ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2011-001

July 29, 2011

ALBERTA HEALTH SERVICES

Case File Number H3350

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Summary: The Complainant made a complaint to the Commissioner regarding Alberta Health Services' (AHS's) collection, use, and disclosure of his health information. The Complainant is an employee of AHS. When he attended addiction counseling, the counselor provided the information she obtained from him to the human resources department of AHS. AHS then used the information obtained from the counseling session to conduct a human resources investigation. AHS also disclosed the information to the complaints officer of a professional body of which the Complainant is a member.

The Adjudicator determined that the *Health Information Act* (HIA) applied to the complaint. She found that AHS had collected the Complainant's health information from his treating physician for a purpose not authorized by the HIA. She also found that AHS had contravened section 22 of the HIA (direct collection) when it obtained the Complainant's health information from the treating physician. The Adjudicator also found that the addictions counselor had collected the Complainant's health information, in part, for the purpose a human resources investigation, and that this collection contravened both sections 20 and 22 of the HIA. In coming to these conclusions, she determined that section 27(1)(c) of the HIA authorizes use of the health information of the patients of a health service provider for the purpose of investigating the health service provider's conduct, but does not authorize use of the health service provider's own health information for that purpose. The Adjudicator also found that AHS had disclosed the Complainant's health information in contravention of the HIA when it disclosed the

findings of its human resources investigation to the complaints officer of his professional body.

The Adjudicator ordered AHS to cease collecting, using, and disclosing the Complainant's health information in contravention of the HIA.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 33, 34, *Health Information Act*, R.S.A. 2000 c. H-5 ss. 1, 2, 18, 20, 22, 27, 31, 34, 35, 37.1, 37.2, 80; *Alcohol and Drug Abuse Act* RSA 2000, c. A-38 s. 9; *Regional Health Authorities Act*, R.S.A. 2000 c. R- 10, s. 5; *Health Professions Act*, R.S.A. 2000 c. H-7 ss. 1, 57; Operation of Approved Hospitals Regulation, Alberta Regulation 247/1990 s. 33.1

Authorities Cited: AB: Investigation reports H2009-IR-003 and F2009-IR-001; Alberta Hansard November 29, 1999

Cases Cited: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27

I. BACKGROUND

[para 1] Prior to April 1, 2009, the Alberta Alcohol and Drug Abuse Commission (AADAC) administered drug and alcohol treatment programs under the authority of the *Alcohol and Drug Abuse Act* R.S.A. 2000 c. A-38. AADAC was specifically excluded from the definition of "custodian" under the HIA by virtue of section 1(1)(f)(xv). In addition, services provided by AADAC were excluded from the definition of "health service" under section 1(1)(m). However, on April 1, 2009, the *Alcohol and Drug Abuse Act* was repealed and services provided by AADAC were no longer excluded from the definition of health services under the HIA. In addition, by Ministerial Regulation, Alberta Health Services (AHS) assumed responsibility for operating AADAC programs.

[para 2] On June 5, 2009, on referral by his treating psychiatrist, the Complainant sought addictions counseling services from a counselor with AHS.

[para 3] The addictions counselor recorded information disclosed to her by the Complainant regarding the condition for which he sought counseling. She then told the Complainant that because he was an employee of AHS she would have to report what he told her to her supervisor for further direction. She also reminded him of the Alberta Health Services Code of Conduct.

[para 4] The addictions counselor requested that the Complainant complete a "Consent to Disclose Individually Identifying Health Information" form so that the counselor could contact his treating physician.

[para 5] The consent form signed by the Complainant is prefaced by the following:

> I understand that the purpose of the collection of my information is to permit Alberta Health Services to provide me continuous care, treatment planning, and treatment services.

[para 6] It states that he consented to allow AHS to collect the following health information:

> To confirm with [the treating physician] the client had spoken to him about his situation.

[para 7] According to AHS, an acting manager of a regional office offering addictions counseling, (the "acting manager"), who was not the Complainant's addictions counselor, called the physician to determine whether the Complainant had informed his employer regarding the issues surrounding the reasons the Complainant had sought addictions counseling.

[para 8] The acting manager then spoke to an "addictions privacy advisor", who directed the acting manager to disclose the information obtained from counseling to human resources employees of AHS. This information, and the information given to the addictions counselor by the Complainant, became the basis for a human resources investigation of which the Complainant was the subject. The Complainant was subsequently suspended from work as a result of the investigation. AHS then reported the suspension and the circumstances giving rise to it to the governing body of the Complainant's health profession.

[para 9] On February 11, 2010, the Complainant made a complaint to the Commissioner that AHS Addiction and Mental Health Services (AHSAMHS) had disclosed his personal health information to his employer, AHS, without his consent or lawful authority.

[para 10] The Commissioner authorized a mediator to investigate and attempt to resolve the matter. As the mediator was unable to resolve the complaint, the matter was scheduled for a written inquiry.

[para 11] As noted above, the HIA has been amended. I have determined that the version of the HIA in force between April 1, 2009 and October 29, 2009 is relevant to the matter before me, as it is argued that AHS collected, used, and disclosed the Complainant's health information during the time this version of the HIA was in force and this version of the HIA governed AHS's treatment of health information at the time referred to in the complaint.

II. ISSUES

Issue A: Did Alberta Health Services (AHS) collect information about the Complainant from Alberta Health Services Addiction and Mental Health Services (AHSAMHS)? If so, was the collection a collection of personal information and subject to the FOIP Act, or a collection of health information and subject to HIA?

Issue B: If AHS collected the Complainant's personal information from AHSAMHS and this collection is subject to the FOIP Act, was this collection in accordance with, or in contravention of, Part 2 of the FOIP Act?

Issue C: If AHS collected the Complainant's health information from AHSAMHS, and this collection is subject to HIA, was this collection in accordance with, or in contravention of, Part 3 of HIA?

Issue D: Did AHSAMHS disclose information about the Complainant to AHS? If so, was this disclosure subject to the FOIP Act or HIA?

Issue E: If AHSAMHS disclosed personal information to AHS, and this disclosure is subject to the FOIP Act, was this disclosure in accordance with, or in contravention of, Part 2 of the FOIP Act?

Issue F: If AHSAMHS disclosed health information that is subject to HIA to AHS, was this disclosure in accordance with, or in contravention of, Part 5 of HIA?

Issue G: Did AHS use information collected from AHSAMHS about the Complainant?

Issue H: If AHS used personal information collected from AHSAMHS, was this use subject to the FOIP Act? If so, was this use in accordance with, or in contravention of, Part 2 of the FOIP Act?

Issue I: If AHS used health information collected from AHSAMHS, was this use subject to HIA? If so, was this use in accordance with, or in contravention of, Part 4 of HIA?

III. DISCUSSION OF ISSUES

Issue A: Did Alberta Health Services (AHS) collect information about the Complainant from Alberta Health Services Addiction and Mental Health Services (AHSAMHS)? If so, was the collection a collection of personal information and subject to the FOIP Act, or a collection of health information and subject to HIA?

[para 12] As described above, some of the information at issue in this case (that collected by the counselor) came into AHS's possession when an addictions counselor collected it from the Complainant when he came to her for treatment. The remainder came into its possession when it collected it from another custodian (the Complainant's treating physician). In each case, the result was that the information came under the custody and control of AHS.

[para 13] The Complainant argues the following:

> AHS and AHS-AMHS should be treated as two distinct entities for the purposes of this complaint. While AHS has dual roles under the Health Information Act, R.S.A. 2000, c. H-5 (the HIA) and the Freedom of Information and Protection of Privacy Act (the FOIP Act) as an employer/public body and health care provider / custodian, AHS cannot play both roles simultaneously. Given the context surrounding [the Complainant's] complaint, AHS-AMHS should be treated as a custodian in accordance with the HIA and AHS should be considered a public body in accordance with the FOIP Act.

[para 14] The Complainant also argues that the information the counselor obtained from him is health information intended to enable the counselor to offer a diagnosis and to provide treatment to him. He therefore reasons that AHS's collection, use, and disclosure of the information for human resources purposes is subject to the HIA. Moreover, he argues that AHS was in contravention of the HIA when employees of its human resources department obtained the Complainant's health information from the addictions counselor and the acting manager.

[para 15] AHS notes that AHS and AHSAMHS are the same entity. As AHSAMHS, AHS operates addictions counseling and treatment programs previously operated by AADAC. As AHS, it also manages employees, including the employees of AHSAMHS. AHS submits that section 4(1)(u) of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") applies to the information it collected from the Complainant. It reasons that its collection of the Complainant's information is therefore subject to the HIA because the information is health information and because it is a custodian under the HIA. AHS maintains that its collection of the Complainant's information is authorized by the HIA.

[para 16] The first question to be addressed in either case is whether the information that is the subject of the complaint is subject to the HIA or the FOIP Act.

Is the information in issue "health information" under the HIA?

[para 17] "Health information" is defined by section 1(1)(k) of HIA in the following way:

> *1(1) In this Act,*
>
> *(k) "health information" means one or both of the following:*
>
> *(i) diagnostic, treatment and care information;*
> *(ii) registration information…*

The information collected by AHS that is at issue is not registration information. However, if the information is diagnostic, treatment and care information, then it is health information.

[para 18] "Diagnostic, treatment and care" information is defined by section 1(1)(i) in the following way:

(i) "diagnostic, treatment and care information" means information about any of the following:

(i) the physical and mental health of an individual;
(ii) a health service provided to an individual, including the following information respecting a health services provider who provides a health service to that individual…
…
and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record…

[para 19] Information about a health service provided to an individual is also diagnostic, treatment and care information, and therefore health information.

[para 20] Section 1(1)(m) of HIA defines "health service" in the following way.

1(1) In this Act,

(m) "health service" means a service that is provided to an individual for any of the following purposes:

(i) protecting, promoting or maintaining physical and mental health;
(ii) preventing illness;
(iii) diagnosing and treating illness;
(iv) rehabilitation;
(v) caring for the health needs of the ill, disabled, injured or dying,

but does not include a service excluded by the regulations…

[para 21] As discussed above, the *Alcohol and Drug Abuse Act* was repealed in its entirety on April 1, 2009 and the services it authorized were no longer excluded from the HIA. Through a series of amendments and ministerial orders, AHS became a custodian under the HIA and assumed responsibilities for providing the services for which AADAC had been responsible. However, it does not necessarily follow from the fact that information regarding counseling services is no longer specifically excluded from the HIA, that these services are necessarily included in the definition of "health services," even if they are provided by AHS. That determination must be made through consideration of the purpose of providing addictions counseling services. If the services are provided for a purpose, or purposes, enumerated in section 1(1)(m) of the HIA, then the services are "health services," as contemplated by that provision, and information generated or collected while providing these services is therefore "diagnostic, treatment

and care information" under section 1(1)(i), and, for that reason, "health information" under section 1(1)(k).

[para 22] The former *Alcohol and Drug Abuse Act* contained a bar to disclosure of information about clients obtained through treatment. Moreover, this bar describes the activities of the former Commission as providing treatment, care or services, and indicates that treatment, care, or services could be provided at a hospital, clinic or centre operated by the former Commission.

> *9(1) Except as otherwise provided in this section,*
>
> *(a) a person who is or has been a member or employee of the Commission or is or has been employed or engaged in the administration of this Act shall not disclose or be compelled to disclose any information obtained by the person that names or identifies a client who has been provided with treatment, care or services by the Commission, and*
>
> *(b) any file, record, document or paper in the custody of the Commission that names or identifies a client who has been provided with treatment, care or services by the Commission shall not be disclosed to any person or be admitted in evidence in any proceedings.*
>
> *(2) In this section, "client" means a person who has been provided with treatment, care or other services by the Commission or at a hospital, clinic or centre operated by the Commission…*

[para 23] The description of services contained in the former *Alcohol and Drug Abuse Act* is consistent with services intended to protect, promote or maintain physical and mental health or for rehabilitation as contemplated by section 1(1)(m), given that they may be offered in a hospital or clinic where these kinds of services are typically provided. In addition, I find that the purpose of providing addictions counseling services is consistent with the purposes of promoting or maintaining physical or mental health and rehabilitation. The counseling services provided to the Complainant were intended to promote and maintain his mental and physical health, given that he attended addictions counseling on referral by his treating psychiatrist and treating physician, as part of his treatment by them. I also find that a purpose of addiction counseling is to assist patients to become free from addiction, and is therefore consistent with the purpose of rehabilitation.

[para 24] I find that addiction counseling of the kind sought by the Complainant is a health service for the purpose of section 1(1)(m). As I find that addiction counseling is a health service, I find that information about the Complainant collected in the context of providing addiction counseling is diagnostic, treatment and care information for the purposes of section 1(1)(i). This conclusion applies both to the information collected by

the counselor directly from the Complainant, as well as the information initially collected by the Complainant's treating physician that the physician subsequently provided to AHS on its request. I find that what AHS collected from the treating physician was health information, because it is information as to whether the Complainant had taken medication from his workplace, which is, in turn, information regarding the extent and the affects of his addiction that the Complainant communicated to his treating physician in the course of being treated.

[para 25] In reaching the conclusion that this is health information, I note Investigation Reports H2009-IR-003 and F2009-IR-001, which the Complainant drew to my attention. These cases address collection of individually identifying health information by a custodian for the purposes of determining eligibility for employment. In that case, the investigator made the following finding:

> The information collected, used and disclosed relevant to this complaint is about immunizations provided to the Complainant. This information falls both within the definition of health information and the definition of personal information. As stated by the Commissioner in Orders H2005-001 and F2004-005, these "definitions have some common ground." The Commissioner went on to say that these definitions could apply to the same information.

[para 26] The investigator determined that the purpose of a custodian in collecting health information would decide which statutory scheme applied – the FOIP Act or the HIA.

> The Complainant did not seek a health service from Caritas; she sought a job. Caritas did not provide any care or treatment to her for an illness. Caritas accessed the Complainant's health records via Netcare to see whether her immunizations were up to date to determine if she was a suitable candidate to begin working. While this may protect her from exposure to a communicable disease, the action was taken because the Complainant sought a job. The collection did not occur as the result of the Complainant seeking a health service. It seems to be me the purpose for collection and use of this information is primarily for employment management purposes.
>
> This context in which the Complainant presented to Caritas was not to receive a health service… I believe the primary purpose of collection was to manager or administer personnel. I find that a health service was not provided. As no health service was provided, the information is not health information. I therefore find the information is personal information subject to FOIP.

The investigator then determined that section 33 of the FOIP Act authorized Caritas to collect a complainant's health information for the purposes of managing personnel and that section 34(1) of the FOIP Act authorized Caritas to collect the information indirectly, from a source other than the subject of the information.

[para 27] I disagree with the conclusion in the investigation report. While it is true that a public body that is a custodian may need to manage personnel, and that in doing so it may collect, use and disclose information that meets the definition of health information in the HIA, (provided that the information is given to it by someone who has the authority to disclose it), the public body is not entitled to simply take and use such information *that is in its custody and control by virtue of its role as custodian*, and apply

it to personnel management purposes. In other words, a public body that is a custodian cannot, simply by applying what is health information, (by virtue of the definition in the HIA), for a purpose that is not provision of a health service, such as managing personnel, transform the character of the information from health information into personal information by doing so.

[para 28] In my view, contrary to the conclusions in the Investigation Report, a public body that is a custodian may use health information that is in its custody and control by virtue of its role as a custodian, only for the purposes specified in the HIA. As will be discussed further below, the FOIP Act does not authorize a public body that is a custodian to collect or use such information for personnel management; rather, as will be seen, it expressly excludes such information, when it is in a custodian's custody and control, from the FOIP Act.

Was the collection of the Complainant's health information authorized by the FOIP Act?

[para 29] The information in issue is health information within the terms of the HIA. As noted above, some of it was collected by AHS from the Complainant in the course of providing treatment to him, and some of it was collected from the Complainant's physician.

[para 30] The question that arises is whether by virtue of the fact that AHS is also a public body within the terms of the FOIP Act, and in this role has a personnel management function (for which the collection and use of personal information is authorized by that Act), this information could be collected or used by AHS in accordance with the FOIP Act, in its personnel management role, for the purposes of the investigation into the Complainant's conduct that resulted in his suspension.

[para 31] In my view, the answer is no. Section 4(1)(u) of the FOIP Act contains the following exclusion:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *...*
>
> *(u) health information as defined in the Health Information Act that is in the custody or under the control of a public body that is a custodian as defined in the Health Information Act.*

[para 32] AHS is a public body that is a custodian as defined in the HIA. Thus, by virtue of section 4(1)(u) – which carves health information that is in the custody and control of a custodian out of the FOIP Act – the information collected by the AHS as custodian, from the Complainant directly, is excluded from the FOIP Act. As a result, the provisions of the FOIP Act that specifically authorize collection of personal information by public bodies for personnel management cannot be taken as authorizing the collection

of this health information, which was in the custody or control of a custodian, for personnel management purposes.

[para 33] With respect to the information collected from the physician, the FOIP Act does not preclude public bodies from collecting information from physicians for their personnel management purposes as long as this collection has been authorized by the subject of the information. However, the FOIP Act contains no means or right in public bodies by which they can demand or require health information from other custodians or from anyone else for such purposes. Moreover, the Complainant's treating physician was not authorized by the FOIP Act, in the absence of the Complainant's consent, to provide the information to AHS for the purposes for which it was given.

[para 34] As I will discuss further below, I do not believe the Complainant authorized his treating physician to give, and AHS to collect and use, his health information for the purposes for which AHS intended to collect and use it.

Issue C: If AHS collected the Complainant's health information from AHSAMHS, and this collection is subject to HIA, was this collection in accordance with, or in contravention of, Part 3 of HIA?

Issue I: If AHS used health information collected from AHSAMHS, was this use subject to HIA? If so, was this use in accordance with, or in contravention of, Part 4 of HIA?

[para 35] As the purposes for which health information may be used are the same as the purposes for which it may be collected, I will address these issues together.

[para 36] AHS argues that it was authorized to collect the Complainant's health information, as it did, under sections 20(a) and 20(b) of the HIA.

[para 37] To reiterate, the evidence and argument before me establishes that AHS collected the Complainant's health information in two ways: first, health information was gathered by the addictions counselor from the Complainant when the Complainant attended counseling, and second, health information was collected from the Complainant's treating physician for human resources purposes.

[para 38] AHS summarizes its collection of the Complainant's health information in the following way:

> Given the information was obtained when an AHS employee [the Complainant] shared it during a counseling session and given the privacy, professional and conduct implications, the counselor consulted with her supervisor, who then consulted with an Acting Senior Manager and the Privacy Advisor of Addictions. No personal identifiers were given at that time.
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> On June 12, 2009 the Complainant attended another session with the counselor. The Complainant continued to present as reluctant to report the matter beyond his physician. The counselor encouraged him to report his actions to the appropriate bodies and to let Addictions know of this. The Complainant signed a consent to allow Addictions to speak to the

> Complainant's physician to determine if the employee's supervisor had been notified as to the theft and use of medication. The counselor encouraged the client to inform the physician of his most recent use of medication. The counselor advised the Complainant that there had been a consultation with the Privacy Advisor and were waiting for further direction. The counselor encouraged the client to inform the physician of his most recent use of medication as the Complainant had indicated that he had not reported it to the physician. The counselor advised that patient safety was a concern and the Complainant stated that there was no risk to safety and listed reasons why he felt that way. [my emphasis]
>
> That afternoon the Acting Senior Manager telephoned the client's [the Complainant's] physician who confirmed what the client had reported to the counselor. The physician had not recently talked to the client so it was unlikely that the physician was aware that the client had taken more medication while the physician was on holiday. The Acting Senior Manager advised the physician that she had consulted with Addictions Privacy Advisor about the situation and was directed to encourage the client to report his actions to his employer and his professional body.
>
> The Acting Senior Manager attempted to contact the client to confirm whether he had advised his supervisor or professional body but was unable to do so. On June 24, 2010 a meeting with human resources, Ethics and Compliance and Privacy took place. It was decided given the potential professional, competency and safety issues that a human resources investigation be undertaken. The Acting Senior Manager was requested to contact the client of this decision and to complete an Ethics Reporting Form. The completed form contained the identity of the client and was forwarded to the human resources lead who would conduct the investigation.

AHS refers to an "acting senior manager" in this submission; however, the affidavit of the individual who contacted the Complainant's physician refers to herself as "an acting manager". As AHS's evidence also contains reference to another individual who is an acting senior manager, I have elected to refer to the individual whom AHS refers to as an "acting senior manager" in its submissions as "the acting manager".

[para 39] The acting manager characterizes the release signed by the Complainant as follows:

> I advised the physician that the client had signed a release allowing me to speak to him to ask if the physician was aware that the client had stolen medication from the hospital and used it himself… The physician confirmed the client had told him he stole medication from his workplace and used it… I advised the physician that we had encouraged the client to report his actions to his professional college and employer and at present the client was thinking things over.

[para 40] There is ambiguity in AHS's evidence and argument as to the nature of the Complainant's authorization, and the acting manager's specific purpose for contacting the Complainant's treating physician. In its arguments, AHS argues that the purpose for obtaining the release and contacting the treating physician was to determine whether the Complainant had advised his employer of his medication usage; however, the acting manager's evidence was that the release authorized her to find out whether the Complainant had told the treating physician that he had taken medication from his workplace. She then told the physician that the Complainant had been encouraged to report himself to his employer.

[para 41] As set out above, the consent form itself authorizes AHS to collect the following information from the treating physician:

> To confirm with [the treating physician] the client had spoken to him about his situation.

[para 42] In my view, both of AHS's stated purposes for obtaining the Complainant's consent to collect his health information from his treating physician are consistent with collecting information for a human resources investigation. Neither purpose is consistent with providing treatment or health services. Consequently, I need not determine which of AHS's stated purposes in collecting the Complainant's health information was its purpose in collecting the information, as the question is whether the HIA authorizes a custodian to collect a health services provider's own health information for the purposes of a human resources investigation. I must also consider whether there is a discrepancy between the health information the Complainant authorized AHS to obtain from his treating physician, and the purposes for which he authorized it to do so, and the information AHS states that it obtained, and its purposes for collecting it. If there is a discrepancy, I will consider whether section 22 of the HIA permits this discrepancy.

[para 43] Section 18 of the HIA prohibits a custodian from collecting health information unless authorized to do so by that Act:

> *18 No custodian shall collect health information except in accordance with this Act.*

[para 44] Section 20 establishes the circumstances in which a custodian may collection individually identifying health information.

> *20 A custodian may collect individually identifying health information*
>
> *(a) if the collection of that information is expressly authorized by an enactment of Alberta or Canada, or*
>
> *(b) if that information relates directly to and is necessary to enable the custodian to carry out a purpose that is authorized under section 27.*

A custodian may collect individually identifying health information if doing so is expressly authorized by an enactment, or if its purpose is authorized under section 27 of the HIA.

[para 45] I will now consider whether AHS's collections of the Complainant's health information comply with section 20, and thereby comply with section 18.

[para 46] With regard to the initial counseling session in which the addictions counselor collected the Complainant's health information from him, I find that she did so, in part, to provide a health service to him. This purpose for collection is authorized by section 20(b) of the HIA, given that the addictions counselor, on behalf of AHS, at first collected this information to provide health services to the Complainant, which is a

purpose consistent with section 27(1)(a), and therefore authorized under section 20 of the HIA.

[para 47] However, the notes of the addictions counselor also establish that once she learned that the Complainant was an employee of AHS, she was immediately concerned that he was not complying with AHS's code of conduct. The topic of discussion at the initial session turned to discussion of the source of the medication the Complainant had taken at his workplace, and whether he had violated any of AHS's workplace policies. Following the initial interview, she discussed the Complainant's employment status with her supervisor and a "Critical Incident" report documenting the Complainant's addiction and his use of medication in his workplace was prepared and forwarded to an acting senior manager and to other members of AHS responsible for human resources management. These actions are consistent with the purpose in collecting the Complainant's health information being for human resources management and disciplinary purposes. This purpose is inconsistent with providing treatment under section 27(1)(a). In essence, the Complainant's health information was initially collected for the purpose of providing treatment, but once he revealed that he was an employee of AHS, subsequent health information was collected for a human resources management purposes.

[para 48] As noted above, I have found that AHS obtained the Complainant's health information from his family physician for human resources investigation purposes. The purpose of ensuring that a code of conduct is complied with is inconsistent with providing health services to a patient, and AHS does not argue that it is. As discussed above, the question is whether collecting this individually identifying health information so that it could be used for this purpose is authorized by section 20(a) or (b) of the HIA.

Section 20(a)

[para 49] Section 20(a) permits collection that is expressly authorized by an enactment. AHS drew my attention to section 5 of the *Regional Health Authorities Act* as authority for its collection, use, and disclosure of the Complainant's health information in order to conduct an investigation. This provision states:

> *5 Subject to this Act and the regulations, a regional health authority*
>
> *(a) shall*
>
> *(i) promote and protect the health of the population in the health region and work toward the prevention of disease and injury,*
> *(ii) assess on an ongoing basis the health needs of the health region,*
> *(iii) determine priorities in the provision of health services in the health region and allocate resources accordingly,*

> *(iv) ensure that reasonable access to quality health services is provided in and through the health region, and*
>
> *(v) promote the provision of health services in a manner that is responsive to the needs of individuals and communities and supports the integration of services and facilities in the health region,*
>
> *and*
>
> *(b) has final authority in the health region in respect of the matters referred to in clause (a).*

AHS reasons that it has the duty to protect the health of the population in the health region and, therefore, a duty to ensure the safety of patients and staff. It suggests that collecting the Complainant's health information for human resources purposes was done in furtherance of this duty.

[para 50] Section 20(a) authorizes collection only where an enactment *expressly* authorizes collection. Section 5 of the *Regional Health Authorities Act* does not refer to collection of information, or refer to specific duties that would necessitate the collection of individually identifying health information. Consequently, I find that it does not provide express authorization for the collection of the Complainant's health information from his family physician.

[para 51] Clearly, there are circumstances in which a health authority might consider it useful to collect individually identifying health information in order to fulfill its duties, as it interprets them, under section 5 of the *Regional Health Authorities Act*. However, the HIA is clear that the authorization provided by an enactment for the collection of health information must be express. Moreover, section 4 of the HIA establishes that the HIA prevails over the *Regional Health Authorities Act* in the event of conflict or inconsistency between these two statutes. Consequently, it is not possible to "read down" or otherwise relax the requirements of section 20 of the HIA in situations where a health authority decides that collecting a patient's health information will assist it in the way it decides to perform general duties under the *Regional Health Authorities Act* in the absence of express legislative authority to do so.

[para 52] Furthermore, it is not clear how this purpose, which is disciplinary in nature, coincides with the purpose of protecting public health. AHS collected the Complainant's health information from his treating physician for human resources purposes. Even if I were persuaded that section 5 of the *Regional Health Authorities Act* provided sufficient authority to collect personally identifying health information for the purpose of promoting public health, the Public Body has not explained why subjecting the Complainant to a human resources investigation was necessary for promoting and protecting the public health.

[para 53] In its arguments, cited above, AHS suggests that the Complainant posed a risk to public health because he had not told his physician about his most recent use of

medication. However, the Complainant states at paragraph 5 of his affidavit that he did tell his physician of his most recent relapse. As a result of this admission, the Complainant was referred to a psychiatrist, who then referred the Complainant to seek addictions counseling. The affidavits of the counselor and the acting manager confirm that they did not establish the date of the Complainant's most recent relapse when they attempted to confirm whether he had advised his physician about it. The acting manager confirmed that the Complainant's physician told her that the Complainant had reported his most recent relapse to him. Consequently, there was no reasonable basis for AHS employees to form the opinion that the Complainant posed a threat to public health by not telling his physician of his most recent relapse, even if I were to accept that if he had not done so it he would have posed a threat to public health.

Section 20(b)

[para 54] Section 20(b) authorizes collection of health information to enable a custodian to carry out a purpose under section 27. Section 27 contains an exhaustive list of uses for which health information may be applied. It states, in part:

> *27(1) A custodian may use individually identifying health information in its custody or under its control for the following purposes:*
>
> *(a) providing health services…*
>
> *…*
>
> *(c) conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline…*
>
> *…*
>
> *(f) carrying out any purpose authorized by an enactment of Alberta or Canada*

Under section 27(1), a custodian may use individually health information in its custody or control for the purpose of providing health services, conducting investigations, or for carrying out a purpose authorized by an enactment. Under section 20(b), a custodian may also collect information so that it may be used for these purposes.

[para 55] With regard to the initial counseling session in which the addictions counselor collected the Complainant's health information from him, I have already found that she did so, in part, to provide a health service to him. This purpose for this aspect of the collection is authorized by section 20(b) of the HIA, given that the addictions counselor, on behalf of AHS, collected this information to provide health services to the Complainant, which is a purpose consistent with section 27(1)(a), and therefore authorized under section 20 of the HIA. However, the evidence of the critical incident report and the addictions counselor's notes indicate that she asked the Complainant questions about the extent of his addiction also in order to determine whether he was in compliance with AHS's Code of Conduct and to determine whether he should be

compelled to comply with the Code of Conduct if he were not. In addition, the evidence of AHS is unequivocal that it did not collect the health information of the Complainant from his treating physician for the purposes of treating him. I will therefore consider whether collecting health information for the purpose of conducting a human resources investigation was authorized by either clause (c) or (f) of section 27(1).

Section 27(1)(c)

[para 56] Section 27(1)(c) enables a custodian to use, and therefore collect, health information for the purpose of conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline.

[para 57] I acknowledge the Complainant is a member of a health discipline. However, at the time he sought health services from AHS and authorized AHS to contact his physician for the purposes of providing treatment to him, he did so as a patient, rather than as a member of a health discipline. Health services are not provided to members of health disciplines, as such, but to individuals.

[para 58] AHS argues the following in relation to the application of section 27(1)(c) to its use of the Complainant's health information:

> As previously stated in paragraph 18 collection of health information was done by AHS and initially related to and necessary to carry on the purpose of providing health services (section 20(b) of HIA.)
>
> When this Ethics Reporting Form that contained the Complainant's identity was completed and sent to human resources this was a "use" within AHS for the purpose of conducting an investigation relating to a member of a health profession (section 27(1)(c)).
>
> …
>
> The Health Information Act Guidelines and Practices published by the Government of Alberta states at page 157 that (TAB #8)
>
> > Under this provision, individually identifying health information could be used by a custodian to investigate the actions or conduct of, or to initiate disciplinary action against, an employee, contractor or agent who is a member of health profession or health discipline.
>
> Investigation is defined as: refers to a systematic process of examination, inquiry and observation.
>
> AHS in this instance used limited health information (the name of the employee, facility and presenting problem) to initiate a human resources investigation as to the fitness of the employee to continue his duties. This was only undertaken after repeated requests for the employee to self-report were not acted upon.
>
> An investigation into the conduct and competence of one of its health professionals was warranted under AHS's common law and statutory duties to ensure the safety of its patients and staff. Under section 5 of the *Regional Health Authorities Act* AHS has the duty to protect the health of the population in the health region and has final authority in the region in respect of matters referred to in section 5(a) (Tab # 9).

With regard to ensuring professional competence of its staff the Operation of Approved Hospitals Regulation 247/1990 section 33.1 requires a hospital to advise a professional body when a member's authority to treat patients has been significantly altered because of misconduct Tab #10).

AHS' approach to this matter was aimed at assisting the Complainant internally while addressing any misconduct with treatment options. Had AHS wished to involve other external agencies it may with a view to further investigation it may have disclosed limited health information pursuant to section 37.1 of the *Health Information Act*. Instead AHS only disclosed to the Complainant's professional body at the conclusion of its investigation due to the regulatory and statutory obligations it was under. In particular section 57 of the *Health Professions Act* where it is incumbent upon an employer to give notice to the profession's complaints director. Failure to do so is an offence under that Act. (Tab #11)

[para 59] In turn, the Complainant argues:

AHS's response submissions are inadequate in the following respects:

- AHS did not put any evidence before the Commissioner or refer to the evidence [the Complainant] put before the Commissioner. Accordingly, [the Complainant's] evidence should be preferred where there are discrepancies between the background described by AHS and [the Complainant's] sworn affidavit evidence;

- AHS failed to appreciate that the contexts in which an individual's information is collected and used must be consistent. As a result, AHS failed to consider whether the context in which [the Complainant's] health information was used was consistent with the context in which it was collected;

- AHS misinterpreted section 27(1)(c) of the HIA in concluding that it authorized AHS to use [the Complainant's] health information to subject him to a human resources [investigation];

- AHS similarly misinterpreted other statutory provisions to justify subjecting [the Complainant] to a human resources investigation;

- It was inappropriate for AHS to justify breaching [the Complainant's] privacy on the basis of professional regulation, given that AHS is not responsible for regulating the [Complainant's] profession; and

- AHS relied on a myth, rather than evidence, to conclude that [the Complainant's] medication use threatened patient safety. This myth was also undermined by the opportunities to learn more about patient care that AHS squandered and the length of time that AHS took to decide to investigate [the Complainant].

AHS's response also makes it clear that AHS failed to fulfill its mandate to provide reasonable health care to [the Complainant]. Disciplining health professionals rather than treating them is not in the best interests of either health professionals or their patients, given the risk that health professionals will not seek treatment to avoid professional repercussions. To better protect patients, the privacy of health professionals should be protected. Patient confidentiality is key to providing reasonable health care. Employees of AHS are entitled to the same level of reasonable health care (and confidentiality) as other Albertans. Surely neither the HIA [nor] FOIP [was] intended to undermine this basic proposition.

[para 60] The Complainant is critical of AHS's interpretation of section 27(1)(c) of the HIA for the following reasons:

> [AHS's] interpretation of subsection 27(1)(c) is unacceptable for three reasons. First, it disregards that the context in which AHS used [the Complainant's] health information was inconsistent with AHS's role as custodian. As per the Caritas Investigation Report, employers may order human resources investigations, and thereby manage the workforce – custodians may not. Therefore, because AHS-AMHS was a custodian of [the Complainant's] health information, AHS was precluded from using that health information as an employer to order the investigation.
>
> Second, AHS's interpretation disregards the intended use of subsection 27(1)(c) of the HIA. Subsection 27(1)(c) is not meant to empower custodians to persecute patients who are health professionals – rather, it empowers custodians to investigate the administration of health care to patients. As submitted in paragraphs 61 and 62 of [the Complainant's] initial submissions, custodians may use a patient's health information under subsection 27(1)(c) to investigate or discipline that patient's care givers. Accordingly, this section only permits the use of a health professional's health information to initiate investigations or disciplinary proceedings *into care provided to* that health professional. [my emphasis]
>
> Third, AHS's interpretation of subsection 27(1)(c) is unacceptable because it enables a dual entity to effectively wear both the hat of custodian and the hat of public body simultaneously, contrary to the Caritas Investigation Report. Permitting AHS to use [the Complainant's] health information to subject him to a human resources investigation would essentially mean that AHS can use the health information of health professionals as an employer, as long as investigation is initiated first. Given that AHS cannot use health information directly to manage personnel due to the context in which health information is collected, it also should be precluded from indirectly using that information as an employer.

[para 61] As AHS argues that section 27(1)(c) authorizes its use of the Complainant's health information in order to conduct an employment investigation, I infer that it also relies on this provision to authorize the collections of the Complainant's health information from the Complainant's treating physician for this purpose under section 20(b).

[para 62] In my view, AHS's interpretation of section 27(1)(c) relies on a literal reading of section 27(1)(c) without consideration of the context of this provision within section 27 or within the HIA itself. I accept that if one were to read this provision in isolation, one could conclude that it appears to permit a custodian to use, and therefore to collect, any health information that it has in its control or custody for the purpose of conducting investigations or discipline proceedings of any members of a health profession or health discipline.

[para 63] However, statutory provisions are to be interpreted consistently with the scheme and remedial purposes of the statutes in which they are found. The Custodian drew my attention to *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, primarily to establish that the use of Hansard is sometimes of assistance in statutory interpretation. However, I find this case is more on point in relation to its adoption of a purposive and contextual approach to statutory interpretation. The Supreme Court of Canada said at paragraphs 20 – 23 of this judgment:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
>
> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates 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 he 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.
>
> …
>
> I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.

[para 64] The Court in *Rizzo Shoes* noted that the proper interpretation of a statutory provision does not necessarily rely on wording alone. Rather, one must also consider the context of the provision, and the remedial purpose of the statute in question, in order to determine legislative intent.

[para 65] The objects of the HIA are set out in section 2. This provision states:

> *2 The purposes of this Act are*
>
> *(a) to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information,*
>
> *(b) to enable health information to be shared and accessed, where appropriate, to provide health services and to manage the health system,*
>
> *(c) to prescribe rules for the collection, use and disclosure of health information, which are to be carried out in the most limited manner and with the highest degree of anonymity that is possible in the circumstances,*

> *(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,*
>
> *(e) to provide individuals with a right to request correction or amendment of health information about themselves,*
>
> *(f) to establish strong and effective remedies for contraventions of this Act, and*
>
> *(g) to provide for independent reviews of decisions made by custodians under this Act and the resolution of complaints under this Act.*

[para 66] These provisions indicate that the HIA is intended to protect the privacy of individuals in relation to their health information, and to limit the extent to which their health information may be collected, used, or disclosed. Members of health disciplines are individuals under the HIA when they receive health services, and section 2(a) indicates that the privacy of the health information of individuals is to be protected. No distinction is made in section 2(a) in relation to the identities of individuals or their professions. The purpose provisions indicate that disciplining patients (who happen to be health service providers) and enabling employers to review the health information of employees who are patients was not among the purposes of the legislature in enacting section 27(1)(c).

[para 67] To further its interpretation of section 27(1)(c), AHS submitted an excerpt from Hansard in its rebuttal submissions. The excerpt is from November 29, 1999 and discusses what is now section 27(1)(c). In my view, this passage, to the extent that Hansard, as an extrinsic aid, is relevant to the interpretation of a statutory provision, supports the view that patient health information is not to be collected or used for the purpose of disciplining a health service provider who is a patient. This excerpt states:

> Another question raised was whether regional health authorities can make an invasive inquiry under the act and utilize the information before a professional body for disciplinary purposes. This section enables custodians to use individually identifying health information for conducting investigations, disciplinary proceedings, practice reviews, or inspections relating to member of the health profession or health discipline. This would permit a regional health authority to use individually identifying health information if they were concerned about the professional competence or conduct of an affiliate. In this case a custodian would likely be following up on a patient's , family member's or colleague's concern about a specific incident that occurred. (My emphasis) The custodian as the employer is responsible for the behavior of its employees and other affiliates and would need to follow up on any incident that occurred. If the custodian determined that the matter was serious, the professional's regulatory body would likely be contacted to determine if the incident warrants disciplinary action.
>
> We also heard a question on whether a regional health authority or other employer could obtain health information to screen prospective employees. The answer is no, Mr. Speaker... The policy intent was that no custodian or an employer may use or get identifying health information about a prospective employee without the individual's consent.

[para 68] The debate in the legislature over section 27(1)(c) indicates that there was concern in the legislature that custodians, as employers, could make invasive inquiries into patient information under the authority of this provision. It also appears that the legislature considered section 27(1)(c) to apply in situations where the conduct of a health service provider or affiliate arising from an incident required discipline by the employer, and health information documenting the incident was necessary. That investigations for the purposes of section 27(1)(c) were contemplated as taking place once a patient, family member, or colleague reported a "specific incident that occurred", indicates that it is the health service provider's role in a specific incident – to which a patient's health information may be relevant – that is to be investigated, not the health service provider's state of health. In other words, because the legislature referred to a patient, a patient's family, or a colleague as making a complaint, the person that would be the subject of the complaint "about a specific incident" would be a health services provider, and the relevant information would be the health information of a patient of that health services provider that is relevant to that incident.

[para 69] There is nothing in the excerpt from Hansard provided by AHS to suggest that section 27(1)(c) was ever intended to enable a custodian to obtain the health information of a health service provider who is a patient, for the purposes of disciplining that health service provider.

[para 70] I agree with the Complainant that the purpose of section 27(1)(c) is to authorize a custodian to "investigate the administration of health care to patients" to ensure that appropriate standards of patient care are maintained by the individuals who provided health services. Health information of the patients of the health services provider who is being investigated within the terms of section 27(1)(c) may be necessary for this purpose as it documents the quality of patient care provided by a health services provider. Section 27(1)(c) acknowledges that there are circumstances in which a custodian must review patient health information in order to determine whether proceedings should be brought against the patients' health care provider and whether the health services provider is providing adequate care.

[para 71] However, I do not believe this provision can be read sensibly as also permitting the use, for the purposes of the types of proceedings contemplated in section 27(1)(c), of the health information of the member of the profession who is the subject of such a proceeding, that had been generated in the course of the custodian's providing a health service to the member, or that has been collected from another custodian who has provided such a service. In my view, such an interpretation would have the effect of excluding health services providers from the protection of the HIA in relation to their own health information. There is nothing in the HIA that suggests that patients who are also health service providers should have less protection in relation to their health information than anyone else seeking health services has.

[para 72] Moreover, I believe reading section 27(1)(c) in this manner would have the extremely deleterious chilling effect of discouraging health services providers with health problems, which could be seen as adversely affecting their ability to perform their

employment duties – such as the addiction problem that was the subject of the information at issue in this case – from seeking treatment, in order to avoid these problems from coming to light. This approach would have the effect of exacerbating the problems to patient care that the provision is seeking to avoid. I do not believe that the Legislature could possibly have intended this result.

[para 73] As section 27(1)(c) does not authorize use of a health services provider's own health information for the purpose of investigating that health service provider, it follows that I find that this provision did not authorize AHS to collect this information so that it could use it for this purpose. I find that AHS was not authorized by either section 20(a) or (b) to collect or use the Complainant's own health information for the purposes of subjecting him to a disciplinary investigation.

[para 74] I acknowledge the Complainant's argument that when human resources employees acquired the Complainant's health information that this amounted to a discrete collection of the Complainant's health information. I also note that the term "collect," as defined in the HIA, does not expressly include or exclude the possibility that health information may be collected internally, as well as from external sources. However, I have already found that section 27(1)(c) does not authorize the use of the Complainant's health information to which human resources employees applied it. Given that I have already found that there is no express legislative authority for AHS's collection of the Complainant's health information for human resources purposes, and that its collection of the Complainant's health information for human resources purposes was not intended to enable it to use it for a purpose authorized by section 27, it follows that whether the acquisition of the Complainant's health information by human resources employees is termed a "collection" or a "use", the "collection" or "use" is unauthorized. I therefore need not decide whether the receipt of the Complainant's health information by human resources employees amounted to a collection or a use, as the result is the same. Gaining access to the Complainant's health information for the purposes of conducting a human resources investigation in relation to him contravened the HIA.

Section 27(1)(f)

[para 75] I have already rejected the argument that section 5 of the *Regional Health Authorities Act* expressly authorized collection of the Complainant's health information under section 20(a). I will now consider whether collecting health information for the purpose of conducting an employment investigation is a purpose authorized under section 27(1)(f) by that statute.

[para 76] In considering whether the *Regional Health Authorities Act* expressly authorized collection of the Complainant's health information, I found that AHS had not established any credible basis for its argument that the Complainant posed a threat to public health. Consequently, it follows that I find that AHS was not authorized by section 5 of the *Regional Health Authorities Act* to use the Complainant's health information to promote or protect the public health, or to collect it for that purpose.

Consent

[para 77] There is some discussion in AHS's submissions of the Complainant's consent to collection, use and disclosure of his health information that he provided to his treating physician. I begin by noting that the HIA does not contemplate collection or use of individually identifying health information, other than for the purposes listed in section 27 or if expressly authorized by statute, *regardless of the patient's consent.* As explained above, neither condition applies here. Furthermore, for the reasons given in the discussion below, I do not believe the Complainant gave his consent to collection of his health information for human resources purposes, as the consent form he signed qualified that he was consenting only to collection of his health information for treatment purposes.

Section 22 – the duty to collect directly

[para 78] Section 22(1) of the HIA imposes a duty to collect health information from the individual who is the subject of the information. It states, in part:

> *22(1) A custodian must collect individually identifying health information directly from the individual who is the subject of the information unless subsection (2) applies.*
>
> *(2) A custodian may collect individually identifying health information from a person other than the individual who is the subject of the information in the following circumstances:*
>
> *(a) where the individual who is the subject of the information authorizes collection of the information from someone else…*

[para 79] Section 22(3) sets out the requirements for direct collection when a custodian is required to collect health information directly. It states:

> *(3) When collecting individually identifying health information about an individual directly from the individual, the custodian must take reasonable steps to inform the individual*
>
> *(a) of the purpose for which the information is collected,*
> *(b) of the specific legal authority for the collection, and*
> *(c) of the title, business address and business telephone number of an affiliate of the custodian who can answer the individual's questions about the collection.*

[para 80] In order to comply with the requirements of section 22, a custodian must collect health information from the individual who is the subject of the health information. Moreover, it must state its purposes in collecting health information, its legal authority for the collection, and provide the contact information who can answer an individual's questions regarding the collection. If the subject of the health information

authorizes a custodian to collect health information from someone else, or in other enumerated circumstances, a custodian is not required to collect directly from the individual.

[para 81] With regard to the addictions counselor's collection of the Complainant's health information for the purposes of disclosing it to her supervisor for human resources management and disciplinary purposes, her notes establish that she did not state explicitly to the Complainant that she was collecting his health information for this purpose, although she intimated that she considered that she had a duty to report the Complainant to his employer pursuant to AHS policies. Moreover, the addictions counselor did not set out any legal authority for collection of the Complainant's health information for disciplinary purposes, or provide the Complainant with a contact person who could answer the Complainant's questions regarding the collection. In any event, I have found that there was no legal authority to collect the Complainant's health information for disciplinary purposes. In addition, AHS has not pointed to any exception to the requirements of section 22(1) that would negate the duty to collect health information directly from the Complainant as set out in section 22(3).

[para 82] In relation to the collection of the Complainant's health information from the treating physician, the only potentially applicable exception to the requirements to collect directly from the Complainant under section 22(1) and 22(3), would be section 22(2)(a), given that the Complainant authorized AHS to collect health information for the purposes of treating him from his treating physician. However, for the reasons given in the preceding section, I find that the authorization AHS obtained from the Complainant to collect his health information did not encompass collecting his health information for purposes other than providing treatment. I therefore find that AHS contravened section 22 of the HIA when it obtained the Complainant's health information from his treating physician for the purpose of conducting an employment investigation, as the collection did not meet the requirements of section 22(3).

[para 83] For the reasons above, I find that AHS collected and used the Complainant's health information in contravention of the HIA.

Issue D: If AHSAMHS disclosed health information that is subject to HIA to AHS, was this disclosure in accordance with, or in contravention of, Part 5 of HIA?

[para 84] Section 31 of the HIA prohibits a Custodian from disclosing health information except in accordance with the HIA. Section 34(1) of the HIA requires a custodian to obtain the consent of the individual who is the subject of health information before disclosing individually identifying health information, subject to exceptions set out in section 35. Section 34 states:

> *34(1) Subject to sections 35 to 40, a custodian may disclose individually identifying health information to a person other than the individual who is the subject of the information if the individual has consented to the disclosure.*

[para 85] Section 35 of the HIA creates an exhaustive list of the situations in which a custodian may disclose diagnostic, treatment and care information without consent. AHS argues that disclosure of the Complainant's health information without his consent was authorized by either of the following provisions:

> *35(1) A custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information*
>
> *(a) to another custodian for any or all of the purposes listed in section 27(1) or (2), as the case may be,*
>
> *…*
>
> *(p) if the disclosure is authorized or required by an enactment of Alberta or Canada…*
>
> *(4) A custodian may disclose individually identifying diagnostic, treatment and care information to a health professional body for the purpose of an investigation, a discipline proceeding, a practice review or an inspection if*
>
> *(a) the custodian has complied with any other enactment authorizing or requiring the custodian to disclose that information for that purpose, and*
> *(b) the health professional body agrees in writing*
> *(i) not to disclose the information to any other person except as authorized by or under the Act governing the health professional body…*

[para 86] AHS makes the following argument in relation to disclosure:

> When this Ethics Reporting Form that contained the Complainant's identity was completed and sent to human resources this was a "use" within AHS for the purpose of conducting an investigation relating to a member of a health profession (section 27(1)(c))…
>
> AHS in this instance used limited health information (the name of the employee, facility and presenting problem) to initiate a human resources investigation as to the fitness of the employee to continue his duties. This was only undertaken after repeated requests for the employee to self-report were not acted upon.
>
> An investigation into the conduct and competence of one of its health professionals was warranted under AHS's common law and statutory duties to ensure the safety of its patients and staff. Under section 5 of the *Regional Health Authorities Act* AHS has the duty to protect the health of the population in the health region and has final authority in the region in respect of matters referred to in section 5(a).
>
> With regard to ensuring professional competence of its staff the Operation of Approved Hospitals Regulation 247/1990 section 33.1 requires a hospital to advise a professional body when a member's authority to treat patients has been significantly altered because of misconduct.

AHS' approach to this matter was aimed at assisting the Complainant internally while addressing any misconduct with treatment options. Had AHS wished to involve other external agencies it may with a view to further investigation … have disclosed limited health information pursuant to section 37.1 of the *Health Information Act*. Instead AHS only disclosed to the Complainant's professional body at the conclusion of its investigation due to the regulatory and statutory obligations it was under. In particular section 57 of the *Health Professions Act* where it is incumbent upon an employer to give notice to the profession's complaints director. Failure to do so is an offence under that Act.

[para 87] The Complainant makes the following argument:

The disclosure of [the Complainant's] health information by AHS-AMHS to AHS must comply with the HIA, as AHS-AHMS collected [the Complainant's] health information at the outset to diagnose and treat him, as part of the unique relationship between patients and health care providers…
…

In disclosing [the Complainant's] health information to AHS without his consent, AHS-AMHS breached Part 5 of the HIA. Section 35 of the HIA sets out the limited circumstances under which a custodian may disclose an individual's health information without that individual's consent.

Subsection 35(1)(m) is the most appropriate provision to apply in this case, given that the chart notes of AHS-AMHS indicate that AHS-AMHS thought that it was obligated to disclose [the Complainant's] health information to his employer because [the Complainant] posed a threat to patients…

Subsection 35(1)(m) permits the disclosure of health information without the consent of the subject of that health information "to any person if the custodian believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person."

The OIPC recently confirmed that two factors must be met when applying subsection 35(1)(m) of the HIA. First, there must be reasonable grounds to believe there is an imminent danger to the health or safety of any person; second, the custodian must have reasonable grounds to believe that disclosing the treatment information would avert or minimize that danger…

Section 35(1)(m) of the HIA simply cannot be satisfied in [the Complainant's] case. In terms of the first requirement, Alberta jurisprudence confirms that [the Complainant's] presence at [his workplace] did not pose an imminent danger to anyone. Danger may be considered imminent when a person poses a present risk. That risk must exist now, not later or earlier. While it is not necessary to precisely predict when that harm will come to pass, there must be more than a tendency or possibility for harm. Danger can reasonably be considered imminent when there is certainty that the health or safety of any person will be threatened...

AHS-AMHS could not have been certain that [the Complainant] posed a risk of imminent danger because AHS-AMHS did not acquire enough information about [the Complainant] to reasonably assess whether or not he posed an imminent danger…

…

There also is no evidence that any employee of AHS-AMHS reasonably believed that disclosure of [the Complainant's] health information to AHS would avert or minimize imminent danger.

> As noted above, there simply were no grounds to believe that an imminent danger needed to be averted or minimized…

The Complainant argues that disclosure took place when employees of AHSAMHS, as a health service provider, discussed the Complainant's health information with AHS in its capacity as the Complainant's employer.

[para 88] AHS concedes that it disclosed the Complainant's health information to the Complainant's disciplinary body in paragraph 31 of its initial submissions. It argues:

> Instead, AHS only disclosed to the Complainant's professional body at the conclusion of its investigation due to the regulatory and statutory obligations it was under.

However, AHS views the exchange of health information between the addictions counselor and employees of human resources, and the exchange of health information between the acting manager and employees of human resources, as a "use", rather than a disclosure.

[para 89] "Disclose" is undefined in the HIA. However, the word "disclose" typically means "make known" or "reveal". Disclosure of health information happens when it is made known or revealed.

[para 90] The question is whether the concept of disclosure in the HIA encompasses making health information known *within* the custodian's organization, or is limited to disclosures that have the effect of making health information known *outside* the custodian's organization.

[para 91] AHS describes the transfer of information by its employees in the following way:

> Given the information was obtained when an AHS employee shared it during the counseling session and given the privacy, professional and conduct implications, the counselor consulted with her supervisor, who then consulted with an Acting Senior Manager and the Privacy Advisor of Addictions. No personal identifiers were given at that time.
>
> On June 12, 2009 the complainant attended another session with the counselor…
>
> …
>
> That afternoon the Acting Senior Manager telephoned the client's physician who confirmed what the client had reported to the counselor… The Acting Senior Manager advised the physician she had consulted with Addictions Privacy Advisor about the situation and was directed to encourage the client to report his actions to his employer and his professional body.
>
> The Acting Senior Manager attempted to contact the client to confirm whether he had advised his supervisor or professional body but was unable to do so. On June 24, 2010 a meeting with human resources, Ethics and Compliance and Privacy took place. It was decided given the potential professional, competency and safety issues that a human resources investigation be undertaken. The Acting Senior Manager was requested to contact the client of this decision and to complete an Ethics Reporting Form. The completed form contained the identity of the client and was forwarded to the human resources lead who would conduct the investigation.

[para 92] AHS states that the addictions counselor did not provide personal identifiers when she spoke to her supervisor and the acting manager regarding the health information she had collected from the Complainant. However, this statement is contradicted by the evidence of the acting manager, which establishes that it was she, and not the addictions counselor, who contacted the Complainant's physician to confirm what the Complainant had told the addictions counselor.

[para 93] If a transfer of health information between employees is a disclosure, as opposed to a "use", then there would be the odd result that a transfer to a different custodian for any permissible section 27 purpose would be authorized under section 35(1)(a), but it could not be so transferred within the organization for such a section 27 purpose because there is no section 35 authority. In my view, the restriction of the application of section 35(1)(a) to disclosures made to another custodian, argues against finding that internal transfers of health information are "disclosures", rather than "uses".

[para 94] I find that the exchange of the Complainant's health information between the addictions counselor and an acting senior manager, a privacy advisor and human resources employees amounted to an internal use of the Complainant's health information. However, in referring to this internal transfer of the Complainant's health information as a "use", I do not mean that it was authorized by the HIA. The HIA prohibits a Custodian from using individually identifying health information for purposes not set out in section 27. Moreover, even if a Custodian has a purpose for using health information that is authorized by section 27, it is required to inform an individual of that purpose for collecting health information under section 22(3) when it is required to collect health information from an individual directly. I have already found that section 27 does not authorize collection of a health services provider's own health information for the purpose of subjecting the health services provider to discipline. I also found that collecting health information for this purpose did not meet the requirements of section 22(3), given that the Custodian did not make reasonable efforts to inform the Complainant of its purpose in collecting his health information and lacked authority under the HIA to collect the Complainant's health information for that purpose in any event.

[para 95] I turn now to the disclosure of the Complainant's health information to the Complainant's professional body, which AHS concedes that it made. The parties have not told me the precise nature of the information disclosed by AHS to the Complainant's disciplinary body, other than that it consisted of the findings of the disciplinary investigation that was prompted by its collection of the Complainant's health information. However, as the investigation was based, in part, on the nature and extent of the Complainant's addiction, it follows that information about the nature and extent of the addiction formed the basis of some of the findings of the human resources investigation. I infer that the findings of the human resources investigation contain the Complainant's health information, given that information about the nature and extent of his addiction was the health information AHS obtained from the Complainant and his treating physician. Section 57 of the *Health Professions Act*, to which AHS points as authority for this disclosure, addresses reporting unprofessional conduct. I infer that AHS disclosed

information about the Complainant's addiction to his professional body when it made its complaint, given that the addiction itself was the conduct that was the subject of the complaint. Information about the Complainant's addiction is his health information.

[para 96] I will determine whether an exception to the requirement to obtain consent from the Complainant for this disclosure under section 35 applies, and whether this disclosure complies with section 31 of the HIA.

Section 35(1)(p)

[para 97] Section 35(1)(p) authorizes disclosure without the consent of the individual who is the subject of the health information if authorized to do so by an enactment of Alberta or Canada.

[para 98] As discussed above, AHS drew my attention to section 57 of the *Health Professions Act* and argues that hospitals are required to advise a professional body when they consider members' conduct to be unprofessional within the terms of that Act. It therefore reasons that disclosure of the Complainant's health information to the Complainant's disciplinary body would be authorized by section 35(1)(p). Section 35(1)(p) authorizes a custodian to disclose health information if authorized or required to do so by an enactment of Alberta or Canada.

[para 99] The Complainant argues in his rebuttal submissions:

> AHS also cited section 57 of the *Health Professions Act*, R.S.A. 2000 c. H-7 (the HPA) for the principle that AHS was under a statutory obligation to give the [the Complainant's disciplinary body] notice of the findings from AHS's human resources investigation…
>
> [Section 57] was not engaged when AHS reported [the Complainant] to [his disciplinary body] because AHS was precluded from acting in its capacity as employer after it collected [the Complainant's health information in its capacity as a custodian.

[para 100] Section 57 of the *Health Professions Act* states:

> *57(1) If, because of conduct that in the opinion of the employer is unprofessional conduct, the employment of a regulated member is terminated or suspended or the regulated member resigns, the employer must give notice of that conduct to the complaints director.*
>
> *(2) On being given notice under subsection (1), the complaints director must*
>
> *(a) treat the employer as a complainant,*
>
> *(b) despite not receiving a complaint under section 54, treat the notice as a complaint in accordance with section 56, and*
>
> *(c) notify the employer and the regulated member accordingly.*

(3) For the purposes of this section, "employment" includes being engaged to provide professional services on a full-time or part-time basis as a paid or unpaid employee, consultant, contractor or volunteer.

[para 101] As discussed above, section 35(1)(p) of the HIA authorizes disclosure of health information without consent in situations where an enactment authorizes or requires disclosure. The question is whether section 57(1) authorized or required AHS to disclose the Complainant's health information to the complaints director of a professional body for the purposes of section 35(1)(p) of the HIA, as AHS argues it does.

[para 102] Section 57(1) of the *Health Professions Act* requires an employer to give notice to the complaints director of a professional body regarding the conduct of a regulated member that it considers to be unprofessional conduct.

[para 103] Unprofessional conduct" is defined exhaustively in the *Health Professions Act*, as follows:

1 In this Act,

(pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable:

(i) displaying a lack of knowledge of or lack of skill or judgment in the provision of professional services;

(ii) contravention of this Act, a code of ethics or standards of practice;

(iii) contravention of another enactment that applies to the profession;

(iv) representing or holding out that a person was a regulated member and in good standing while the person's registration or practice permit was suspended or cancelled;

(v) representing or holding out that person's registration or practice permit is not subject to conditions when it is or misrepresenting the conditions;

(vi) failure or refusal

(A) to comply with the requirements of the continuing competence program, or

(B) to co-operate with a competence committee or a person appointed under section 11 undertaking a practice visit;

(vi.1) failure or refusal

(A) to comply with a request of or co-operate with an inspector;

(B) to comply with a direction of the registrar made under section 53.4(3);

(vii) failure or refusal

(A) to comply with an agreement that is part of a ratified settlement,

(B) to comply with a request of or co-operate with an investigator,

(C) to undergo an examination under section 118, or

(D) to comply with a notice to attend or a notice to produce under Part 4;

(viii) contravening an order under Part 4, conditions imposed on a practice permit or a direction under section 118(4);

(ix) carrying on the practice of the regulated profession with a person who is contravening section 98 or an order under Part 4 or conditions imposed on a practice permit or a direction under section 118(4);

(x) carrying on the practice of the regulated profession of physicians, surgeons, osteopaths, dentists, chiropractors or optometrists on behalf of a corporation that does not meet the requirements of sections 104 to 115 or as a partner of a partnership that does not meet the requirements of section 98(3);

(xi) carrying on the practice of the regulated profession of physical therapists on behalf of a corporation that does not meet the requirements of Schedule 20;

(xii) conduct that harms the integrity of the regulated profession…

[para 104] While AHS is not clear in its submissions as to what conduct falling under section 1(pp) of the *Health Professions Act* its complaint to the Complainant's disciplinary body was founded on, it appears that the complaint was based on its view that the Complainant's conduct fell within the parameters of section 1(pp)(ii) of the *Health Professions Act*. I draw this inference because AHS argues that members of the health profession in which the Complainant practices are required to maintain their fitness to practice upon becoming aware that they do not have the physical or mental capacity to practice safely and are obliged to withdraw from the provision of care after consulting with their employer, and because AHS highlighted a portion of page 18 of the code of ethics governing the Complainant's profession which contains a statement to this effect.

[para 105] Section 57(1) of the *Health Professions Act* could potentially have the effect of requiring disclosure of health information to a disciplinary body in some instances where the health information may found, or is relevant to, a complaint of misconduct on the part of a practitioner. However, I find that it does not have the effect of authorizing or requiring AHS to disclose the Complainant's health information to his professional body as it did. I make this finding because I have found that AHS collected the Complainant's health information without his consent in contravention of the HIA. In my view, another enactment of Alberta cannot be interpreted as anticipating that a custodian would obtain and use health information in contravention of the HIA, or authorizing it to do so. As AHS contravened the HIA when it obtained the Complainant's health information and when it used the health information to investigate the Complainant's conduct, which formed the basis of its complaint, I find that the *Health Professions Act* cannot serve as authorization for AHS to do anything further with the Complainant's health information, such as disclosing it to a professional body. In my view, the legislature could not have intended such an outcome when it enacted the *Health Professions Act*.

[para 106] If the purpose of AHS's arguments in relation to section 57(1) of the *Health Professions Act* is to establish that this provision provides authority for its use of the Complainant's health information for the purposes of section 27(1)(f), I note that section 57 requires an employer to provide notice of unprofessional conduct, once the employer has formed an opinion that the conduct of a member is unprofessional conduct. Section 57 does not speak to conducting investigations for human resources purposes or using health information to do so. While it is possible to infer from this provision that an employer is expected to take steps to form an opinion regarding a member's conduct, there is nothing in this provision that would suggest that an employer may, or must necessarily, collect or use a member's own health information in order to form an opinion regarding the member's conduct. I therefore find that this provision does not authorize use of the Complainant's health information for the purpose of conducting a human resources investigation, implicitly or explicitly.

[para 107] AHS also points to section 33.1 of the Operation of Approved Hospitals Regulation as authorizing its disclosure of the Complainant's health information to his professional body for the purposes of section 35(1)(p):

> With regard to ensuring professional competence of its staff the Operations of Approved Hospital Regulation 247/1990 section 33.1 requires a hospital to advise a professional body when a member's authority to treat patients has been significantly altered because of misconduct.

[para 108] This Regulation states:

> *33.1 If a member of the medical or professional staff of a hospital*
>
> *(a) is suspended or whose authority to admit, attend or treat patients has been cancelled or significantly altered because of incompetence, negligence or misconduct, or*
>
> *(b) resigns when the member's competence, negligence or conduct is under investigation,*
>
> *the hospital shall so advise the regulatory body of the health profession to which the member belongs.*

This provision requires a hospital to advise a regulatory body of a member's suspension, reduced ability to admit, attend or treat patients, or resignation. While I accept that section 33.1 is authority for advising a regulatory body of a suspension, suspension is not the same thing as health information. Moreover, information of the kind contemplated by section 33.1 of the Operation of Approved Hospitals Regulation was not present in the health information that was collected from the Complainant or the Complainant's treating physician, as evidenced by the notes of the addictions counselor and the acting manager. Section 33.1 is, therefore, not authority for any of AHS' disclosures of the Complainant's health information; rather, it is authority for communicating a suspension.

Section 35(4)

[para 109] In its rebuttal submissions, AHS argued, for the first time, that section 35(4) authorized disclosure of the Complainant's health information to his professional body. This provision states:

> *35(4) A custodian may disclose individually identifying diagnostic, treatment and care information to a health professional body for the purpose of an investigation, a discipline proceeding, a practice review or an inspection if*
>
> *(a) the custodian has complied with any other enactment authorizing or requiring the custodian to disclose that information for that purpose, and*
> *(b) the health professional body agrees in writing*
> *(i) not to disclose the information to any other person except as authorized by or under the Act governing the health professional body…*

[para 110] I find that this argument fails for the same reason that AHS's arguments in relation to the application of section 27(1)(c) fail. While this provision permits the disclosure of the information of the patient of a health services provider that is being investigated in the circumstances outlined in this provision, I do not believe section 35(4) can be read sensibly as permitting the disclosure, for the purposes of the types of proceedings contemplated in section 35(4), of the health information of the member of the profession. As discussed above, such an interpretation would have the effect of excluding health service providers from the protection of the HIA in relation to their own health information. There is nothing in the HIA that suggests that patients who are also health service providers should have less protection in relation to their health information than anyone else seeking health services has.

Section 37.1

[para 111] As noted above, AHS also cites Section 37.1 of the HIA, in addition to section 57(1) of the *Health Professions Act*, as possible authority to disclose the Complainant's health information:

> *37.1(1) A custodian may disclose individually identifying health information referred to in subsection (2) without the consent of the individual who is the subject of the information to a police service or the Minister of Justice and Attorney General where the custodian reasonably believes*
>
> *(a) that the information relates to the possible commission of an offence under a statute or regulation of Alberta or Canada, and*
>
> *(b) that the disclosure will detect or prevent fraud or limit abuse in the use of health services. [my emphasis]*
>
> *(2) A custodian may disclose the following information under subsection (1):*
>
> *(a) the name of an individual;*
>
> *(b) the date of birth of an individual;*
>
> *(c) the personal health number of an individual;*
>
> *(d) the nature of any injury or illness of an individual;*
>
> *(e) the date on which a health service was sought or received by an individual;*
>
> *(f) the location where an individual sought or received a health service;*
>
> *(g) the name of any drug, as defined in the Pharmacy and Drug Act, provided to or prescribed for an individual and the date the drug was provided or prescribed.*

> *(3) If a custodian discloses individually identifying health information about an individual under subsection (1), the custodian may also disclose health services provider information about a health services provider from whom that individual sought or received health services if that information is related to the information that was disclosed under subsection (1).*
>
> *(4) Health services provider information may be disclosed under subsection (3) without the consent of the health services provider who is the subject of the information.* [my emphasis]

[para 112] It is unclear why AHS raised section 37.1 in its submissions, as AHS has not communicated the Complainant's health information to a police service or the Minister of Justice and Attorney General. It may be that the purpose of AHS's reference to section 37.1 is to imply that AHS was empowered to disclose the Complainant's health information to a greater extent than it did.

[para 113] However, as AHS is of the view that section 37.1 would be authority to disclose the Complainant's health information to a police service or the Minister of Justice and Attorney General if it chooses, and given that the Complainant has made submissions on this point, I will address this argument.

[para 114] The heading of section 37.1 is "Disclosure to prevent or limit fraud or abuse of health services". While a heading does not form part of an enactment, it may be viewed as some evidence of the legislature's intention in enacting a legislative provision. In this case, the heading of section 37.1 indicates that its purpose is to authorize disclosures of health information if doing so would serve the purpose of limiting fraud or abuse of health services. As discussed above, "health service" is a defined term in the HIA. Consequently, "health services" has the same meaning in section 37.1 as it does in section 1(1)(m) of the HIA.

[para 115] The provisions of section 37.1 themselves also support the view that section 37.1 is intended to authorize disclosure for the purposes of preventing fraud or abuse of health services, given that section 37.1(1)(b) requires a custodian to form the opinion that the disclosure of health information will serve to detect or prevent fraud or limit abuse in the use of health services, in addition to deciding that the health information relates to the possible commission of an offence, before section 37.1 can apply. As the Complainant health information does not indicate or state that he has ever committed fraud when using health services, or has abused the use of health services, it would seem unlikely that the Custodian could reasonably form the opinion that he has for the purposes of satisfying the requirements of this provision.

Section 37.2

[para 116] In its rebuttal submissions, AHS raised, for the first time, the application of the former section 37.2 of the HIA, which was in force at the time of the incidents giving rise to the Complainant's complaint. This provision states:

37.2(1) A custodian may disclose individually identifying health information referred to in subsection (2) without the consent of the health services provider who is the subject of the information to a police service or the Minister of Justice and Attorney General where the custodian reasonably believes

(a) that the information relates to the possible commission of an offence under a statute or regulation of Alberta or Canada by the health services provider, and

(a) that the disclosure will detect or prevent fraud or limit abuse in the provision of health services.

(2) A custodian may disclose the following information under subsection (1):

(a) the name of the health services provider;
(b) the business address of the health services provider;
(c) the date on which the health services provider provided a health service;
(d) the description of a health service provided by the health services provider;
(e) the benefits that were paid or charged in relation to a health service provided by the health services provider.

(3) If a custodian discloses information under subsection (1) about a health service, the custodian may also disclose individually identifying health information about the individual who received that health service if that information is related to that health service.

(4) Individually identifying health information may be disclosed under subsection (3) without the consent of the individual who is the subject of the information.

[para 117] As with section 37.1, section 37.2 contemplates disclosure of health information to a police service or the Minister of Justice and Attorney General in specific circumstances which are not present, and is therefore not clearly relevant in this case. In addition, as it has been repealed, it would not now provide any authority to disclose health information, even if its requirements were met. Finally, I do not view section 37.2 as authorizing disclosure of a health service provider's own health information. Rather, it authorizes disclosure of information about a health service provider in circumstances where the health services provider's information constitutes a patient's health information under section 1(1)(k) of the version of the HIA in force prior to September 1, 2010.

Conclusion

[para 118] To summarize, I find that when the Complainant's individually identifying health information was transferred between the addictions counselor and the acting manager and employees of human resources, for the purpose of conducting a human

resources investigation, that this was an internal use of health information, and was in contravention of both sections 22 and 27. I also find that when AHS disclosed information regarding the Complainant's conduct to his professional body, that this disclosure contravened section 34, as information regarding his conduct was, in this case, his health information. Therefore, this disclosure contravened section 31 of the HIA.

IV. ORDER

[para 119] I make this Order under section 80 of the *Health Information Act*:

[para 120] I order Alberta Health Services to cease collecting the Complainant's health information in contravention of the HIA.

[para 121] I order Alberta Health Services to cease using the Complainant's health information in contravention of the HIA.

[para 122] I order Alberta Health Services to cease disclosing the Complainant's health information in contravention of the HIA.

[para 123] I 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.

_____

Teresa Cunningham
Adjudicator