

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2015-01

April 9, 2015

**COLLEGE & ASSOCIATION OF REGISTERED NURSES OF
ALBERTA**

Case File Number P2041

Office URL: www.oipc.ab.ca

Summary: The College & Association of Registered Nurses of Alberta (the Organization) received a complaint about an individual's professional conduct in 2010. At that time, the individual being complained about was informed of the complaint by the Organization, and was provided with a copy of the complaint. The individual later made an access request under the *Personal Information Protection Act* (PIPA) for access to "a copy of the letter sent [by the Organization] to the complainant pursuant to section 55(1) of the Health Professions Act."

The Organization denied access to the requested letter on the basis that most of it was not personal information of the Applicant. The Organization also withheld the portion of the letter that was personal information under section 24(2)(c) of the Act (information collected for an investigation or legal proceeding). The Applicant requested a review of that decision.

The Adjudicator agreed that most of the letter was not personal information of the Applicant. She also found that section 24(2)(c) applies to the personal information in the letter. However, as the Organization did not explain how it exercised its discretion to withhold the personal information, she ordered the Organization to reconsider its decision, taking into account the appropriate factors.

Statutes Cited: AB: *Health Professions Act*, R.S.A. 2000, c. H-7, ss. 55, 56, 66, 82, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 52.

Authorities Cited: AB: Orders F2004-026, P2007-002, P2012-09.

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 (CanLII).

I. BACKGROUND

[para 1] The Applicant is a member of the College & Association of Registered Nurses of Alberta (the Organization). The Organization had received a complaint about the Applicant's professional conduct in 2010. At that time, the Applicant was informed of the complaint and provided with a copy of the complaint by the Organization. The Applicant made a request dated September 5, 2011, under the *Personal Information Protection Act* (PIPA) for access to "a copy of the letter sent [by the Organization] to the complainant pursuant to section 55(1) of the Health Professions Act."

[para 2] The Organization responded by letter dated September 29, 2011, denying access to the requested letter. The Applicant requested a review of the Organization's response. The Commissioner authorized an investigation of this complaint. This did not resolve the matter and it was set down for a written inquiry.

II. INFORMATION AT ISSUE

[para 3] The information at issue is a three-page letter sent by the Organization to the person who had made a complaint about the Applicant.

III. ISSUE

[para 4] The Notice of Inquiry, dated November 14, 2014, set out the following issue for inquiry as the following:

Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to the record?

IV. DISCUSSION OF ISSUE

Is the information in the withheld record the Applicant's personal information?

[para 5] An applicant may request only his or her own personal information under section 24(1) of the Act. Personal information is defined in section 1(1)(k) of the Act, which reads as follows:

1(1) In this Act,

...

(k) "personal information" means information about an identifiable individual;

...

[para 6] The relevant provisions of section 24 are as follows:

24(1) An individual may, in accordance with section 26, request an organization

(a) to provide the individual with access to personal information about the individual, or

...

(1.1) Subject to subsections (2) to (4), on the request of an applicant made under subsection (1)(a) and taking into consideration what is reasonable, an organization must provide the applicant with access to the applicant's personal information where that information is contained in a record that is in the custody or under the control of the organization.

...

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

...

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

...

[para 7] The letter being withheld by the Organization is a standard acknowledgement letter sent to the complainant under section 55(1) of the *Health Professions Act* (HPA). That section requires the complaints director to notify a complainant of the action to be taken regarding the complaint.

[para 8] In its September 29, 2011 response to the Applicant, the Organization stated that the "majority of the letter is not personal information pertaining to you" (Initial submission, attachment 8). The letter was further described by the Organization to the Applicant as acknowledging the receipt of the complaint and telling the complainant what information would be required (presumably if an investigation were undertaken) (email from the Organization to the Applicant's union, attachment 2 of the Organization's initial submission).

[para 9] I agree with the Organization that the majority of the letter is not the Applicant's personal information. Rather, it is a description of the Organization's processes regarding investigations and, as described by the Organization, the information the complainant will be asked to provide. The fact that those processes will apply to an investigation into the Applicant's conduct does not make those processes about the Applicant.

[para 10] The Organization states that the information in the letter to the complainant relating to the Applicant is limited to the Applicant's name and his practice permit

number. In my view, information summarizing the subject of the complaint also relates to the Applicant (the first sentence of the second paragraph of the letter).

[para 11] Information about employees acting in the course of their job duties is normally not considered information *about* those individuals; however, there may be circumstances that give that information a “personal dimension”, such as disciplinary issues or performance evaluations (see Orders F2004-026 and P2012-09). As the information at issue relates to the professional conduct of the Applicant, I must consider whether the information is personal information or whether it is about his work duties such that it lacks a personal dimension.

[para 12] In this case, while the information relating to the Applicant concerns the Applicant’s status as a professional, the disciplinary context in which the information appears gives the information a personal dimension such that it is the Applicant’s personal information. This applies only to the information that relates to the Applicant, as described above. The parts of the letter describing the Organization’s process for investigations does not relate to the Applicant in either a professional or personal manner.

[para 13] Therefore, the Applicant’s name and his practice permit number appearing in the letter, as well as the information in the second paragraph of the letter that summarizes the subject of the complaint, is the personal information of the Applicant to which he may request access under PIPA. The remaining question is whether the Organization had authority to withhold the personal information in this letter from the Applicant under section 24(2)(c) of the Act.

[para 14] Section 24(2)(c) of the Act permits an organization to withhold personal information that was collected for an investigation or legal proceeding. Section 1(1)(f) of PIPA defines “investigation”, in part, as follows:

1(1)(f) “investigation” means an investigation related to

(i) a breach of agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) circumstances or conduct that may result in a remedy or relief being available at law,

if the breach ... in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;

[para 15] The Organization states that an investigation conducted under Part 4 of the HPA meets the definition of investigation in PIPA.

[para 16] Upon receiving a complaint of unprofessional conduct (as defined in section 1(1)(pp) of the HPA), the complaints director may conduct an investigation into the complaint (section 55(2)(d)). At the completion of the investigation, the complaints director must refer the complaint on to a hearing, unless the complaints director is

satisfied that the complaint is trivial or vexatious, or there is insufficient evidence of unprofessional conduct (section 66(3)). If a hearing tribunal makes a finding of unprofessional conduct, it can direct sanctions against the investigated individual, including a reprimand, conditions on a practice permit, and suspension or cancellation of the practice permit (section 82(1)). I find that an investigation into an allegation of unprofessional conduct under the HPA meets the definition of investigation in PIPA.

[para 17] The Applicant argues that section 55 of the HPA, which requires the acknowledgement letters to the complainant, appears in Division 1 (Part 4) of the HPA, which governs the complaint process. It states that the investigation process falls within Division 3 (Part 4) of the HPA and therefore an investigation process under the HPA does not encompass the complaint or the Organization's acknowledgement letter to the complainant.

[para 18] I am not persuaded by the Applicant's argument. The organization of the HPA into different divisions and headings is not relevant to whether the complaint acknowledgement letter is information that was collected for an investigation, as defined in PIPA.

[para 19] An investigation under the HPA is an investigation into alleged unprofessional conduct as defined in that Act; if a regulated member is found to have acted in a manner that constitutes unprofessional conduct, various penalties or sanctions can be imposed. I find that an investigation under the HPA meets the definition of investigation for the purposes of PIPA.

[para 20] Under the HPA, investigations are initiated by complaints; even where the complaints director has not received a complaint but has reasonable grounds to believe that a regulated member has acted in a manner that constitutes unprofessional conduct, the complaints director may treat that information *as a complaint*, and act on it in accordance with section 55 (section 56).

[para 21] Since a complaint under the HPA initiates an investigation, when the Organization collects personal information in a complaint, that collection is for the purpose of an investigation, and section 24(2)(c) of PIPA applies. The Organization's response to the complainant contained personal information of the Applicant that was collected as part of the complaint, and therefore as part of an investigation. I find that section 24(2)(c) applies to the information at issue.

[para 22] Section 24(2)(c) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant. In its submissions, the Organization did not explain what factors it considered in determining that it would refuse to disclose the personal information in the letter to the Applicant; it stated only that "[the Organization] was acting within [its] statutory authority in the exercise of [its] discretion when denying the original request" (Initial

submission, page 4). By letter dated February 18, 2015, I asked the Organization to explain how it exercised its discretion. The Organization did not respond to my letter.

[para 23] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a public body's exercise of discretion under the Ontario *Freedom of Information and Protection of Privacy Act*. The Court stated (at paras. 68-69, 71):

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

...

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[para 24] While this decision involved the exercise of discretion under FOIP legislation, in my view, the authority of the Commissioner to review an organization's exercise of discretion under PIPA is the same.

[para 25] Orders from this Office under the FOIP Act have given guidance regarding appropriate factors to consider in exercising discretion to withhold information under that Act, including the purpose of the Act, and the purpose of the particular exception being applied. Further, in Order P2007-002, the Director of Adjudication commented on factors that may be relevant to considering whether to withhold information subject to section 24(2)(c). She said (in footnote 34):

An example of a situation in which withholding information would achieve the policy goals of this heading is where an investigation was under way and providing an applicant's own personal information to him could compromise its effectiveness. This might happen where the investigation was into some wrongdoing on the part of the Applicant and providing the information could help him

conceal evidence of the wrongdoing, or where providing to the Applicant some of the statements others were making about him relative to the matter being investigated would dissuade others who remain to be interviewed from providing information. In this regard, I note the parallel provision in British Columbia does not apply after an investigation or legal proceeding has been concluded, so that disclosure of information that was collected for such purposes, but can no longer harm the investigation or proceeding, cannot be withheld on the basis of this provision. The Alberta provision does not contain this restriction. However, in my view, there is still an implicit restriction that before information is withheld, it must be clear that disclosing the information would or likely would have some consequence that is contrary to the policy goals of the provision permitting withholding of information collected for an investigation or legal proceeding.

[para 26] As the Organization in this case has not told me any of the factors it considered in deciding to withhold the personal information at issue from the Applicant, I cannot uphold its exercise of discretion, and will order the Organization to reconsider its decision, taking into account appropriate factors, such as those listed above.

V. ORDER

[para 27] I make this Order under section 52 of the Act.

[para 28] I find that section 24(2)(c) applies to the personal information at issue; however, I do not uphold the Organization's exercise of discretion. I therefore direct the Organization to re-exercise its discretion to withhold the information, on the basis of the proper considerations, including the purpose of the Act generally as well as the particular provision, and whether withholding the information would further these purposes.

[para 29] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order. If the Organization decides to continue to withhold the information, I further order it to provide an explanation of how it exercised its discretion to do so, to both me and the Applicant, at that time.

Amanda Swanek
Adjudicator