

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-37

September 5, 2018

ALBERTA HEALTH SERVICES

Case File Number 001166

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Commissioner that she believed two nurses who are employees of Alberta Health Services (the Public Body) had collected a physician's note that she had submitted to the University of Calgary.

The two nurses offer services on behalf of the Public Body at a building where the Complainant's employer also provides services and at which the Complainant works. The Public Body is not the Complainant's employer. The Complainant's employer is a non-profit society and is not a public body. The Complainant explained that the basis of her complaint was that she discovered the note in question "lying face up on the fax" in the office used by the two nurses. Further, she is concerned that the note may have been lying face up in the office for as long as a week, and visible to members of the public who visited the nurses' office.

The Adjudicator found that it had not been established that the Public Body had collected the note and also found that even if it had been proven that the nurses had gained access to the note, or reviewed its contents, it would not mean that the Public Body had custody or control over the note. The Adjudicator determined that the Public Body did not have any duties under section 38 (protection of personal information) of the FOIP Act that it had failed to meet in relation to the note.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 38, 72

Authorities Cited: AB: Orders F2002-014, F2008-023, P2010-007, F2010-023

I. BACKGROUND

[para 1] On June 22, 2015, the Complainant made a complaint to the Commissioner that two nurses who are employees of Alberta Health Services (the Public Body) had collected a physician's note that she had submitted to the University of Calgary. The two nurses offer services on behalf of the Public Body at a building where the Complainant's employer also provides services and at which the Complainant works. The Public Body is not the Complainant's employer and neither is the University of Calgary. The Complainant's employer is a non-profit society and is not a public body. The Complainant explained that the basis of her complaint was that she discovered the note in question "lying face up on the fax" in the office used by the two nurses. Further, she is concerned that the note may have been lying face up in the office for as long as a week, and visible to members of the public who visited the nurses' office.

[para 2] The Commissioner authorized a senior information and privacy manager to investigate and attempt to resolve the complaint. As this process was unsuccessful, the Commissioner decided to conduct an inquiry.

II. ISSUES

Issue A: Did the Public Body collect the Complainant's personal information?

Issue B: Did the Public Body meet its obligations to protect the information as required by section 38 of the Act (protection of personal information)?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body collect the Complainant's personal information?

[para 3] A complainant bears the initial burden of adducing or pointing to evidence, "the evidential burden", that establishes information was or is being collected, used or disclosed, depending on the nature of the complaint.

[para 4] In deciding whether there is sufficient evidence before me to meet the evidential burden, I must consider whether there is evidence before me that could support the Complainant's assertion that the Public Body collected and failed to protect the Complainant's personal information in the circumstances she alleges.

[para 5] The Complainant has submitted photographs of the office where she found the note and emails from her colleagues regarding the note. She also provided an email from a nurse dated May 1, 2014 that confirmed the nurse recalled seeing a note in the office and moving it. The Complainant also submitted an email from her employer's

human resources leader that informed the Complainant that the employer was commencing an investigation into the “access and release” of her medical information. This email stated:

We can further advise that our external legal counsel has spoken to the Office of the Privacy Commissioner about this matter. We understand that the Office of the Privacy Commissioner has decided not to exercise jurisdiction over this matter and therefore will not be investigating it further. However, as indicated above, we are of the view that this matter warrants an investigation, which is why we have engaged an external investigator.

[para 6] I am unable to find, on the evidence before me, that the Public Body collected the Complainant’s personal information in the circumstances she alleges. While the Complainant’s evidence establishes that it is reasonably likely that the doctor’s note she submitted to the University of Calgary was in the nurses’ office, in the circumstances she describes, and may have been reviewed by a nurse, she has not established that the Public Body collected the note and then failed to take appropriate measures to protect it.

[para 7] The evidence establishes that the nurses did not have exclusive access to the office where they worked, given that the Complainant was able to gain access to the office in order to find the note. Further, the Public Body asserts that all the Complainant’s employer’s employees had access to the nurses’ office.

[para 8] The email of the nurse indicates that she did not review the contents of the note but looked at it long enough to decide that it was not part of her work duties and set it aside. The email does not support finding that the nurse collected the information in the note on behalf of the Public Body, or that another nurse did.

[para 9] The letter of the Complainant’s employer’s human resources leader appears to acknowledge that the employer believes it has a duty to investigate what it terms an “*access and release*” of the Complainant’s personal information, which suggests that the organization may have originally collected the note. I say this because it appears concerned that someone accessed the note and then released it, which would not be its concern if the Complainant’s employer did not originally have custody and control of the note.

[para 10] It is unclear how the medical note that is the subject of the complaint made its way from the University of Calgary, to which the Complainant provided the note, to the Complainant’s place of work, on the evidence before me. However, of the two entities sharing the office space – the Complainant’s employer and the Public Body, it would seem that only the Complainant’s employer would potentially have some authority to collect the note, as it appears that the course at the University of Calgary was work related. The actions of the Complainant’s employer are not those of the Public Body. In addition, the Public Body would have no ability or reason to collect the Complainant’s personal information from the University of Calgary.

[para 11] For the reasons above, I am unable to find that the Public Body collected the Complainant’s medical note.

Issue B: Did the Public Body meet its obligations to protect the information as required by section 38 of the Act (protection of personal information)?

[para 12] The Complainant argues that the nurse who moved the note had custody or control of the note. She argues that the Public Body should have taken positive steps to protect the note from unauthorized access for this reason.

[para 13] Section 38 of the FOIP Act states:

38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 14] While section 38 creates a broad duty to protect personal information, section 4 of the FOIP Act limits the scope of the Act to records in the custody or control of a public body. In other words, if a public body does not have custody or control of records, it has no duty to protect the record under section 38.

[para 15] In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

Under the Act, custody and control are distinct concepts. “Custody” refers to the physical possession of a record, while “control” refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

[para 16] Former Commissioner Work interpreted “custody” as referring to physical possession of a record. He also suggested that it would be possible for a public body to have custody over a record but not control over it. Subsequent decisions of this office have moved away from this position and have determined that custody, like control, requires that a public body have rights and duties in relation to the record in question before a public body could be said to have custody over it.

[para 17] For example, in Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term “custody” was defined as the physical possession of a record, whereas the term “control” was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that “bare” possession of information does not amount to

custody, as the word “custody” implies that there is some right or obligation to hold the information in one’s possession (Order F2009-023).

[para 18] In Order F2010-023, I said:

In section 6 of the FOIP Act, the word “custody” implies that a public body has some right or obligation to hold the information in its possession. “Control,” in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

I find that the question “Does the Public Body have a right to obtain the records?” must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

[para 19] The phrase “custody or control” refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. “Custody or control” also imparts the notion that a public body has duties and powers in relation to a record, such as the duty to preserve or maintain records, or the authority to destroy them.

[para 20] Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body’s mandate and functions?
- Does the public body have the authority to regulate the record’s use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 21] Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said, after consideration of the factors, that a public body has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records. In this case, it would appear that the Public

Body would have no right to possess the record, and would have no reason or use for the record.

[para 22] Even if I were to find that a nurse reviewed or accessed the note, which I do not, I would be unable to find that this action would bring the note within the custody or control of the Public Body. As discussed above, in order to be said to have custody or control over a record, a public body must have some rights or duties in relation to the record. If an employee of the Public Body obtains a record that the Public Body does not have any right or duty to obtain, and does not obtain it on behalf of the Public Body, then the Public Body cannot be said to have custody or control over the record or to have collected it. When a public body does not have custody or control over a record, it has no duty to protect the record under section 38 of the FOIP Act. Were it otherwise, anytime an individual lost personal information on a public body's premises, such as a university campus, the public body would be responsible for protecting the information, even if it did not have any reason to know of the information's existence or location.

[para 23] For the foregoing reasons, I find that it has not been established that the Public Body collected the Complainant's note or that it had any duties under section 38 in relation to the note.

[para 24] In arriving at this conclusion, I acknowledge the Complainant's position that the discovery of the note was very upsetting and a violation of her personal privacy. However, the evidence does not establish that the Public Body was responsible for that violation.

IV. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I confirm that the Public Body has not failed to meet its duties under the FOIP Act.

Teresa Cunningham
Adjudicator