

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2011-002

November 23, 2011

ALBERTA HEALTH SERVICES

Case File Number H3751

Office URL: www.oipc.ab.ca

Summary: In 2002, the Complainant had requested a memo be put on her medical record at the David Thompson Health Region, which is now part of Alberta Health Services (“Custodian”), and which encompassed the Red Deer Regional Hospital (“RDRH”). The memo requested that the Complainant’s medical information not be disclosed without her consent. This memo was placed at the front of the Complainant’s file.

In 2010, the Complainant sought medical treatment at the Shuswap Lake General Hospital (“SLGH”) in British Columbia. The attending physician at the SLGH requested the Complainant’s health information from the RDRH. The RDRH disclosed four pages of records related to the Complainant’s most recent treatment there.

The Complainant made a complaint to this office that staff of the Custodian at RDRH disclosed her health information without her consent, in contravention of her request and of Part 5 of the *Health Information Act*.

The Adjudicator determined that the Custodian had authority to disclose the Complainant’s health information to the SLGH, and properly considered the Complainant’s request for non-disclosure of her health information in determining how much health information to disclose.

Statutes Cited: **AB:** *Health Information Act*, R.S.A. 2000, c. H-5, ss. 35, 58, 80.

Authorities Cited: AB: Investigation Report H2008-IR-001, Order H2004-005.

I. BACKGROUND

[para 1] In 2002, the Complainant had requested a memo be put on her medical record at the David Thompson Health Region, which is now part of Alberta Health Services (“Custodian”), and which encompassed the Red Deer Regional Hospital (“RDRH”). The memo requested that the Complainant’s medical information not be disclosed without her consent. This memo was placed at the front of the Complainant’s file.

[para 2] In February 2010, the Complainant sought medical treatment at the Shuswap Lake General Hospital (“SLGH”) in British Columbia. The attending physician at the SLGH contacted the RDRH, requesting the Complainant’s health information; specifically discharge summaries and histories, mental health records, medication history, investigations, and ER care plans.

[para 3] The RDRH disclosed four pages of records to the SLGH, including a Mental Health Discharge Summary, an Ambulatory Patient Care Record, a History and Physical, and a Nursing Unit Medication Profile. All records related to the Complainant’s most recent treatment at the RDRH.

[para 4] The Complainant made a complaint to this office that staff of the Custodian at RDRH disclosed her health information without her consent, in contravention of her request and of Part 5 of the *Health Information Act*.

II. INFORMATION AT ISSUE

[para 5] The information at issue consists of the Complainant’s health information disclosed by the Custodian, specifically by staff at the RDRH, to the SLGH.

III. ISSUES

[para 6] Per the Notice of Inquiry, dated March 23, 2011, the issue in this inquiry is:

- 1. Did the Custodian disclose the Complainant’s information in contravention of the Act?**

IV. DISCUSSION OF ISSUES

[para 7] The Custodian does not dispute that it disclosed the Complainant’s health information, including her psychiatric information, to the SLGH. It cites section 35(1)(b) of the Act as its authority to disclose the information. That section states:

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

...

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

...

[para 8] Section 58 places limits on the amount of health information that can be disclosed. That section states:

58(1) When collecting, using or disclosing health information, a custodian must, in addition to complying with section 57, collect, use or disclose only the amount of health information that is essential to enable the custodian or the recipient of the information, as the case may be, to carry out the intended purpose.

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

[para 9] I agree that section 35(1)(b) authorizes the disclosure of the Complainant's health information. It is clear from the evidence provided that the attending physician at the SLGH was providing treatment to the Complainant; the Complainant does not argue otherwise. As well, the information disclosed is obviously relevant to the request for information made by the attending physician at SLGH.

[para 10] The Complainant states that she understands the purpose of the Act, but asks that an exception be made in her case such that all of her records "in any hospital in Alberta be "locked or sealed" and that [her] permission has to be granted unless [she] is unable to speak for any information to be released from them." The Complainant seems to be asking that she be allowed to effectively veto any disclosure of her health information, despite the disclosure provisions in the Act.

[para 11] Section 58(2) requires custodians to consider the expressed wishes of individuals in determining the amount of health information to disclose, but does not provide an override of the authority to disclose under the Act.

[para 12] This section was considered in Investigation Report H2008-IR-001, where a pharmacist was required by law to disclose certain health information of his patients to Alberta Health and Wellness, despite a patient's expressed wish that his information not be disclosed. I agree with the portfolio officer's interpretation of section 58(2):

Furthermore, the "expressed wishes" of an individual do not operate as a mechanism through which they have absolute veto over the disclosure of

health information; expressed wishes are a just [sic] consideration, albeit an important one. It is possible for a custodian confronted with an expressed wish from an individual to give the wishes of the individual full consideration and still determine that they cannot accede to them. This is the circumstance which faces the Pharmacist in this case.

[Investigation Report H2008-IR-001, at para. 65]

[para 13] In the present case, staff at the RDRH were not *required* to disclose the Complainant's health information to the SLGH; indeed, another hospital in the region refused the same request, citing the Complainant's wish for her information not to be disclosed without her consent. However, the same principle was stated in Order H2004-005, in which the custodian was authorized but not required to disclose health information for the purpose of a legal proceeding:

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

[Order H2004-005, at para. 102]

[para 14] Section 58(2) does not permit an individual to veto a disclosure of his or her health information that is otherwise authorized under the Act, and I cannot interpret an exception to the Act that as giving the Complainant such veto power.

[para 15] The remaining question in this inquiry is whether or not the Custodian failed in its duty to consider the expressed wishes of the Complainant in determining how much of her health information to disclose to the SLGH, pursuant to section 58(2).

[para 16] The memo conveying the Complainant's request regarding the disclosure (or non-disclosure) of her health information is dated April 2002. The Custodian states that the memo is located in the front of the Complainant's chart. Both parties have provided me with a copy of the memo, which basically states that the Complainant has requested that information from her health record not be disclosed to a physician or another health care facility without her consent. The memo was written by a regional director of the David Thompson Health Region, which is now part of the Custodian. In the memo, the regional director provides instructions to the effect that any disclosure information from the Complainant's chart be first discussed with himself, or another one of the three named individuals listed in the memo.

[para 17] The Complainant has provided evidence showing that the SLGH requested the Complainant's health information from another hospital in Lacombe, which had the same memo on its copy of the Complainant's chart. According to SLGH notes, provided to me by the Complainant, the Lacombe hospital refused to disclose the Complainant's

health information to the SLGH, citing specific instructions from the Complainant not to share her health information with other medical facilities (pursuant to the memo).

[para 18] I assume that the Complainant offers this as evidence that the RDRH staff failed in their duty to consider the Complainant's expressed wishes before disclosing her health information.

[para 19] The Custodian states that it took the Complainant's wishes into consideration, but ultimately decided to disclose the four pages to the SLGH for the following reasons:

- The health information was provided solely for the purpose of providing treatment and care to the Complainant,
- The Custodian believed there was an emergent need for the information in order for the SLGH to provide health services to the Complainant,
- The Custodian disclosed only the minimum amount of information needed and the information was limited to "clinically significant hospitalization that has occurred approximately six weeks before the Complainant was seen by the [attending physician at SLGH]", and
- The request was from a physician in an acute care site, and indicated he needed accurate and complete information related to the Complainant's last hospitalization to provide necessary treatment.

[para 20] I accept the Custodian's evidence that it considered the Complainant's expressed wish concerning the non-disclosure of her health information, but that it decided to disclose the four pages to the SLGH for the reasons listed above. I find that the Custodian appropriately limited the amount of health information disclosed, and that the factors considered in making the determination to disclose the health information were reasonable and appropriate. The fact that another hospital decided not to disclose the Complainant's health information in response to the same request from the SLGH does not negate the reasonableness of the Custodian's disclosure.

[para 21] In my view, two important factors in determining how much of the Complainant's health information to disclose are that the request for information came from a physician in an acute care site, and that the Custodian believed there was an urgent need for the information. In contrast, a custodian might give more weight to an individual's expressed wish not to disclose his or her health information in a non-urgent situation where the individual might feasibly decline treatment if the treatment required disclosure of the health information. In an acute or emergency situation, such as this appears to have been, it is much more likely that the treating physician would provide treatment regardless of whether he or she could get access to the individual's health information. In that case, the value of the treating physician having access to the health information that he or she deems necessary often outweighs the individual's wishes with respect to disclosure.

V. ORDER

[para 22] I make this Order under section 80 of the Act.

[para 23] I find that the Custodian had authority to disclose the Complainant's health information, and that it properly carried out its duty to consider the expressed wishes of the Complainant in determining the amount of health information to disclose.

Amanda Swanek
Adjudicator