

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2021-07

July 22, 2021

ALBERTA HEALTH SERVICES

Case File Number 008740

Office URL: www.oipc.ab.ca

Summary: The Complainant complains that Alberta Health Services (the Custodian) disclosed her health information contrary to the *Health Information Act* (the HIA). The Custodian provided the Edmonton Police Service (EPS) a copy of a Form 1 Admission Certificate regarding the Complainant (the Admission Certificate), completed pursuant to section 2 of the *Mental Health Act*. The Custodian also disclosed to the EPS notes from a physician's (the Physician) examination of the Complainant (the Physician's Notes).

The Custodian acknowledged that it disclosed the Physician's Notes in error. The Adjudicator agreed and found that disclosure was not permitted under the HIA.

The Adjudicator found that disclosure of the Admission Certificate was permitted under section 35(1)(m)(ii) of the HIA. The Custodian had reasonable grounds to believe that disclosing the full Admission Certificate to the EPS would avert or minimize danger to the health or safety of any person. Specifically, it would enable the EPS to apprehend and convey the Complainant to a medical facility, after the Physician had determined that she was likely to cause harm to herself or others.

Regarding the Physician's Notes, the Adjudicator ordered the Custodian to refrain from similar disclosures in the future. In light of remedial actions already taken by the Custodian, the Adjudicator did not impose any further conditions on the Custodian.

Statutes Cited: AB: *Health Information Act*, RSA 2000, c H-5 ss. 1(1)(a)(i), 1(1)(a)(ii); 1(1)(k), 1(1)(k)(i), 1(1)(k)(ii); 1(1)(i)(i), 1(1)(i)(ii), 1(1)(i)(ii)(A), 1(1)(i)(ii)(B); (1)(m)(i), 1(1)(m)(iii); 1(1)(u); 35(1)(m)(ii); 36(a); 62(2); 80; *Health Statutes Amendment Act*, 2020 (No. 2), SA 2020, c 35, s. 43; *Mental Health Act*, RSA 2000, c M-13 ss. 2; 4(1), 4(2); 6(a), 6(b), 6(c), 6(d), 6(e), 6(f); *Mental Health Amendment Act*, 2020, SA 2020 c. 15 ss. 3; 6; *Health Information Regulations*, Alberta Regulation 70/2001 ss. 3(a)(i); 3.1; *Mental Health Act Forms and Designation Regulation*, Alberta Regulation 136/2004, Schedule; *Alberta Regulation* 183/2020 s. 11.

Cases Cited: *JK v Gowrishankar*, 2019 ABCA 316

I. BACKGROUND

[para 1] On December 26, 2016, a Crisis Response Team including members of the Edmonton Police Service (EPS), and a physician (the Physician), attended the Complainant’s home¹. The Physician is an affiliate of Alberta Health Services (the Custodian) under the *Health Information Act*, RSA 2000, c H-5 (the *HIA*).

[para 2] The Physician and members of the EPS operate as a Crisis Response Team pursuant to a Memorandum of Understanding (MOU) between the Custodian and the EPS. Paragraph 3 of the MOU states the mandate of a Crisis Response Team as, “...a mandate to provide initial response to incidences (sic) of adults experiencing a mental health crisis...”

[para 3] The MOU defines “mental health crisis” as, “any situation where a person is, or is reasonably believed to be, suffering from any mental illness that causes that person to be a danger to themselves or others;”.

[para 4] Under the MOU, the Custodian and the EPS each remain responsible for the conduct of their own members, and indemnify each other against liability for illegal actions of their own members. The MOU also specifies the information sharing arrangement between the Custodian and the EPS. The Custodian’s information sharing responsibilities include the following:

23. Pursuant to the HIA Capital Health² will supply information to the EPS for the purpose of investigating matters involving a mental health crisis with a goal that clients receive intervention services in a safe manner to themselves and all others. The information supplied by Capital Health may be oral or in writing.

24. Any and all information supplied by Capital Health to the EPS is supplied as part of the working relationship between Capital Health and the EPS and is to be used solely for the

¹ The Complainant makes some suggestion that the residence that the Crisis Response Team attended was not her home. Regardless, the residence was where the Complainant could be found on December 26 and 27, 2016; for ease of reference, I use the term “home” to refer to it.

² “Capital Health” is the name of a former Health Region in Alberta, amalgamated into the Custodian.

purpose as identified in paragraph 23 of this Agreement, or as otherwise permitted by FOIPP or HIA.

[para 5] As part of his responsibilities under the MOU, the Physician, examined the Complainant, and prepared two pages of notes (the Physician's Notes) about the examination.

[para 6] Following the examination, the Physician completed a Form 1 Admission Certificate (the Admission Certificate) regarding the Complainant, pursuant to section 2 of the *Mental Health Act*, RSA 2000, c M-13 (the MHA). The Admission Certificate contained the Physician's opinion that the Complainant should be conveyed to a medical facility for examination.

[para 7] After obtaining a warrant to enter the Complainant's home, the Crisis Response Team, including the Custodian's Mental Health Clinicians, attended the Complainant's home again on December 27, 2016. Pursuant to the Admission Certificate, the EPS transported and admitted the Complainant to a medical facility, involuntarily. As explained by the Custodian, the general practices is for the EPS to handle apprehension and conveyance of those subject to such admission certificates.

[para 8] In late February 2017, the Complainant made an access to information request under the HIA to the Custodian. Upon receiving a response to the access request, the Complainant learned that the Custodian disclosed the Admission Certificate, and two pages of the Physician's Notes taken during the December 2016 examination (the Physician's Notes), to the EPS.

[para 9] On January 16, 2018, the Complainant made a complaint to the Office of the Information and Privacy Commissioner that the Custodian disclosed her health information contrary to the HIA, when it provided the Admission Certificate and the Physician's Notes to the EPS.

[para 10] Investigation and mediation were authorized to attempt to resolve the issue, but did not do so. The matter proceeded to inquiry.

II. ISSUES

Issue A: Did the Custodian (or Affiliate) disclose the Applicant's health information in contravention of Part 5 (Division 1, ss. 31-45) of the HIA?

III. DISCUSSION OF ISSUES

Preliminary Matter – Custodian acknowledges that the Physician's Notes were disclosed in error

[para 11] In its initial submission, the Custodian admits that it disclosed the Physician's Notes to the EPS in error. It states that while the EPS required the Admission Certificate to see the Complainant admitted to hospital, the EPS did not require the

Physician's Notes. The Custodian's inquiry into how the Physician's Notes came to be disclosed concluded that it was an inadvertent error.

Issue A: Did the Custodian (or Affiliate) disclose the Applicant's health information in contravention of Part 5 (Division 1, ss. 31-45) of the HIA?

Disclosure

[para 12] The parties provide differing versions of how disclosure took place.

[para 13] The Complainant believes that a nurse working with the Crisis Response Team provided the EPS with the Admission Certificate. The Complainant's belief is premised on a notation at the bottom of a record of her interaction with the Crisis Team that indicates that the nurse printed the record on December 27, 2016. The Complainant surmises that the Physician later accessed the Admission Certificate through Netcare³ in order to prepare the Physician's Notes after the fact.

[para 14] Upon receiving the disclosure complaint, the Custodian's Director of Urgent and Intensive Services (the Director) investigated how the EPS came into possession of the Admission Certificate and Physician's Notes. The Director determined that the following series of events was most likely how disclosure occurred.

[para 15] Based upon the wording of the Physician's Notes, the Director believes that the Physician examined the Complainant orally by speaking through the door of the Complainant's home, and over the telephone, and prepared the Physician's Notes at that time. The Physician then used that information to prepare the Admission Certificate. The Physician provided the Admission Form, with the Physician's Notes included, in an envelope to "AHS Mental Health Clinicians" who attended the Complainant's home, as part of the Crisis Response Team, to apprehend the Complainant pursuant to the Admission Certificate.

[para 16] The Director stated that providing Form 1 admission certificates to the EPS is a routine practice, since a copy of the Admission Certificate was required in order for them to apprehend and convey the Complainant to the hospital.

[para 17] In the course of the investigation the Director learned that the EPS had uploaded the Admission Certificate and Physician's Notes to the Canadian Police Information System (CPIC). Uploading information to CPIC is done by the EPS, rather than the Custodian.

[para 18] Whether it was a nurse as suggested by the Complainant, or an "AHS Mental Health Clinician" as suggested by the Custodian, the evidence indicates that the Physician passed the Admission Form and Physician's Notes to someone associated with the AHS, but did not directly give them to the EPS. It is undisputed, though, that, at some point, the EPS obtained both documents. Considering the Custodian's explanation of how

³ Netcare is an electronic health records information system.

disclosure occurred, it appears that both documents were disclosed at the time when the Crisis Response Team apprehended the Complainant.

[para 19] The Custodian’s explanation of how the EPS obtained the Admission Certificate and the Physician’s Notes is consistent with the timing of the Crisis Response Team’s interaction with the Complainant, and the date on which the Complainant was admitted to hospital, which are not disputed by the Complainant. The Custodian’s regular practice is to provide Admission Certificates to the EPS. Further, the fact that the EPS uploaded the Physician’s Notes to CPIC indicates that it had the notes at its disposal. There is no indication of how the EPS could have obtained such notes other than from an AHS member of the Crisis Response Team who received them from the Physician. While there is no definitive statement of how the EPS obtained the Admission Certificate and Physician’s Notes, I find that the evidence establishes, on the balance of probabilities, that an AHS member provided them to the EPS on either December 26 or 27, 2016.

[para 20] The evidence does not support the Complainant’s theory that the Physician’s Notes were created after the Physician learned of her access request. The Physician’s Notes and the Admission Certificate are both dated December 26, 2016, with no evidence of tampering. It appears that both were created at the same time.

Is the Custodian Responsible for Disclosure to EPS?

[para 21] The Custodian states that the Physician and its other members of the Crisis Response Team are its affiliates under the HIA under section 1(1)(a)(i) and (ii) of the HIA. Section 1(1)(a) states,

1(1) In this Act,

(a) “affiliate”, in relation to a custodian, means

(i) an individual employed by the custodian,

(ii) a person who performs a service for the custodian as an appointee, volunteer or student or under a contract or agency relationship with the custodian,

[para 22] The Custodian does not specify whether the Physician or “AHS Mental Health Clinicians” are employed by the Custodian, or perform a service for it. However, I have no reason to doubt that the Custodian is aware of its relationship with its members on the Crisis Response Team, and accept that the Physician and the AHS Mental Health Clinicians are its affiliates. Additionally, the MOU describes the role of the Custodian’s members on the Crisis Response Team and it is clear that the Physician and the AHS Mental Health Clinician must either be an employee of or performing a service for the Custodian to fulfill that role.

[para 23] Under section 62(2) of the HIA, disclosure of health information by an affiliate is considered to be disclosure by a Custodian:

(2) *Any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection, use or disclosure by the custodian.*

[para 24] Accordingly, when the Custodian's member on the Crisis Response Team disclosed the Complainant's health information to the EPS, the Custodian is considered to have disclosed the Complainant's health information.

Is the information health information?

[para 25] The Admission Certificate contains all information required by section 6 of the *MHA*, as it was written at the time:

6 An admission certificate shall show

- (a) *the name of the person in respect of whom the certificate is issued,*
- (b) *the name and address of the physician issuing it,*
- (c) *the date and time at which the personal examination was conducted,*
- (d) *the facts on which the physician formed the physician's opinion that the person is*
 - (i) *suffering from mental disorder,*
 - (ii) *likely to cause harm to the person or others or to suffer substantial mental or physical deterioration or serious physical impairment, and*
 - (iii) *unsuitable for admission to a facility other than as a formal patient,**distinguishing the facts observed by the physician from the facts communicated to the physician by others,*
- (e) *the name of the facility where the person was examined or, if the person is not in a facility, the name and address of the facility to which the person is to be conveyed, and*
- (f) *the date and time of issue.*⁴

[para 26] The precise form of the Admission Certificate, at the time in question, was set out as Form 1 in the Schedule to the *Mental Health Act Forms and Designation Regulation*, Alberta Regulation 136/2004. It contains prompts for all of the information

⁴ Section 6 of the MHA has since been amended by section 6 of the *Mental Health Amendment Act, 2020*, SA 2020 c. 15.

required by section 6 of the MHA at the time.⁵ The information in the Admission Certificate is the information required by section 6 of the MHA at the time; there is no extraneous information. All of this information is “health information” as defined in the HIA.

[para 27] “Health information” is defined in section 1(1)(k) of the HIA:

- (k) “health information” means one or both of the following:
 - (i) diagnostic, treatment and care information;
 - (ii) registration information;

[para 28] “Diagnostic, treatment and care information” as used in section 1(1)(k)(i) is defined in section 1(1)(i) of the HIA, and includes the following:

- (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:
 - (A) name;
 - (B) business title;
 - ...

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 29] The information required by section 6(d) of the MHA at the time, is health information under section 1(1)(i) of the HIA as diagnostic information. Information identifying the Physician, including information required by section 6(b) of the MHA at the time - is health information under sections 1(1)(i)(ii)(A) and (B) of the HIA.

[para 30] Information required by sections 6(c), (e), and (f) of the MHA at the time, are also health information under section 1(1)(i)(ii) of the HIA. While this information is not specifically listed in the subsections of section 1(1)(i)(ii) of the HIA, the date, time, and location of a medical examination is information about a health service. Given the

⁵ Form 1 in the Schedule to the *Mental Health Act Forms and Designation Regulation*, Alberta Regulation 136/2004, has since been amended by section 11 of Alberta Regulation 183/2020 to reflect the changes to section 6 of the MHA, made in section 6 of the *Mental Health Amendment Act, 2020*, SA 2020 c. 15.

definition of “health service,” the time and date of issue of the Admission Certificate is also information about a health service.

[para 31] The definition of “health services” is at section 1(1)(m) of the HIA, and includes the following:

(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;

...

(iii) diagnosing and treating illness;

...

but does not include a service excluded by the regulations;

Excluded services are listed in section 3.1 of the *Health Information Regulations*, Alberta Regulation 70/2001 (the Regulations); none of them apply here.

[para 32] Completing the Admission Form in order to see that the Complainant received medical attention, even if involuntarily, is a service for the purpose of protecting promoting, or maintaining mental health, and diagnosing and treating illness. As such, information about the date and time when the Admission Form was issued is also information about a health service, and thus health information.

[para 33] I note that the Admission Certificate contains the Physician’s observations about the Complainant’s reaction to the presence of the Crisis Response Team; this information appears to be part of the facts upon which the Physician concluded that the Complainant is suffering from a mental disorder, as required by section 6(d) of the MHA at the time. Even if it were not, it is still considered diagnostic, treatment and care information since it was collected at the time the Physician provided a health service to the Complainant.

[para 34] Along with the diagnostic, treatment and care information on the Admission Certificate, there is information about the Complainant’s name (as required by section 6(a) of the MHA at the time), age, and location, which is “registration information” as used in section 1(1)(k)(ii) of the HIA. “Registration information” as used in section 1(1)(k)(ii) is defined in section 1(1)(u) of the HIA and includes the following:

(u) “registration information” means information relating to an individual that falls within the following general categories and is more specifically described in the regulations:

(i) demographic information, including the individual’s personal health number;

(ii) *location information;*

...

but does not include information that is not written, photographed, recorded or stored in some manner in a record;

[para 35] “Demographic information” is further explained in section 3(a) of the Regulations. The pertinent portion of that section states,

The following information, where applicable, relating to an individual is registration information for the purposes of section 1(1)(u) of the Act:

(a) *demographic information, including the following:*

(i) *name, in any form;*

[para 36] The Physician’s Notes contain his observations about the Complainant as well as possible diagnosis of a mental health condition based on the Complainant’s behaviours. All of this information is health information since it was collected as the Physician examined the Complainant, which is a health service.

Did the Custodian Comply with the HIA when it disclosed the Complainant’s health information?

[para 37] In *JK v Gowrishankar*, 2019 ABCA 316 at paras. 26 to 28, the Court determined that under section 62(2) of the HIA, affiliates of custodians may disclose information for the same purposes as their custodians so long as they do so in accordance with their duties to their custodian. In this case, the Custodian argues that, at the time, disclosing the Admission Certificate to the EPS was permitted under section 35(1)(m)(ii) of the HIA. In December 2016, section 35(1)(m)(ii) of the version of the HIA then in force, stated,

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

(m) *to any person if the custodian believes, on reasonable grounds, that the disclosure will avert or minimize*

(ii) *an imminent danger to the health or safety of any person*⁶

⁶ Section 35(1)(m)(ii) of the HIA has since been amended by section 43 of the *Health Statutes Amendment Act, 2020* (No. 2), SA 2020, c 35. Section 35(1)(m)(ii) currently reads, “a significant risk of harm to the health or safety of any person.”

[para 38] While section 35(1) is specific to diagnostic, treatment and care information, it may also justify disclosing registration information, pursuant to section 36(a) of the HIA. Section 36(a) states,

36 A custodian may disclose individually identifying registration information without the consent of the individual who is the subject of the information

(a) for any of the purposes for which diagnostic, treatment and care information may be disclosed under section 35(1), (4) or (5),

[para 39] I agree with the Custodian; disclosing the Admission Certificate falls squarely within section 35(1)(m)(ii) as it was written at the time.

[para 40] The Admission Certificate was issued pursuant to section 2 of the *MHA*. At the time in question, that section stated,

2 When a physician examines a person and is of the opinion that the person is

(a) suffering from mental disorder,

(b) likely to cause harm to the person or others or to suffer substantial mental or physical deterioration or serious physical impairment, and

(c) unsuitable for admission to a facility other than as a formal patient,

the physician may, not later than 24 hours after the examination, issue an admission certificate in the prescribed form with respect to the person.⁷

[para 41] The Physician completed the Admission Certificate, including all information required by section 6(d) of the MHA at the time, and arrived at the conclusion that the Complainant was likely to cause harm to others or suffer negative effects of a mental disorder. The Physician believed that there was a danger to the health and safety of “any person” as stipulated in section 35(1)(m)(ii) of the HIA. The fact that the Physician issued the Admission Certificate demonstrates that he felt that the risk was great enough to warrant conveying the Complainant to the hospital, regardless of whether she went voluntarily.

[para 42] The effect of the Admission Certificate is set out in section 4(1) of the MHA:

4(1) One admission certificate is sufficient authority

(a) to apprehend the person named in the certificate and convey the person to a facility and for any person to care for, observe, assess, detain and control the person

⁷ Section 2 of the MHA has since been amended by section 3 of the *Mental Health Amendment Act, 2020*, SA 2020 c. 15

named in the certificate during the person's apprehension and conveyance to a facility, and

(b) to care for, observe, examine, assess, treat, detain and control the person named in the certificate for a period of 24 hours from the time when the person arrives at the facility.

(2) The authority to apprehend a person and convey the person to a facility under subsection (1)(a) expires at the end of 72 hours from the time when the certificate is issued.

[para 43] The limited period of time in which the Admission Certificate was issued following examination of the Complainant (less than 24 hrs.) and was acted upon (1 day) – indicates that the Physician believed that the risk of harm posed by the Complainant created an imminent danger. The requirement for “imminent danger” in section 35(m)(1)(ii) at the time is met.

[para 44] By providing the Admission Certificate to EPS, the Physician enabled EPS to convey the Complainant to a medical facility for treatment, which would diminish the risk posed by the Complainant, for up to 24 hrs. It appears that there was a reasonable basis to believe that disclosing the Admission Certificate to EPS would avert or minimize a danger to any person.

[para 45] The Complainant challenges the necessity of disclosing the full information in the Admission Certificate to the EPS. The Complainant takes the position that the EPS did not need to see all of the detailed health information in the Admission Certificate, and that the Admission Certificate should have been disclosed only to her, and to the medical facility to which she was taken. The Complainant argues that the EPS only needed to know her name; address; the facility to which she would be transferred; and whether she was a harm to herself, others, or physically deteriorating, in order to carry out its duties.

[para 46] For several reasons, I disagree with the Complainant's argument.

[para 47] To the extent that the Complainant's argument suggests that it must be necessary to disclose health information in order to reduce risk, on a plain reading, section 35(1)(m)(ii) has a broader application. The section permits disclosure where a custodian has reasonable grounds to believe that doing so will avert or minimize danger to health, and is not limited to situations where disclosure is the only way to avert or minimize danger.

[para 48] Further, I consider that what the Complainant is also suggesting is that the EPS only needed to know the following in order to carry out its responsibilities: that the Complainant was subject to the Admission Certificate by virtue of being a threat to herself or others, or physically deteriorating; where to find her; and to which facility to take her in order to see her admitted to a medical facility. To put the argument in terms germane to section 35(1)(m)(ii), there was no reasonable basis to believe that disclosing the detailed health information in the Admission Certificate would avert or minimize

danger per se; that was accomplished by disclosing the more general information described by the Complainant.

[para 49] I find that there was a reasonable basis to believe that disclosing the Admission Certificate to the EPS in full would avert or minimize danger.

[para 50] Under the MOU, the Custodian has a responsibility to share information with the EPS for the purposes of intervening in situations involving a mental health crisis. There is no doubt that the Custodian disclosed the Admission Certificate for that purpose in this case. The Custodian has explained that the EPS requires the Admission Certificate in order to apprehend and convey the Complainant; without it the EPS lacks proper authority.

[para 51] As the ones tasked with apprehending and conveying the Complainant, I cannot see how the EPS could reasonably be expected to do so without first being able to verify their authority to take those actions. The EPS is liable for violating the Complainant's rights if the Complainant were apprehended without proper authority, and has agreed to indemnify the Custodian against liability for illegal actions of its members.

[para 52] Reviewing the full Admission Certificate is required in order to verify authority under it. Section 6 of the MHA (at the time in question and now) contains numerous, specific requirements for proper completion of the Admission Certificate, upon which authority rests. Without the ability to examine the Admission Certificate, the EPS could not know if their authority was fully grounded. This is not to suggest that the EPS has a role in reviewing the medical opinion of the Physician contained in the Admission Certificate; the purpose of reviewing the Admission Certificate is to see that all of the information required is present.

[para 53] Under the above circumstances, where the Custodian has a responsibility to share information, and the EPS must have proper authority to apprehend and convey the Complainant, the Custodian had a reasonable basis to believe that *full* disclosure of the Admission Certificate would be required to provide proof of the necessary authority for the EPS to take steps to avert or minimize the danger the Physician believes that the Complainant posed.

[para 54] In light of the above, I find that the Custodian complied with section 35(1)(m)(ii) as it was written at the time when it disclosed the Admission Certificate.

[para 55] I reach a different conclusion regarding the Physician's Notes. As noted at the outset of this Order, the Custodian acknowledges that the Physician's Notes should not have been disclosed. It makes no argument that such disclosure was permitted by the HIA. I do not see any provision of the HIA that would permit disclosure of the Physician's Notes in this case. Given that the Physician's Notes did not imbue the EPS with authority to apprehend and convey the Complainant, there is no reasonable basis to believe that disclosing them would permit the necessary steps to avert or minimize danger to anyone.

[para 56] In light of the erroneous disclosure of the Physician's Notes, the Custodian has already taken remedial actions, including,

- Reviewing how the Physician's Notes were disclosed with its Crisis Response Team members,
- Providing direction to its Crisis Response Team members regarding their obligations under the HIA and the MOU,
- Requiring its Crisis Response Team members to complete a course reviewing privacy and security awareness, privacy legislation, and the Custodian's overall AHS policy,
- Consulting EPS about removal of the Physician's Notes from CPIC; and,
- Informing the Complainant of the EPS' process for removing the Physician's notes from CPIC.

IV. ORDER

[para 57] I make this Order under section 80 of the HIA.

[para 58] I confirm that the Custodian complied with the HIA when it disclosed the Admission Certificate.

[para 59] Regarding unauthorized disclosure of the Physician's Notes, I order the Custodian to refrain from similar disclosures in the future. I see no need to impose conditions upon this order, in light of the remedial steps already taken by the Custodian.

John Gabriele
Adjudicator
/an