

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER H2002-005

March 18, 2003

**Dr. Daniel J. Toliver**

Review Number H0029

Office URL: <http://www.oipc.ab.ca>

**Summary:** The Applicant complained that his physician, Dr. Daniel J. Toliver (“the Custodian”), disclosed his health information in contravention of the *Health Information Act* (“the Act”). The Custodian disclosed the Applicant’s name, telephone number and a brief explanation when making a referral.

The Commissioner found that the Custodian properly applied section 35(1)(a) when making the disclosure as the health information was disclosed in accordance with the authority established under the Act to disclose to another custodian for purposes of providing health services. The Commissioner did not find it necessary to consider whether the Custodian also had the authority to disclose under section 35(1)(b) of the Act.

The Commissioner found that the Custodian made a reasonable effort to ensure that the information was accurate and complete before disclosing the health information, as required by section 61 of the Act.

**Statutes Cited:** AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(a)(i), 1(1)(a)(ii), 1(1)(f)(iv), 1(1)(f)(ix), 1(1)(i)(i), 1(1)(i)(ii), 1(1)(k)(i), 1(1)(k)(iii), 1(1)(m)(i), 1(1)(n), 1(1)(u)(i), 1(1)(u)(iii), 27(1)(a), 35(1)(a), 35(1)(b), 36(a), 43, 44 and 61; *Health Information Regulation*, AB Reg. 70/2001, ss. 3(a)(i) and 3(b)(i). **Orders Cited:** AB Order 98-002.

Appendix I provides the full text of the enactments cited in the Order.

## I. BACKGROUND

[para 1] The Applicant made a complaint about Dr. Daniel J. Toliver (the “Custodian”) under the *Health Information Act* (the “Act”), as follows:

On October 15, 2001, I had an appointment with Dr. Daniel J. Toliver...On October 18, 2001, I received a call from a Ms. [X]...Ms. [X] informed me that she was calling to set up an appointment for counseling for me. When I asked what type of counseling Ms. [X] could not tell me. When I asked how she had gotten my unlisted private phone number, Ms. [X] told me that Dr. Toliver’s Clinic had given her the phone number. I am greatly offended that a doctor can release information to third parties without even mentioning anything at all to the patient. I suspect that this is at best greatly unethical and at worst, illegal...

[para 2] On November 5, 2001, I authorized an investigation under the Act. The Applicant was not satisfied with the outcome of the investigation. On May 8, 2002, the Applicant made a request for review under the Act . The matter was set down for a written inquiry.

[para 3] The Applicant and Custodian provided written initial submissions and the Custodian provided a written rebuttal submission. The Custodian provided part of his initial submission and part of his rebuttal submission ‘in camera’. Copies of the submissions and the rebuttal were exchanged between the parties, except for the ‘in camera’ portions.

## II. ISSUES

[para 4] The issues before this inquiry are:

- Did the Custodian properly apply section 35(1)(a) of the Act to the disclosure of the health information?
- Did the Custodian properly apply section 35(1)(b) of the Act to the disclosure of the health information?
- Did the Custodian disclose the health information in contravention of section 61 of the Act?

## III. DISCUSSION OF THE ISSUES

### A. General Application (Definitions)

[para 5] The Applicant says the Custodian disclosed his health information in breach of the Act, as he says the information was disclosed without his knowledge or consent. To address this issue, I must first determine whether the individuals and the information involved falls under the Act.

[para 6] The Custodian's submission says that his Office Administrator made the disclosure in question. I find that Dr. Daniel Toliver was a 'custodian' under section 1(1)(f)(ix) of the Act, as he was a 'health services provider' who was providing the 'health service' of diagnosing and treating an illness under section 1(1)(m) of the Act. I find that the Office Administrator was an 'affiliate' of the custodian, as defined in sections 1(1)(a)(i) and 1(1)(a)(ii) of the Act.

[para 7] It is not disputed that the only information disclosed was the Applicant's name and telephone number and a brief explanation of the reason for the referral. The Applicant's name and telephone number were recorded in the health record. The Act says that 'registration information' is recorded information about an individual and includes a name and telecommunications number (sections 1(1)(u)(i) and 1(1)(u)(iii) of the Act and sections 3(a)(i) and 3(b)(i) of the *Health Information Regulation*). I find that the Applicant's name and telephone number are 'registration information' as defined in the Act.

[para 8] In an entry in the health record dated October 2, 2001, the Custodian wrote, "Appt with AADAC please" and "alcoholism". Another entry says, "Camrose Mental Health notified Oct. 2/01". Sections 1(1)(i)(i) and 1(1)(i)(ii) of the Act say that 'diagnostic, treatment and care information' includes recorded information about the physical and mental health of an individual and about a health service provided to an individual. I find that the brief explanation or reason for the referral that was disclosed was 'diagnostic, treatment and care information' under the Act.

[para 9] The information in issue was disclosed during a telephone call. Section 44 of the Act applies to the disclosure of health information that is not written or recorded. The information disclosed in this situation was written in the record. Where a verbal disclosure is made of health information that is written or recorded, that disclosure does not fall within section 44. Therefore, I find that this verbal disclosure is governed by the general provisions of the Act relating to the disclosure of recorded health information. It makes no difference whether the disclosure of the recorded health information occurred verbally or in some other way.

[para 10] "Registration information" and "diagnostic, treatment and care information" both fall within the definition of "health information" in sections 1(1)(k)(i) and 1(1)(k)(iii) of the Act. As I have determined that the individuals and the information in question fall under the Act, I will now consider whether the Custodian has complied with the specific provisions of the Act that are at issue.

[para 11] Part 5 of the Act establishes the rules for custodians when disclosing health information. Section 35 provides custodians with discretionary authority to disclose health information without consent. A custodian has the discretion to disclose to another custodian for certain purposes under section 35(1)(a) and the discretion to disclose for purposes of continuing treatment and care under section 35(1)(b) of the Act.

[para 12] Part 6 of the Act establishes independent and mandatory duties of custodians that relate to health information. Part 6 requires custodians to comply with prescribed general duties when disclosing health information. For example, before disclosing health information, custodians must make a reasonable effort to ensure that information is accurate and complete under section 61 of the Act.

[para 13] I will first consider whether the Custodian properly applied the discretionary provisions in sections 35(1)(a) and 35(1)(b) of Part 5 and then consider whether the Custodian contravened the mandatory duties in section 61 of Part 6.

#### **B. Application of Section 35(1)(a) (Disclosure to Another Custodian)**

[para 14] Section 35(1) of the Act gives custodians the discretion to disclose diagnostic, treatment and care information without consent in certain circumstances. Section 35(1)(a) gives custodians the discretion to disclose this type of health information to another custodian for the same purposes they can use health information under section 27(1). Section 27(1)(a) of the Act allows custodians to disclose diagnostic, treatment and care information to another custodian for the purpose of providing health services.

[para 15] Section 36(a) of the Act allows custodians to disclose registration information without consent for the same purposes as they can disclose diagnostic, treatment and care information under section 35(1). Therefore, custodians are allowed to disclose registration information to another custodian for the purpose of providing health services. Section 43 of the Act requires an affiliate of a custodian to follow the same rules for disclosure of health information as a custodian.

[para 16] In his submission, the Custodian says the information was disclosed to Camrose Mental Health Services, for the purpose of facilitating an assessment and referral to AADAC. Camrose Mental Health Services is part of a regional health authority, which is a custodian under section 1(1)(f)(iv) of the Act. The Applicant does not dispute these statements. The Custodian says the information was disclosed to another custodian for the purpose of providing a health service to the Applicant, as allowed under sections 35(1)(a) and 36(a) of the Act.

[para 17] In his submission, the Applicant says, "I am greatly offended that a doctor can release information to third parties without even mentioning anything at all to the patient". The Custodian says he discussed the consumption of alcohol with the Applicant and that it is his practice to discuss referrals with his patients. The parties disagree about whether or not the Custodian discussed the referral itself with the Applicant. I am not in a position to decide who is right, nor is that my role.

[para 18] I find that the Custodian had the discretionary authority to disclose the health information without consent as the information was disclosed to another custodian for purposes of providing a health service. Section 35(1)(a) of the Act authorizes the disclosure of the brief explanation or reason for the referral, which is

diagnostic, treatment and care information. Section 36(a) authorizes this disclosure for the Applicant's name and telephone number, which is registration information.

[para 19] As this decision of the Custodian involves an exercise of discretion, I must consider whether the Custodian properly exercised his discretion. The Custodian disclosed this information in an effort to help his patient. There is no evidence before me that the Custodian exercised this discretion in an improper manner or for an improper purpose. Therefore, I find that the Custodian properly exercised his discretion and properly applied section 35(1)(a) of the Act when disclosing the health information.

#### **C. Application of Section 35(1)(b) (Disclosure for Continuing Treatment and Care)**

[para 20] As I have found that the Custodian properly applied section 35(1)(a) when making the disclosure, I do not find it necessary to consider whether the Custodian also had the authority to disclose the information under section 35(1)(b) of the Act.

#### **D. Application of Section 61 (Accurate and Complete)**

[para 21] Part 6 of the Act creates mandatory duties that apply to the disclosure of health information. Section 61 of the Act requires a custodian to make a reasonable effort to ensure that health information is accurate and complete before using or disclosing the information. As the issue before this inquiry is the accuracy and completeness of the health information that was disclosed, I will only consider the application of this provision to the Applicant's name, telephone number and the explanation for the referral.

[para 22] The standard imposed by section 61 of the Act for a custodian to make 'a reasonable effort' is not a standard of perfection. In Order 98-002, Commissioner Clark adopted the definition of 'reasonable' in Black's Law Dictionary: "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view." I am adopting this definition for section 61 of the Act.

[para 23] The Applicant says the Custodian's health records were inaccurate and incomplete because the record did not contain a notation that his telephone number was unlisted and was not to be disclosed. The Applicant and the Custodian disagree about whether the Custodian was ever told that the Applicant's telephone number was unlisted and that the Custodian was not to disclose that number. In any event, I do not find it necessary to make a finding of fact on this aspect as the information that was disclosed was the telephone number itself, not whether or not this was an unlisted number. The telephone number that was disclosed was not inaccurate.

[para 24] In his submission, the Applicant says the Custodian's health records are inaccurate as notations such as "alcoholism" and "ETOH" (acronym for ethanol) are inaccurate. The Applicant disagrees with the Custodian's diagnosis of "alcoholism". I note that the diagnosis was consistent with other notations made by the Custodian

including the first visit on July 30, 2001, which was for a medical assessment for a Class I Drivers Licence. I have no evidence before me to indicate that the health information that was disclosed about the diagnosis is inaccurate.

[para 25] The accuracy of a medical diagnosis is a matter of professional medical judgement. The Applicant has already pursued this matter with the College of Physicians and Surgeons of Alberta, which is the appropriate forum for medical peer review. It is not within my jurisdiction under the Act to determine whether or not a medical diagnosis is accurate. For these reasons, I cannot find that the notation of alcoholism is inaccurate. I can only decide whether the Custodian made a reasonable effort to ensure that the information was accurate and complete.

[para 26] The Applicant says the Custodian's health records are inaccurate and incomplete as he disputes the dates that are recorded in the health record for some of his visits to the clinic. The entries made by the Custodian in the health record are sparse at best. However, the only health information at issue is the information the Custodian disclosed, that is the Applicant's name, telephone number and a brief explanation of the reason for the referral.

[para 27] I have no evidence before me to indicate that the information that was disclosed is either inaccurate or incomplete. Therefore, I find that the Custodian made a reasonable effort to ensure that the health information that was disclosed was accurate and complete as required by section 61 of the Act.

#### **IV. ORDER**

[para 28] In summary, I find that:

- ❑ The Custodian properly applied section 35(1)(a) of the Act to the disclosure of health information as that provision gives authority for disclosure to another custodian for the provision of health services;
- ❑ I did not find it necessary to consider whether the Custodian also had the authority to disclose the health information under section 35(1)(b) of the Act; and
- ❑ The Custodian did not disclose health information in contravention of section 61 of the Act, as the Custodian made a reasonable effort to ensure that the information was accurate and complete before disclosing the information.

[para 29] As I have found that the Custodian has complied with the Act, there is no Order to be made.

Frank Work, Q. C.  
Information and Privacy Commissioner

## APPENDIX I

### A. Health Information Act, R.S.A. 2000, c. H-5

- Sections 1(1)(a)(i), 1(1)(a)(ii), 1(1)(f)(iv), 1(1)(f)(ix), 1(1)(i)(i), 1(1)(i)(ii), 1(1)(k)(i), 1(1)(k)(iii), 1(1)(m)(i), 1(1)(n), 1(1)(u)(i) and 1(1)(u)(iii)

1(1) In this Act,

- (a) “affiliate”, in relation to a custodian, includes
  - (i) an individual employed by the custodian,
  - (ii) a person who performs a service for the custodian as an appointee, volunteer or student or under a contract or agency relationship with the custodian,

...

- (f) “custodian” means

...

- (iv) a regional health authority established under the *Regional Health Authorities Act*;

...

- (ix) a health services provider who is paid under the Alberta Health Care Insurance Plan to provide health services;

...

- (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;

...

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;

...

- (k) “health information” means any or all of the following:

- (i) diagnostic, treatment and care information;

...

- (iii) registration information;

...

- (m) “health service” means a service that is provided to an individual

- (i) for any of the following purposes and is directly or indirectly and fully or partially paid for by the Department:

- (A) protecting, promoting or maintaining physical and mental health;

- (B) preventing illness;

- (C) diagnosing and treating illness;

- (D) rehabilitation;

- (E) caring for the health needs of the ill, disabled, injured or dying,

...

- (n) “health services provider” means an individual who provides health services;

...

- (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;

...

(iii) telecommunications information;

...

but does not include information that is not written, photographed, recorded or stored in some manner in a record;

- **Section 27(1)(a)**

27(1) A custodian may use individually identifying health information in its custody or under its control for the following purposes:

(a) providing health services;

- **Sections 35(1)(a) and 35(1)(b)**

35(1) A custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information

(a) to another custodian for any or all of the purposes listed in section 27(1) or (2), as the case may be,

(b) to a person who is responsible for providing continuing treatment and care to the individual,

- **Section 36(a)**

36 A custodian may disclose individually identifying registration information without the consent of the individual who is the subject of the information

(a) for any of the purposes for which diagnostic, treatment and care information may be disclosed under section 35(1) or (4),

- **Section 43**

43 An affiliate of a custodian must not disclose health information in any manner that is not in accordance with the affiliate's duties to the custodian.

- **Section 44**

44 A custodian that collects information described in section 1(1)(i), (o) or (u) that is not written, photographed, recorded or stored in some manner in a record may disclose the information only for the purpose for which the information was provided to the custodian.

- **Section 61**

61 Before using or disclosing health information that is in its custody or under its control, a custodian must make a reasonable effort to ensure that the information is accurate and complete.

**B. Health Information Regulation, AB Reg. 70/2001**

- **Sections 3(a)(i) and 3(b)(i)**

- 3 The following information, where applicable, relating to an individual is registration information for the purposes of section 1(1)(u) of the Act:
  - (a) demographic information, including the following:
    - (i) name in any form;
    - ...
  - (b) location, residency and telecommunications information, including the following:
    - (i) home, business and mailing addresses, electronic address and telecommunications numbers;