ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-40

December 3, 2015

OUT-OF-COUNTRY HEALTH SERVICES COMMITTEE

Case File Number F7919

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act"), the Applicant made a request to the Out-of-Country Health Services Committee ("the Public Body") for a decision it made regarding a third party. The Public Body initially responded by relying on section 12(2) of the Act. In Order F2013-45 I ordered the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act. The Public Body did so, identifying three pages of responsive records which were withheld entirely in reliance on section 17 of the Act.

The Adjudicator found that the Public Body properly applied section 17 of the Act to the responsive records.

Statutes Cited: AB: *Alberta Health Care Insurance Act*, R.S.A. 2000c. A-20; *Assured Income for the Severely Handicapped*, S.A. 2006, c. A-45.1; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 12,17, 72; *Out-Of-Country Health Services Regulation* AR 78/2006, 2, 7, and 8.

Authorities Cited: AB: Orders F2006-07, 2008-009 , F2010-019, F2013-45, and F2014-31.

I. BACKGROUND

[para 1] Through her doctor, the Applicant applied to the Out-of-Country Health Services Committee ("the Public Body") for reimbursement of money she had paid to have a medical procedure performed outside of Canada. Her application was denied and she asked the Courts to judicially review the Public Body's decision.

[para 2] On November 4, 2011, the Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act") for a copy of a decision made by the Out-of-Country Health Services Committee ("the Public Body") regarding a named third party ("the third party") who she had learned through media reports had received funding for the same procedure for which she was seeking reimbursement.

[para 3] Initially, the Public Body relied on section 12(2) of the Act and refused to confirm or deny the existence of responsive records. On October 31, 2013, I ordered the Public Body to respond to the Applicant access request without relying on section 12(2) of the Act (see Order F2013-45). The Public Body responded to the Applicant stating that it had found three pages of responsive records but was withholding all of the records from the Applicant pursuant to section 17 of the Act.

[para 4] On February 14, 2014, the Applicant asked the Office of the Information and Privacy Commissioner ("this Office") to review the Public Body's response to her access request. The Commissioner authorized mediation but that was unsuccessful and on October 22, 2014, the Applicant requested an inquiry. After reviewing the records at issue, I decided to ask a third party to participate in the inquiry as an undisclosed affected party ("Affected Party"). The invitation was accepted. I received submissions from both the Applicant and Public Body as well as an *in camera* submission from the Affected Party.

II. RECORDS AT ISSUE

[para 5] The records at issue in this inquiry are the three pages of responsive records the Public Body withheld pursuant to section 17 of the Act.

III. ISSUES

[para 6] The Notice of Inquiry dated May 22, 2015 sets out the issue in this inquiry as follows:

> **Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**

IV. DISCUSSION OF ISSUES

Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

a. Is the information in the records third party personal information?

[para 7] In order for section 17 of the Act to apply, information in the records at issue must be a third party's personal information. Personal information is defined by 1 (n) of the Act as follows:

> *1(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*
> >
> > *(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;*

[para 8] The records at issue have the third party's name, age, and sex, as well as information about the third party's health and health care history. Therefore, the responsive records contain the third party's personal information.

b. Does section 17(2)(h) of the Act apply to the records at issue?

[para 9] The Applicant argues that she was not asking for the health information or personal information of the third party and indicates that that information can be severed from the records such that only the Public Body's reasoning in making its determination

is disclosed. I have reviewed the records, and find this is not possible. The reasoning of the Public Body in coming to its decision is all inextricably interwoven with the third party's personal information. As a result, if section 17 applies to the records at issue, it applies to all of the information. If it does not apply, the Applicant will receive an unsevered version of the information. Given this, the Public Body states that section 17(1) of the Act applies to all of the information in the records. Section 17(1) of the Act states:

> *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.*

[para 10] Section 17(2) of the Act lists circumstances in which the disclosure of a third party's personal information would not be an unreasonable invasion of his or her personal privacy. It provides:

> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> …
> *(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*
> …

[para 11] The Applicant argues that section 17(2)(h) of the Act applies to the records at issue because the Public Body's decision regarding funding of the third party's out of country medical procedure is a discretionary benefit of a financial nature.

[para 12] The Public Body replies that a decision to accept or reject an application for funding of a medical procedure is not discretionary but, rather, is governed by a strict set of factors outlined and defined in several pieces of legislation.

[para 13] In support of its position, the Public Body relies on Order F2014-31 in which the Adjudicator found that benefits granted under the *Assured Income for the Severely Handicapped* (AISH) were not discretionary as that term is used in section 17(2)(h) of the Act. The Adjudicator found:

> For section 17(2)(h) to apply, a benefit must not only be discretionary, but must also be granted by a public body. In Order F2007-025, the adjudicator noted that "grant" has a range of meanings; she concluded that in the context of section 17(2)(h),
> … it appears that "grant" means to "give" or "confer" discretionary benefits of a financial nature, in situations where the grantor is not required to give or confer these benefits, or to consent or agree to provide them, but has discretion to do so. (at para. 25)
>
> In my view, this provision does not apply to benefits such as those provided under the AISH program. While the benefit might be described as discretionary because the provision uses the term "may", and is determined on a case-by-case basis, the eligibility criteria for the benefits, as well as what benefits may be provided, are set out in the AISH Act and regulation. In other words, although AISH benefits *may* be

> provided under the AISH Act, the assessment of whether a particular individual is entitled to the benefit, and the benefits to which an individual is entitled under the AISH Act, is determined by the legislation; the director under the AISH Act cannot decide, outside of this statutory scheme, that a benefit will not be provided, or provide benefits in excess of those set out in the statutory scheme. This finding is consistent with Order 98-004 (at paras. 207-210), and BC Order 01-40 (at para. 36). Therefore, I find that section 17(2)(h) is not applicable in this case.
>
> (Order F2014-31 at paras 18-19)

[para 14] The legislation which primarily sets the Public Body's mandate is the *Out-Of-Country Health Services Regulation* ("OOCHS regulation") which is a regulation established under the *Alberta Health Care Insurance Act*. The OOCHS regulation states that an individual may apply to the Public Body for reimbursement of medical expenses incurred outside of Canada (OOCHS regulation, s. 2). On receiving a completed application, the Public Body must make a decision to either accept or reject the application (OOHSC regulation, ss. 7 and 8). In deciding whether to accept or reject the application, the Public Body must make decisions on each of the following individual factors set out in section 8 of the OOCHS regulation:

1. Are the services referred to in the application insured services or insured hospital services?

2. Are the insured services or insured hospital services applied for available in Canada?

3. Are the services applied for experimental or applied research?

[para 15] In addition to the factors outlined in section 8 of the OOCHS regulation, there are different timing requirements for applications for elective and emergency services. Specifically, funding for an elective service must be made prior to the service being performed. If a service is found to be an emergency service, an individual can apply before the service is performed or within 365 days of it having been performed.

[para 16] So, put as simply as possible, if the services applied for are insured services or insured hospital services (as those terms are defined in the *Alberta Health Care Insurance Act* and *Hospitals Act*), and the services cannot be performed in Canada, and are not experimental or applied research, the Public Body must approve the application as long as it was made within the timeframes set out in the previous paragraph. In determining which timeframe applies, the Public Body must also decide if the procedure was an emergency service or was elective.

[para 17] The Public Body described other factors which are considered when making these decisions which are found in the *Alberta Health Insurance Act*. However, these factors all stem from the ones outlined in the OOCHS regulation. For instance, if a service has already been declared an insured service under the *Alberta Health Insurance Act*, the Public Body cannot find that it is not an insured service. The same is true for

services that have already been found by the Minister to be experimental. Although these may appear to be additional factors, they are not. They are simply part of the definition of insured services or experimental services which are stated factors in the OOCHS regulation.

[para 18] Whether a service is insured, available in Canada, experimental, elective or emergency can raise very complex factual questions requiring evidence from multiple sources. I also note that the Public Body's decision-making panels are mainly comprised of people in the health care field who would bring their own expertise to any decision. Given the possible complexity, this could lead to the Public Body granting funding for one individual and not for another even though their cases look identical on the surface. However, in each case the Public Body is simply fitting findings of fact with legislatively established factors. A difference in a finding of fact does not involve an exercise of discretion as that term is used in section 17(2)(h) of the Act. If the factors are met, the Public Body must approve the application. If they are not, the application must be denied.

[para 19] Although the findings of fact may be more complex, the decisions made by the Public Body are substantially similar to those made by employees of the public body in Order F2014-31 insofar as their discretionary nature is concerned. As a result, I find that section 17(2)(h) of the Act does not apply to the records at issue.

[para 20] Next, I will next consider if section 17(4) of the Act applies to the records at issue to create a presumption that the disclosure of the records would be an unreasonable invasion of the third party's personal privacy.

c. Does section 17(4) of the Act apply to the records at issue?

[para 21] What is presumed to be an unreasonable invasion of a third party's personal privacy is defined in section 17(4) of the Act. The parts of section 17(4) of the Act that apply to the records at issue state:

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

[para 22] The responsive records contain the third party's medical history, diagnosis, condition, treatment and/or evaluation. The records also state his name and other personal information about him. Therefore, by operation of section 17(4)(a) and 17(4)(g) of the Act, there is a presumption that disclosing the information in the records at issue would be an unreasonable invasion of the third party's personal privacy.

d. Do the factors under section 17(5) weigh in favour of disclosure of the records at issue?

[para 23] Although I have found that section 17(4)(a) and 17(4)(g) of the Act apply to the records at issue, the presumption that disclosing the third party's personal information can be rebutted by operation of section 17(5) of the Act.

[para 24] The factors listed in section 17(5) of the Act that are relevant in this inquiry state:

> *17(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,*
> > …
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> > …
> > *(f) the personal information has been supplied in confidence,*
> > …

[para 25] Initially, the Applicant argued that section 17(5)(a) and (c) of the Act weighed in favour of disclosure of the records at issue. In her rebuttal submissions, the Applicant indicated that she was no longer relying on section 17(5)(c) of the Act because her judicial review of the Public Body's decision regarding her application for funding had been resolved with a Consent Order and was no longer before the Courts.

[para 26] In addition to the enumerated factors, the Applicant notes that the third party's medical and financial struggles were made public in news articles and on a website. Therefore, the Applicant argues that the third party has waived the confidentiality of the information in the records or, possibly, impliedly consented to the disclosure of the records at issue.

[para 27] The Public Body argues that there are no factors that weigh in favour of disclosure and that the information in the records at issue was supplied in confidence (section 17(5)(f)). Additionally, the Public Body argued in rebuttal that the fact that the

Applicant no longer needed the information in the records for her judicial review is a factor weighing against disclosure.

[para 28] In addition to the factors argued by the Applicant and Public Body, the undisclosed Affected Party argues that the third party whose personal information is in the records at issue does not want his information disclosed.

[para 29] I will discuss each of these factors separately.

i. Public scrutiny (section 17(5)(a)):

[para 30] In order for section 17(5)(a) of the Act to be applicable to a set of facts, there must be a public component. In Order F2006-007, the Adjudicator stated:

> In Pylypiuk (supra) Gallant J. stated that the reference to public scrutiny of government or public body activities under what is now section 17(5)(a) requires some public component, such as public accountability, public interest and public fairness.
>
> (Order F2006-007 at paragraph 27)

[para 31] In Order F2008-009, the Adjudicator held as follows:

> A factor weighing in favour of disclosure of the personal information of third parties is that disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny, under section 17(5)(a) of the Act. For the section to apply, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88).
>
> (Order F2008-009 at paragraphs 64)

[para 32] Therefore, the Applicant must provide adequate evidence to prove that there is some public component to her concerns and also must provide sufficient evidence that the activities of the Public Body have been called into question.

[para 33] In Order F2010-019, the Adjudicator discussed the sufficiency of evidence as to activities in which a public body is said to have engaged that could call its activities into question. She said:

> I find that section 17(5)(a) does not apply to the information at issue. After a review of all of the submissions of the parties I find that there is insufficient evidence that the activities of the Government of Alberta or a public body have been called into question which necessitates a disclosure of the names and other personal information of the third parties. There is insufficient evidence before me that a public body has acted in a

> manner that would fulfill the requirements of section 17(5)(a). There is insufficient evidence that a public body acted inappropriately or engaged in a type of misconduct or other behavior that would suggest that public scrutiny was necessary.
>
> (Order F2010-019 at paragraph 28)

[para 34] The Adjudicator's finding shows that calling a public body's activities into question involves pointing to some credible concern about, or problem with, the activities in which it has engaged.

[para 35] The Applicant argues that public scrutiny of the Public Body's decisions regarding the third party and herself are desirable. She points to the fact that the third party and the Applicant had the same surgery, at the same clinic, for the same condition and yet the third party seems to have received funding and the Applicant did not. The Applicant argues that this discrepancy in outcome makes public scrutiny desirable to ensure that there was public fairness and public accountability.

[para 36] The circumstances presented by the Applicant do not meet the criteria that the matter is one of public interest, or that it calls for public accountability or would promote or demonstrate public fairness. The Applicant was initially primarily concerned with the correctness of the decision in her own case. As the Public Body correctly points out, the proper forum to address a purportedly unfair administrative result is judicial review before the Courts.

[para 37] Further, the Applicant believes that the inconsistency described shows the panel was wrong to reject her application. I do not have both decisions before me and cannot compare them, or form any view on the correctness of the decision in the Applicant's case (nor in the third party's case). However, there are many possible reasons why cases having apparently similar facts could have inconsistent results besides the one that the result in an applicant's case was wrong. In my view, the apparent inconsistency between the outcomes in the cases is insufficient to suggest any systemic problem with the Public Body's decision-making. For these reasons, the circumstances the Applicant presents do not call the Public Body's activities into question sufficiently to make it desirable to scrutinize its decision-making in cases other than her own.

[para 38] Order 2008-009 raised a number of additional factors that may be considered to determine if public scrutiny is desirable:

> …the following may be considered: (1) whether more than one person has suggested that public scrutiny is necessary; (2) whether the applicant's concerns are about the actions of more than one person within the public body; and (3) whether the public body has previously disclosed a substantial amount of information or has investigated the matter in issue (Order 97-002 at paras. 94 and 95; Order F2004-015 at para. 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk* at

> para. 49). What is most important to bear in mind is that the reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).
>
> (Order F2008-009 at paragraph 65)

[para 39] Having concluded that this case does not have a public component and does not raise sufficient evidence to call the Public Body's activities into question, I do not need to apply the additional factors set out in Order F2008-009 for determining if public scrutiny is desirable. Therefore, based on my analysis above, I find that section 17(5)(a) of the Act does not weigh in favour of disclosure of the records at issue.

ii. Relevant to a fair determination of the Applicant's rights (s. 17(5)(c))

[para 40] In her rebuttal submissions, the Applicant stated that she is, "…no longer advancing an argument pursuant to section 17(5)(c)". Therefore, I will not be making any finding regarding this factor.

[para 41] I do note that the fact the Applicant no longer needs this information for a judicial review is not a factor that weighs *against* disclosure as the Public Body suggested in its rebuttal. This factor is simply no longer a factor potentially weighing in favour of disclosure.

iii. Personal information supplied in confidence (section 17(5)(f))

[para 42] The Public Body argues that the health information provided to the Public Body as part of the application process was provided in confidence. The Applicant argues that the information is not confidential and was reported on in the media and also on a blog posted by the third party or his family, with his consent. The Public Body argues that the information in the application was not provided to the Public Body by the third party but rather by a physician and, therefore, must have been provided in confidence; otherwise the physician could be breaching privacy legislation and/or opening himself or herself up to sanction by professional regulatory bodies.

[para 43] Although some of the information in the records at issue may have been made public around the time of the Public Body's decision, this does not mean that the doctor who provided the information did not do so in confidence. I find that the information was provided in confidence and that this factor weighs in favour of withholding the information.

iv. Information made public

[para 44] In Order F2013-045, I found:

> I acknowledge there might be situations in which information is known widely enough that it would weigh in favour of disclosure of a third party's personal information. I do

> not believe this is so in this inquiry. The evidence provided to me by the Applicant indicates that some information about the third party and his medical history was public. The amount of information in the articles was limited but did include information about his symptoms and the treatment he sought. They also mentioned that the third party's family was seeking reimbursement from Alberta Health Services but was not hopeful that their expenses would be covered. A later article noted that the third party's family had been refunded after a panel determined that the treatment was not elective, but gave no indication what the source of this information was. The Applicant also provided a copy of information posted on a website, presumably by the third party's family. It goes into further detail about the third party's struggles with his illness.
>
> I do not know how widely the information on the website was viewed. Given the limited information in the articles, and the fact that I do not know how widely the website was viewed, I believe that the fact that some of the information described above was public in a limited way is a factor that weighs somewhat, though not heavily, in favour of requiring the Public Body to respond without relying on section 12(2).
>
> (Order F2013-045 at paras 57-58)

[para 45] In Order F2013-045, I was dealing with the same parties and the same information and adopt my same findings on this point.

v. The Third Party does not want his information disclosed

[para 46] A third party's wish to not have his or her personal information disclosed is not an enumerated factor but is a relevant one, which I feels weighs heavily in favour of withholding the information. It is his personal information. It is detailed and although some of the information in the records may have been made public by himself or others, this does not amount to a waiver of his right to keep these records, which have never been made public, private.

[para 47] Therefore, based on my finding above, and weighing the section 17(5) factors, I find that the Public Body properly applied section 17 to the records.

V. ORDER

[para 48] I make this Order under section 72 of the Act.

[para 49] I find that the Public Body properly applied section 17 of the Act to the records at issue.

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Keri H. Ridley
Adjudicator