that I addressed above, this statement is also consistent with a statement of a general nature that does not require particular expertise and that does not take into account the parent's particular state of health.

[para 33] With regard to the other information severed by the Public Body, such as information referring to other relatives, the agent, structured visitation, ongoing review of complaints, and the generally-applicable policies of Covenant Health, I am unable to identify any information that could be said to be about anyone's physical or mental health.

[para 34] Accordingly, I find that the information about the parents in records 10 and 11 that was withheld from the Applicant is not information about their physical or mental health within the terms of the definition provisions of the HIA, quoted above.

Is any of the information recorded information about a health service provided to an individual (section 1(1)((i)(ii))?

[para 35] Section 1(1)(m) of the HIA defines "health service":

> *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;*

[para 36] Again, AHS stated the following in its submissions:

> Record 10: the information severed was collected pursuant to section 20(b) of HIA for the purposes of section 27 (i.e. the provision of health services to the parents). Information about collaterals [*sic*] and a patient's agent and their views as to the quality of health care is necessary for the provision of care. Health information is defined in section 1(1)(k)(i) as "diagnostic, treatment and care information". The definition of this term at 1(1)(i)(ii) "means information about any of the following: (ii) a health service provided to an individual … that is collected when a health service is provided to the individual." It is submitted that "health service provided to an individual' has to be interpreted as a continuum. Health services are not isolated events but, especially in this instance, of a continuing nature 24/7. Views as to the adequacy of that care and the decisions made by a patient agent form part of that health information as treatment decisions may be affected by those decisions. If this interpretation is accepted then the information severed falls within section 11(2) of the HIA.
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> Record 11: the information severed in the first part again is a synopsis of information that was collected under HIA. The record itself deals with issues that clearly will have an impact on the continuum of patient care inasmuch as it is a review of visitation rights to the patients concerned and whether such visits interfere with patient care. In the alternate [*sic*] the last two paragraphs of the severed records constitute actions and analysis for those actions that meet the requirements of section 24 of FOIP.

[para 37] In my view, it is not the case that *all* services provided to residents of a health care facility are necessarily health services, even though they may promote or maintain physical or mental health, or constitute "care" in the general sense of the word. To qualify as a health service within the terms of the Act, a decision or action must be taken or performed by a health services provider (a person who provides "health services" under sections 1(1)(m) and 1(1)(n)), and the decision or action must be based on an assessment of the physical or mental health needs of the particular individual.

[para 38] For example, decisions by the culinary staff of a health services facility as to what meals to provide to the general population of the facility may promote physical health, as may decisions by the operators of the physical plant as to the air quality and temperature, or cleaning practices, or more indirectly, decisions by the general manager as to appropriate staffing levels. However, in my view, these kinds of decisions and actions do not constitute "health services" within the terms of the HIA, such that the nature of those services constitutes the "health information" of the residents of the

facility. In contrast, a decision by a physician or a qualified dietician as to his or her patient's particular dietary needs resulting from a medical condition would be a "health service". Similarly, a decision by a qualified mental health professional, based on an assessment of his or her patient's psychological state and needs, made for a purpose enumerated under section 1(1)(m), as to the persons with whom the patient ought to have contact, would be a provision of a health service that would constitute "health information".

[para 39] The position of AHS in this case may be that steps taken to prevent interference with the care of the parents in themselves constituted "care" within the terms of "*diagnostic treatment and care* information" as found section 1(1)(i).

[para 40] Whether steps taken to avoid disruptions to patient care constitutes "care" within the terms of section 1(1)(i) and 1(1)(m)(i), depends upon by whom, and for what reasons, this kind of action was decided upon and taken. It is possible that persons who are not "health service providers" could make such decisions, and if that is the case, while these actions could be described as *supporting* the provision of "health services", to describe such steps as "health services" would necessarily involve an overly broad interpretation, that could embrace many other activities having nothing to do with a particular patient's health needs. It would not be disclosing a particular patient's health information that hospital administration was routinely taking all necessary steps to prevent disruptions in services for patients generally. However, if the direction that such steps be taken were given by a health service provider exercising his or her professional expertise regarding his or her patient's particular medical needs or situation, I would agree this direction could have the potential to constitute the provision of a "health service".

[para 41] Turning to the records at issue, it may be inferred from the presence of the parents in the health care facility that health services were being provided to them, but beyond this, the nature of the services is unknown. As already noted, the remaining records equally give rise to this inference and some of them disclose this information directly, so AHS is presumably not taking the position that this is "health information" in itself. It would be practically impossible to sever all such information in any event, so the only response consistent with this idea would be to withhold all the records, which has not been the Public Body's approach.

[para 42] As already discussed in the foregoing section, a small part of the information concerning one of the parents that is found in record 11 possibly documents a course of action or decision about one of the parents that could have been determined by a health care professional. However, as discussed earlier, in my view, there is no evidence to support a finding that this was so.

[para 43] As to the second item of information, I have inadequate evidence on which to conclude that the recommendation it contains documents the provision of a health service. Given the sentence preceding the severed statement, to which the latter relates, the recommendation may be of a general nature that does not require particular

health care expertise, nor take into account the particular state of health of the parent concerned. This possibility is supported by the third and fourth bullets in the final section on record 11.

[para 44] I turn to the withheld information that relates to views of the agent, which are found in the fourth paragraph of record 10, and the fourth paragraph of record 11. The first opinion relates the agent's views with respect to a review of the Applicant's concerns. The second is of a very general nature. In my view, neither qualifies as documenting a health service.

[para 45] With respect to the final two paragraphs of record 11, only the second bullet of the first paragraph relates in any way to the provision of care to the parents, insofar as decisions with respect to the Applicant's visitation rights may be said to constitute care. With respect to this limited matter, AHS did not advance arguments or evidence to establish that any decisions made or to be made about these matters had, or would have, regard to the particular physical and mental state, and related health needs, of the parents, or that they were made by persons qualified to make them on the basis of such health-related needs. Further, the records that have been disclosed to the Applicant indicate that the parents' agent participated in decisions about the Applicant's visitation rights. The records establish that the agent participated in these decisions as the agent of the Applicant's parents under a personal directive. However, to be a health service, the decision must be made by a qualified health service provider. Making a decision on behalf of the maker of a personal directive regarding visitation rights does not qualify as providing a health service, and information about such decisions is not health information.

[para 46] I note that in parts of record 2, which was provided to the Applicant, there is some discussion of the way in which care plans are developed. Portions of this record establish that such plans are made by teams of professionals in conjunction with a patient or the patient's agent, and that these plans incorporated decisions about the Applicant's visitation rights.

[para 47] Portions of records 5 – 8, which were disclosed to the Applicant, provide more detail about the interactions between the Applicant and hospital staff that gave rise to the decisions about her visitation rights than the withheld portions of the records do, yet they were not withheld on the basis that they were the parents' health information. AHS did not itself regard this information as the health information of the parents. I cannot conclude that the information that was withheld from a different part of the records, but contained far less detail in relation to the parents' particular situation, constituted health information of the parents within the terms of the HIA.

[para 48] Other information in the records – such as the identities of other relatives of the Applicant, the existence of recorded information, and the identity of the Applicant's parents' agent, clearly does not document a health service provided to the Applicant's parents.

[para 49] With respect to the remainder of the final two paragraphs of record 11, the first and third bullets in the next-to-final section have nothing to do with services to the parents of any kind. Most of the statements in the final section refer to policies that would be generally applicable rather than confined to the parents' situation, and do not relate even remotely to the health of the parents or services being provided to them in particular.

[para 50] For the foregoing reasons, I am unable to find that any of the withheld information documents the provision of a health service.

Is any of the information recorded information about an individual that was collected when a health service was provided to the individual?

[para 51] I turn to the final possible theory – that the records document "other information" about the Applicant's parents that was collected at the time a health service was being provided to them, within the terms of the closing words of section 1(1)(i). This is the theory on which the Public Body's arguments rely.

[para 52] In my view, these closing words apply to information that is collected about a patient that is related to the service that is being or may be provided to them. In other words, the qualifier "when a health service is provided" refers not to timing but to substance. For example, pleasantries exchanged during a patient's interaction with their nurse or doctor, even though they impart some information about the patient, would not qualify, but information about the patient's symptoms or health history would qualify.

[para 53] Accordingly, I discount the idea that references in the records to the parents meet the terms of the "other information" simply because their presence in the facility can be deduced from the references, and the information from which the inference can be drawn was recorded during the period of their stay. In my view, unless information is collected in relation to the provision of a health service, it is not information of the type referenced in the closing part of the provision.

[para 54] To address the Public Body's specific argument, its idea seems to be that the views of the agent regarding the impact of the Applicant's visits on the parents were collected by the Public Body because these views could influence future decision about treatment and care of the parents, and that the information about the agent's views is "other information" for this reason.

[para 55] In my view, this argument fails because the collected information that is referenced in the closing words of section 1(1)(i) must be information "about the individual" to whom health services are being provided. With the exception of information in the third paragraph of record 11 (which does not mention the agent or her views), none of the severed information is about the parents. It is, instead, information about the agent's views regarding a process and decisions, and information about the agent's views about the actions of the Applicant. Though the severed information may record the views of the agent as to how the parents are affected by the Applicant's

actions, the comment imparts no information particular to the parents themselves, and is too remote and conjectural to qualify as a statement "about" them.

[para 56] For the reasons set out above, I find that there is no information meeting the closing words of section 1(1)(i) of the HIA in records 10 and 11.

Is there registration information in the records?

[para 57] Registration information is defined by section 1(1)(u) of the HIA. This provision states:

> *1(1) In this Act,*
>
> > *(u) "registration information" means information relating to an individual that falls within the following general categories and is more specifically described in the regulations:*
> >
> > *(i) demographic information, including the individual's personal health number;*
> > *(ii) location information;*
> > *(iii) telecommunications information;*
> > *(iv) residency information;*
> > *(v) health service eligibility information;*
> > *(vi) billing information,*
>
> *but does not include information that is not written, photographed, recorded or stored in some manner in a record;*

[para 58] The definition of "registration information" does not state that to qualify as "registration information" information must be presented in order to register for admission to a plan or a facility. However, the fact that the information is called "*registration information*" indicates that the information that is subject to section 1(1)(u) is information that would be presented as part of a registration process. Section 3 of the Health Information Regulation supports this view, as it includes information as to whether an individual is "a registrant or a dependent of a registrant under the *Health Insurance Premiums Act*" as registration information.

[para 59] As noted earlier, while one can learn from the briefing note that the Applicant's parents are residents of the facility, the information does not appear to have been drawn from information registering them for coverage under the *Health Insurance Premiums Act*, or a similar scheme of coverage. Certainly, there is no evidence before me as to the source of this information. Thus I find that the information that was withheld does not fall within this category.

[para 60] The foregoing analysis reaches the same conclusions as to what qualifies as "health information" under the HIA as the conclusions at which I arrived in Order F2013-24 / H 2013-02. In the earlier order, I relied in part on the closing words of section 1(1)(i) to conclude that before information is "health information" within the terms of the Act, the information must be associated with a health service provided by a health service provider. I read "collected when a health service is provided" as referring to information that is generated and recorded in relation to provision of such a service, which would be in contrast to, for example, information that is the opinion of a non-health-service-provider, or describes a service of a general nature that may promote health but does not take a person's particular health condition into account. In the present order, I reach the same conclusion, but note that this same result can be derived simply by reading the relevant phrases "diagnostic, treatment and care information", the "physical and mental health of an individual" and "a health service provided to an individual" in their contexts and having regard to the totality of the Act. None of these phrases are, in my view, meant to describe diagnoses, treatment or care other than that which is related to the provision of health services by providers who are qualified to provide such services to their patients and who take those patient's particular conditions and needs into account in doing so. In other words, however reached, the analysis avoids an unduly broad interpretation that would include in a person's "health information" opinions of non-professionals, or services of a general nature that have no relation to their health conditions and which are not provided by health service providers to their patients.

Conclusion

[para 61] I conclude that there is no basis on which I can find that the records contain the Applicant's parents' "health information" within the terms of the Act.

[para 62] I note before leaving this section that if I were wrong, and the information severed from records 10 and 11 was health information, thereby subject to the HIA, it would be necessary to consider how sections 4(1)(u) and 15.1 apply in this case. However, given my findings above, I do not need to make a decision about these questions.

Issue B: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the *Freedom of Information and Protection of Privacy Act* (duty to assist applicants)?

[para 63] As discussed above, the Applicant requested copies of all records in the Patient Concerns Office containing information relating to her. She indicated that her request encompassed all information relating to her and that this request included information obtained from Covenant Health and from her mother's agent.
In her submissions, the Applicant challenges the adequacy of Covenant Health's search as it has not produced records documenting communications between the Patient Concerns Office and her parents' agent.

[para 64] Section 10 of the FOIP Act states, in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 65] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants contemplated by section 10(1) includes the duty to conduct a reasonable search for responsive records. In Order, the Commissioner noted:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> • The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> • The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> • The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> • Who did the search
> • Why the Public Body believes no more responsive records exist than what has been found or produced

[para 66] The Public Body provided the affidavit of the Public Body's Information and Privacy Coordinator to document the steps it had taken to locate responsive records. The Information and Privacy Coordinator states:

> On April 26, 2011 I sent out a call for records to the then Patient Concerns Officer and the Executive Director for Patient Concerns. I was satisfied that this was the only department where such records would be stored as the Patient Concerns Office ("PCO") is a centralized office in Alberta Health Services ("AHS") set up under the authority of section 3 of the Patient Concerns Resolution […] Process Regulation AR 124/2006 and all concerns or complaints regarding the services to a patient are referred to that office. In addition the Applicant's access request was specifically related to that office and the position of Patient Concerns Officer.
>
> Subsequently on May 4, 2011 I received from the PCO investigator who was assigned to review the Applicant's concerns the responsive records. From the completed call for record form completed by the investigator the search for records consisted of her filing cabinet, her computer, the Patient Concerns Officer EA's computer, the Patient Concerns Officer's computer and the PCO's generic email account and shared drive. After I reviewed the responsive records a recommendation for release of records was sent to the Executive Director and the investigator concerned who reviewed those records and supported the recommendation for release.

[para 67] This affidavit establishes the steps taken by the Public Body to locate responsive records and explains why it elected to confine its search for records to specific areas of the Patient Concerns Office. Given that the Patient Concerns Office is the body to which the Applicant submitted her concerns, and was responsible for investigating them, I agree with the Public Body that is reasonable to confine its search in this way.

[para 68] However, it is unclear from the Access and Privacy Coordinator's affidavit and the Public Body's submissions why the Public Body believes there are no responsive records other than those it has produced to the Applicant.

[para 69] The Public Body provided the affidavit of a patient concerns officer. (The supplier of this affidavit is not the same individual who investigated the Applicant's complaint. Although the employee who swore the affidavit and the employee who investigated the Applicant's complaint are both patient concerns officers, to distinguish between them in this order, I have decided to refer to the employee who investigated the complaint as a patient concerns investigator.) The patient concerns officer reviewed the file in which the patient concerns investigator kept documents relating to the Applicant's complaint to the Patient Concerns Office. This affidavit states:

> The file indicates that no further information was sent to AHS from Covenant Health as when contacted by a Patient Concerns investigator the agent for the Applicant's parents care expressed her satisfaction with her parents care and the review of concerns completed by Covenant Health. The PCO's review therefore consisted of the reports forwarded by Covenant Health and the Applicant's submissions. [my emphasis]

The patient concerns officer indicates that the file establishes that contact was documented as having taken place between the patient concerns investigator and the agent for the Applicant's parents. In addition, it refers to an indication in the file that the agent expressed her satisfaction with the Applicant's parents' care and the review of the Applicant's concerns undertaken by Covenant Health. The patient concerns investigator's letter of March 25, 2011 also indicates that the investigator contacted the agent in order to learn her views.

[para 70] However, the Public Body has produced no records documenting what was communicated to the investigator by the agent or vice versa.

[para 71] It may be the case that the patient concerns investigator did not document the conversations she had with the agent but reproduced them from memory in her letter of March 25, 2011; however, it appears to me to be more likely, given that she was conducting an investigation which could be reviewed by the Office of the Ombudsman of Alberta (as indicated by section 5 of the Patient Concerns Resolution Process Regulation and at the conclusion of the letter of March 25, 2011), that she would take notes or preserve emails to document any communications she had with the agent.

[para 72] It may be the case that the Public Body did not consider any communications with the agent to be responsive to the Applicant's access request. However, the Applicant's access request specifically includes a request for information relating to her provided by her parents' agent. In my view, records documenting the agent's views regarding the concerns raised by the Applicant would be responsive to this request.

Conclusion

[para 73] As the Public Body has not established that no responsive records exist other than those it has produced, and as it appears quite possible that recorded communications between the patient concerns investigator and the Applicant's parents' agent exist, I must ask the Public Body to search the Patient Concerns Office for records

documenting communications between the Applicant's parents' agent, and the patient concerns investigator, or at a minimum, to ascertain and explain why no such records could exist, if that is the case.

Issue C: Does section 17 of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to personal privacy) apply to the information severed from the records?

[para 74] The Public Body has severed references to the Applicant's family members and to the Applicant's parents' agent from the records under section 17. The Public Body has also severed information about the Applicant and information that does not appear to be about a third party under section 17. I will address these kinds of information individually.

Information about the agent

[para 75] The agent was appointed under the parents' personal directive, or directives, to make personal decisions on their behalf. Section 14 of the *Personal Directives Act* explains the nature of the decisions that an agent under a personal directive may make on behalf of the maker of the directive. It states, in part:

> *14(1) Unless a personal directive provides otherwise, an agent has authority to make personal decisions on all personal matters of the maker.*

The agent's name is her personal information, as is the fact she was appointed and acts as an agent. However, the extent to which the actions and decisions of an agent acting under a personal directive are the personal information of the agent is less clear.

[para 76] With respect to information in the records as to decisions she made and actions she took in her capacity as agent, this is information the agent created in the performance of her powers and duties that arise when a person is appointed as agent under the *Personal Directives Act*. This statute both authorizes making decisions and taking actions on behalf of the maker of a personal directive, and creates the obligation to make decisions and take actions in accordance with the directives of the maker or alternatively in the maker's best interests, and relieves the agent from liability as long as the agent acts in good faith. As decisions and acts made under a personal directive are performed in the exercise of a statutory authority with corresponding statutory obligations, acts and decisions of an agent are not properly primarily characterized as the personal information of the agent. Similarly, the acts of employees of public or private organizations exercising powers and performing duties on behalf of the public or private organization are not properly characterized as personal information.

[para 77] In saying this I recognize that the agent has a personal and familial relationship with the makers of the directive, which is arguably reflected in her acts and decisions regarding them, and which gives these acts and decisions a personal dimension to some degree. The same may be true of the agent's decisions that affected the Applicant

by reference to the personal relationship between the agent and the Applicant. Information as to the improper performance of such powers would arguably be personal information if it were to have the consequence of her removal from the position of agent. However, that does not appear to be the case here. In the present circumstances, I believe these statutorily-governed actions and decisions as they are recorded in the records are best characterized as *primarily* not the personal information of the agent.

[para 78] Moreover, these same acts and decisions will often also constitute the personal information of the makers of the directive to the extent the latter are affected by them. In addition, in this particular case, the decisions of the agent with respect to the Applicant's rights to visit her parents and to be present in the hospital had an effect upon, and thus also constituted, the personal information of the Applicant. Furthermore, the decisions and the acts of the agent were closely interrelated with the decisions and acts of Covenant Health in relation to these same matters, and it appears that the agent's decisions also influenced the Public Body's decisions, as evidenced by the letter of March 25, 2011 in which the patient concerns officer communicated the results of her investigation to the Applicant.

[para 79] Thus, in my view, the information in the records about the acts and decisions of the agent acting in that capacity are not properly primarily characterized as the agent's personal information. To the extent that they may be her personal information, in the present circumstances, for the reasons I give below, disclosure of this information is not an unreasonable invasion of her personal privacy.

Information about the Applicant

[para 80] I note that the Public Body has severed information about the Applicant from the first paragraph of the briefing note on record 10. This information is not intertwined with the personal information of another identifiable individual.

[para 81] The application of section 17 is limited to the personal information of third parties. Section 1(r) of the FOIP Act defines the term "third party" so as to exclude an applicant. In other words, an applicant's personal information cannot be withheld under section 17.

[para 82] As section 17 does not apply to this information, and as the Public Body is no longer relying on section 24 to withhold this information, the information severed from the first paragraph of the briefing note must be disclosed to the Applicant.

Other information

[para 83] With the exception of the final six words of the third bullet point on record 11, Part II of the briefing note on record 11 contains no personal information other than that of the Applicant.

[para 84] The Public Body has also severed information from the key messages portion of record 11 (Part III) under section 17[1]. I am unable to identify any personal information, other than that of the Applicant, in the key messages.

[para 85] As the Public Body has also withheld this information under section 24 of the FOIP Act, I will return to this information when I address section 24. However, with the exception the portion of the third pullet that I have described, I find that this information is not personal information to which section 17 can be applied.

[para 86] I turn now to the issue of whether the Public Body properly withheld the information of individuals from the records under section 17(1). Although I have found that information about the agent's decisions is not *primarily* her personal information, I will also deal with this information to the limited extent that it may be considered personal information.

Section 17

[para 87] Section 17 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[…]*
>
> *[…]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if[…]*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, […]*
> > *(d) the personal information relates to employment or educational history,*
> > *[…]*
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*

[1] (The record indicates that this information is being withheld under section 11(2) of the HIA. However, the Public Body decided that it would withhold this information under section 17 of the FOIP Act in the event that I found that the HIA did not apply.)

(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 88] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 89] 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 any other relevant circumstances must be considered.

[para 90] 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). [my emphasis]

Section 17(1) requires a public body to withhold information only once the head has weighed all relevant interests in disclosing and withholding information under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 91] The personal information that has been severed consists of the names of the Applicant's parents, the names of her siblings, and the name of the Applicant's parents' agent, in the context of actions the agent has taken and decisions she has made on behalf of the Applicant's parents.

[para 92] I find that all this information falls under section 17(4)(g), cited above, as the information consists of the names of these individuals in the context of other information about them. The information is therefore subject to a presumption that it would be an unreasonable invasion of the privacy of these individuals to disclose the information.

[para 93] In response to my question as to what factors were considered relevant under section 17(5), the Public Body argues:

> The Information Access and Privacy Advisor who dealt with the severing of responsive records predominantly relied on sections 17(1) and 17(4)(g)(i) of FOIP. Section 17(5)(c) (personal information is relevant to a fair determination of the applicant's rights) was considered but no weight was attached to it as the severed portions in pages 2, 10, 11 and 12 related to the identity of the parent's agent, the views of the agent with regard to the initial complaint raised by the Applicant and the identity of a collateral. It was considered that such information would not assist in the case to be met as that information had been canvassed by Covenant Health's review process with the Applicant and in the unsevered Concern Review Report (pages 1 – 5 in the disclosure package) in particular page 4 that dealt with Visitation Conditions.

The Public Body argues that the information it has severed from the records would not assist the Applicant to meet her case, as Covenant Health addressed this information in a Concern Review Report, which the Public Body provided to the Applicant in unsevered form.

[para 94] Records 5 – 9 (records 1 – 5 of the disclosure package) which were disclosed to the Applicant, do contain information such as the identity of the agent and the agent's role in making decisions regarding the outcome of the review of the Applicant's concerns. These records also contain detailed information, such as diagnoses, regarding one of the Applicant's parents. The Public Body provides no explanation as to why it considered it appropriate to provide the detailed information about the agent and the Applicant's parents in records 5 – 9 to the Applicant, but to withhold similar, but more general, information from other records.

[para 95] I understand from the Applicant's submissions that there are two separate decisions that she seeks, or has sought, to have reviewed. First, there is the decision of Covenant Health to impose visitation restrictions. Second, there is the decision of the Public Body to dismiss the Applicant's concerns regarding Covenant Health's decision. The Applicant sought to have Covenant Health's decision reviewed by the Patient Concerns Office. She has also sought review of the decision of the Patient Concerns Office by the Ombudsman. The Applicant submits that the Alberta Ombudsman has completed a review of the Patient Concerns Office decision to dismiss her complaint and found the process by which it her complaint was dismissed to have been administratively unfair.

[para 96] For the reasons set out below, I find that section 17(5)(c), cited above, is a relevant factor weighing in favor of disclosure in this case. The section 17(5)(c)factor is not satisfactorily addressed by the fact that Covenant Health completed a Concern Review Report in which it confirmed the Applicant's restrictions, given that the Applicant is seeking to challenge the findings and conclusions in the Concern Review Report. That this is her intention is supported by the Applicant's submissions, and by the decisions she has already made to request review of Covenant Health's decision to the Patient Concerns Office, and her decision to request review by the Ombudsman of the Patient Concerns Office's decision.

[para 97] I turn now to the requirements of section 17(5)(c). In Order F2008-012, I said:

> If personal information is relevant to a fair determination of an applicant's rights, then this is a factor that weighs in favor of disclosing the information under section 17(5)(c). I interpret the term "fair" to refer to administrative fairness. The two basic requirements of administrative fairness -- the right to know the case to be met and the right to make representations, are set out in Jones and DeVillars, *Principles of Administrative Law*:
>
> > The courts have consistently held that a fair hearing can only be had if the persons affected by the tribunal's decision know the case to be made against them. Only in this circumstance can they correct evidence prejudicial to their case and bring evidence to prove their position. Without knowing what might be said against them, people cannot properly present their case. But knowing the case that must be met is not enough, of course; the opportunity to present the other side of the matter must also be allowed. (Jones and DeVillars, Principles of Administrative Law Third Edition (Scarborough: Thomson Canada Ltd. 1999) p. 260
>
> If the personal information would assist an applicant to know the case to be met and to make representations in relation to a decision being made about the applicant's rights, then that is a factor weighing in favor of disclosure.

(In *Caritas Health Group v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 186, the Alberta Court of Queen's Bench denied judicial review of Order F2008-012.)

[para 98] In Order 99-028, former Commissioner Clark adopted reasoning from an Ontario decision, as follows:

> In Order P-312 (1992), the Ontario Assistant Commissioner stated that in order for the Ontario equivalent of section 16(3)(c), [now 17(5)(c], to be a relevant consideration, all four of the following criteria must be fulfilled:
>
> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 99] The Applicant is clear in her submissions that she is seeking the information in the records to challenge the visiting restrictions imposed on her by Covenant Health. The Applicant states in her submissions:

> I have never acted improperly or caused any harm to my parents yet I have been unable to defend myself against Covenant Health's accusations because without full disclosure of the alleged harm that I have caused, I cannot accurately respond to the unsubstantiated allegations.

Covenant Health has restricted the Applicant's visiting privileges, I presume through exercise of its statutory authority under the *Trespass to Premises Act*. Possibly, Covenant Health has done so under the common law or another statute. The specific source of its authority is immaterial; for the purposes of the test it is sufficient that Covenant Health's decision has affected the Applicant and that there is a mechanism available by which the Applicant may grieve this decision and seek a remedy.

[para 100] The effect of Covenant Health's decision to restrict the Applicant's visiting rights is to make it illegal for her to attend its premises and visit her parents at certain times, when it was not illegal for her to do so previously. The Applicant indicates in her submissions that she seeks the information in the records in order to challenge this decision by Covenant Health. The Applicant raised her concerns about her visiting restrictions to the Public Body's Patient Concerns Office to obtain a remedy under the Patient Concerns Resolution Process Regulation, A.R. 124/2006. The Applicant was not necessarily limited to seeking a remedy under this process; it may also have been possible for her to request review of Covenant Health's decision process by the Ombudsman, or to seek judicial review of the decision by the Courts.

[para 101] The effect of the Public Body's decision to dismiss the Applicant's concerns regarding Covenant Health's decision was to deny the remedy she had requested. The nature of the remedy she sought would was to have the visiting restrictions removed. Section 5 of the Patient Concerns Resolution Process Regulation acknowledges that the Ombudsman has the power to review the patient complaints process. The Applicant states that the Ombudsman has already reviewed the complaint process and found that the process by which the Public Body made its decision to dismiss her concerns was unfair. AHS was aware of this assertion, and provided no evidence to contradict it; therefore, I accept it to be the case. I presume it will necessitate further action by AHS, such as deciding whether and how to implement recommendations from the Ombudsman. Possibly, this could include a new proceeding, and an opportunity for

the Applicant to make new submissions. Even if this route were not available or the Applicant chose not to follow it, there would be other steps, whether ultimately successful or not, she could take, such as those already mentioned (for example, an application for judicial review of Covenant Health's or the Patient Concerns Office's decisions). Regardless which legal process the Applicant chooses to pursue to try to overturn the decision to restrict her visitation, it is clear that she is contemplating further action to try to change her legal position respecting visitation, which would involve a legal proceeding.

[para 102] The first two branches requirements of the test stated above are therefore met in relation to both decisions that the Applicant seeks to challenge.

[para 103] The personal information regarding the Applicant's parents, her brother, and the Applicant's parents' agent, is information that is relevant to the administrative decisions that the Applicant seeks to challenge. I say this because the records indicate that the information appearing in the records about the agent, the parents, and the brother is significant to the decisions that the Applicant seeks to challenge.

[para 104] The information withheld from the records under section 17 is relevant to Covenant Health's decisions to restrict the Applicant's visiting privileges as it provides background, and in some cases, additional bases for the decisions. The information appearing in paragraphs 3, 4, 6, and 7 of the briefing note on records 10 and 11 are examples of such information. The same holds true for the information severed from the note dated October 4, 2010 on record 2, and the information severed from the email dated January 11, 2011 on record 12. This information is relevant to Covenant Health's decision to impose restrictions and would therefore be necessary for the Applicant to review if she is to be in a position to learn the case she must meet and make representations effectively.

[para 105] In my view, the information severed from these records is also relevant to the determination the Patient Concerns Office must make in relation to the Applicant's concerns regarding her visitation restrictions.

[para 106] The final branch of the test is the question of whether the personal information is necessary in order for the Applicant to prepare for proceedings. In my view, the personal information severed from in the records is necessary for the Applicant to prepare for proceedings effectively, as it would enable her to better understand the basis of the two public bodies' decisions.

[para 107] I find the personal information severed from paragraphs 3, 4, 6, and 7 of the briefing note on records 10 and 11, the information severed from the note dated October 4, 2010 on record 2, and the information severed from the email dated January 11, 2011 on record 12, meet the requirements of section 17(5)(c), which is a factor that weighs strongly in favor of disclosure.

The information of the parents and the brother

[para 108] The names of the Applicant's parents are included in the records because being restricted in her ability to visit them is the subject of the Applicant's complaint. The personal information of the parents that was severed does not appear in any other context.

[para 109] Information about the Applicant's siblings appears in a sentence on record 2. However, the sentence is primarily about the Applicant. Information about the applicant's siblings also appears under the heading: "1. Issue" on record 10. Little can be determined about the personal views of the sibling in the severed information that cannot be determined from the statement in the second last paragraph of record 2, which was provided to the Applicant. There is more information about the Applicant in the sentence that was severed from the record, then there is about the brother, and this sentence is relevant to the Public Body's decision.

[para 110] It appears from the records before me that the personal information of the parents was never intended to be kept confidential from the Applicant. The Applicant is aware that her parents are in care; it is precisely this care that led to the concerns that she brought to the Public Body's attention.

Conclusion

[para 111] I have decided that the personal information in the records cannot be withheld under section 17(1). I have made this decision on the basis that the factor set out in 17(5)(c) of the FOIP Act is engaged and weighs strongly in favour of disclosure. The factor set out in sections 17(5)(c) applies to all the personal information withheld from the records, and outweighs any interests in withholding it.

[para 112] In making this finding, I take into account that where information is about an individual acting in a representative capacity, the fact that the individual acts as a representative means that disclosure is less invasive of personal privacy because the information is not about the representative, so much as about the matter the agent is addressing on behalf of someone else. The Applicant requires the personal information in the records to better understand the case she must meet as to why visitation restrictions have been imposed and to respond to it. The agent's privacy interests in her decisions and actions as agent are diminished by the fact that she acting in a representative capacity and because her information is also the information of others. I find that the factor set out in section 17(5)(c) outweighs the privacy interests of the agent in her personal information. Therefore I find that it is not an unreasonable invasion of the agent's personal privacy to disclose her personal information where it appears in the records.

[para 113] I also find that section 17(5)(c) applies to the personal information of the Applicant's parents and the brother, and outweighs any privacy interests in their information. I make this finding on the basis that the severed information does not disclose information that is not already known or inferable, is intertwined with the

Applicant's personal information, and is relevant to the decision made by the Public Body. I therefore find that section 17 does not require the Public Body to withhold this information, as it would not be an unreasonable invasion of the parents' or the brother's personal privacy to disclose it.

[para 114] To conclude, I have found that some of the information withheld by the Public Body under section 17 is not personal information, or is the personal information of the Applicant. In those cases, section 17 cannot be applied to withhold this information. With regard to the information that I have found is personal information, I find that section 17 does not require the Public Body to withhold this information.

Issue D: Did the Public Body properly apply section 24 of the *Freedom of Information and Protection of Privacy Act* (advice from officials) to the information in the records?

[para 115] The Public Body originally withheld records 10 and 11 in their entirety under section 24(1)(b). However, it subsequently made decisions not to apply section 24(1)(b) to record 10 and to apply it only to portions of record 11. Section 24(1)(b) states:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council[…]*

[para 116] A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views that would assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 117] In my letter to the Public Body, I asked the following questions:

> With regard to the information withheld under section 24(1)(b), you describe it as intended to "advise and prepare Covenant Health senior leadership with regard to the next steps to be taken to manage the concerns of the Applicant". However, the information appearing under "1. Issue" appears to describe an issue that had arisen and to provide background information regarding the issue. How does the information appearing under the heading "1. Issue" reveal information subject to section 24(1)(a) or (b)? i.e. What decision was before the senior leadership, and how does the information reveal advice regarding potential courses of action for the senior leadership to take, or

> a course or course of action that the senior leadership was considering taking? (If you find it necessary to refer to the contents of the records in order to provide a detailed answer to this question, I am prepared to accept *in camera* those submissions that would reveal the information AHS has withheld under section 24(1)(b).)

[para 118] In its response to these questions, the Public Body stated:

> With regard to the information under "1. Issue" it is conceded that such information would not come within those parameters and as such should be disclosed.

As the Public Body has conceded that section 24(1)(b) does not apply to the information appearing under the heading: "1. Issue", the application of this provision to this information is no longer at issue. As I have found elsewhere in this order that this information cannot be withheld under either section 11 of the HIA or section 17 of the FOIP Act, under which the Public Body also withheld this information, I will order the Public Body to disclose this information to the Applicant.

[para 119] The Public Body continues to rely on section 24(1)(b) to withhold portions of part II and III of the briefing note (record 11). The Public Body has withheld both the heading from Part II of the briefing note, as well as the information falling underneath this heading.

[para 120] In Order F2004-026, former Commissioner Work held that information revealing only the topic of discussion, such as headings, will not usually fall under section 24(1)(b). Information must reveal something substantive about the advice sought or given before section 24(1)(a) or (b) can be said to apply. He said:

> I reject the Public Body's argument that sections 24(1)(a) and 24(1)(b) permit withholding of a document or a portion of a document that would reveal only that an individual participated in a discussion. This reasoning applies as well to the parts of the correspondence that contain non-substantive content (for example, cover documents that convey the advice, or parts of the bodies of e-mail exchanges indicating only that comments are being sought or provided).
>
> The same point applies to subject matter or timing of the consultation. The exceptions in section 24(1)(a) and 24(1)(b) do not apply to the subject line or other indicator of the topic (or the date it took place), unless they would allow an accurate inference to be drawn about the substance of the advice or consultations. In Order 96-012, the former Commissioner held (at paragraph 31) that "... a summary statement of the topic of a consultation or deliberation, as opposed to a summary of the consultation or deliberation in itself, is also not exempt."

[para 121] The heading severed from the briefing note is part of the Public Body's template and does not reveal the topic of advice, or anything substantive about advice given.

[para 122] The information falling under the second and third headings can be characterized as advice within the terms of section 24(1)(a) as it proposes courses of action to be taken by the senior leadership of Covenant Health. The information may also be characterized as a deliberation under section 24(1)(b), as the proposed courses of action in the briefing note were to be considered by the senior leadership of Covenant Health in making a decision. As there is no evidence to contradict the Public Body's

assertion that these portions of the briefing note were written in order to advise and prepare Covenant Health senior leadership regarding a decision to be made, I find that these portions of the briefing note are subject to section 24(1)(b).

Exercise of discretion

[para 123] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the

> Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 124] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

In addition, the fact that the Court remitted the issue of whether the head had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 125] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations where the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 126] In *Ontario (Public Safety and Security)*, the Supreme Court of Canada established the following two-part process for applying discretionary exceptions to disclosure under the FOIP Act:

> As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made. [My emphasis]

[para 127] The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly. [My emphasis]

While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 128] As the Public Body did not include in its initial or rebuttal submissions its reasons for exercising its discretion to withhold information from the records under section 24(1)(b), I asked it the following question:

> 1. What interests or factors were considered relevant to the decision to exercise discretion to withhold information under section 24(1)(b)?

[para 129] The Public Body responded:

> If it is determined that information falls within section 24(1)(a) or (b) consideration is then given to the exercise of discretion. The exercise of discretion is determined by following the Government of Alberta's "Freedom of Information and Protection of Privacy Guidelines and Practices 2009" at page 178:
>
> The exercise of discretion regarding this type of advisory information should be based on the impact the disclosure can reasonably be expected to have on the public body's ability to carry out similar internal decision-making processes in the future. Consideration should be given to whether disclosure of the information in this instance would:
>
> - make advice less candid and comprehensive;
> - make consultation or deliberation less frank;
> - hamper the policy-making process;
> - have a negative effect [on] the ability of a public body or the government to develop and maintain strategies and tactics for present of future negotiations; or
> - undermine the public body's ability to undertake personnel or administrative planning
>
> Such determinations can only be made on a case-by-case, bearing in mind the magnitude of the process involved, the procedures for decision-making that have been followed, and the sensitivity of the particular information. Public bodies should take into account the effect disclosure would have on all steps of a decision-making process and not just the immediate interests regarding the particular information in question.

> In this instance the information severed consisted of candid comments regarding action required combined with possible suggestions for messaging. Disclosure of such information it was determined would make advice less candid and consultations less frank.

[para 130] The factors cited above are essentially a statement of the purpose of section 24(1). The purpose of sections 24(1)(a) and (b) is to enable public bodies to make sound decisions by enabling them to seek advice in confidence, free from interference, harassment, and second-guessing before or after they make decisions regarding potential courses of action. I agree with the Public Body that consideration of this factor is relevant when exercising discretion under a provision of section 24(1) and I agree that consideration should be given to whether disclosing information falling within section 24(1)(a) or (b) would make advice less candid or consultations less frank.

[para 131] As discussed by the Supreme Court of Canada in *Ontario (Public Safety and Security)*, (cited above) the head of a public body must also consider all relevant interests weighing in favor of disclosure, including private interests, when deciding whether to exercise discretion in favor of disclosing or withhold information. While I agree with the Public Body that it is appropriate to consider the purpose of section 24(1), the Public Body has not addressed the Applicant's personal need to obtain the information it has withheld under section 24(1) and it does not appear that her interests were considered as factors. The Public Body states that it considered only factors set out in "Freedom of Information and Protection of Privacy Guidelines and Practices 2009" (the guidelines). These guidelines include only factors weighing against disclosure. Considering only the factors set out in the guidelines can result in failing to consider relevant factors weighing in favor of disclosure when exercising discretion, where such factors exist.

[para 132] The Public Body's submissions regarding section 17 indicate that it did not consider that the Applicant might need the information severed from the records for a fair determination of her rights. As the information withheld from the briefing note was withheld under both sections 24(1)(b) of the FOIP Act and section 11(2) of the HIA (or alternatively section 17 of the FOIP Act) I infer that the Public Body considered this factor in relation to section 24, but did not consider it to apply. However, I have found above, in the discussion under section 17, that this factor does apply to the information and weighs in favor of disclosure.

[para 133] The information severed from the records under section 24(1) was obtained by the Public Body from Covenant Health in order to make decisions regarding the three issues raised by the Applicant to the patient concerns investigator. These issues are the following:

1. The process for requesting exceptions to the visitation restrictions.
2. The process for enforcement of the visitation restrictions.
3. Responses from the Unit Manager of Unit 10Y at the Edmonton General Hospital, the President and CEO of Covenant Health, and the Board Chair for Covenant Health Board of Directors to the Applicant's written correspondence.

[para 134] The information severed from the briefing note is relevant to Covenant Health's decision to impose visiting restrictions on the Applicant as it reveals something of the process by which the restrictions are imposed and the basis for the decision. It is clear from the Applicant's submissions, and from the fact that she took the step of submitting her concerns about her visiting restrictions to the Patient Concerns Office, that the Applicant seeks to challenge Covenant Health's decision to impose visiting restrictions. At least some of the information severed from the briefing note under section 24(1)(b) would enable the Applicant to understand something more about the case she must meet, and to respond to it.

[para 135] The Public Body has not yet considered whether disclosing the information it severed under section 24(1)(b) would assist the Applicant to know the case she must meet and to make representations in order to challenge the decision to impose restrictions. If disclosure of the information would serve this purpose, then this factor must be considered when exercising discretion.

[para 136] I also note that Parts II and III of record 11 contain recommendations regarding Covenant Health's expectations of the Applicant; if the Applicant is not to be informed of these expectations, it is unclear how she will be able to comply with them. Conversely, if these expectations have been communicated to the Applicant, it is unclear why it would be harmful to the Public Body's or Covenant Health's deliberative processes to disclose them to her in an access request, given that they would be known to her. If the expectations have not been communicated to her, but remain Covenant Health's expectations, then fairness weighs strongly in favor of disclosing them to the Applicant so that she has the opportunity to meet them.

[para 137] As the Public Body has not yet considered whether there are any factors weighing in favor of disclosure that could outweigh its stated interest in protecting the candour of Covenant Health's deliberations, I will require it to reconsider its decision to withhold Parts II and III of the briefing note, and to consider whether there are relevant interests in disclosing the information that outweigh the interests it has cited as weighing against disclosure. Moreover, it should also consider whether the information has already been communicated to the Applicant. As discussed above, if the information has already been communicated to the Applicant as Covenant Health's policy, then it may not be harmful to its deliberative processes to disclose the information.

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

[para 138] Section 40(1) of the FOIP Act establishes the circumstances in which a public body may disclose personal information. It states, in part:

> *40(1) A public body may disclose personal information only*
>
> *[…]*

> *(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> *(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
>
> *[…]*
>
> *(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,*
>
> *(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure[…]*

[para 139] Section 40(4) limits the amount of personal information that may be disclosed by a public body for the purposes of section 40(1). This provision states:

> *40(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.*

The first question to be addressed is whether the Public Body disclosed the Applicant's personal information. If the Public Body did disclose the Applicant's personal information, the next questions to be addressed are whether it complied with subsections 40(1) and (4) when it did so.

a. Did the Public Body disclose the personal information of the Applicant?

[para 140] Personal information is defined by section 1(n) of the FOIP Act. This provision states:

> *1 In this Act,*
>
> > *(n)"personal information" means recorded information about an identifiable individual, including*
> >
> > > *(i) the individual's name, home or business address or home or business telephone number,*
> > > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> > > *(iii) the individual's age, sex, marital status or family status,*
> > > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> > > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> *(viii) anyone else's opinions about the individual, and*
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

Personal information under the FOIP Act is not defined exhaustively. If information is about an identifiable individual, then it is personal information within the terms of section 1(n).

[para 141] The Public Body acknowledges that the patient concerns officer who dealt with the Applicant's concerns regarding her parents' care disclosed the concerns to the parents' agent. The fact that the Applicant raised concerns about Covenant Health's decision to impose visiting restrictions with the Patient Concerns Office is the personal information of the Applicant. I say this because this is information about the Applicant's Applicant, and is therefore personal information within the terms of section 1(n).

Was the Public Body authorized by section 40(1) of the FOIP Act to disclose the Applicant's personal information to the agent?

[para 142] In its initial submissions, the Public Body stated:

> This submission will deal with the disclosure of the information to the patients' agent. The patients involved named [the] Agent by personal directive. Section 7(1) of the *Personal Directives Act* states that a personal directive may contain instructions respecting any personal matter and section 11 states a personal decision made by an agent in accordance with the Act has the same effect as if the maker had made the personal decision while the maker had capacity. The agent is responsible for the continuing care of the parents. When a concern is raised regarding the fairness of a process that concerns the parents the public body may disclose that fact and surrounding circumstances to the agent pursuant to section 84(1)(c) of the Act.

[para 143] Section 84(1)(c) of the FOIP Act states:

> *84(1) Any right or power conferred on an individual by this Act may be exercised*
>
> > *(c) if an agent has been designated under a personal directive under the Personal Directives Act, by the agent under the authority of the directive if the directive so authorizes[…]*

Section 84 authorizes an agent under a personal directive to exercise any right or power conferred on the maker of a personal directive by the FOIP Act. If the Applicant's parents have a right or power conferred upon them by the FOIP Act, then the agent can exercise that right or power on their behalf.

[para 144] While I agree with the Public Body that the status of the agent as an agent under a personal directive is relevant to the issue of whether it was authorized to disclose personal information, I disagree that section 84 provides authority for the Public Body to disclose the Applicant's personal information to the agent. This is because it has not been established that in the present circumstances the parents would be exercising a right or power conferred on them by the FOIP Act that would be exercisable by their agent.

[para 145] In my letter of July 2, 2013, I asked

> I agree that if the Public Body has authority under the FOIP Act to disclose the Applicant's personal information to her parents then it has authority to disclose it to their agent. However, the Public Body has not provided an affidavit from someone with knowledge of the circumstances in which the information was disclosed, such as the PCO officer who made the disclosure, to establish the purpose in disclosing the information, nor has it pointed to a provision of section 40 of the FOIP Act that would authorize the disclosure to the Applicant's parents. It has also not addressed whether the disclosure complies with the terms of section 40(4). I therefore have the following questions:
>
> - For what purpose was the Applicant's personal information disclosed?
> - What provision of section 40(1) authorizes the disclosure?
> - If the disclosure was authorized by a provision of section 40(1), did the Public Body comply with section 40(4)?

[para 146] The Public Body provided the following response to my questions:

> The Applicant communicated concerns to Covenant Health regarding the standard of care of her parents and visiting access. The letter of concern contained […] recorded information about individuals(s) namely the Applicant's parents. Some of the information supplied by the Applicant in recording her concerns would be personal information of the parents other information would fall under sections [1(n)(vi)] (health care history) and 1(1)(viii) (the Applicant's opinion with regard to her parents), all of which would be personal information of the parents. Therefore disclosure to the parent's agent of the fact that a review to the Patient Concerns Office had been requested by the Applicant and the result of such a review would be authorized pursuant to section 84(1)(c) of FOIP. It is further argued that such a disclosure would not be an unreasonable invasion of the Applicant's privacy as the Concern Review Report (pages 5 – 9) had identified the concerns set out by the Applicant while as part of that process the parents' agent was approached by Covenant Health as to whether she held similar concerns.
>
> With regard to section 40(4) the PC Office communicated to the parents' agent that a review had been initiated by the Applicant and requested the agent's views regarding care, the letter sent to the Applicant concluding the PCO review was cc'ed to the agent. No further information such as submissions made by the Applicant was disclosed.

[para 147] The Public Body has provided arguments to explain why disclosure of the parents' personal information to the agent would be authorized; however, the question for this inquiry is whether the Public Body was authorized to disclose the *Applicant's* personal information to the agent.

[para 148] While the Public Body suggests that the Applicant's concerns consist of opinions about her parents, her opinions are primarily about the quality of care they

receive and the actions of Covenant Health. As such, these opinions are not "about someone else" within the terms of section 1(n)(ix), but personal opinions of the Applicant.

[para 149] Although the Public Body argues that it would not be an unreasonable invasion of the Applicant's personal privacy to disclose the personal information it disclosed, it does not explain why it would not be an unreasonable invasion of the Applicant's personal privacy to disclose the fact that she made a complaint regarding her concerns about the care her parents receive. I will nevertheless consider whether the Public Body was authorized under the FOIP Act to disclose the Applicant's personal information in the circumstances.

[para 150] The March 25, 2011 letter of the patient concerns officer states:

> In the course of my review, I confirmed the wishes and view of the Agent for your parents, […] I spoke with the Vice President of Quality for Covenant Health, and to Covenant Health Patient Relations. I also reviewed the December 17, 2010 Concern Review Report completed by Covenant Health and considered the concerns you had raised to my office through multiple written pieces of correspondence and conversations.
>
> I would like to share with you the findings of my review of your concerns. […] as the Agent for your parents indicates that she is satisfied with the care your parents are receiving and does not share your concerns regarding the quality of care provided. [my emphasis]

It is clear from this letter that the patient concerns investigator disclosed to the agent the fact that the Applicant had raised concerns regarding the quality of care her parents receive and the details of those concerns, to determine whether the agent shared them.

[para 151] The Public Body did not address the Patient Concerns Resolution Process Regulation AR 124 / 2006 in its submissions. However, I find that this Regulation is relevant to the question of whether the Public Body had authority to disclose the Applicant's personal information to the agent. Section 2 of this Regulation states:

> *2(1) A patient or a person acting on behalf of a patient or in the interest of a patient may make a complaint to a health authority in accordance with the patient concerns resolution process established by the health authority if the patient or person has concerns regarding*
>
> > *(a) the provision of goods and services to the patient,*
> > *(b) a failure or refusal to provide goods and services to the patient, or*
> > *(c) the terms and conditions under which goods and services are provided to the patient,*
> >
> > *by the health authority or by a service provider under the direction, control or authority of that health authority.*
>
> *(2) Nothing in this section prevents a health authority or service provider from addressing a concern raised by a patient or other person before the patient or*

person has made a complaint under the health authority's patient concerns resolution process.

[para 152] The review by the Patient Concerns Office was conducted under the authority of the Patient Concerns Resolution Process Regulation, cited above. Section 2 of this regulation establishes that only a patient, or those acting on behalf of, or in the interest of, a patient, may make complaints regarding the provision of goods and services to the patient. This legislation does not contain provisions specifically authorizing the disclosure of personal information, such that disclosure of personal information would meet the requirements of clauses 40(1)(e) or (f). However, for the reasons that follow, I do find the framework created by the legislation gives rise to the Public Body's authority to disclose the Applicant's personal information on the facts of this case.

[para 153] As I noted above, an agent appointed under a personal directive has authority to make personal decisions on all personal matters of the maker. The agent therefore has the authority to make personal decisions on the parents' behalf, which would include what is, or is not, "in their interests" within the terms of the Patient Concerns Resolution Process Regulation.

[para 154] The Applicant is not the agent of her parents, although her complaint regarding her visiting restrictions relates to the care Covenant Health provides to her parents. For the Patient Concerns Office to have jurisdiction to take action regarding the Applicant's complaint, it would be necessary for the patient concerns investigator to ensure that the complaint was made by a patient or by someone authorized to make a complaint on behalf of a patient or in the interests of a patient. Contacting the authorized agent of the parents regarding the concerns to determine whether the agent also wanted the Patient Concerns Office to address these issues affecting the parents would be the only way in which the patient concerns investigator could be satisfied that there was jurisdiction to address the complaint, in the sense that the complaint was made by someone acting on behalf of a patient, or in the patient's interests.

[para 155] For the reasons below, I find that the Applicant's information was disclosed for a purpose consistent with the Public Body's purpose in collecting the Applicant's personal information within the terms of section 40(1)(c).

[para 156] Section 41 provides further guidance for the interpretation of section 40(1)(c). It states:

> *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 157] For the Patient Concerns Office to take action in relation to the concerns raised by the Applicant, it was first necessary to disclose the concerns to the agent in order to ensure that the issues were the patients' issues and reflected the patient's interests and not the Applicant's. If the concerns were only those of the Applicant, who is not a patient, then the Patient Concerns Office would lack jurisdiction to resolve the concern. I find that the purpose in disclosing the information has a reasonable and direct connection to the Patient Concerns Office's purpose in accepting the Applicant's complaint. Moreover, as the jurisdiction of the Patient Concerns Office stems from patient complaints, it was necessary for that office to determine whether it was, in fact, dealing with a patient complaint or one reflecting the patient's interests. As a result, I find the disclosure was necessary for the patient concerns investigator to perform her statutory duties.

[para 158] With regard to the question of whether the Public Body met the terms of section 40(4), I am satisfied that the patient concerns investigator did not disclose more of the Applicant's personal information than was necessary to determine whether the agent also had the same concerns. Her letter indicates that only the Applicant's concerns were discussed with the agent and no other information. As discussed above, discussing the concerns was necessary for the patient concerns investigator to be satisfied regarding her jurisdiction.

[para 159] I find that the Public Body complied with the terms of Part 2 of the FOIP Act when it disclosed the Applicant's concerns to the Applicant's parents' agent.

Issue F: Did the Public Body make every reasonable effort to ensure the Applicant's personal information was accurate and complete, as required by section 35(a) of the *Freedom of Information and Protection of Privacy Act* (accuracy and retention)?

[para 160] The Applicant argues that the Public Body has not taken reasonable effort to ensure that her personal information is accurate and complete. Section 35 of the FOIP Act establishes a Public Body's duties regarding retaining personal information and ensuring its accuracy. This provision states:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete, and

(b) retain the personal information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it, or for any shorter period of time as agreed to in writing by

(i) the individual,
(ii) the public body, and
(iii) if the body that approves the records and retention and disposition schedule for the public body is different from the public body, that body.

[para 161] In Order F2013-14, the Director of Adjudication commented on the interpretation of section 35. She noted that section 35 is not a means to allow the Commissioner to reweigh the evidence that was before a public body or to review its decision. She said:

> Despite these observations, however, I find that section 35(a) is not engaged in this case. Indeed, I find that trying to engage it raises precisely the concern I outlined in paras 38 and 42 above - that the FOIP Act must not be used to interfere with or encroach upon tribunals in the exercise of their quasi-judicial responsibilities. In my view, trying to inject section 35 considerations into the middle, or at the end, of the exercise of a quasi-judicial function is a clear and inappropriate interference with that function. It is up to the quasi-judicial decision maker to decide what evidence to accept or require, and what findings of fact to make. If it were appropriate for parties in disagreement with these decisions to try to engage section 35(a) and the related authority of the Commissioner, as the Complainants have tried to do in this case, the Commissioner would be in a position to - indeed would have the responsibility to - inquire into every allegation by a Complainant that a tribunal had taken into account inadequate or unreliable evidence or made incorrect findings of facts. Clearly, a party to a proceeding that has such concerns is to take them to the courts on judicial review rather than to the Commissioner.
>
> Given these considerations, in my view, despite its broad wording, section 35(a) is to be engaged primarily in relation to information that does not depend, for the determination of its accuracy, on a quasi-judicial process. Rather, resort may be had to it where a public body is to make a decision on the basis of information the accuracy of which is readily ascertainable by reference to concrete data. As the Adjudicator noted in Order F2006-019, section 35 is intended to promote fair information practices and data quality in relation to personal information.

[para 162] I agree with the Director of Adjudication's interpretation of section 35. Section 35 is not engaged by personal information in relation to which a decision maker must make findings of fact. Rather, it applies to information that can be readily ascertained by reference to data. An example of the kinds of information to which section 35 applies is a birthdate or a social insurance number.

[para 163] In reviewing the Applicant's submissions in relation to section 35, I note that she is primarily concerned with the weight she believes the patient concerns investigator gave to the evidence of Covenant Health. She states:

> Given that the Patient Concerns Officer made the decision that Covenant Health's investigation was administratively fair, I believe that she based this decision on inaccurate and incomplete information provided by Covenant Health. I had provided her with comprehensive verifiable evidence that Covenant Health had provided her with inaccurate and incomplete information.

[para 164] The Applicant's complaint is that she does not agree with the patient concerns investigator's decision to review and give weight to records prepared by Covenant Health. To put it another way, she does not agree with the patient concerns investigator's findings of fact. Complaints of this nature may be the subject of judicial review; however, they are outside the scope of section 35. It is not the accuracy of the personal information that the patient concerns investigator considered in making her decision that the Applicant challenges, but the correctness of the decision itself. As discussed above, section 35 does not enable parties to challenge the correctness or reasonableness of decisions. However, the access provisions in the FOIP Act enable parties to obtain information that will be useful for challenging the correctness or reasonableness of decisions affecting them.

[para 165] I find that it has not been established that the Public Body failed to meet its duty under section 35.

V. ORDER

[para 166] I make this Order under section 72 of the Act.

[para 167] I order the Public Body to conduct a search of the Patient Concerns Office for any documentation of communications taking place between the patient concerns investigator who investigated the Applicant's concerns and the Applicant's parents' agent. The Public Body must then prepare a new response to the Applicant, documenting the results of its new search.

[para 168] I order the Public Body to reconsider its decision to withhold Parts II and III of record 11 under section 24(1)(b), taking into consideration any interests, public or private, weighing in favor of disclosure.

[para 169] I order the Public Body to disclose the remainder of the records to the Applicant.

[para 170] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator