

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

INVESTIGATION REPORT 2001-IR-003

May 17, 2001

Alberta Mental Health Board

Investigation #2153

I. INTRODUCTION

[para 1.] On April 13, 2001, the Edmonton Journal reported that information regarding a patient ("the Patient") from Alberta Hospital Edmonton ("AHE") was mistakenly faxed to its newsroom. Subsequently, on April 17, 2001, the Commissioner authorized me to investigate this matter.

II. WHAT INFORMATION WAS DISCLOSED?

[para 2.] The information sent to the Edmonton Journal consisted of two documents: a one-page fax cover page and a two-page form entitled "Discharge Guide".

[para 3.] Both documents contained information about the Patient, such as name, address, date of birth, AHE number, contact persons, psychiatric and personal history, accommodation needs, financial assistance arrangements and support services required.

III. INVESTIGATION FINDINGS

[para 4.] On April 11, 2001, an AHE social worker ("the Social Worker") was working on discharge arrangements for the Patient. The Social Worker said the Patient was being discharged the next day and required accommodations, financial assistance and support services.

[para 5.] The Social Worker had discussed the Patient's accommodation needs with an intake worker at the Salvation Army Men's Hostel (the "Hostel") earlier that day and was waiting for finalization of the Discharge Guide.

[para 6.] The Social Worker said the Discharge Guide needed to be reviewed and approved by an AHE doctor. The doctor was not on site that day and the Social Worker could not finalize the Discharge Guide until after regular business hours.

[para 7.] The Social Worker explained the purpose of the fax cover sheet and the Discharge Guide was to secure accommodations for the Patient and to communicate the Patient's treatment and care needs. This would enable the Hostel to ensure it had the necessary arrangements to support the Patient. As the Patient was arriving at the Hostel the next day, the Social Worker promised the intake worker that she would fax the information to the Hostel "ASAP".

[para 8.] The Social Worker said she had confirmed the fax number for the Hostel during her earlier conversation with the intake worker. However, when she typed the fax number on the cover sheet, she

inverted the "6" into a "9" in error. The correct fax prefix number for the Hostel was "426". However, the Social Worker typed "429".

[para 9.] The Social Worker did not realize that the two documents went to the Edmonton Journal until the next day when a journalist (the "Journalist") contacted her.

IV. APPLICATION OF THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

1. General

[para 10.] The first consideration is whether the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") applies to the information that was disclosed. To decide whether the FOIP Act applies, it is necessary to look at section 5(2) of the FOIP Act.

[para 11.] Section 5(2) of the FOIP Act permits another enactment or a provision of the enactment to prevail despite the FOIP Act if the following criteria apply:

- The information falls within another enactment or a provision of it that expressly provides that the enactment or provision of it prevails despite the FOIP Act; and
- There is an inconsistency or conflict between a provision of the FOIP Act and the other enactment or provision of it.

2. Does the information disclosed fall within another enactment or a provision of it that expressly provides that the enactment or a provision of it prevails despite the FOIP Act?

[para 12.] The information disclosed was information obtained from diagnostic and treatment records maintained by AHE.

[para 13.] In Order 2000-002, the Commissioner found that "*information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them*" falls within section 17(4) of the *Mental Health Act*. In Order 2001-012, the Assistant Commissioner said "*Alberta Hospital Edmonton is a "diagnostic and treatment centre". Consequently, any information in those records would fall within section 17(4) of the Mental Health Act* [para 16.]".

[para 14.] I find that the information disclosed falls within section 17(4) of the *Mental Health Act*. Section 15(2)(f) of the FOIP Regulation specifically provides that the *Mental Health Act* prevails despite the FOIP Act. Therefore, the information disclosed meets the first requirement set out under section 5(2) of the FOIP Act.

3. Is there an inconsistency or conflict between the FOIP Act and the *Mental Health Act* or a provision of it?

[para 15.] The Commissioner has said that the terms "inconsistent" or "in conflict with" refer to a situation where two legislative enactments cannot stand together, that is, compliance with one law involves breach of the other law (Order 99-034, Order 2000-002, and Order 2001-012).

[para 16.] The issue is whether the disclosure provisions under section 38 of the FOIP Act are inconsistent or in conflict with the disclosure provisions in the *Mental Health Act*.

[para 17.] In Order 2000-002, the Commissioner wrote:

[para 112.] ...section 38 of the FOIP Act is inconsistent or in conflict with section 17(4) of the Mental Health Act because section 38 specifies other ways in which personal information may be disclosed. Given the complete scheme for disclosure under the Mental Health Act, the fact that section 38 may contain some similar disclosure provisions as do sections 17(5.1) to (9) is not sufficient to find that there is no inconsistency or conflict. The same reasoning applies to any provisions contained in section 38 for which section 17 is silent.

[para 18.] Following the Commissioner's findings in Order 2000-002, I find that the disclosure provisions of the FOIP Act are inconsistent or in conflict with the disclosure provisions in section 17 of the *Mental Health Act*. Therefore, the information disclosed meets the second requirement set out under section 5(2) of the FOIP Act.

4. Conclusion under section 5(2) of the FOIP Act

[para 19.] The information disclosed falls within section 17(4) of the *Mental Health Act*. The disclosure provisions of the FOIP Act are inconsistent or in conflict with the disclosure provisions of the *Mental Health Act*. In such a case, section 15(2)(f) of the FOIP Regulation says that the *Mental Health Act* prevails despite the FOIP Act. Consequently, section 5(2) of the FOIP Act applies to the information disclosed and the Commissioner has no jurisdiction over the disclosure.

V. CLOSING COMMENTS

[para 20.] Although the Commissioner has no jurisdiction over the disclosure of the Patient's information, this does not mean there is no accountability over mental health information. The *Mental Health Act* contains confidentiality provisions and sets out the parameters under which mental health information may be disclosed. In addition, the new *Health Information Act* (proclaimed April 25, 2001) and its associated regulations also governs the collection, use and disclosure of health information and the Commissioner has jurisdiction under that legislation. However, no legislation can prevent incidents of human error.

[para 21.] The disclosure to the Edmonton Journal was not deliberate or intentional. From evidence presented during the investigation, the Social Worker appears to be a competent employee. In my view, the disclosure was an unfortunate incident due to human error.

[para 22.] Subsequent to the Edmonton Journal article, the Alberta Mental Health Board conducted a review into this matter. Alberta Mental Health Board advised it has issued a directive to its staff regarding the transmittal of confidential information by mediums such as facsimile, postal, telephone, etc.

[para 23.] On April 18, 2001, the Edmonton Journal reported that the Alberta Mental Health Board did not comply with its own internal policy of reporting the breach to the Commissioner within 24 hours. Although the policy was effected in 1998 and was revised in 1999, evidence during the investigation indicates that the policy may not be well known to all staff. I was informed that Alberta Mental Health Board has undergone a number of organizational changes and that this may be a contributing factor in staff awareness of certain policies. Alberta Mental Health Board advised it has initiated a review of its organizational-wide communication strategies and procedures to ensure that employees are aware of policies and directives.

[para 24.] I would like to commend the Alberta Mental Health Board for its willingness to use this incident as an opportunity to review its existing practices. I would also like to thank the staff of the

Alberta Mental Health Board for their cooperation during the investigation. This investigation is now closed.

Submitted by,

Marilyn Mun
Portfolio Officer