

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2003-001

October 06, 2003

CAPITAL HEALTH AUTHORITY

Review Numbers H0151 and H0245

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

Summary: The Applicant made two requests to the Alberta Mental Health Board (“AMHB”) under the *Health Information Act* (“the Act”), for access to portions of her hospital record at Alberta Hospital Edmonton. The operation and management of Alberta Hospital Edmonton has since been transferred from the AMHB to the Capital Health Authority (“CHA”) or the Custodian. The AMHB refused to disclose any records/information to the Applicant.

The CHA has considered these requests and has also refused to disclose the health information to the Applicant. The Custodian said it was exercising its discretion to refuse to disclose any of the records/information under s. 11(1)(a)(ii) of the Act as the disclosure could reasonably be expected to threaten the mental or physical health or safety of another individual.

The Commissioner found that all of the information met the requirements of section 11(1)(a)(ii) (threat to mental or physical health or safety of another individual) of the Act and that discretion was properly exercised. The Commissioner upheld the decision of the Custodian to refuse to disclose the records/information.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(k), 7(1), 11(1)(a)(ii) and 80; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

Authorities Cited: AB: Orders 96-004, 2001-010, H2002-001.

I. BACKGROUND

[para 1.] The Applicant made two requests for information under the *Health Information Act* ("the Act") that are before this Inquiry. On August 30, 2002, the Applicant made an access request to the Alberta Mental Health Board ("AMHB") for a history and nursing notes from her hospital records at Alberta Hospital Edmonton.

[para 2.] In the first request the Applicant requested:

The initial interview/history from 3-6.
The nursing notes from the day I was transferred from 3-2 to 3-5 in April 2002.

[para 3.] The AMHB advised the Applicant that it was refusing access to all the information requested. The AMHB advised the Applicant that this refusal was based upon section 11(1)(a)(ii) of the Act. In a letter dated September 26, 2002, the Applicant requested a review of the AMHB's refusal to disclose the information, which became Request for Review #H0151.

[para 4.] On March 20, 2003, the Applicant made another access request to the AMHB for notes made in her hospital records at Alberta Hospital Edmonton. In the second request the Applicant requested:

The notes from both days and evenings on the 14th of March 2003.

[para 5.] The AMHB advised the Applicant that it was refusing access to all the information requested. The AMHB advised the Applicant that this refusal was based upon section 11(1)(a)(ii) of the Act. In a letter dated April 25, 2003, the Applicant requested a review of the AMHB's refusal to disclose the information, which became Request for Review #H0245. The responsibility for these requests was subsequently transferred from the AMHB to the Capital Health Authority ("CHA") or the Custodian.

[para 6.] These two matters were set down together for a written inquiry. The Applicant and the Custodian provided written initial submissions. The Custodian provided an 'in camera' written submission that included the records at issue and two affidavits. The Applicant and the Custodian both provided written rebuttal submissions. The submissions were exchanged between the parties, with the exception of the 'in camera' submission.

II. RECORDS/INFORMATION

[para 7.] The records/information at issue are comprised of two sets of records. The Custodian labeled the first set of records as Tab 1, which it numbered from pages A-001

to A-031. Tab 1 includes a typewritten version of the handwritten pages, which are numbered from pages A-001 to A-011 with repeated numbers that correspond to the handwritten page numbers.

[para 8.] The Custodian labeled the second set of records as Tab 2, which is numbered from pages B-001 to B-004. Tab 1 consists of 31 pages and Tab 2 consists of 4 pages of records with a total of 35 pages of records at issue.

III. ISSUES

[para 9.] The following issue is addressed in this inquiry:

Did the Custodian properly apply section 11(1)(a)(ii) of the Act to the records/information?

IV. DISCUSSION

A. Preliminary Issue: Is there health information?

[para 10.] The right of access of an individual under the Act extends to records containing health information about the individual (s. 7(1)). Health information includes registration information, health services provider information and diagnostic, treatment and care information (s. 1(1)(k)).

[para 11.] There is no dispute that all of the records/information requested by the Applicant contain the Applicant's health information. I find that all of the records/information withheld by the Custodian involve health information of the Applicant. I will now consider whether the provision claimed by the Custodian applies to the records/information withheld.

B. Did the Custodian properly apply section 11(1)(a)(ii) of the Act to the records/information?

1. General

[para 12.] Section 11(1) is a discretionary ("may") exception to disclosure. If a discretionary section applies, the custodian has the authority to refuse access but must properly exercise its discretion.

[para 13.] Section 11(1)(a)(ii) of the Act says:

- 11(1) A custodian may refuse to disclose health information to an applicant
- (a) if the disclosure could reasonably be expected
 -
 - (ii) to threaten the mental or physical health or safety of another individual.

[para 14.] For section 11(1)(a)(ii) to apply, the custodian must establish that the disclosure of health information to the applicant could reasonably be expected to result in the above situation.

2. Could disclosure of the health information reasonably be expected to threaten the health or safety of another individual?

[para 15.] In Order H2002-001, I adopted the test for a threat of harm that was developed under the *Freedom of Information and Protection of Privacy Act* ("FOIP Act"). The three-part test is as follows:

- a. there must be a reasonable expectation of probable harm;
- b. the harm must constitute damage or detriment and not mere inconvenience; and
- c. there must be a causal connection between disclosure and the anticipated harm.

[para 16.] In Order 2001-010, the former Commissioner said there must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or the record. In Order 96-004, the former Commissioner said detailed evidence must be provided to show the threat and disclosure of the information are connected and there is a probability that the threat will occur if the information is disclosed.

[para 17.] In its submission, the Custodian says that the Applicant should be denied access to all the information on the basis of section 11(1)(a)(ii) of the Act. The Custodian says that both the AMHB and the Custodian have independently considered these requests and have both refused access under section 11(1)(a)(ii) of the Act. The Custodian says that the above tests are satisfied in the present situation.

[para 18.] The Custodian says that the Applicant was initially admitted to the Forensics Unit 3-6 at Alberta Hospital Edmonton, on May 12, 2000, for assessment of her fitness to stand trial. In June of 2000, the Applicant was found not criminally responsible on account of mental disorder. The Applicant was committed to Alberta Hospital Edmonton under Part 20.1 of the Criminal Code and has remained there until the present time.

[para 19.] The Custodian has provided the records and detailed affidavit evidence in its 'in camera' submission. The Custodian says that the above three-part test is satisfied. I have carefully reviewed the evidence provided in the affidavits as well as the hospital records. The affidavits describe a number of

incidents where the Applicant has physically harmed other individuals and continues to threaten and attempt to harm other individuals.

[para 20.] In her written submission, the Applicant denies that the disclosure of information could reasonably be expected to pose a threat to another individual. The Applicant says she wants to see the information in her patient record to see if the information is incorrect. The Applicant says that “no one needs to worry about their safety and welfare”.

[para 21.] Applying the evidence before me to the criteria in the Act and the test adopted in Order H2002-001, I find that disclosure of any of the records/information could reasonably be expected to threaten the mental or physical health or safety of other individuals. I find that there is a reasonable expectation of probable harm that is damage or detriment rather than mere inconvenience and that there is a causal connection between the disclosure and the anticipated harm.

[para 22.] The records/information meet the criteria for section 11(1)(a)(ii). I also find that the Custodian has properly exercised its discretion in refusing to disclose the records/information.

3. Conclusion under section 11(1)(a)(ii)

[para 23.] I find that the Custodian properly applied section 11(1)(a)(ii) of the Act to the records/information.

V. ORDER

[para 24.] I make the following order under section 80 of the Act.

[para 25.] I find that the Custodian properly applied section 11(1)(a) (ii) of the Act to the records/information. I uphold the Custodian’s decision to withhold the records/information.

Frank Work, Q. C.
Information and Privacy Commissioner