

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER P2010-007

November 24, 2010

### THE GREAT-WEST LIFE ASSURANCE COMPANY

Case File Number P1145

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

**Summary:** The Applicant made an access request to The Great-West Life Assurance Company (the “Organization”) under the *Personal Information Protection Act* (“PIPA”). The Applicant requested copies of all correspondence that related to the Applicant. In particular, the Applicant requested all correspondence to and from the Alberta Solicitor General, physicians, psychiatrists, psychologists, and other parties. The Applicant also requested tests, evaluations, investigations and referrals carried out by or, at the request of, the Organization.

The Organization provided the Applicant with access to some of the information directly, but required the Applicant to access the remaining information through his treating physician and psychologist. These healthcare practitioners did not, however, provide the Applicant with a copy of the remaining information.

The Adjudicator held that the Organization did not fulfill its duty under section 24 of PIPA. The Adjudicator held that it may be reasonable, in some circumstances, for an organization to arrange to provide an applicant with access to his personal information through his treating physician or psychologist or, in the alternative, to arrange to have these healthcare practitioners review the content of the records with the applicant prior to providing access. However, if these healthcare practitioners do not provide the applicant with a copy of the records, section 24(1) requires that, subject to sections 24(2) and 24(3),

the organization should either make alternate arrangements through another healthcare practitioner or expert or, provide the applicant with access directly.

In addition, although the Adjudicator found that the Organization complied with section 28 and responded to the Applicant's access request within 45 days, the Organization did not fully comply with section 29(c). The Adjudicator held that the Organization did not, in its response to the Applicant's request for information, specifically identify the name of the individual who could answer questions about its refusal to provide the records nor did it specifically state that the Applicant could request a review of its decision under section 46 of PIPA.

**Statutes Cited:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; *Health Information Act* R.S.A. 2000 c.H-5; *Personal Information Protection Act*, S.A. 2003, c.P-6.5, ss. 1, 1(k), 2, 5(1), 24, 24(1), 24(2), 24(3), 28, 28(1), 28(1)(a), 28(2), 29, 29(a), 29(b), 29(c), 32, 46, 52; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, Schedule 1, Principle 4.9.1.

**Regulation Cited:** *Freedom of Information and Protection of Privacy Regulation A/R* 200/1995, s. 5(5)

**Authorities Cited:** PIPA: Orders: P2008-007, P2009-009; FOIP Act: 2000-003, F2002-014, F2009-023

## I. BACKGROUND

[para 1] On September 28, 2008, the Applicant made an access request to the Organization under PIPA for copies of all correspondence that related to the Applicant. In particular, the Applicant requested all correspondence to and from the Alberta Solicitor General, physicians, psychiatrists, psychologists, and other parties. The Applicant also requested tests, evaluations, investigations and referrals carried out by or at the request of the Organization.

[para 2] On October 20, 2008, the Organization responded to the Applicant, providing him with a portion of the information that was responsive to the request. However, the Organization did not directly provide him with a copy of the other information at issue. Instead, the Organization gave copies of this information to his treating physician and to his psychologist who were then to communicate the information to the Applicant. The Organization states that it provided this information to these healthcare practitioners because the documents contained "sensitive medical and psychiatric information" about the Applicant, which these healthcare practitioners were in a better position to interpret and communicate to the Applicant.

[para 3] The Applicant's treating physician and psychologist did not, however, provide this information to the Applicant. The Applicant states that these healthcare practitioners told him that the guidelines issued by the Alberta College of Physicians and Surgeons and the Alberta College of Psychologists precluded them from providing this information to the Applicant. The Applicant states that these healthcare practitioners told him that since the Organization paid for the information, the information is the property of the Organization and only the Organization can provide the Applicant with that information.

[para 4] On November 7, 2008, this Office received the Applicant's request for review of the Organization's decision. Mediation was authorized but did not resolve the issues.

[para 5] On June 25, 2009, this Office received a request from the Applicant that the Information and Privacy Commissioner conduct an inquiry into the matter.

[para 6] I note that the Applicant made another access request to the Organization on June 18, 2009. That access request is not at issue in this inquiry as that request was made after the Applicant had requested a review by this Office. As such, the Organization's response to that request is also not at issue in this inquiry.

[para 7] During the inquiry, the Organization and the Applicant each submitted an initial submission and a rebuttal submission. The physicians and the psychologist who authored the medical assessments were invited to participate in the inquiry as Affected Parties. However, none of these individuals responded to the invitation to participate.

[para 8] This Order proceeds on the basis of PIPA as it existed prior to the amendments to PIPA coming into force on May 1, 2010.

## **II. ISSUES**

[para 9] There were five issues identified in the inquiry notice:

- A. Is the Applicant's personal information in the Organization's custody or control?
- B. Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?
- C. Did the Organization refuse to provide access to the Applicant's personal information in its custody or control in accordance with section 24(2) and/or 24(3)?
- D. Did the Organization respond to the Applicant in accordance with section 28 of the Act?
- E. Did the Organization comply with section 29 of the Act?

[para 10] In this inquiry the Organization stated that primary issue centers on whether it complied with section 24(1) and provided access to the records in a reasonable manner. Given the Organization's submission on this point, I will rephrase issue "C" to read as follows:

"C. Did the Organization provide the Applicant with access to his personal information in the custody and/or control of the Organization in accordance with section 24?"

[para 11] In this Order I will also address issue "B" before issue "A".

[para 12] The revised list of issues read as follows:

- A. Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?
- B. Is the Applicant's personal information in the Organization's custody or control?
- C. Did the Organization provide the Applicant with access to his personal information in the custody and/or control of the Organization in accordance with section 24?
- D. Did the Organization respond to the Applicant in accordance with section 28 of the Act?
- E. Did the Organization comply with section 29 of the Act?

[para 13] In the Applicant's submissions, the Applicant referred to various sections of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") as potential issues in this inquiry. The Organization is not a public body under the FOIP Act. As such, I will not address the FOIP Act nor the corresponding issues raised by the Applicant in that regard.

[para 14] In the Applicant's submissions, the Applicant also stated that he had made a request to Alberta Health Care (presumably to Alberta Health and Wellness) for the billing information of two named physicians and a copy of the Organization's policy on the release of patient/client records and files. I will also not address this information as it was not included as part of the Applicant's access request nor was it included in the Applicant's request for review.

### **III. RECORDS AT ISSUE**

[para 15] There are eight records at issue. These records include reports and/or information authored by several psychiatrists and a psychologist.

### **IV. DISCUSSION**

#### **A. Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?**

[para 16] In the Applicant's access request, the Applicant requested a copy of all correspondence related to the Applicant, including tests, evaluations, investigations and referrals carried out by or at the request of the Organization. After a review of the records that were provided to me by the Organization, I find that Records 1-7 are responsive to the access request. However, I find that Record 8 is not responsive to the access request. Record 8 consists of a report by a physician, dated December 1, 2008. This record therefore postdates and, is not responsive to, the September 28, 2008 access request.

**B. Is the Applicant’s personal information in the Organization’s custody or control?**

[para 17] There are two sub-issues under this heading:

1. Is the information at issue the Applicant’s personal information? and
2. If so, is that personal information in the Organization’s custody or control?

**1. Is the information at issue the Applicant’s personal information?**

[para 18] “Personal information” is defined in section 1(k) of PIPA:

*I In this Act,*

...

*(k) “personal information” means information about an identifiable individual;*

[para 19] After a review of the records at issue, I find that Records 2-7 contain information about the Applicant and therefore consist of the Applicant’s personal information. These records include the Applicant’s name as well as information and opinions about the Applicant’s health and health care history. I find that this information is the Applicant’s personal information. In addition, I find that Record 1 contains the Applicant’s personal information with the exception of a portion of page 2 where the psychiatrist, who is the author of the report, discusses his professional qualifications. I find that this information is not the Applicant’s personal information. A portion of the Records also contain a small amount of information that was supplied by the Applicant regarding his family members. However, I find that this information, in the context of these medical assessments, is about the Applicant and consists of his personal information. I find that this information is not the personal information of the family members (Order P2009-009).

**2. If so, is that personal information in the Organization’s custody or control?**

[para 20] Section 5(1) of PIPA reads:

*5(1) An organization is responsible for personal information that is in its custody or under its control.*

[para 21] In Order P2008-007, the Adjudicator held that the principles under the FOIP Act regarding custody and control are applicable to the issue of custody and control under PIPA. In prior FOIP orders, the term “custody” was defined as the physical possession of a record, whereas the term “control” was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have

both custody *and* control (Order F2002-014). A recent Order of this Office also held that “bare” possession of information does not amount to custody, as the word “custody” implies that there is some right or obligation to hold the information in one’s possession (Order F2009-023).

[para 22] I find that the Organization has custody of the records. I find that the Organization has physical possession of the records at issue and I accept that the Organization has the right or obligation to hold the information in its possession.

[para 23] In the Applicant’s submissions, the Applicant also raised a concern regarding the Organization’s insistence that the Applicant sign a document(s) acknowledging that the independent medical assessment(s) would be the property of the Organization. As I have already found that the Organization has custody of the records, it is inconsequential to this issue as to whether the Applicant signed this acknowledgement.

**C. Did the Organization provide the Applicant with access to his personal information in the custody and/or control of the Organization in accordance with section 24?**

[para 24] Section 24 reads:

*24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:*

*(a) the individual’s personal information where that information is contained in a record that is in the custody or under the control of the organization;*

*(b) the purposes for which the personal information referred to in clause (a) has been used by the organization;*

*(c) the names of the persons to whom and circumstances in which the personal information referred to in clause (a) has been and is being disclosed.*

*(2) An organization may refuse to provide access to personal information under subsection (1) if*

*(a) the information is protected by any legal privilege;*

*(b) the disclosure of the information would reveal confidential information that is of a commercial nature and it is not unreasonable to withhold that information;*

*(c) the information was collected for an investigation or legal proceeding;*

*(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided;*

*(e) the information was collected by a mediator or arbitrator or was created in the conduct of a mediation or arbitration for which the mediator or arbitrator was appointed to act*

*(i) under an agreement*

*(ii) under an enactment, or*

*(iii) by a court;*

*(f) the information relates to or may be used in the exercise of prosecutorial discretion.*

*(3) An organization shall not provide access to personal information under subsection (1) if*

*(a) the disclosure of the information could reasonably be expected to threaten the life or security of another individual;*

*(b) the information would reveal personal information about another individual;*

*(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*

*(4) If, in respect of a record, an organization is reasonably be able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.*

[para 25] Section 2 of PIPA defines the term “reasonable”:

*2 Where in this Act anything or any matter*

*(a) is described, characterized or referred to as reasonable or unreasonable, or*

*(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,*

*the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.*

[para 26] The Organization states that, under section 24(1), the Organization must, when responding to an access request, take into account what is reasonable. The Organization states that it did not refuse to provide the Applicant with access to the records but rather arranged to provide access through the Applicant’s treating physicians and psychologist. The Organization states that the issue in this inquiry is whether it complied with section 24(1) and provided the Applicant with access to the records in a reasonable manner.

[para 27] The Organization states that it is reasonable to provide an applicant with access to sensitive medical information through a physician or other healthcare practitioner for the following reasons:

- (a) The information may not previously be known to the applicant;
- (b) The information may contain technical/medical terms that may not be understood by the applicant or could be misinterpreted by the applicant;
- (c) The information may cause emotional distress to the applicant; and
- (d) It is in the best interests of the applicant to have a physician or other appropriate healthcare professional present to help interpret the information.

[para 28] In support of its argument that this practice is reasonable, the Organization referred to other pieces of legislation such as Schedule 1, Principle 4.9.1 of the Federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), and section 5(5) of the Alberta *Freedom of Information and Protection of Privacy Regulation A/R 200/1995* (Alberta FOIP Regulation) which also permit either an organization or a public body to make medical information available through a healthcare practitioner.

[para 29] After a review of the submissions of all of the parties, I find that the Organization did not comply with section 24. Section 24(1)(a) states that an organization must provide an individual with access to that individual's personal information that is in the custody or under the control of the organization. In doing so, an organization must take into consideration what is reasonable.

[para 30] In this inquiry, the Organization did not provide the Applicant with access to the Applicant's personal information at issue in this inquiry. Although the Organization provided copies of these records to the Applicant's treating physician and psychologist on the understanding that the records would be given to the Applicant, these healthcare practitioners did not provide the Applicant with a copy of these records. Various reasons have been put forth as to why these healthcare practitioners did not give access to the Applicant including the reason, that it is the Organization, and not the healthcare practitioners, who "own" the records. However, regardless of the reason why these healthcare practitioners did not provide the Applicant with copies of this information, the fact remains that the Organization did not fulfill its duty to provide access to the Applicant.

[para 31] In this regard I note that the Applicant requested access to the records from the Organization under PIPA, and it is the Organization that had the duty to provide access to the records. I agree that in some circumstances it may be reasonable for an organization to arrange to provide access to these types of records through an applicant's treating physician or psychologist or arguably another expert or healthcare practitioner under contract or employed with the organization. In the alternative, it may be reasonable for an organization to choose to have a healthcare practitioner or another expert review the content of the records with the applicant prior to providing access. However, if an organization chooses to provide an applicant with access in this manner, the organization must make these arrangements. If a healthcare practitioner or other expert does not provide an applicant with the applicant's personal information found within that record, the organization should either make alternate arrangements through



another healthcare practitioner or expert to provide the applicant with access or provide the applicant with access directly. Access should also be provided in accordance with the timeline set out in section 28.

[para 32] I also note that, in this regard, an organization who believes that the disclosure of medical records would reasonably be expected to threaten the life or security of another individual is not required to provide access to the records under section 24(3)(a). There is no evidence, however, that this is the case in this inquiry. There is also insufficient evidence that any of the other criteria under sections 24(2) or 24(3) apply. In this regard, I note that in its submissions, the Organization did not assert that these sections applied, and the physicians and the psychologist who authored the records chose not participate in this inquiry.

[para 33] I do not find it reasonable for the Organization, who has a duty to provide this information under PIPA, to require the Applicant to obtain the records from his or her treating physician or psychologist even though these healthcare practitioners had refused to provide the Applicant with this information. I agree with the Applicant that it places the Applicant in a “Catch 22” situation, and does not fulfill the Organization’s duty under PIPA.

[para 34] I note that the question of whether the Applicant’s treating physician and psychologist are required to provide access to these records, once they have them in their possession, could arguably be addressed under the *Health Information Act* R.S.A. 2000 c.H-5 (the “HIA”). That issue is, however, beyond the scope of this inquiry. It is, however, clear that the Organization has a duty independent of any duty the Applicant’s treating physician or psychologist may have under the HIA to provide the Applicant with access.

[para 35] Lastly, I will make some comments on two other issues that were raised in this inquiry. First I will address Record 8. In this inquiry I found that this record was not a responsive record as it post-dated the Applicant’s September 28, 2008 access request. As such, I will not issue an order regarding this particular record. However, in my view, the principles I have outlined above would equally apply to the Organization’s response to the Applicant’s request for this record. Although it may be reasonable for the Organization to arrange to provide access to the Applicant’s personal information within this record through a healthcare practitioner or other expert, ultimately, it is the Organization that has a duty to make those arrangements and to provide that information to the Applicant. If a healthcare practitioner or other expert does not provide the Applicant with the Applicant’s personal information found within that record, the Organization should either make alternate arrangements to provide access through another healthcare practitioner or expert, including those that may be employed or under contract with the Organization, or provide the Applicant with access directly. Access should also be provided in accordance with the timeline set out in section 28.

[para 36] Second, I note that the Applicant, in his submissions, raised a concern regarding the fees that he may be required to pay if the Organization chooses to provide him with access through his treating physician or through his psychologist. This issue was also not addressed in the inquiry notice and I therefore will not make an order

regarding this issue. However, I will make some comments in order to provide some direction to the Organization.

[para 37] As previously mentioned, when an organization receives a request for personal information in its custody and/or control, it is the organization that has a duty to provide access in accordance with section 24. In this regard, section 32 states that an organization may charge a reasonable fee for access to that information. This section does not, however, state that an individual must pay a fee to the healthcare practitioner or other expert as a pre-condition to obtaining access. In my view, if an organization arranges to provide an applicant with access to his personal information through a healthcare practitioner or other expert, the organization cannot require that the applicant pay the healthcare practitioner or expert a fee as a precondition to access. An organization may, however, charge the Applicant “reasonable” fees set out in section 32 of PIPA. In this regard, I am not commenting on whether a healthcare practitioner may or may not charge a fee when it receives an access request for information under the HIA. Whether a healthcare practitioner may charge a fee under the HIA or pursuant to another authority and the amount of the fee, is beyond the scope of this inquiry.

**D. Did the Organization respond to the Applicant in accordance with section 28 of the Act?**

[para 38] Sections 28(1) and 28(2) read:

*28(1) Subject to this section, an organization must respond to an applicant not later than*

*(a) 45 days from the day that the organization receives the applicant’s written request referred to in section 26, or*

*(b) the end of an extended time period if the time period is extended under section 31.*

*(2) An organization is not required to comply with subsection (1)(a) if the time period is extended under section 31.*

[para 39] I find that the Organization complied with section 28 of PIPA. I find that the Organization responded to the Applicant’s September 28, 2008 access request on October 20, 2008, which was within the 45 day requirement under section 28(1)(a).

**E. Did the Organization comply with section 29 of the Act?**

[para 40] Section 29 reads:

*29 In a response to a request made under section 24, the organization must inform the applicant*

*(a) as to whether or not the applicant is entitled to or will be given access to all or part of his or her personal information,*

*(b) if the applicant is entitled to or will be given access, when access will be given, and*

*(c) if access to all or part of the applicant's personal information is refused,*

*(i) of the reasons for the refusal and provision of this Act on which the refusal is based,*

*(ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and*

*(iii) that the applicant may ask for a review under section 46.*

[para 41] Section 29(c) states that if an organization refuses to give an applicant access to the applicant's personal information, the organization must provide the applicant with reasons for the refusal and the provisions of the Act on which it is based, the name a person who can answer questions regarding the refusal, and inform the applicant that the applicant may ask for a review under section 46 of PIPA.

[para 42] After a review of all of the information and evidence before me, I find that the Organization complied with sections 29(a) and 29(b). I find that in the Organization's October 20, 2008 letter, the Organization informed the Applicant that it would provide the Applicant with access to some of the information responsive to the access request and when access would be given. The Organization did not, however, comply with section 29(c). I find that in the Organization's letter, the Organization informed the Applicant of its reasons for withholding a portion of the responsive information. However, the Organization did not provide the Applicant with name of the person who could answer questions about the refusal. Although the Organization, in its letter, stated that any concerns regarding its decision should be directed to its "Chief Compliance Officer", it did not identify this individual by name. In addition, although the Organization stated that concerns regarding its decision to withhold the information could be directed to this Office, it did not specifically state that the Applicant could request a review of its decision under section 46 of PIPA.

## **V. ORDER**

[para 43] I make the following order under section 52 of PIPA:

### **A. Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?**

[para 44] I find that Records 1-7 are responsive to the Applicant's September 28, 2008 access request. I do not find that Record 8 is responsive to this access request as it post-dates the access request.

### **B. Is the Applicant's personal information in the Organization's custody or control?**

[para 45] I find that Records 2-7 contain the Applicant's personal information and that this information is in the Organization's custody. I find that Record 1 is also in the

Organization's custody and, with the exception of information regarding the physician's qualifications on page 2 of the record, consists of the Applicant's personal information.

**C. Did the Organization provide the Applicant with access to his personal information in the custody and/or control of the Organization in accordance with section 24?**

[para 46] I find that the Organization did not comply with section 24. I find that the Organization did not provide the Applicant with all of the personal information that was responsive to the Applicant's September 28, 2008 access request.

[para 47] I order the Organization to provide the Applicant with a copy of records 2-7 in their entirety. I also order the Organization to provide the Applicant with a severed copy of record 1, severing from that record the physician's qualifications on page 2. I order the Organization to provide the Applicant with a copy of these records either directly or through a healthcare practitioner or other expert. If the Organization provides the Applicant with access through a healthcare practitioner or other expert, the Organization must ensure that the Applicant receives a copy of his personal information that is at issue.

**D. Did the Organization respond to the Applicant in accordance with section 28 of the Act?**

[para 48] I find that the Organization complied with section 28 of the Act. I find that the Organization responded to the Applicant's access request within 45 days of the request.

**E. Did the Organization comply with section 29 of the Act?**

[para 49] I find that the Organization complied with sections 29(a) and 29(b). However, I find that the Organization did not fully comply with section 29(c). In response to the Applicant's access request, the Organization did not provide the Applicant with the name of the person who could answer questions about the Organization's refusal to provide access to the records nor did it inform the Applicant that the Applicant could request a review of its decision under section 46 of PIPA.

[para 50] However, as the Organization has now, through the inquiry process, provided the Applicant with the name of its Chief Compliance Officer and as the Applicant has already requested a review of this matter, I find that this issue has been dealt with and I will not order the Organization to do anything further in this regard.

[para 51] I further order the Organization to notify me in writing, within 50 days of receiving a copy of this Order that it has complied with this Order.

Lisa McAmmond  
Adjudicator