ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2010-003

November 30, 2010

ALBERTA HEALTH SERVICES

Case File Number H2789

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Summary: The Applicant made a request for his health information to the Calgary Health Region, now Alberta Health Services (the Custodian) under the *Health Information Act* (the HIA). The Custodian withheld the names of some of the Applicant's health services providers from the records, and some treatment notes on the basis that disclosing this information could reasonably be expected to threaten the mental or physical health or safety of individuals.

The Adjudicator determined that the Custodian had not established that disclosing the health information it had withheld could reasonably be expected to threaten the mental or physical health or safety of individuals. She ordered the Custodian to disclose the records to the Applicant in their entirety.

Statutes Cited: AB: *Health Information Act* R.S.A. 2000, c. H-5 ss. 1, 2, 7, 11, 79, 80; *Freedom of Information and Protection of Privacy Act* R.S.A. 2000, c. F-25, s. 18

Authorities Cited: AB: Orders H2002-001, 96-004, 99-009, F2004-032

Cases Cited: *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515

I. BACKGROUND

[para 1] On January 29, 2009, the Applicant made a request for his health information to the Calgary Health Region, now Alberta Health Services (the Custodian) under the *Health Information Ac*t (the HIA). The information he requested included nurses' and doctors' notes, progress notes and reports, diagnosis and life support information, information regarding specific treatments, emergency department records and hospital admittance records. The Applicant also requested his personal information under the *Freedom of Information and Protection of Privacy Act*. However, only the request for health information under the HIA is at issue for this inquiry.

[para 2] The Custodian responded to the Applicant's access request on April 2, 2009. The Custodian provided the Applicant's charting, but withheld some health information, in particular, the names of some, but not all, health services providers, and some, but not all, treatment notes, under section 11 of the HIA.

[para 3] The Applicant requested that the Commissioner review the Custodian's response to his request for access.

[para 4] The Commissioner authorized mediation to resolve the dispute between the Applicant and the Custodian. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Both parties provided initial and rebuttal submissions for the inquiry and exchanged them with each other.

II. HEALTH INFORMATION AT ISSUE

[para 5] The information at issue consists of some of the names of health service providers and some of the statements and observations recorded by health services providers in progress notes and treatment records contained in the Applicant's health records.

III. ISSUE

Issue A: Did the Custodian properly apply section 11(1) of the Act to the records / information?

IV. DISCUSSION OF ISSUE

Issue A: Did the Custodian properly apply section 11(1) of the Act to the records / information?

[para 6] Section 7 of the HIA creates a right of access in an individual to access to the individual's health information. It states:

7(1) An individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian.

(2) The right of access to a record does not extend to information in respect of which a custodian is authorized or required to refuse access under section 11, but if that information can reasonably be severed from a record, an individual has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

[para 7] Section 2 of the HIA establishes that a purpose of the legislature in enacting the HIA was to give individuals a right of access to their own personal health information. It states, in part:

2 The purposes of this Act are

…

(d) to provide individuals with a right of access to health information about themselves, subject to limited and specific exceptions as set out in this Act…

[para 8] In the version of the HIA in force at the time of the Custodian's decision to withhold information from the Applicant, health information was defined by section 1(1)(k) of the HIA in the following way:

1(1) In this Act,

(k) "health information" means any or all of the following:

(i) diagnostic, treatment and care information;

(ii) health services provider information;

(iii) registration information;

[para 9] The present version of section 1(1)(k) of the HIA defines "health information" as follows:

1(1) In this Act,

(k) "health information" means one or both of the following:

(i) diagnostic, treatment and care information;

(ii) registration information;

However, information about a health services provider as described under section 1(1)(i)(ii) of the HIA is defined as diagnostic, treatment and care information for the purposes of section 1(1)(k). Therefore, under either version of the HIA, the information regarding the identities of health services providers severed by the Custodian is the health information of the Applicant.

[para 10] Section 11 of the HIA grants a custodian the discretion to withhold an individual's health information in specific circumstances. The Custodian in the present inquiry relies on section 11(1)(a)(ii) to withhold some of the Applicant's health information. This provision provides:

> *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 11] In Order H2002-001, the Commissioner considered what must be established in order for section 11(1)(a)(ii) to apply. He considered previous orders of this office addressing what is necessary to establish a reasonable expectation of harm under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) and adopted the following approach:

> In Order 2001-010, the 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 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 12] In Order 99-009, the former Commissioner explained the necessary elements of establish that there is a reasonable expectation that disclosing information would threaten the health or safety of an individual under what is now section 18 of the FOIP Act. He said:

> In Order 96-004, I said that where "threats" are involved, the Public Body must look at the same type of criteria as the harm test referred to in Order 96-003, in that (i) there must be a causal connection between disclosure and the anticipated harm; (ii) the harm must constitute "damage" or "detriment", and not mere inconvenience; and (iii) there must be a reasonable expectation that the harm will occur.
>
> Consequently, for section 17(1)(a) to apply, [now section 18(1)(a)], the Public Body must show that there is a threat, that the threat and the disclosure of the information are connected, and that there is a reasonable expectation that the threat will occur if the information is disclosed.

[para 13] In Order F2004-032, the Adjudicator found that a Public Body cannot rely on speculation and argument that harm might take place, but must establish a reasonable expectation that harm would result from disclosure before it may apply section 18 of the FOIP Act.

[para 14] Section 18(1)(a) of the FOIP Act, which the former Commissioner considered in Order 99-009 is similar in wording and purpose to section 11(1)(ii) of the HIA. It states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health…*

[para 15] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner),* 2006 ABQB 515 the Court agreed with the Commissioner that a public body must provide evidence to support its arguments that there would be a risk of harm if information is disclosed. The Court said:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.
>
> The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm."

These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors other than disclosure of information in the records at issue. Further, a public body must provide evidence that there is a reasonable expectation that harm will result from the disclosure of information contained in the records. In my view, a custodian under the HIA bears the same burden when applying section 11(1)(a)(ii) of the HIA, as does a public body applying section 18(1)(a) of the FOIP Act: the custodian must provide evidence that it is reasonable to regard the disclosure of the information it seeks to withhold as giving rise to a risk that the mental or physical health or safety of another individual would be threatened.

[para 16] Following the approach adopted by the former Commissioner in Order 96-004, the onus is on the Custodian to provide detailed evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed

[para 17] The Custodian explains in its initial submissions that it exercised discretion under 11(1)(a)(ii) to withhold the Applicant's health information from him for the following reasons:

> Finally, in exercising such a discretionary section as section 11(1)(a)(ii) the discretion must be exercised appropriately. In this instance AHS' Privacy Office weighed the right of the individual to access his health information against the need to protect the safety of staff and other individuals. Safety was deemed to be paramount.

However, the Custodian's submissions do not explain why it considered disclosing the information it withheld would reasonably be expected to lead to the threat contemplated by section 11(1)(a)(ii).

[para 18] In its rebuttal submissions, the Custodian provided an affidavit sworn by a Corporate Investigator for Alberta Health Services. This affidavit documents the affiant's dealings with the Applicant, and those of the Unit, and the security measures in place at the Unit regarding the Applicant. In this affidavit, the Affiant notes the following:

> Following the withdrawal of the undertaking, the staff reported that the Applicant's behavior began to escalate. They noted that he was angry, agitated and very disruptive to the unit. Various staff members reported that they are fearful of the Applicant and several made requests that they do not want to be assigned to his care.
>
> To ensure the Applicant knew his boundaries and met the behaviour appropriate to a patient of the Unit [the Manager, Corporate Investigation, Protective Services] and I met with him on March 30, 2010. During our meeting and from other conversations I have had with staff it became apparent that the Applicant directs most of his comments toward one staff member whom he believes is responsible for a campaign to undermine him and who he believes is responsible for his difficulties on the unit.
>
> On June 18, 2010, the staff at the … Unit reported that the Applicant is continuing his confrontational and angry behaviour. This was very upsetting to his nurses. As a result, I telephoned him directly and informed him that if he continued his disrespectful and abusive comments to the medical staff, he would be asked to leave the Unit. Minutes later, I received an angry email which accused me of bullying him and openly threatening to have him killed.
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> On June 22, 2010, I was contacted by the Firearms Officer for the local police in … who have received an application from the Applicant for a firearms Licence. This is of concern due to the Applicant's past behaviour and the fact that Medical staff report he is in no physical condition due to [name of specific treatment] to go hunting.
>
> On August 25, 2010, I was informed by the staff at the … [treatment] unit of an incident wherein a new security personnel inadvertently followed the Applicant into the unit. This had an immediate and aggravating affect on the Applicant who became visibly angry and verbally abusive to staff on the unit. He left the unit without receiving his scheduled [medically necessary] treatment. To prevent another similar incident, arrangements were made so that Security personnel were always aware of the Applicant's identity before he attended his scheduled treatments.
>
> …
>
> As a person responsible for the safe treatment environment for patients and staff I have concerns as to the release of further information to the Applicant given his unpredictable and volatile nature.

The evidence of the affiant indicates that the Applicant has a history of being angry and upsetting staff members. The affiant characterizes some of the Applicant's statements as "abusive". He notes that the Applicant has directed angry comments against one member of the staff in particular. When confronted, the Applicant responds by sending angry emails or refusing to undergo treatment.

[para 19] The affiant does not comment on the health information withheld by the Custodian or explain why he has concerns regarding the release of this information to the Applicant. It may be that the affiant believes that disclosing the names of staff members and their treatment notes beyond what has already been disclosed will result in further

angry emails or angry comments. Assuming, for the moment, that angry emails and comments constitute physical and mental harm for the purposes of section 11(1)(a)(ii), I note that the affiant does not explain how disclosing the information withheld by the Custodian would be expected to lead to that result. However, in any event, I find that sending angry emails and making angry comments, in and of itself, without evidence that these emails and comments could have the effect of threatening the mental or physical health or safety of another individual, does not constitute such a threat.

[para 20] It may be that the affiant is concerned that disclosing further information could lead to the use of firearms by the Applicant. I say this because the affidavit states:

> In September 2008, the Applicant is alleged to have told a nurse who was initiating [a necessary treatment] that he carried a gun on his person at all times. Police were advised of his statement and after investigation executed a search warrant at the Applicant's residence. No weapons were found at the residence, however, the Applicant was charged with selling unregistered weapons.

The affidavit does not establish that the Applicant has firearms, only that the RCMP was unable to locate any when they executed a search warrant at the Applicant's home. Moreover, even if the affiant had established that the Applicant does have firearms, he has not established that the Applicant has ever threatened anyone with one, or is reasonably likely to. Additionally, the affiant does not explain how disclosure of the information in the records could reasonably be expected to create a risk of harm involving firearms if disclosed.

[para 21] The Investigator states the following in relation to providing further information to the Applicant:

> As a person responsible for the safe treatment environment for patients and staff I have concerns as to the release of further information to the Applicant given his unpredictable and volatile nature.

While the Investigator details incidents involving the Applicant, he does not explain why he believes that disclosing the names of some of his health service providers, and some of the statements he has made to them and they have made to him in the course of treating him, should not be disclosed to the Applicant.

[para 22] The Custodian provided a copy of a "Notice of Trespass" dated October 8, 2010 that notifies the Applicant that his actions and behaviours at the Unit are unacceptable. These actions and behaviours include "abusive language, profanity, veiled threats, intimidating actions and comments, as well as unwelcomed communications". The letter indicates that the Applicant is entitled to visit the Regional Hospital for treatments, and only then under escort by a Protective Services Officer. The Custodian argues that the fact that the Custodian issued a Notice of Trespass demonstrates the Custodian's view that there exists a reasonable threat to the mental and physical safety of its staff.

[para 23] In my view, if the Applicant does present a threat to individuals, the Notice of Trespass effectively neutralizes any threat, by restricting the access of the

Applicant to the Unit and by ensuring that the Applicant is accompanied by a Protective Services Officer whenever he visits the Unit. Furthermore, I am not satisfied that the conduct documented in either the affidavit or the Notice of Trespass establishes that the conduct of the Applicant poses a threat to the mental or physical health or safety of individuals. The behavior to which the Custodian objects is making angry statements and sending angry emails; however, it has not established that this conduct on the part of the Applicant is anything more than a nuisance or inconvenience. As the former Commissioner noted in Order 99-009, proving inconvenience is not the same thing as proving a risk of harm.

[para 24] The Custodian also provided a copy of a psychiatrist's report dated March 25, 2009. The Custodian exchanged this report with the Applicant and the report also indicates that the Applicant was also provided a copy of it when it was created. This report was not prepared as an opinion regarding the likely result of providing the names of the Applicant's health service providers to him, or their comments while treating him, but rather, to assess the Applicant's mental status and his suitability for a medical procedure. The Custodian argues that for the purposes of this inquiry, the report establishes that the Applicant's presentation is consistent with a paranoid personality disorder and potentially leaves him as misreading situations and feeling as though he is mistreated by others.

[para 25] The psychiatrist's report states:

> I have evaluated him at present for symptoms that are consistent with delusional ideation, hallucination, thought broadcasting, thought insertion, thought form abnormalities as well as other psychotic symptoms. He at no point during the interview demonstrated anything consistent with that set of symptoms. He also appeared to be free of mood symptoms including that of depression or mania at any point in life. In discussing the symptoms of anxiety, there also appeared to be none. Through the discussion, there were consistent themes of being suspicious of other people, a significant amount of doubting the loyalty and trustworthiness of people that were in charge of his care, and a sense that he spent a long time ruminating about the slights that occurred … in the … unit. Further, he mentioned legal action on a couple of occasions during the interaction, not as plans going forward but as possible actions that he might choose to take regarding the slander that had been spoken against him. There are no symptoms of other personality styles in the Cluster A specifically that of schizotypal or schizoid personality that I was able to demonstrate. [My emphasis]

Elsewhere in the report, the psychiatrist notes the opinion of another psychiatrist who did find that the Applicant's presentation is consistent with a paranoid personality disorder, but expresses points of disagreement with this opinion. I find that the Custodian's characterization of the psychiatrist's report it offered as evidence is not supported by the contents of the report. At no point in the report does the psychiatrist offer the diagnosis of paranoid personality disorder, as the Custodian suggests she does. Rather, her report documents the absence of symptoms consistent with paranoid personality disorder and she states on the second page of this report that the Applicant has a very low risk of developing psychotic symptoms. Moreover, the psychiatrist does not suggest that the Applicant misreads situations but only that he has the potential to do so. She notes that the Applicant does not trust the staff of the Unit and feels that he has been slighted by

them; however, the psychiatrist does not state in her report that these views are the result of misreading situations.

[para 26] The Psychiatrist's report does not comment on the information withheld by the Custodian or suggest that providing the Applicant with this kind of information would reasonably be expected to create a risk to the mental or physical health or safety of the Applicant's health service providers.

[para 27] The Custodian has provided no explanation as to why it chose to sever the names and treatment notes of some health service providers from the records and not others. For example, record 1 contains the name of a physician and his instructions, but the names of nursing staff are withheld from this same record under section 11(1)(a)(ii). If the theory behind the Custodian's severing is that the mental and physical health of health services providers would be threatened by disclosing their names and notes to the Applicant, it is unclear why the physician's name and instructions were disclosed when the nurse's name was not. This pattern of severing occurs throughout the records.

[para 28] In any event, the evidence of the affiant, the records themselves, and the Applicant, is that the Applicant is aware of the names of his treatment providers at the Unit. It is clear that this is so because he has been attending the Unit for treatment at least three days a week since 2005. During that time, he has made complaints regarding his treatment providers in which he refers to them by name, and they have, in turn, made complaints regarding him that have been brought to his attention.

[para 29] As it is clear from the evidence of both parties that the Applicant is aware of the names of the staff members who have treated him, or whom he has complained about, or had disputes with, it is unclear why the Custodian applied section 11(1)(a)(ii) to withhold their names from him. Even though the Applicant is already aware of their names, there is no evidence that the mental or physical health of these employees has been put at risk because of this knowledge. Moreover, the health information that the Custodian did provide to the Applicant contains sufficient detail, such as the dates and details of his treatment and visits, and notes regarding treatment, would enable him to learn the names of health service providers who authored the treatment notes simply by drawing on his memory or his knowledge of the services he received from the employees of the Unit when he attended. For example, the name of the health service provider was withheld from record 774, but the date and time of treatment, and the notes of a conversation held with the Applicant regarding his dietary habits were not withheld. The Applicant need only review the notes and review the time of the treatment to recall with whom he had the conversation documented on the record.

[para 30] With regard to the notes documenting treatment that the Custodian withheld under section 11(1(a)(ii), for example, records 775, 777 - 779, 783 - 788, 791 - 798, and 800 - 801, it is unclear why the information was severed from the records. The Custodian disclosed the times and dates of treatment from these notes, which would enable the Applicant to recall by whom he was treated and what was discussed, simply by recalling the appointment. These records contain information documenting conversations

that took place during treatment with the Applicant. Given that he formed one part of the conversation or meeting, it may be inferred that he already has knowledge of some of the information withheld from him, in particular, statements attributed to him and statements made to him. However, there is no evidence that his knowledge of statements of this kind has created a risk to the physical or mental health or safety of another individual.

[para 31] It may be that the Custodian is concerned that the notes interpret the Applicant's mood or actions in a way that the Applicant may not agree with; however, in my view there is nothing to suggest that a threat to mental or physical health or safety would result if the Applicant were to be presented with notes containing interpretations of his mood and actions with which he does not agree. On the contrary, the affiant documents in his affidavit many situations in which the Custodian has confronted the Applicant over his behavior; however, he does not point to anyone having suffered harm to mental or physical health or safety as a result of these confrontations. While the affiant points to the Applicant writing angry emails and speaking angrily when confronted, in my view, this type of conduct, without evidence that this is likely to threaten the mental or physical health or safety of another individual, does not amount to a threat or risk to the physical or mental health or safety of another individual for the purposes of section 11(1)(a)(ii).

[para 32] The Custodian has established that the Complainant is capable of being disruptive; however, I find that this quality alone is not a threat to the mental or physical health or safety of individuals. Moreover, the Custodian's evidence is that it has taken security measures to reduce the possibility of disruptions when the Applicant attends for treatment.

[para 33] As noted above, a purpose of the HIA is to provide individuals with the right to access their own health information. This right of access is subject to limited and specific exceptions. Section 79 of the HIA states that the onus is on a custodian to demonstrate that an applicant has no right of access to the records it has withheld. The onus is therefore on the Custodian to establish that the information it severed under section 11(1)(a)(ii) meets the requirements of that provision. In the words of the former Commissioner in Order 96-004, the onus is on the Custodian to provide detailed evidence to show the threat and disclosure of the information are connected and that there is a probability that the threat will occur if the information is disclosed.

[para 34] I find that the Custodian has not demonstrated that there is a threat to the mental or physical health or safety of another individual or that a threat of this kind would be connected to the disclosure of the information the Custodian seeks to withhold. It therefore follows that I find that the Custodian has not established that a threat to the mental or physical safety of another individual is likely to occur if the information in the records is disclosed.

V. ORDER

[para 35] I make this Order under section 80 of the Act.

[para 36] I order the Custodian to disclose to the Applicant his health information in its entirety.

[para 37] I further order the Custodian to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order

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Teresa Cunningham