ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2004-005

January 14, 2005

DR. SALMA B. MURJI

Review Number H0198

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

Summary: The Complainant alleged that Dr. Murji ("the Custodian") disclosed his health information to the Canadian Medical Protective Association ("CMPA") in contravention of the *Health Information Act* ("the Act"). The Complainant had brought a medical malpractice action against three physicians, but not against the Custodian who was the complainant's treating physician. The CMPA, which is a defence organization or quasi-insurer for physicians, was representing the three defendant physicians. In an interview with legal counsel for the CMPA, the Custodian disclosed information about the Complainant's medical treatment. The Complainant had expressly objected to the interview.

The Commissioner found that section 3(a), which says the Act does not limit the information otherwise available by law to a party to legal proceedings, allows the Act and the common law to co-exist of the Act and did not remove this disclosure from the scope of the Act. He found that the Custodian disclosed the health information in accordance with section 35(1)(h) of the Act as the information was disclosed for the purpose of a court proceeding. Section 58(2) of the Act did not apply as the only issue was whether the Custodian could grant the interview, not the amount of information disclosed during the interview. The Commissioner also found that the Custodian had properly exercised her discretion to disclose.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, Part 1, ss. 1(1)(f)(ix), 1(1)(i)(ii), 1(1)(k)(i), 2(a), 2(c), 3, 3(a), Part 2, s. 17, Part 5, Division 1, ss. 31, 34, 35, 35(1), 35(1)(h), 35(1)(i), 35(1)(p), Part 6, Division 1, ss. 58, 58(2), Part 7, s. 80(1); *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 3(c), 40(1)(v); *Alberta Rules of Court Regulation*, A.R. 390/1968; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 28(1)(m);

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 7(3)(a); *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 20(m); *Personal Information Protection Act*, S.B.C. 2000, c. 5, s. 7(3)(a); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 33.1(1)(g); *Personal Health Information Act*, S.M. 1997, c. P33.5, s. 22(2)(k); *Health Information Protection Act*, S.S. 1999, c. H-0.021, as amended by S.S. 2002, c. R-8.2 and S.S. 2003, c. 25, s. 27(4)(m); *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, s. 41.(1)(a); *Privacy Act*, R.S.C. 1985, c. P-21, s. 8.(2)(d); *Privacy Act 1988* (Australia), as amended to No. 49 of 2004, Schedule 2.1(v); *Health Records Act 2001*, (Victoria) No. 2/2001, Schedule 1, Principle 2.2(k); *Health Information Privacy Code 1994*, under s. 46 of the *Privacy Act 1993* (New Zealand), Rule 11(2)(i)(ii); *Data Protection Act 1998*, (UK) 1998, c. 29, clause 35.-(2); *The Privacy Rule*, under the *Health Insurance Portability and Accountability Act of 1996*, (USA) 45 CFR, Parts 160 and Subparts A and E of Part 164, Part 164.512(f)

Cases Cited: *R. v. Sharpe*, [2001] 1 S.C.R. 45 (SCC); *N.M. v. Drew Estate*, [2003] A.J. No. 962 (AB CA); *McInerney v. MacDonald*, (1992) 93 D.L.R. (4th ed) 415 (SCC); *Hay v. University of Alberta Hospital*, (1990) 69 D.L.R. (4th) 755 (AB QB); *Sugarman v. Radomsky*, [1997] A.J. No. 596 (AB QB); *Stoodley v. Ferguson*, [2001] A.J. No. 357 (AB QB); *Phillip v. Whitecourt General Hospital*, [2001] A.J. No. 460 (AB QB); *Pozdzik v. Wilson*, [2002] A.J. No. 39 (AB QB); *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 (SCC); *Cook v. Ip* (1985) 52 O.R. (2d) 289 (Ont CA), leave to appeal to SCC refused; *Wells v. Paramsothy*, [1996] O.J. No. 4486 (Ont Div Ct); *Ferenczy v. MCI Medical Clinics*, 2004 CanLII 12555 (Ont SC)

Authorities Cited: E.A. Driedger, *Construction of Statutes* (2nd ed. 1983); R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002); Provincial Steering Committee on the Health Information Protection Act, *Report and Recommendations* (June 30, 1998); The Law Society of Alberta, *Code of Professional Conduct*, Chapter 10, "The Lawyer as Advocate", Rule 22 and Commentary 22, Version #:2004_V2, (June 23, 2004); Canadian Medical Association, *Code of Ethics of the Canadian Medical Association* (October 15, 1996); *Black's Law Dictionary* (7th ed. 1999)

Orders Cited: AB: F2004-010, F2003-017, F2002-019, 2000-012, 98-010

I. BACKGROUND

[para 1] The Complainant made a complaint about Dr. Salma B. Murji (the "Custodian") under the *Health Information Act* (the "Act" or "HIA"), saying the Custodian disclosed his health information to the Canadian Medical Protective Association as legal counsel for the defendant physicians ("CMPA" or "defence counsel"), in contravention of the Act.

[para 2] I authorized an investigation under the Act, but the Complainant was not satisfied with the outcome of the investigation. The Complainant made a request for review under the Act. The matter was set down for an oral inquiry.

[para 3] Legal counsel for the Complainant and legal counsel for the Custodian both provided written submissions that were exchanged between the parties beforehand. At the inquiry, legal counsel for the parties provided oral argument, an Agreed Statement of Facts and an additional legal decision.

II. ISSUES

[para 4] The issues before this inquiry are:

A. Does section 3(a) of the Act remove the disclosure of the Complainant's health information from the scope of the Act?

B. If the Act applies to the disclosure, did the Custodian disclose the Complainant's health information in accordance with section 35 of the Act?

III. DISCUSSION OF THE ISSUES – DISCLOSURE UNDER THE ACT

A. General

[para 5] The Complainant says the Custodian disclosed his health information in breach of the Act as the information was not only disclosed without his consent, but in the face of his express written objection. To address this issue, I must first determine whether the situation falls under the Act. The facts are not in dispute, as the parties provided an Agreed Statement of Facts at the inquiry.

[para 6] The Complainant commenced a medical malpractice action against three treating physicians ("defendant physicians"). The Custodian was also a treating physician of the Complainant, but not a defendant or party to the litigation. The CMPA is a defence organization or quasi-insurer for physicians and was representing the defendant physicians involved in the litigation. Defence counsel notified the Complainant's legal counsel that they intended to interview the Custodian.

[para 7] In a letter dated September 10, 2002, legal counsel for the Complainant wrote to the Custodian regarding a letter from defence counsel advising of their intent to meet with the Custodian. In that letter, legal counsel for the Complainant said:

> I would simply like to advise you that I have discussed this matter with [name of Complainant], and I can advise that he does not consent to you meeting with [name of defence counsel] or any other defence counsel, and in fact objects to any such meeting. I trust you will take this into consideration.

There is no dispute that the Complainant clearly objected to the interview and requested the Custodian to take his objection into consideration in deciding whether to meet with defence counsel.

[para 8] In a letter dated September 20, 2002, the Custodian replied to legal counsel for the Complainant and said:

> In response to your letter dated September 10, 2002, I would like to inform you that I have seriously taken your advice regarding [name of Complainant] objections to my meeting [name of defence counsel]. I have been in contact with the Canadian Medical Protective Association on this issue and they feel that I am at liberty to meet [name of

> defence counsel]. CMPA also advised me that I am at liberty to meet with yourself if you feel this is necessary.

The Complainant did not take further steps to prevent the interview from going ahead.

[para 9] The Agreed Statement of Facts says the Custodian provided an interview to defence counsel and discussed the Complainant's medical treatment relevant to the medical malpractice action. Neither legal counsel for the Complainant nor the Complainant were present at the interview with the Custodian. I accept the representations in the Agreed Statement of Facts as a correct description of the facts.

[para 10] I accept the written submission of the Complainant that Dr. Salma B. Murji is a "custodian" within the meaning of that term under section 1(1)(f)(ix) of the Act. The information that was disclosed about the Complainant's medical treatment was obtained from the health record and falls within the definition of "diagnostic, treatment and care information" in section 1(1)(i)(ii), which falls within the definition of "health information" in section 1(1)(k)(i) of the Act.

[para 11] As I have determined that the physician and information in question fall within the definitions in the Act, I will now consider whether the Custodian disclosed the information in accordance with the Act.

B. Approach to Interpretation

[para 12] The proper approach to the interpretation of legislation has been described by Justice McLachlin, C. J., in the majority decision in *R. v. Sharpe*, [2001] 1 S.C.R. 45 (SCC), which says:

> Much has been written about the interpretation of legislation…E.A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.' (para 33)

The above described approach to statutory interpretation is referred to as the "modern principle" and is reiterated in the most recent edition of the text (*Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), p. 1).

[para 13] In order to consider how the various components of the Act fit together, I will begin by reviewing the scheme and objects of the Act. Part 1 of the Act addresses introductory matters and clarifies the scope of the Act. Section 2 of Part 1 describes the purposes of the Act, which include provisions to protect individual privacy and confidentiality (s. 2(a)) and rules to collect, use and disclose health information in the most limited manner possible (2(c)). Section 3 of Part 1 describes particular situations that the Act does not limit, affect or prohibit. Subsection 3(a) says the Act does not limit the information otherwise available by law to a party to legal proceedings.

[para 14] Part 5 of the Act contains the rules for disclosure of health information. Division 1 of Part 5 contains the general disclosure rules. Section 31 of Division 1 prohibits a custodian from disclosing health information except in accordance with the Act. Section 34 of Division 1 sets out the general rule for disclosure, which is that health information can be disclosed with consent. Sections 35 to 40 of Division 1 describe the exceptions to consent and prescribe the specific circumstances where health information can be disclosed pursuant to the Act.

[para 15] Subsection 35(1) of the Act provides custodians with discretionary authority to disclose diagnostic, treatment and care information without consent in prescribed circumstances. For example, a custodian has the discretion to disclose diagnostic, treatment and care information for purposes of court and quasi-judicial proceedings under subsection 35(1)(h), for purposes of complying with a court order under subsection 35(1)(i) and when disclosure is authorized by an enactment under subsection 35(1)(p) of the Act.

[para 16] Part 6 of the Act creates independent and mandatory duties for custodians relating to health information. Division 1 of Part 6 prescribes the general duties and powers of custodians. Section 58 of Division 1 requires custodians to collect, use and disclose health information in a limited manner. Subsection 58(2) creates a mandatory duty for custodians to consider as an important factor any expressed wishes of the individual, together with any other factors the custodian considers relevant, in deciding how much health information to disclose.

[para 17] In addition to considering the scheme and object of the Act, I must also consider the intention of Parliament, or in this case, the Legislature. Although I do not have any evidence before me of the specific intention of the Legislature regarding the two provisions of the Act before me at this inquiry, I note the general recommendation made in the *Report and Recommendations* of the Provincial Steering Committee on the Health Information Protection Act (June 30, 1998) "to ensure that the rules in health information legislation are harmonized to the extent possible with FOIP" (p. 62). I will subsequently consider the parallel provisions in the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP Act").

[para 18] Following the foregoing approach to interpretation of legislation, I must read the words in the Act "in their ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature" (*Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), p. 2). I must also read the words of the Act as part of the "entire context", which will include the evolving legal norms found in both legislation and common law (*Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), p. 2).

[para 19] I will first consider whether section 3(a) removes the disclosure of the Complainant's health information from the scope of the Act. If I determine that section 3(a) does not remove that disclosure from the Act, I will then determine whether the

Custodian disclosed the Complainant's health information in accordance with section 35 of the Act.

C. Section 3(a) (Part 1, Introductory Matters, Scope of Act)

[para 20] Section 3(a) of the Act says:

> 3 This Act
> (a) does not limit the information otherwise available by law to a party to legal proceedings,

D. Application of Section 3(a): Does section 3(a) of the Act remove the disclosure of the Complainant's health information from the scope of the Act?

[para 21] If section 3(a) applies to this situation, it would be possible to find that this interview was between parties to legal proceedings and was not something that is to be limited by the HIA. In other words, this is the kind of practice that could continue.

[para 22] In his oral submission, the Complainant says section 3(a) does not apply in this situation and therefore does not remove this disclosure from the scope of the Act. He says section 3(a) would only apply if the physician was compelled to disclose in these legal proceedings. The Complainant says there must be a mandatory disclosure and a party to legal proceedings must be able to compel the disclosure in order for information to be "available by law" within the meaning of section 3(a) of the Act.

[para 23] The Complainant also says that section 3(a) does not apply in this situation because there is no statute or rule of court that requires a non-party physician to disclose this information; rather, this disclosure is voluntary, as a physician can decide not to provide an interview. He says even a court does not have the authority to order a non-party treating physician to provide an interview with defence counsel. He says the Act fills a void left by the common law as to whether a physician can grant such an interview. The Complainant says the effect of section 3(a) of the Act is that where information is not compellable by law to a party to legal proceedings, those decisions are removed from the purview of the courts and are now made by the Commissioner.

[para 24] The Complainant maintains that before the Act came into force the common law granted non-party treating physicians the right to voluntarily agree to disclose health information to defence counsel without consent. He says the Act has changed this aspect of the common law and creates a new self-contained set of statutory rules that govern the protection of privacy and disclosure for purposes of litigation. The Complainant says the Act overrides the previous common law and prohibits non-party physicians from exercising the discretion to grant an interview without consent, particularly in the face of a written objection.

[para 25] The Complainant submits that the common law decisions and the Law Society rules that have been applied by the courts when making these decisions previously are a red herring in this situation, as they merely prescribe procedures for

situations where physicians have the authority to disclose. The Complainant says the recent decision of the Alberta Court of Appeal in *N.M. v. Drew Estate*, [2003] A.J. No. 962 (AB CA), casts doubt on whether a non-party physician can voluntarily grant an interview respecting a patient. He says the issue under section 3(a) of the Act is not the set of rules that should be applied to make such a disclosure, but whether the physician has the discretion to grant the interview and make the disclosure in the first place.

[para 26] The Complainant says that rights must be balanced and a defendant is entitled to defend their case. However, this situation is entirely different from a witness in a motor vehicle accident who does not have a pre-existing fiduciary relationship with the plaintiff such as the physician/patient relationship described by the Supreme Court of Canada in *McInerney v. MacDonald*, (1992) 93 D.L.R. (4th ed) 415 (SCC). The Complainant says defendants in legal proceedings have adequate access to health information from custodians, through the disclosure provisions in section 35(1) of the Act, which include court orders to compel the production of records and witnesses and enactments such as the *Alberta Rules of Court Regulation*, AR 390/1968 ("*Rules of Court*"), with procedures such as examinations for discovery and independent medical examinations.

[para 27] In contrast, in her written and oral submissions, the Custodian says that section 3(a) of the Act does apply in this situation. She says that a physician granting counsel an interview respecting a patient is an activity which is caught by section 3(a) and is therefore not to be limited by the Act. In that respect, this disclosure of the Complainant's health information is removed from the scope of the Act. She says section 3(a) applies to non-party defendant physicians because there is "information otherwise available by law to a party to legal proceedings". The Custodian says that section 3(a) merely says the information must be "available" by law, so this section applies to both discretionary and mandatory disclosures. She says this section applies to information that is "otherwise" available by law such as by common law.

[para 28] The Custodian says this situation falls within section 3(a) of the Act as this is information otherwise "available by law" to a party to legal proceedings. She says this is not a question of whether the physician has the discretion to grant or refuse the interview, but rather whether a physician who decides to grant an interview is in breach of the Act. The Custodian says the right to privacy is not absolute and does not trump all other rights including the ability of a party to litigation to defend themself. She says the court system considers this balance on a case by case basis, which is evident in the numerous common law decisions that relate to non-party physicians who provide interviews to defence counsel.

1. The *Hay* decision

[para 29] The Custodian did cite numerous common law authorities in support of her position. She said a long line of court decisions in Alberta demonstrate that non-party physicians can voluntarily grant interviews to defence counsel. In *Hay v. University of Alberta Hospital*, (1990) 69 D.L.R. (4th) 755 (AB QB), the plaintiff expressly refused consent to any discussions between defence counsel and his treating physicians.

In *Hay*, the defendant applied for a court order permitting defence counsel to interview three other treating physicians at the pre-trial stage on an informal ex parte basis as potential witnesses.

[para 30] The *Hay* court weighed the right of a patient to confidentiality against the right of another litigant to access information at issue in the lawsuit and acknowledged the public interest in ensuring that all relevant evidence is available to the court to enable justice to be done between the parties. The *Hay* case said the silence in the *Rules of Court* did not preclude such an interview from occurring, although other processes for parties to obtain information prior to trial were addressed in those rules. Justice Picard (as she then was) said, "The mere absence of such a provision does not mean that the rules have abrogated the right to contact a witness with a request for such an interview" (p. 757). Picard J., held that defence counsel had the right to request an interview from a treating physician in those circumstances. Picard J., said:

> I find that the right of a patient to confidentiality ceases when he puts his health in issue by claiming damages in a lawsuit; the raison d'etre for confidentiality is gone. (p. 760)

[para 31] In that case, Picard J., said it was not necessary and in fact would be inappropriate to issue a court order to say that defence counsel has the right to interview the treating physicians of the plaintiff, because a plaintiff who initiates litigation that puts their health at issue has given an implied consent for treating physicians to release medical information (p. 761). The *Hay* court found that a patient cannot prohibit a treating physician from speaking to defence counsel, as all treating physicians are potential witnesses in litigation and therefore the common law rules for contacting witnesses apply. Although defence counsel is allowed to contact a non-party treating physician and request an interview, this right is subject to the rules and ethics of the legal profession. Picard J., said although the scope of the information that can be released by a treating physician was not before her in the *Hay* case, that scope would be a problem for other litigants and for other courts to address.

[para 32] The Custodian says the *Hay* principle remains, but the extent of the waiver has since been narrowed. It is now clear that a plaintiff has not waived all rights to confidentiality by commencing litigation against a physician. Specific issues such as the scope of the information and the common law rules for requesting and releasing medical information have been further delineated in subsequent cases. Later cases have imposed detailed procedures and conditions that must be met should a physician grant an interview to defence counsel. However, she said the basic rule established in the *Hay* case has not changed, which allows defendants to obtain the necessary health information to defend themselves in litigation, by requesting interviews of non-party treating physicians.

[para 33] The Custodian submits the common law decisions in Alberta after the *Hay* case have created specific rules for litigation should a non-party treating physician decide to grant an interview to defence counsel, but do not preclude the interview. She says those cases include *Sugarman v. Radomsky*, [1997] A.J. No. 596 (AB QB), *Stoodley v. Ferguson*, [2001] A.J. No. 357 (AB QB), *Phillip v. Whitecourt General Hospital*, [2001] A.J.

No. 460 (AB QB), *Pozdzik v. Wilson*, [2002] A.J. No. 39 (AB QB) and *N.M. v. Drew Estate*, [2003] A.J. No. 962 (AB CA) .

[para 34] The Custodian says that notwithstanding the existence of legislation that protects medical confidentiality, similar decisions have been made by the Supreme Court of Canada in *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 (SCC), for access to medical records by an insurer for a double indemnity insurance claim and by the Ontario Court of Appeal in *Cook v. Ip*, (1985) 52 O.R. (2d) 289 (Ont. CA), for access to medical records from the Ontario Health Insurance Plan to ascertain injuries sustained in a motor vehicle accident.

[para 35] The Custodian says that over time the courts have established additional rules for a non-party physician granting an interview to defence counsel, but have never said a physician cannot grant such an interview. She says the Alberta cases after *Hay* including the *Sugarman*, *Stoodley, Phillip, Pozdzik* and *Drew* decisions involve the scope of the waiver and the process to be followed in specific circumstances should a non-party treating physician decide to grant an interview to defence counsel.

2. The *Sugarman* decision

[para 36] The *Sugarman* case was a medical negligence action where an interview was conducted in the face of an express objection from the plaintiff, but involved issues not relevant to the present situation, such as the adequacy of the notice and removal of a solicitor from the record. In *Sugarman*, the court said the plaintiff had certain rights during the interview process in that case: the right to be present at the meeting between defence counsel and the treating physician, the right to object to questions asked on the basis of relevance and the right to bring a court application to determine the merits of an objection.

3. The *Stoodley* decision

[para 37] The *Stoodley* case narrowed the extent of the waiver of confidentiality and set out the appropriate procedure where further interviews were requested. The *Stoodley* case involved a medical malpractice action where defence counsel gave notice of the intention to interview five non-party treating physicians. The physicians had all been retained as experts by the plaintiff. The plaintiff objected to the interviews, but there was a problem communicating the objection. After defence counsel had spoken to two of the physicians, the plaintiff applied for a court order to require defence counsel to give the plaintiff all written records of the interviews and to provide a decision regarding interviews of the other physicians.

[para 38] In regard to the physician's fiduciary duty, Justice Burrows said:

> Given the fundamental importance of the duty, it seems to me it should be considered "waived" only to the extent necessary to accommodate the defendant's right to full disclosure of relevant information in the action the plaintiff has commenced. (para 28)

Burrows J., said that although a non-party treating physician is not required to grant an interview, the physician may choose to participate in such an interview (para 35).

[para 39] Burrows J., said the plaintiff must be fully informed of the information released by a treating physician and therefore all notes or records of interviews must be given to the plaintiff. He found that the duty to accommodate the defendant's right of access to all relevant information does not justify interviews of treating physicians in the absence of the plaintiff or plaintiff's counsel unless the plaintiff consents. In regard to interviews of the remaining physicians, in order to protect the physicians from subsequent accusations of breach of the continuing fiduciary obligation, Burrows J., said the appropriate procedure for the interviews is to: conduct the interviews in the presence of plaintiff's counsel, reliably record the interview and provide plaintiff's counsel with the right to object to questions asked on the basis of relevance or privilege and to have the merits of any objections determined by the courts (para 34).

4. The *Phillip* decision

[para 40] In the *Phillip* decision, the plaintiffs asked the court for a declaration that defence counsel not conduct interviews of treating physicians or alternatively give notice and allow plaintiff's counsel to be present and provide copies of written notations compiled by defence counsel from previous interviews. The background to the court application was that, after ensuring the treating physicians had not been retained as expert witnesses, defence counsel gave notice of the intention to interview, but took the position that plaintiff's counsel was not entitled to be present and that notice in accordance with Rule #22 of the *Code of Professional Conduct* of The Law Society of Alberta ("*Code of Conduct*") was sufficient. Defence counsel then proceeded to interview nine of the 12 treating physicians. At a later case management meeting Justice Murray said that defence counsel could interview the treating physicians, plaintiff's counsel could attend and bring a court application regarding questions posed and defence counsel must provide plaintiff's counsel with a summary of the notes from previous interviews.

[para 41] Some time later, the plaintiffs made an application before Justice Murray. Murray J., considered the codes of ethics that govern both the medical and the legal professionals involved in such interviews. He canvassed the Hippocratic Oath and Clause 22 of the *Code of Ethics of the Canadian Medical Association* and found that the right to confidentiality in those codes as between a physician and a patient is consistent with the legal fiduciary duty described in various common law decisions including the *McInerney* case (para 15-19).

[para 42] Justice Murray also canvassed the professional duties of members of the legal profession, as described in the *Code of Conduct* in Rule #22 and Commentary #22, which say:

> Rule 22. A lawyer must not advise or encourage a witness or potential witness in a matter to refrain from communicating with other parties involved in the matter, subject to the exceptions set forth in Commentary 22.

> Commentary 22. There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. Rule #22 does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.
>
> There are certain exceptions to Rule #22:
> …….
> (d) *The expert witness*. Because an expert witness usually receives confidential information of the client, it would be inappropriate for that witness to communicate freely with all parties. In addition, an expert's report will likely be privileged as part of the solicitor's brief. With respect to an expert, such as an attending doctor, who can be characterized as both an ordinary and an expert witness, opposing counsel is entitled to question the witness on matters not subject to privilege. However, such questioning should be conducted only on notice to the lawyer concerned due to the risk of improper disclosure, intentional or otherwise.

[para 43] Murray J., quoted the following excerpt from a letter dated April 15, 1997, written by the Professional Responsibility Committee of The Law Society of Alberta regarding the application of Rule #22 to a physician who is an expert witness:

> …that defence counsel is entitled to contact and interview a doctor in the circumstances described, but only upon notice of plaintiff's counsel, in advance of such arrangements. The Committee was further of the view that this interpretation of its own commentary is consistent with that portion of Justice Picard's decision in *Hay v. University of Alberta and Sterns*, paragraph 27, where she states that the rights of defence counsel, are: "subject to the rules and ethics of the legal profession" and those must be adhered to by all counsel in dealing with witnesses in those circumstances. (para 24)

Justice Murray noted that these Law Society provisions were not in place at the time of the *Hay* decision. However, the rules and the commentary in the *Code of Conduct* now govern the professional practice of legal counsel.

[para 44] Justice Murray conducted an exhaustive review of the common law including the decisions in other jurisdictions. He distinguished the Ontario cases that are based upon the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, as the Ontario rules enable a court to grant permission for oral discovery of non-parties including treating physicians, where physicians must submit to the examination (para 40). The *Rules of Court* in Alberta do not have an equivalent concept. Murray J., said that the adoption of a similar rule in Alberta would require careful thought before being implemented and would "open the door to a new species of interlocutory applications" (para 40). For that reason, I do not find the Ontario cases before me including the *Wells v. Paramsothy*, [1996] O.J. No. 4486 (Ont Div Ct) and the *Cook* case, to be of assistance in this inquiry.

[para 45] Justice Murray quoted and followed various passages in the *Hay* decision. He agreed with Justice Picard that once a patient commences legal

proceedings the right of the patient to confidentiality vis à vis the party adverse in interest ceases and is "then eclipsed by the right of those who faced the action" to know the basis of the claim being advanced (para 56). Murray J., said defence counsel has a duty to clients to ensure that all relevant facts are known. Therefore it may be necessary to speak with treating physicians because relying solely upon information producible under the *Rules of Court* such as medical records may not be adequate (para 58).

[para 46] Justice Murray stated:

> Thus, I am satisfied that it is a law of Alberta that the patient's right to confidentiality and privacy is overridden by "the public interest in an efficient administration of justice, including the right to full and complete defence" and the need to protect the integrity of the principles inherent in our adversarial system of justice. (para 62)

Murray J., held that defence counsel is at liberty to interview a treating physician providing the physician is willing to give the interview and they both abide by their respective professional codes of conduct (para 63, 67). The scope of such an interview is limited, for example, to relevant factual information and must not touch upon information subject to solicitor-client privilege that the physician has received from plaintiff's counsel as an expert witness (para 64). Murray J., describes some of the difficulties and the "awkward position" of the treating physician who chooses to grant an interview to defence counsel (para 65-66). He agreed with Justice Lee in *Sugarman* that the notice given to the plaintiff must be reasonable and allow sufficient time for the plaintiff to apply to the court for directions (para 68).

[para 47] Justice Murray did not interpret Justice Picard's decision in *Hay* to say that a patient who commences litigation puts all medical information in issue, but rather only the information relevant to the issues raised in the claims made in the lawsuit (para 69). He agreed with Picard J., that interviews of treating physicians by defence counsel can be important for the administration of justice as they can assist in trial preparation, enable the adversarial process to operate fairly and ensure a full and efficient disclosure of all material facts to the court (para 70).

[para 48] Justice Murray disagreed with Justice Burrows in *Stoodley* on the point that defence counsel must either conduct all interviews of treating physicians in the presence of plaintiff's counsel or alternatively disclose the results to plaintiff's counsel (para 70). He stated:

> To my mind it is an essential element of our system that counsel be able to conduct their interviews using the skill and knowledge which they individually possess without having to make that available to their adversary. (para 70)

Justice Murray said, "It would be inappropriate to have the patient's counsel act as the 'gatekeeper' during such interviews" (para 70). Although Murray J., found in *Phillip* that the time given between the notice and the interview was too short, he did not require defence counsel to produce the notes of the interviews. Justice Murray said, "Those materials are privileged, being part of counsel's brief, originating during the

course of his conducting this litigation. Plaintiffs counsel are free to speak with the same doctors" (para 75).

[para 49] Justice Murray prescribed a detailed procedure that must be complied with by defence counsel for any further interviews with treating physicians of the plaintiffs (para 76). This is also the procedure, in the opinion of Justice Murray, that should be followed in future for interviews of treating physicians, whether or not the physicians have already been consulted as an expert by plaintiff's counsel (para 72). Once defence counsel has given notice to plaintiff's counsel of the intention to interview treating physicians, the onus is then upon plaintiff's counsel to make an application to limit such interviews, which enables the court to impose specific conditions and retain its role as the 'gatekeeper' (para 72, 4.). Defence counsel must give two weeks notice and can proceed with the interview unless plaintiff's counsel makes a court application within that time (para 72).

5. The *Pozdzik* decision

[para 50] The *Pozdzik* decision is the only case cited by the parties that was decided after HIA was proclaimed in force and that explicitly considers the Act. In *Pozdzik*, defence counsel wanted to interview the treating physician of the mother of the plaintiff before trial. Plaintiff's counsel objected saying the *Hay* principle did not apply as this situation involved the treating physician of the mother rather than the plaintiff. Justice Marshall held that defence counsel could interview the physician saying:

> The treatment provided to the mother of the Plaintiff is the focus of the trial and privacy considerations of the doctor-patient relationship must yield to the extent of the litigation process. I do not find the Act makes any change in that principle. (para 3)

6. The *Drew* decision

[para 51] Although the *Drew* decision was made after the Act came into force, the case does not mention HIA. In the oral submission, the Complainant said that *Drew* casts doubt about whether a plaintiff's non-party treating physician can even grant an interview with defence counsel. In contrast, the Custodian said the *Drew* decision does not assist in answering the questions before this inquiry as the only issue in that case was whether plaintiff's counsel could insist on being present during the interview of a treating physician, which is not relevant to this proceeding. She said the only issue before the court in the *Drew* decision was whether the plaintiff, who had consented to the interview on the condition of attending, could impose that condition. In their oral submissions, both counsel agreed the *Drew* decision was limited to the sole issue of whether plaintiff's counsel could preclude defence counsel from conducting an interview unless plaintiff's counsel was allowed to attend as requested.

[para 52] The Custodian also argued that the *Drew* case is not on point as it involved personal injury litigation rather than the dynamics of a medical malpractice action. Additionally, the Custodian says the *Drew* case was decided before the disclosure at issue was made and therefore even if the Complainant is correct in his

interpretation that was not the applicable law at the time. The Custodian says it is still clear that at common law a non-party physician can decide whether to grant an interview with defence counsel. She said the *Drew* decision illustrated that disagreements regarding interviews of treating physicians are governed by the courts and therefore are part of the information that is "otherwise available by law" as described in the Act.

[para 53] In the *Drew* decision, defence counsel gave notice that she intended to interview seven of the treating physicians as the plaintiff had decided not to call these physicians as witnesses at trial. The plaintiff did not dispute the right of defence counsel to interview the physicians but consented to the interviews by defence counsel on the condition that plaintiff's counsel must be present. The defendant refused to agree to the condition and sought a court order. The chambers judge held that plaintiff's counsel had the right to be present at any interviews. Two justices of the Court of Appeal found no specific error in the trial judge's decision and dismissed the appeal. They upheld the decision of the lower court to accede to the plaintiff's request that plaintiff's counsel must attend any interviews with treating physicians although they said the cases on that issue were split both in Canada and in Alberta (para 18). Justice O'Leary issued a strong dissent.

[para 54] The majority of the Court of Appeal stated that the case law is divided about whether defendants have a right to ask a plaintiff's treating physician for an interview and that disclosures made without consent need careful re-examination (para 42, 77-79). The majority acknowledged that "a host of privacy statutes might be affected" but the Act was not even mentioned. The issue of whether a treating physician could voluntarily grant an interview with defence counsel was not fully argued before the court because the plaintiff had agreed to an interview if his counsel could attend (para 9). The majority decision dwelt extensively on the difficulties that arise for physicians who agree to provide such interviews to defence counsel (para 44-76, 80). The majority said in these situations, the "physician is the referee" as the physician owes the duty to the patient and must decide whether to provide or refuse an interview to defence counsel before trial (para 80).

[para 55] Justice O'Leary reviewed the relevant common law decisions in detail, distinguished *Stoodley* on the facts and adopted the reasoning in *Phillip*. He confirmed that the only issue in this appeal was whether the condition requiring the presence of plaintiff's counsel at the interviews was proper and justified in the circumstances (para 109). Justice O'Leary would have allowed the appeal and struck the condition that plaintiff's counsel must be present at any interview of treating physicians by defence counsel. Justice O'Leary said:

> The treating physicians are not subject to a duty of confidentiality with respect to medical information relevant to the plaintiff's claims. The plaintiff cannot assert a privilege in the information and has no control over its disclosure. The defendant has a right to seek that information through unconditional interviews of the treating physicians.
>
> In my view, the condition imposed by the chambers judge is a serious and unwarranted interference with the right of defence counsel to interview potential trial witnesses in

> confidence. It deprives the defendant of the privilege which ordinarily attaches to the contents of such interviews. It is unfair to the defendant as it skews, without justification, the level playing field which is fundamental to the operation of the adversary process. (para 116-117)

[para 56] Justice O'Leary said the right to contact and interview potential witnesses about relevant information is not merely a matter of disclosure between the parties, but a right vested in all litigants as an essential element of a functioning adversary system (para 122). He said that right is not a benefit dependent upon leave of the court or the consent of the opposing party. Justice O'Leary also said that information within the knowledge of third parties may not be within the possession or power of a litigant and therefore not subject to disclosure under the *Rules of Court* (para 123). He said that physicians are in the best position to decide whether to grant or refuse an interview by defence counsel (para 148). The exception to this discretion is in the formal court setting when physicians are subpoenaed to give evidence.

7. Discussion

[para 57] The Custodian says the numerous cases before the courts demonstrate that this is a matter within the jurisdiction of the courts to decide. The courts rely on rules such as the *Rules of Court* and the *Code of Conduct*. She says disagreements about interviews of non-party treating physicians should not be a matter of patient choice but rather a matter for the court as the independent arbitrator, because plaintiffs will typically object to interviews of treating physicians by defence counsel due to the dynamics of litigation. Preventing access to health information that is necessary for the conduct of medical malpractice litigation may preclude a defendant from making a full answer and defence to allegations and may interfere with the ability of the courts to make a fair determination.

[para 58] The Custodian says that if the Complainant had exercised his right to seek a court ruling regarding this disclosure, a court would have considered the specific circumstances and rendered a decision. The Custodian says section 3(a) means that this situation, which is governed mainly by the common law and the court process, is not limited by the Act. The Custodian says the two provisions of the Act that are before this inquiry are not in conflict and both section 3(a) and the disclosure provisions in section 35(1) can co-exist. In her written submission the Custodian says:

> This situation is relevant because it indicates that disputes such as this one ought to be governed by the Courts. The HIA is not intended to arbitrate disputes about the availability of evidence in a court proceeding.

The Custodian says the court makes these decisions when the questions arise under common law and the Commissioner makes these decisions when questions arise under the Act.

[para 59] What meaning should be given to the specific words in section 3(a), which say the Act "does not limit the information otherwise available by law to a party to legal proceedings"? The term, "law" is not defined either in the Act or in the

Interpretation Act, RSA 2000, c. I-8. The seventh edition of *Black's Law Dictionary* defines "law" as follows:

> The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action…(p. 889)

This definition of the word "law" clearly includes the common law as well as statute law.

[para 60] It is significant that section 3(a) of the Act refers to "law" rather than to a narrower concept such as an "enactment", which is referred to in other parts of the Act such as in section 35(1)(p). In contrast, the *Interpretation Act* defines an "enactment" to mean "an Act or a regulation or any part of an Act or regulation" (s. 28(1)(m)). In Order 2000-012 under the FOIP Act, the previous Commissioner defined "common law" to mean a body of non-statutory principles and adopted the definition from the previous edition of *Black's Law Dictionary*.

8. The *Freedom of Information and Protection of Privacy Act*

[para 61] How should section 3(a) be interpreted? An identical provision to section 3(a) of the Act exists in section 3(c) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP Act"). The parallel provision in section 3(c) of the FOIP Act was considered by the former Commissioner in Order 98-010 in a breach of privacy case. In that Order, the Commissioner found the provision did not permit the Public Body to disclose information merely because it had a system or procedure in place for the disclosure, as that was not a "law" as contemplated by the FOIP Act provision. The former Commissioner said section 3(c) of the FOIP Act addressed procedures available for access to information but not for disclosure of information.

[para 62] The application of section 3 of the FOIP Act was again considered by the Adjudicator in Order F2002-019, in an access request where the Applicant was asserting a right of access under the FOIP Act pursuant to the *Rules of Court* and the common law. The Adjudicator found that the common law cases were not relevant to the issue raised under the FOIP Act. The Adjudicator stated," The Act, as evidenced by section 3, has its own process for access which is in addition to the processes found under the *Rules of Court* and common law. It is the statutory rules and procedures under the Act that I must consider and which will determine whether the Applicant will be given access to the records at issue."

[para 63] The purposes of the Act include not only the protection of privacy and confidentiality of the individual (s. 2(a)) but also the collection, use and disclosure of health information (s. 2(c)). Section 3(a) must be read together with and harmoniously with all provisions in the Act including the discretionary disclosure provisions under section 35(1). The *Report and Recommendations* of the Provincial Steering Committee on the Health Information Protection Act recommended that the rules in the Act should be "harmonized to the extent possible with FOIP" (p. 62). This recommendation was

fulfilled with an identical provision in HIA and therefore in the two major pieces of privacy legislation in Alberta.

[para 64] In *Sullivan and Dreidger on the Construction of Statutes*, the authors describe the principle of legislative sovereignty where validly enacted legislation is paramount over the common law (p. 340). The presumption against changing the common law means that, although legislation is paramount, there is a presumption the Legislature did not intend to interfere with common law rights, to oust the jurisdiction of the common law courts or to change the common law (p. 341). Legislative provisions may be intended to codify the common law or to reproduce the common law without changing it (p. 344). The common law may be used to supplement legislation and where there is no reason to believe the common law has been deliberately excluded it continues to apply (pp. 349-50). Legislation can expressly preserve the common law and allow certain aspects of the common law to continue in force and apply as it exists from time to time (pp. 358-9).

[para 65] The Act was not enacted in a vacuum. Disclosure of the health information involved in legal proceedings has been governed by a combination of statute and common law for a long time. Before the Act was in force, a number of health sector statutes existed alongside the common law. The Act consolidated the privacy provisions in the health sector statutes with one set of statutory rules for health information. The judicial system has established a large body of common law rules that govern multiple aspects of litigation, many of which do not address privacy per se but other concepts inherent in the litigation process such as due process, procedural fairness, protection against self-incrimination and the relevance, admissibility and weight of evidence.

[para 66] Section 3(a) of the Act expressly recognizes that information is otherwise available by law, and other procedures that enable parties to legal proceedings to obtain information outside the Act continue to exist. Although legislation is usually presumed to override the common law, this presumption is rebutted where the legislature clearly intends to preserve the common law. Read in its ordinary and grammatical sense, this section means that in the sphere of the "information otherwise available by law to a party to legal proceedings," the Act is not intended to change or alter the information available to parties to legal proceedings. In my view, the Act is intended to co-exist along with other laws such as the common law that previously governed the information available by law to a party to legal proceedings.

[para 67] This does not mean that there are 'no rules' when it comes to disclosure for purposes of litigation. The judicial process and common law are well established. The courts balance and weigh the value of protecting individual privacy against the value of disclosing health information for purposes of legal proceedings, as evident in the large body of common law that exists. The protection of privacy is addressed in an extensive body of law with well established judicial precedent.

[para 68] In my view it is logical that the legislators intended the courts to continue to make decisions and for the common law to continue to apply and to govern situations

where information is otherwise available by law to a party to legal proceedings. There are checks and balances in the common law such as the duty of defence counsel to notify the plaintiff, which provides an opportunity for the plaintiff to make a court application to object to the interview. The interpretation that section 3(a) of the Act was intended to co-exist with the common law in legal proceedings is consistent with the general rule that legislation is not presumed to override the common law.

[para 69] Reading the words in the context of the entire Act, other sections in HIA clearly allow processes outside the Act to continue and co-exist along with processes created in HIA. For example, section 17 of the Act says an individual is "not limited" to the HIA procedure when requesting access to information. Section 3 of the Act contains a list of situations the Act does not limit, affect or prohibit. Section 3(a) says the Act "does not limit" the information otherwise available by law to a party to legal proceedings. Section 3(b) says the Act "does not affect" the power of a court or tribunal to compel witnesses or the production of documents. Section 3(c) says the Act "does not prohibit" the transfer, storage or destruction of a record governed by an enactment. The interpretation that section 3(a) of the Act was intended to co-exist with the common law in legal proceedings is consistent with other provisions in the Act.

[para 70] The Complainant says that section 3(a) does not apply unless a physician is compelled to disclose the information such as by a court order. However, the wording in section 3(a) is not limited to situations of mandatory disclosure. It does not seem reasonable to interpret this provision in a manner that requires a physician to obtain a court order before granting an interview as this would duplicate section 35(1)(i) of the Act. A court in Alberta cannot compel a non-party treating physician to participate in such an interview, as the decision rests with the physician. Additionally, there may be situations where a patient has no issue whatsoever with a treating physician granting such an interview, so a requirement to invariably obtain a court order would be unnecessary.

[para 71] If section 3(a) allows the common law to co-exist along with the Act and apply to the information otherwise available by law to a party to legal proceedings, what is the purpose of the specific disclosure provisions that pertain to legal proceedings such as court and quasi-judicial proceedings (section 35(1)(h)), court orders (section 35(1)(i)) and enactments such as the *Rules of Court* (section 35(1)(p))? The above described rules of interpretation say that legislation is to be interpreted as speaking as a whole rather than as repetitive or internally inconsistent.

[para 72] The Act has its own regime for custodians to collect, use and disclose health information. These rules apply to all custodians regardless of whether they are parties to legal proceedings. These provisions are in addition to and may complement the information otherwise available by law to parties in legal proceedings that is mentioned in section 3(a). The interpretation that privacy statutes allow the common law to co-exist is consistent with the decision of the Ontario Superior Court in *Ferenczy v. MCI Medical Clinics*, 2004 CanLII 12555 (Ont SC), where videotape evidence that was collected, used and disclosed for defence purposes was not precluded by the federal

private sector privacy legislation (*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA")).

[para 73] The disclosure rules in Part 5 of the Act prohibit a custodian from disclosing health information except in accordance with the Act. It is significant that section 31 does not prohibit a custodian from disclosing health information except in accordance with the specific disclosure provisions in Division 1 of Part 5 of the Act, but rather allows disclosure in accordance with the Act as a whole.

[para 74] For the above reasons, I find that section 3(a) does not remove the disclosure of the Complainant's health information from the scope of the Act. Section 3(a) allows the Act to co-exist along with other laws as it "does not limit the information available by law to a party to legal proceedings". In order to determine whether the Act also allows the Custodian to disclose the information at issue I will now consider the disclosure provisions under Part 5.

E. Section 35 (Part 5, Division 1, General Disclosure Rules for Disclosure of Diagnostic, Treatment and Care Information)

[para 75] The relevant subsections of section 35 of the Act say:

> 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
>
> …….
>
> (h) for the purpose of a court proceeding or a proceeding before a quasi-judicial body to which the custodian is a party,
>
> (i) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction to compel the production of information or with a rule of court that relates to the production of information,
>
> …….
>
> (p) if the disclosure is authorized or required by an enactment of Alberta or Canada, or

F. Application of Section 35: If the Act applies to the disclosure, did the Custodian disclose the Complainant's health information in accordance with section 35 of the Act?

[para 76] Similar to the FOIP Act, the Act is silent regarding which party bears the burden of proof in a breach of privacy case. Following the rationale for allocating the burden of proof laid out in previous Orders F2003-017 and F2004-010, the Complainant raised the issue so therefore he has the initial burden to establish that his health information was disclosed as alleged.

[para 77] There is no dispute that the Custodian disclosed health information as a non-party treating physician by granting an interview to defence counsel. The initial burden of the Complainant was discharged in the Agreed Statement of Facts. When the

disclosure of health information is proven, then the burden shifts to the Custodian to show that the disclosure is allowed under the Act.

[para 78] In her submissions, the Custodian argues that in the alternative, both section 3(a) and sections 35(1)(h), 35(1)(i) and 35(1)(1)(p) apply to allow this disclosure. In his written submission, the Complainant argues that neither section 3(a) nor sections 35(1)(h), 35(1)(i) or 35(1)(p) of the Act apply in this situation.

[para 79] First I will consider whether section 35(1)(h) of the Act applies in this situation. In his oral submission, the Complainant says that if section 35(1)(h) does apply it only applies when a custodian is a party to legal proceedings. The Complainant says that, if section 35(1)(h) applies, this provision cannot be read disjunctively and only applies for purposes of a court proceeding when a custodian is a party. Therefore, it does not apply to the Custodian in the present situation.

[para 80] In his written submission, the Complainant says the Custodian disclosed information about her patient over the patient's objection "to a representative acting on behalf of the insurer of the defendant, an entity utterly and completely adverse in interest to the patient in the litigation. He says the conflict of interest is all the more severe because this disclosure, to the insurer, was done on the advice of the same insurer, which was the doctor's own insurer, and with whom the doctor may reasonably feel compelled to cooperate". If the doctor can make the decision under common law, according to section 3(a), then the doctor's decision can only be reviewed under common law, not by me.

[para 81] In the written submission, the Custodian says that section 35(1)(h) applies and authorizes the Custodian to make this disclosure. The Custodian says this provision is to be read disjunctively and therefore allows a custodian who is not a party to legal proceedings to disclose health information without consent. The Custodian says she agrees with the finding to that effect contained in Investigation Report #H0198, which was issued by my office.

[para 82] This Report came to my attention as part of the written submission provided by counsel for the Complainant. That report is the product of a separate process that includes an investigation and finding made by a staff member in my office. Mediation and investigation are separate processes from inquiry. The report is not binding on me in an inquiry because the parties can come before me and bring fresh evidence and argument. An inquiry is a "de novo" or new process in which I make my own independent decision.

[para 83] The Complainant cites a publication entitled, *Health Information A Personal Matter: A Practical Guide to the Health Information Act* (the "Guide"), which was published by my office. The Complainant cites the Guide as authority for his argument that section 35(1)(h) should not be read disjunctively. As the Complainant acknowledges, the Guide expressly states that it is intended to provide general information and is not an official interpretation of the law. The Guide does not distinguish between a party

and a non-party in legal proceedings or address the interaction of sections 3(a) and 35(1) of the Act, and therefore does not address the issue before me at this inquiry.

[para 84] These comments apply equally to the information provided in the PowerPoint presentation by a member of my office that was provided in the written submission by the Custodian. Similar to my above comments regarding the Investigation Report, this information is not binding on me in an inquiry because the parties can come before me and bring fresh evidence and argument to assist in making my independent decision in this "de novo" inquiry process.

[para 85] Subsection 40(1)(v) of the FOIP Act contains a provision that pertains to disclosures without consent in court proceedings that on its face looks somewhat similar to section 35(1)(h) of the Act. The FOIP Act says:

> 40(1) A public body may disclose personal information only
>
> …..
>
> (v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,

[para 86] However, the provision in the FOIP Act is significantly different from section 35(1)(h) of the Act. The FOIP Act disclosure provision clearly only applies when the Government of Alberta or a public body is a party to a proceeding. The FOIP Act was the key privacy legislation in place in Alberta at the time the Act was drafted. Why was the provision in the Act worded so differently from the FOIP Act?

[para 87] It would have been very simple to merely adopt the wording in the FOIP Act if the Legislature had intended the provision in the Act to have the same meaning as the FOIP Act and to apply only to parties to a proceeding. The recommendation made in the *Report and Recommendations* by the Provincial Steering Committee on the Health Information Act was to harmonize the two pieces of legislation to the extent possible. However, the two provisions were worded in a very different manner. In my view, any variation in the Act from the FOIP Act wording was intentional and connotes the intention to create a different meaning.

[para 88] Section 40(1)(v) of the FOIP Act was considered in Order F2002-019. In that decision, the Adjudicator determined that the three criteria required by the section were met as the disclosure was for use in a proceeding, the proceeding was before a court or quasi-judicial body and the Public Body was a party to the proceeding. This Order demonstrates the difference in the wording between the two pieces of legislation.

[para 89] In his oral submission, the Complainant says that unless section 35(1)(h) is interpreted to apply only to a custodian who is a party to a proceeding, the interpretation is too broad and is inconsistent with the purposes of the Act. However, I note that other privacy statutes contain similar or even broader disclosure provisions for purposes of court proceedings.

[para 90] Section 20(m) of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 of Alberta allows an organization to disclose personal information if the disclosure is "reasonable for the purposes of an investigation or a legal proceeding". In British Columbia, section 7(3)(a) of the *Personal Information Protection Act*, S.B.C. 2000, c. 5, allows an organization to disclose personal information if made to "a barrister or solicitor who is representing the organization". Section 33.1(1)(g) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 in British Columbia allows a public body to disclose personal information for "use in civil proceedings involving" the government or public body.

[para 91] The *Personal Health Information Act*, S.M. 1997, c. P33.5, in Manitoba says a trustee may disclose personal information if "required in anticipation of or for use in a civil or quasi-judicial proceeding to which the trustee is a party" (s. 22(2)(k)). Information required "in anticipation of" proceedings would be required before a trustee became a party to any subsequent proceedings. The Manitoba legislation was the first health information privacy legislation in Canada and was in force when HIA was enacted.

[para 92] In Saskatchewan, section 27(4)(m) of the *Health Information Protection Act,* S.S. 1999, c. H-0.021 allows a trustee to disclose personal health information where the disclosure is being made to the trustee's legal counsel for the "purpose of providing legal services to the trustee". In Ontario, section 41.(1)(a) of the *Personal Health Information Protection Act, 2004,* S.O. 2004, c. 3 allows a health information custodian to disclose personal health information for the "purpose of a proceeding or contemplated proceeding" in which the custodian is or is expected to be a party or a witness.

[para 93] Under the *Privacy Act*, R.S.C. 1985, c. P-21, personal information under the control of a government can be disclosed to the Attorney General of Canada for "use in legal proceedings involving the Crown in right of Canada or the Government of Canada" (s. 8.(2)(d)). PIPEDA allows an organization to disclose personal information when the disclosure is "made to, in the Province of Quebec, an advocate or notary or in any other province, a barrister or solicitor who is representing the organization" (s. 7(3)(a)).

[para 94] In Australia, Schedule 2.1(v) of the *Privacy Act 1988*, as amended to No. 49 of 2004, allows an organization to use or disclose personal information for the "preparation for, or conduct of, proceedings before any court or tribunal". In Victoria, Schedule 1, Principle 2.2(k) of the *Health Records Act 2001*, No. 2/2001, allows personal health information to be used or disclosed when "necessary for the establishment, exercise or defence of a legal or equitable claim".

[para 95] In New Zealand, the *Health Information Privacy Code 1994* issued under s. 46 of the *Privacy Act 1993*, was in force when the Act was being drafted. Rule 11(2)(i)(ii)) allows a health agency to disclose health information for the "conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation)". In the UK, clause 35.-(2) of the *Data Protection Act 1998*, 1998, c. 29, says that personal data are exempt from non-disclosure provisions where

the disclosure is necessary for the "purpose of, or in connection with, any legal proceedings (including prospective legal proceedings)".

[para 96] In the USA, the Privacy Rule mandated under the *Health Insurance Portability and Accountability Act of 1996*, 45 CFR, Parts 160 and Subparts A and E of Part 164 ("HIPAA"), allows a covered entity to disclose protected health information in the course of a judicial or administrative proceeding. Part 164.512(f) requires the party seeking the information to give the covered entity satisfactory assurance that reasonable efforts have been made either to give notice of the request to the subject of the information to give the subject the opportunity to raise an objection to the court or tribunal, or to obtain a qualified protective order.

[para 97] Considering the words in their entire context and in their grammatical and ordinary sense, with the scheme of the Act, the objects of the Act and the intention of the Legislature, I find that in order for section 35(1)(h) to apply, there must be a disclosure by a custodian of diagnostic, treatment and care information without consent that is either:

1. for the purpose of a court proceeding, or

2. for the purpose of a proceeding before a quasi-judicial body to which the custodian is a party.

The use of the word "or" means that there are two alternatives. In other words, the two alternatives are to be read disjunctively. *Sullivan and Dreidger on the Construction of Statutes* says the courts often declare that "and" is conjunctive but "or" is disjunctive (p. 66).

[para 98] After carefully considering all of the above described evidence, submissions, legal argument and authorities, I find that the Custodian has discharged the burden of proving she disclosed the health information for the purpose of a court proceeding. Therefore I find that the Custodian has disclosed the information in accordance with the authority of section 35(1)(h) of the Act.

[para 99] Why did the Act create this distinction between court proceedings and quasi-judicial proceedings? In my view, the common law previously discussed provides the answer, in that a custodian can be involved in court proceedings when the custodian is not a party. The common law and enactments such as the *Rules of Court* provide detailed rules that govern disclosures made for purposes of court proceedings and provide the inherent checks and balances of judicial precedent. In contrast, a custodian is unlikely to come before a quasi-judicial proceeding, such as a disciplinary proceeding, unless the custodian is a party or is compelled to attend.

[para 100] As I have found that the Custodian made the disclosure in accordance with her authority under section 35(1)(h), I do not find it necessary to consider whether the Custodian also had the authority to disclose the information under section 35(1)(i) and section 35(1)(p) of the Act.

[para 101] Having found that the Custodian was allowed to make the disclosure under section 35(1)(h), I must now consider whether the Custodian satisfied the relevant mandatory duties of custodians in Part 6 of the Act. The disclosure rules in section 35(1) are subject to the mandatory duties in Division 1 of Part 6. Section 58(2) says:

> 58(2) In deciding how much health information to disclose, a custodian must consider as an important factor any expressed wishes of the individual who is the subject of the information relating to disclosure of the information, together with any other factors the custodian considers relevant.

[para 102] Section 58(2) of the Act is a mandatory provision that must be satisfied when deciding how much health information to disclose. This provision requires a custodian to consider the expressed wishes of the individual as an important factor, rather than to necessarily follow those wishes. Otherwise an individual's expressed wish could preclude a custodian from disclosing information for purposes such as reporting a child in need of protection or abuse of a person in care.

[para 103] Section 58(2) requires a custodian to consider any other factors the custodian considers relevant along with the individual's wishes. Section 58(2) pertains to the determination of how much information to disclose, rather than whether or not to make the disclosure. There is no issue before this inquiry regarding the amount of information that was disclosed. The only issue is that the physician agreed to provide the interview, not whether the physician disclosed too much information during the interview. Therefore, I find that section 58(2) of the Act does not apply in this situation.

[para 104] As the decision of the Custodian to disclose under section 35(1)(h) involved an exercise of discretion in this case, I must consider whether the Custodian properly exercised her discretion. The Custodian gave notice to the Complainant of the intention to grant the interview and was advised of the Complainant's objection to the interview. Does proceeding in the face of an express objection mean the Custodian did not properly exercise her discretion?

[para 105] In her letter to the Complainant, the Custodian said she had seriously considered the express objection of the Complainant. The Custodian referred to other factors she considered such as the existence of legal proceedings, the legal advice received, her belief that she had the authority to disclose to defence counsel, her willingness to meet with the Complainant, and the absence of any further objection following her letter to the Complainant advising of her intention to meet with defence counsel.

[para 106] The Complainant did not take any further steps to prevent the interview after receiving the letter from the Custodian. I have no evidence before me that the Custodian did not properly exercise her discretion. Therefore, I find that the Custodian properly exercised her discretion when making the disclosure for the purpose of a court proceeding under section 35(1)(h).

IV. ORDER

[para 107] In summary, pursuant to my authority under section 80(1) of the Act, I find that:

- Section 3(a) of the Act does not remove the disclosure of the Complainant's health information from the scope of the Act;
- The Custodian disclosed the Complainant's health information in accordance with section 35(1)(h) of the Act for the purpose of a court proceeding; consequently section 35(1)(h) authorizes that disclosure under the Act;
- I did not find it necessary to consider whether the Custodian also had the authority to disclose the health information under a court order in section 35(1)(i) or under an enactment under section 35(1)(p) of the Act;
- Section 58(2) of the Act does not apply to this disclosure; and
- The Custodian properly exercised her discretion in making this disclosure.

[para 108] In conclusion, I find that the Custodian has complied with the Act.

[para 109] I commend legal counsel for both the Complainant and the Custodian for their assistance in providing the Agreed Statement of Facts and for their comprehensive legal arguments.

Frank Work, Q. C.
Information and Privacy Commissioner