

**ALBERTA**

**INFORMATION AND PRIVACY COMMISSIONER**

**ORDER 99-034**

February 10, 2000

**ALBERTA HEALTH AND WELLNESS, ALBERTA CANCER  
BOARD, CAPITAL HEALTH AUTHORITY AND CALGARY  
REGIONAL HEALTH AUTHORITY**

Review Numbers 1510, 1601, 1617, 1682

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## I. BACKGROUND

[para 1.] The Applicants applied under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for information and documents that contained the names of the Applicants, related to the Applicants or contained the personal information of the Applicants, in the custody or control of Alberta Health and Wellness, the Alberta Cancer Board, the Capital Health Authority and the Calgary Regional Health Authority (referred to collectively as the “Public Bodies”). With the exception of Alberta Health and Wellness, these Public Bodies became subject to the FOIP Act on October 1, 1998.<sup>1</sup> Alberta Health and Wellness became subject to the FOIP Act on October 1, 1995.

[para 2.] The Calgary Regional Health Authority disclosed all its records. The other Public Bodies withheld some of their records or some of the information contained in their records, claiming certain exceptions under the FOIP Act.

[para 3.] Given the recent extension of the FOIP Act to these Public Bodies, it was necessary to deal with some preliminary issues before holding an inquiry to deal with the Public Bodies’ decisions to withhold certain information. Once the preliminary issues were dealt with, future inquiries could be held to determine whether the Public Bodies properly withheld the information from the records.

[para 4.] On September 13, 1999, my Office issued a Notice of Inquiry, which stated that an oral public inquiry would be held on October 18-19, 1999. The Notice of Inquiry was sent to the head of the Public Bodies and to the Applicants. My Office also invited the College of Physicians and Surgeons of Alberta and the Alberta Medical Association to participate as affected parties (the “Affected Parties”). The Notice specified that this inquiry would not deal with whether the Public Bodies properly applied the exceptions to the information withheld by the Public Bodies. Those issues would be dealt with in separate inquiries, if necessary, that were specific to the public bodies involved.

[para 5.] The dates for the inquiry were changed to November 8-9, 1999. On November 4, 1999, in contemplation of hearing the parties’ submissions with respect to section 5(2) of the FOIP Act (the jurisdictional issue in this case), I prepared several questions (attached as Appendix A to this Order), which I sent to the parties to address at the inquiry.

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<sup>1</sup> See section 98(4) of the FOIP Act.

[para 6.] The Public Bodies and the Affected Parties were also asked at the conclusion of the inquiry to provide further information (a supplementary submission) to my Office regarding certain types of records.

[para 7.] On November 8-9, 1999, I conducted the inquiry on the jurisdictional issue. The Applicants represented themselves. The Public Bodies and the Affected Parties were represented by solicitors.

[para 8.] This Order proceeds on the basis of the FOIP Act as it existed before the amendments to the FOIP Act came into force on May 19, 1999.

## **II. PRELIMINARY ISSUES**

[para 9.] I raised some preliminary issues at the commencement of the inquiry. First, I advised the parties that one of the lawyers from my Office advising me on this inquiry was employed up to 1997 by one of the Public Bodies in this inquiry. I advised the parties that this lawyer's involvement with the issues before me was very limited. Consequently, I did not believe there was a conflict of interest in this lawyer's continuing to be Counsel to the Commissioner on this matter. None of the parties voiced any objections.

[para 10.] I also advised the parties that I accepted the Alberta Cancer Board's submission that it is a "public body" and subject to the FOIP Act for the purposes of this inquiry, even though the Alberta Cancer Board did not become a public body for the purposes of the FOIP Act until May 19, 1999, after the Applicants made their request for access to the Alberta Cancer Board. No parties objected to the Alberta Cancer Board's submission on this point.

[para 11.] In any event, the Alberta Cancer Board is a health care body now: see section 1(1)(g)(iii.1) of the FOIP Act. A "health care body" is a "local public body" (section 1(1)(j)(ii)), which in turn is a "public body" (section 1(1)(p)(vi)) under the FOIP Act. Therefore, I would have jurisdiction over the Alberta Cancer Board for the purposes of this inquiry.

[para 12.] Furthermore, I believe that the records withheld by the Alberta Cancer Board were subject to the FOIP Act at the time the request for access was made, irrespective of the omission of the Alberta Cancer Board as a "health care body" under section 1(1)(g) of the FOIP Act at the time of the access request. The records were in the custody or under the control of the Cross Cancer Institute, which is an "approved

hospital” according to Deputy Ministerial Order #4/97, made pursuant to section 44(2)(a) of the *Hospitals Act*.<sup>2</sup> An approved hospital is a “health care body” for the purposes of the FOIP Act (section 1(1)(g)(i), before amendment). Consequently, the Applicants could have made an access request to the Cross Cancer Institute for the records in the custody or control of the Cross Cancer Institute.

[para 13.] The Public Bodies raised three preliminary issues: the scope of the inquiry; the protection of the Applicants’ privacy; and the questions dealing with section 5(2) of the FOIP Act (attached as Appendix A to this Order), which my Office sent to the Public Bodies on November 4, 1999.

[para 14.] In response to the first preliminary issue raised by the Public Bodies, I advised that the scope of the inquiry would be limited to the issues raised by the Notice of Inquiry. Second, it is my practice, when dealing with personal information in records, that that part of the inquiry be held *in camera*. This means that only one party is before me at one time. All other parties and the public would be excluded during an *in camera* session. Furthermore, given the general nature of this inquiry, it was my opinion that there would be little personal information that would be relevant to the issues at hand.

[para 15.] Finally, I advised the parties that, even if the parties believed that I had jurisdiction and that my jurisdiction was not an issue for the parties, I still must deal with the issue of whether I have jurisdiction under the FOIP Act. As a result, I asked the parties to answer the questions I put to them on that matter.

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

#### Alberta Health and Wellness

[para 16.] Alberta Health and Wellness withheld the following information:

- i) information from records pertaining to the Out-of-Country Health Services Committee and the Out-of-Country Health Services Appeal Committee (also known as the Appeal Panel);
- ii) information from its general administration records; and

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<sup>2</sup> According to section 1(1)(c)(i) of the *Interpretation Act*, R.S.A. 1980, c. I-7, “regulation” means an order enacted in the execution of a power conferred by or under the authority of an Act.

- iii) information from litigation records related to a lawsuit between the Applicants and Alberta Health and Wellness.

[para 17.] A listing of the pages on which information has been withheld from the records, as categorized by Alberta Health and Wellness, is set out in Appendix B.

#### The Alberta Cancer Board

[para 18.] The Alberta Cancer Board withheld:

- i) two pages of information related to a lawsuit between the Applicants and the Alberta Cancer Board, and
- ii) 115 pages of clinical trial protocol information and bulletins. The protocol bulletins were provided to the Alberta Cancer Board from a third party research organization.

[para 19.] A listing of the pages withheld, as categorized by the Alberta Cancer Board, is set out in Appendix B.

#### The Capital Health Authority

[para 20.] The Capital Health Authority withheld information related to a lawsuit between the Applicants and the Capital Health Authority.

[para 21.] A listing of the pages withheld, as categorized by the Capital Health Authority, is set out in Appendix B.

#### The Calgary Regional Health Authority

[para 22.] The Calgary Regional Health Authority disclosed all its records. Consequently, it has no records at issue for the purpose of this inquiry.

[para 23.] As a result of the Applicants' request for access, numerous records were disclosed. At the inquiry, the parties stated that they had already disclosed numerous pages of records to the Applicants, as follows:

- Alberta Health and Wellness - approximately 1100 pages of records;
- The Alberta Cancer Board - approximately 700 pages of records;
- The Capital Health Authority - approximately 850 pages of records;

- The Calgary Regional Health Authority - approximately 30 pages of records.

[para 24.] This Order does not deal with the specific information or records the Public Bodies disclosed to the Applicants. Furthermore, this Order does not deal with whether the Public Bodies properly withheld information or records under the FOIP Act.

#### **IV. ISSUES**

[para 25.] There are two issues, as set out in the Notice of Inquiry:

##### **Issue A: Jurisdiction**

[para 26.] The issue is whether I, as Information and Privacy Commissioner, have jurisdiction over the records and over the parties who are in custody and/or control of the records. This includes the following questions:

- Do the records fall within one of the statutes specified in section 15(2) of the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the “FOIP Regulation”)?
- If the answer to the above question is in the affirmative, are the records excluded from the *Freedom of Information and Protection of Privacy Act* in accordance with section 5(2) of the FOIP Act. Alternatively, are the records only excluded by section 5(2) of the FOIP Act if the statute or regulation specified in section 15(2) of the FOIP Regulation is inconsistent or in conflict with the FOIP Act?

##### **Issue B: Custody or control of records**

[para 27.] If I determine that I have jurisdiction over the records, are the records in the custody or control of a public body for the purposes of the FOIP Act? Who has custody or control of the records? As a patient passes through the health system, doctors and other medical professionals generate many records. From the perspective of the patient, this is a seamless service. However, in reality, the health system is made up of numerous public bodies with complex inter-relationships. Doctors and other health professions may be independent contractors, contract employees, or staff of hospitals, boards, authorities, private clinics or professional corporations. This inquiry will look at those relationships that are specific to the records at issue to determine who

has custody or control for the purposes of the *Freedom of Information and Protection of Privacy Act*.

## **V. DISCUSSION OF THE ISSUES**

### **ISSUE A: Jurisdiction**

[para 28.] I intend to deal with Issue A in the following parts:

1. How should section 5(2) of the FOIP Act be interpreted?
  - i) How does section 5 of the FOIP Act relate to sections 1 to 4 of the FOIP Act?
  - ii) When is section 5(2) engaged?
  
2. Does the information withheld fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation? Is there an inconsistency or conflict between the FOIP Act and the provision of the statute (or its regulations), in relation to the information withheld?

#### **1. How should section 5(2) of the FOIP Act be interpreted?**

##### **i) How does section 5 of the FOIP Act relate to sections 1 to 4 of the FOIP Act?**

[para 29.] Sections 1, 2, 3, 4 and 5 of the FOIP Act are introductory provisions in that they appear before Parts 1-6 of the FOIP Act.

[para 30.] *Driedger on the Construction of Statutes*, third edition, R. Sullivan, (Toronto: Butterworths, 1994) at page 245, reads:

Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by considering the rest of the Act, including both other provisions of the Act and its various structural components.

[para 31.] At page 248, it reads:

When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan.

[para 32.] In my view, sections 1 to 5 apply to the entire FOIP Act. All five sections refer to “this Act” rather than a particular part or division of the FOIP Act. Accordingly, a definition outlined in section 1 would apply equally to Part 1 of the FOIP Act as to Part 4 of the FOIP Act, unless otherwise stated.

[para 33.] These five sections must be interpreted coherently. Given the structure of the FOIP Act, I believe that not one of the five sections is subordinate to another. In looking at the scheme of the FOIP Act and the relationship between the five introductory sections, I believe they must work together.

[para 34.] These five introductory sections describe the FOIP Act’s application and jurisdiction. For example, unless a government body fits within the definition of a “public body”, it is not subject to the FOIP Act.

[para 35.] Section 2 sets out the purposes of the FOIP Act. Section 3 allows for parallel systems of access to information to exist, such as the discovery process in civil litigation. The FOIP Act does not replace other systems of access or disclosure already in place.

[para 36.] Section 4 says which types of “records” are outside the FOIP Act. The focus of section 4(1) is “records” because section 4(1) excludes certain “records” from the application of the FOIP Act. The object of section 4(1) is to specify which “records” are excluded from the application of the FOIP Act. Therefore, if a record is outside the FOIP Act, it is outside all Parts of the FOIP Act. Accordingly, the provisions dealing with access as well as protection of privacy would not apply to that type of record.

[para 37.] Like sections 1-4, section 5 also delineates the FOIP Act’s application. Section 5 permits another “enactment” (a statute or regulation), or a provision of the enactment, to prevail over the FOIP Act. Section 5 is often referred to as the “paramountcy provision”. Section 5 is a jurisdictional provision because, if another enactment or a provision of it “prevails” over the FOIP Act, I am unable to use my jurisdiction to apply the FOIP Act.

**ii) When is section 5(2) engaged?**

[para 38.] Section 5(2) of the FOIP Act reads:

*5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*

- (a) another Act, or
- (b) a regulation under this Act

*expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

[para 39.] 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: see *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4<sup>th</sup>) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4<sup>th</sup>) 585 (N.B. C.A.)

[para 40.] Section 5(2) of the FOIP Act is engaged if there is an inconsistency or a conflict between a provision of the FOIP Act and a provision of another enactment. In determining whether section 5(2) is engaged, it is necessary to find a provision of the FOIP Act and a provision of the enactment that is inconsistent or in conflict.

[para 41.] Should there be an inconsistency or conflict, the general rule outlined by section 5(2) is that the provision of the FOIP Act is to prevail. Therefore, section 5(2) provides a legislative solution to determine which provision governs.

[para 42.] This general rule has two exceptions. First, other legislation may expressly provide that the other legislation or a provision of that legislation is to prevail despite the FOIP Act. An example of this type of exception is found in s. 8.1 of the *Provincial Court Judges Act*, S.A. 1981, c. P-20.1.<sup>3</sup> Section 8.1 reads:

*Confidentiality of selection process*

*8.1 Records containing information arising during the process for the selection of judges are confidential and despite the Freedom of Information and Protection of Privacy Act [emphasis added] are not subject to that Act.*

[para 43.] Second, section 5(2) also says that a regulation under the FOIP Act may expressly provide that the other legislation or a provision of that legislation is to prevail despite the FOIP Act.

[para 44.] Section 15(1) of the FOIP Regulation says:

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<sup>3</sup> Other examples can be found in the *Cemeteries Act*, R.S.A. 1980, c. C-2, s. 59.6(2), the *Funeral Services Act*, R.S.A. 1980, c. F-22.7, s. 17(2) and the *Municipal Government Act*, S.A. 1994, c. M-26.1, s. 301.1.

*15(1) The following provisions prevail despite the Freedom of Information and Protection of Privacy Act:...*

[para 45.] Section 15(1) then lists specific sections of certain statutes that prevail despite the FOIP Act.

[para 46.] On the other hand, section 15(2) of the FOIP Regulation says that various statutes (along with their regulations) prevail despite the FOIP Act. Section 15(2) reads:

*15(2) The following Acts and the regulations made under them prevail despite the Freedom of Information and Protection of Privacy Act:*

- (a) Alberta Health Care Insurance Act;*
- (b) Ambulance Services Act;*
- (c) Blind Persons' Rights Act;*
- (d) Cancer Programs Act;*
- (e) Emergency Medical Aid Act;*
- (f) Government Organization Act, Schedule 7;*
- (g) Health Facilities Review Committee Act;*
- (h) Health Foundations Act;*
- (i) Health Insurance Premiums Act;*
- (j) Hospitals Act;*
- (k) Human Tissue Gift Act;*
- (l) Lloydminster Hospital Act;*
- (m) Mental Health Act;*
- (n) M.S.I. Foundation Act;*
- (o) Nursing Homes Act;*
- (p) Personal Directives Act;*
- (q) Premier's Council on the Status of Persons with Disabilities Act;*
- (r) Provincial Health Authorities of Alberta Act;*
- (s) Public Health Act;*
- (t) Regional Health Authorities Act.*

[para 47.] This case concerns only section 15(2) of the FOIP Regulation. This case also concerns only information that has been withheld from the Applicants on the Applicants' access request.

[para 48.] Therefore, for section 5(2) to be engaged in this case, two criteria must be met: 1) the information withheld must fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation; and 2) there must be an inconsistency or a conflict between a provision of the FOIP Act and the provision of the statute (or its regulations), in relation to the information withheld.

[para 49.] If those two criteria are met, the statute (or its regulation) prevails despite the FOIP Act. I will deal with each Public Body separately on those two criteria.

**2. Does the information withheld fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation? Is there an inconsistency or conflict between the FOIP Act and the provision of the statute (or its regulations), in relation to the information withheld?**

**a) Alberta Health and Wellness**

**i) Does the information withheld fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation?**

[para 50.] Section 3(1) of the *Alberta Health Care Insurance Act*, R.S.A. 1980, c. A-24 (the “AHCI Act”), says that:

*3(1) The Minister shall, in accordance with this Act and the regulations, administer and operate on a non-profit basis a plan to provide benefits for basic health services to all residents of Alberta.*

[para 51.] Alberta Health and Wellness says that it withheld information from what it describes as its general administration records, litigation records and records pertaining to the Out-of-Country Health Services Committee and Out-of-Country Health Services Appeal Committee (Appeal Panel). These committees (which I will collectively refer to as the “OOCHSC” in this Order) are created by Part 4 of the *Alberta Health Care Insurance Regulation*, Alta. Reg. 216/81.

[para 52.] The general administration records deal mostly with funding or costing of certain health care services, as do the records pertaining to the OUCHSC. Alberta Health and Wellness withheld what appears to be personal information of third parties and advice contained in those records.

[para 53.] The litigation records contain information about a lawsuit arising out of the *Alberta Health Care Insurance Act*. The lawsuit is between the Applicants and Alberta Health and Wellness. For the most part, Alberta Health and Wellness has withheld all the information contained in those records.

[para 54.] Section 13(1) of the AHCI Act is a provision that deals with information under that legislation. Section 13(1) reads:

*13(1) The Minister and every person employed in the administration of this Act or the Health Insurance Premiums Act shall preserve secrecy with respect to all matters that come to his knowledge in the course of his employment and shall not communicate any of those matters to any other person except as otherwise provided in this section.*

[para 55.] Does the information withheld by Alberta Health and Wellness fall within section 13(1) of the AHCI Act? To decide this, it is necessary that I interpret section 13(1).

[para 56.] Section 13(1) of the AHCI Act is worded very broadly in that the Minister and each person employed in the administration of the AHCI Act or the *Health Insurance Premiums Act* must preserve secrecy with respect to “all matters [emphasis added] that come to his knowledge in the course of his employment”. “All matters” must include all information obtained in the administration of the AHCI Act or the *Health Insurance Premiums Act*.

[para 57.] Alberta Health and Wellness was of the view that the information withheld from the records pertaining to the OCHSC would fall within section 13(1) of the AHCI Act. In its submission dated October 4, 1999, Alberta Health and Wellness said:

The AHCI (*Alberta Health Care Insurance Act*) and Regulations apply in respect of those records maintained by Alberta Health and Wellness that pertain to the Out of Country Health Services Committee and Appeal Committee. These Committees are established pursuant to the AHCI Regulation and operate in accordance with the procedures set out in the AHCI Regulation.

[para 58.] I agree with Alberta Health and Wellness that the information withheld from the records pertaining to the OCHSC would fall within section 13(1) because that information comes within “all matters” under section 13(1).

[para 59.] Alberta Health and Wellness nevertheless urged me to take a narrow interpretation of the meaning of section 13(1) so that “all matters” would not include all the information withheld by Alberta Health and Wellness. Alberta Health and Wellness “were less convinced” that section 13(1) applied to the information withheld from the general administration records and the litigation records.

[para 60.] However, that distinction is too narrow, and I find that all the information withheld from the general administration records, the

litigation records, and the records pertaining to the OCHSC falls within “all matters” under section 13(1) of the AHCI Act.

[para 61.] I have also looked at sections 13(1.1) to 13(8.1) of the AHCI Act to see whether any of the information withheld by Alberta Health and Wellness would fall within any of those provisions. Sections 13(1.1) to 13(8.1) set out limited circumstances in which certain information may be disclosed. Section 13(4)(e) is of particular interest, and reads:

*13(4) The Minister or a person employed in the administration of this Act authorized by the Minister may furnish information pertaining to the date on which health services were provided and a description of those services, the registration number of the person who received the services, the benefits paid for those services and the person to whom they were paid, but the information may be furnished only*

...

*(e) to the resident or his dependant who received the services or to any other person with the written consent of the resident or dependant who received the services.*

[para 62.] So it appears that, in spite of the comprehensive confidentiality provision (“all matters”) contained in section 13(1) of the AHCI Act, section 13(4)(e) would allow persons such as the Applicants to obtain the kind of information listed in section 13(4).

[para 63.] I have reviewed all the information withheld by Alberta Health and Wellness. None of that information is the kind of information listed in section 13(4) of the AHCI Act. Therefore, in this Order, I do not find it necessary to consider whether there is an inconsistency or conflict between the FOIP Act and section 13(4) of the AHCI Act. The information withheld falls within the confidentiality provision (“all matters”) of section 13(1) of the AHCI Act and is inaccessible.

[para 64.] In summary, I find that all the information withheld by Alberta Health and Wellness on the Applicants’ access request, as set out in Appendix B of this Order, falls within section 13(1) of the AHCI Act.

[para 65.] The AHCI Act is listed as one of the statutes in section 15(2) of the FOIP Regulation. Therefore, if there is an inconsistency or conflict between the FOIP Act and section 13(1) of the AHCI Act in relation to the information withheld, the AHCI Act will prevail despite the FOIP Act.

**ii) Is there an inconsistency or conflict between the FOIP Act and section 13(1) of the *Alberta Health Care Insurance Act*, in relation to the information withheld?**

[para 66.] Alberta Health and Wellness identified an inconsistency or conflict between section 13(1) of the AHCI Act and the FOIP Act.

[para 67.] Alberta Health and Wellness stated, at page 5 of its supplementary submission dated November 23, 1999:

As indicated in the AHW written submission, section 13 contains no provision that would permit a general disclosure of records to a registrant. Certain records may be provided. In contrast, such records would likely be accessible under the FOIP Act if the Act was read in isolation. AHW submits that this is the type of conflict that section 5(2) was specifically designed to address.

[para 68.] At page 6 of its November 23, 1999 submission, Alberta Health and Wellness stated:

Absent express provisions to the contrary, the precedence of one statute over another does not replace or impliedly repeal the subordinate enactment. The records in question remain as records for purposes of the FOIP Act and the Commissioner's jurisdiction over those records remains intact. However, in considering whether to release the record(s) in question, the Commissioner's discretion is restricted because of the paramountcy of the AHCI Act. As the AHCI creates a general cloak of confidentiality over records and data, including section 13 records or data, that cloak conflicts in a direct and substantive manner with the FOIP Act disclosure provisions.

[para 69.] Section 13(1) of the AHCI Act is a comprehensive confidentiality provision with respect to information acquired in the course of administering the AHCI Act and the *Health Insurance Premiums Act*. Section 13(1) requires that the Minister and each employee keep confidential "all matters that come to his knowledge in the course of his employment".

[para 70.] In what way is the FOIP Act inconsistent or in conflict with section 13(1) of the AHCI Act, in relation to the information withheld?

[para 71.] Section 6(1) of the FOIP Act provides an applicant with a right of access to records on an access request, subject to limited exceptions (section 6(2) of the FOIP Act). Under the FOIP Act, the Applicants would have a right of access to records containing the information withheld by Alberta Health and Wellness, subject to limited exceptions, some of which are discretionary ("may").

[para 72.] On the other hand, section 13(1) of the AHCI Act prohibits access to all the information withheld by Alberta Health and Wellness because section 13(1) says that the Minister and each employee “shall preserve secrecy”.

[para 73.] Section 25(2)(e) of the *Interpretation Act*, R.S.A. 1980, c. I-7, says that “shall” is to be interpreted as imperative, that is, mandatory. Consequently, the Minister and each employee has no choice about preserving secrecy. They must do so.

[para 74.] The FOIP Act gives a right of access to the information withheld, and the AHCI Act prohibits access to that information. Therefore, regardless of whether access to that information is refused, as here, on an access request under the FOIP Act, I find that the access provisions of the FOIP Act are inconsistent or in conflict with the confidentiality provision of section 13(1) of the AHCI Act, in relation to the information withheld by Alberta Health and Wellness.

[para 75.] The paramountcy provisions of section 5(2) of the FOIP Act and section 15(2) of the FOIP Regulation resolve this conflict in favour of the AHCI Act. So the access provisions of the FOIP Act will give way to the AHCI Act on the issue of access to information that falls under section 13(1) of the AHCI Act.

[para 76.] Consequently, on the Applicants’ access request, I have no jurisdiction over access to the information Alberta Health and Wellness withheld from the records listed in Appendix B of this Order.

[para 77.] In this Order, I have ruled on the narrow issue of the inconsistency or conflict between access to information under the FOIP Act (Part 1 of the FOIP Act) and access to information under section 13(1) of the AHCI Act. While I have listened with interest to arguments about whether other provisions of the FOIP Act are inconsistent or in conflict with the AHCI Act, I express no opinion on those arguments now. I will rule on those other arguments in an appropriate case.

**iii) Do I, as Commissioner, nevertheless have jurisdiction over information that falls within a provision of legislation that is paramount over the FOIP Act?**

[para 78.] Alberta Health and Wellness submitted that, despite the conflict, I still have jurisdiction, in a limited sense, over the information it withheld. Alberta Health and Wellness argued that the existence of an inconsistency or conflict in one or more provisions of another enactment does not supplant the entirety of the FOIP Act where no such inconsistency or conflict exists.

[para 79.] At page 7 of its November 23, 1999 submission, Alberta Health and Wellness submitted that I could adjudicate a dispute involving records because there is no appeal mechanism in the AHCI Act. However, although I could adjudicate the dispute, Alberta Health and Wellness says that I would be limited in my remedies by the provisions of the paramount enactment, that is, the AHCI Act. Accordingly to Alberta Health and Wellness, I would have to look at the AHCI Act provisions to determine the scope of the available remedies.

[para 80.] I disagree. I am a statutory body. I may do only what the FOIP Act empowers me to do. I cannot incorporate into the FOIP Act the remedies that may exist under the AHCI Act or any other legislation. Nor can I review a decision to refuse access under a paramount provision of any other legislation, as I have no jurisdiction under that legislation.

[para 81.] My authority in this case is limited to determining whether I have jurisdiction over access to the information in question. If I do not, as here, I cannot conduct an inquiry to decide whether the Applicants should be given access to the information.

[para 82.] I have found that the access provisions of the FOIP Act are inconsistent or in conflict with section 13(1) of the AHCI Act. That means I have no jurisdiction over access to the information withheld by Alberta Health and Wellness. I do not find it necessary to decide whether I have jurisdiction over the information for purposes other than access.

#### **iv) Conclusion regarding Alberta Health and Wellness**

[para 83.] The information withheld by Alberta Health and Wellness, as set out in Appendix B of this Order, falls within section 13(1) of the AHCI Act. The AHCI Act is listed in section 15(2) of the FOIP Regulation. The access provisions of the FOIP Act are inconsistent or in conflict with section 13(1) of the AHCI Act. In such a case, section 15(2) of the FOIP Regulation says that the AHCI Act prevails over the FOIP Act.

[para 84.] Therefore, section 13(1) of the AHCI Act prevails over the access provisions of the FOIP Act. Consequently, section 5(2) of the FOIP Act is engaged, and I have no jurisdiction over access to the information withheld by Alberta Health and Wellness.

**v) Amendment of section 13(1) of the *Alberta Health Care Insurance Act***

[para 85.] The *Health Information Act*, S.A. 1999, c. H-4.8, was passed in December 1999, but is not yet in force as of the date of this Order. Section 110(2) of that Act amends section 13 of the *Alberta Health Care Insurance Act*, as follows:

*110(2) Section 13 is amended*

*(a) by repealing subsection (1) and substituting the following:*

*13(1) Except as permitted or required under this Act, the Minister or a person employed in the administration of this Act and authorized by the Minister may disclose health information acquired under this Act or the *Health Insurance Premiums Act* only in accordance with the *Health Information Act* [emphasis added].*

[para 86.] I mention this amended provision because the interpretation I have given to section 13(1) in this Order may well change once the amendment is in force.

**b) The Alberta Cancer Board**

**i) Does the information withheld fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation?**

[para 87.] The Alberta Cancer Board withheld the following: 115 pages of what the Alberta Cancer Board describes as “health records” and two pages of “administration/director’s records”. The “health records” consist of clinical trial protocol information and bulletins.

[para 88.] A “protocol” is defined by *Dorland’s Illustrated Medical Dictionary*, 28<sup>th</sup> Edition, (Philadelphia: W.B. Saunders Company, 1994) at page 1371, as “an explicit, detailed plan of an experiment, procedure or test.” In this case, the protocol relates to the conduct of a clinical trial. One of the Applicants was a participant in this particular clinical trial.

[para 89.] The protocol bulletins are from a third party research organization and, for the most part, are sent to Principal Investigators and Clinical Research Associates in order to update the researchers conducting the clinical trial. Some protocol information is contained in records other than the protocol bulletins.

[para 90.] The administration/director's records relate to a lawsuit between the Applicants and the Alberta Cancer Board.

[para 91.] I have reviewed the *Cancer Programs Act*, R.S.A. 1980, c. C-1. The information withheld does not appear to fall within a specific provision of that Act.

[para 92.] However, according to section 20 of the *Cancer Programs Act*, section 40 of the *Hospitals Act* applies to provincial cancer hospitals (whether or not they are approved hospitals under the *Hospitals Act*), outpatient clinics, and to programs of the Alberta Cancer Board.

[para 93.] At the inquiry, I raised the issue of whether the information withheld fell within section 40(3) of the *Hospitals Act*, R.S.A. 1980, c. H-11. If so, my next question to the Alberta Cancer Board was whether there is an inconsistency or a conflict between the FOIP Act and section 40(3) of the *Hospitals Act*.

[para 94.] It is the Alberta Cancer Board's position that there is no inconsistency or conflict with the FOIP Act that would engage the paramountcy provision contained in section 5(2) of the FOIP Act. However, since I raised the issue at the inquiry and requested submissions on this point, I will discuss it in this Order.

[para 95.] Section 40(3) of the *Hospitals Act* provides:

*40(3) Information obtained from hospital records or from persons having access thereto shall be treated as private and confidential information in respect of any individual patient and shall be used solely for the purposes described in subsection (2) and the information shall not be published, released or disclosed in any manner that would be detrimental to the personal interests, reputation or privacy of a patient or the patient's attending physician or any other person providing diagnostic or treatment services to a patient.*

[para 96.] Section 40(3) of the *Hospitals Act* contains a general confidentiality provision for "information obtained from hospital records...in respect of any individual patient". Given the wording of section 40(3) generally, I believe that section 40(3) prohibits access to patient information.

[para 97.] Section 40(1) of the *Hospitals Act* is also relevant, and reads:

*40(1) The board of each approved hospital shall cause to be kept by the attending physician or any other person providing diagnostic or treatment services to a patient a record of the diagnostic and treatment services provided in respect of each patient in order to assist in providing a high standard of medical care.*

[para 98.] Section 13(1) of the *Operation of Approved Hospitals Regulation*, Alta. Reg. 247/90, gives some insight as to what information is contained in “a record of the diagnostic and treatment services provided in respect of each patient”. That information includes diagnoses, reports of consultations, and orders for treatment.

[para 99.] In *Kiedynk v. Doe 1* (1991), 79 Alta.L.R. (2d) 72 (Alta. Q.B.), the Court compared section 40(1) with section 40(3) of the *Hospitals Act*, and stated:

The Plaintiff submits that only the record of diagnostic or treatment services is protected by the Act. I do not believe this interpretation takes into account the difference in wording between s. 40(1) and s. 40(3). What is protected by subsection (3) is “information from hospital records”, a term which is broader than “a record of the diagnostic and treatment services”, the term used in s. 40(1). A record of diagnostic or treatment services is part of – but does not comprise the whole of – the term: “hospital records”.

[para 100.] Therefore, I find that section 40(3) of the *Hospitals Act* is a confidentiality provision that prohibits access not only to information contained in “a record of the diagnostic and treatment services provided in respect of each patient”, but also to the more general “information obtained from hospital records...in respect of any individual patient”.

[para 101.] Does the information contained in the records, as categorized by the Alberta Cancer Board, fall within section 40(3) of the *Hospitals Act*?

[para 102.] I have reviewed that information, which I find is not information contained in “a record of the diagnostic and treatment services provided in respect of each patient”, nor “information obtained from hospital records...in respect of any individual patient”, within the meaning of section 40(3) of the *Hospitals Act*. Therefore, the information withheld by the Alberta Cancer Board, as set out in Appendix B of this Order, does not fall within section 40(3) of the *Hospitals Act*. Consequently, that information is subject to the FOIP Act.

[para 103.] Having made this finding, I do not find it necessary to decide whether the information withheld falls within an exception to section 40(3), such as section 40(5)(a) (disclosure of a diagnosis, record or

information to the patient to whom the diagnosis, record or information relates).

**ii) Is there an inconsistency or conflict between the FOIP Act and section 40(3) of the *Hospitals Act*, in relation to the information withheld?**

[para 104.] Since the information contained in the records does not fall within section 40(3) of the *Hospitals Act*, I do not have to decide if there is an inconsistency or conflict.

**iii) Conclusion regarding the Alberta Cancer Board**

[para 105.] The information withheld by the Alberta Cancer Board does not fall within a provision of a statute (or its regulations) set out in section 15(2) of the FOIP Regulation. Therefore, section 5(2) of the FOIP Act is not engaged.

[para 106.] Since the information withheld by the Alberta Cancer Board, as set out on in Appendix B of this Order, is therefore subject to the FOIP Act, I have jurisdiction over that information.

**c) The Capital Health Authority**

**i) Does the information withheld fall within a provision of a statute (or its regulations) set out in section 15(2) of the FOIP Regulation?**

[para 107.] Regardless of the Capital Health Authority's categorization of its records, it withheld only the information that relates to a lawsuit between the Applicants and the Capital Health Authority.

[para 108.] I also raised the issue of whether section 40(3) of the *Hospitals Act* applied to that information. It was the Capital Health Authority's position that the information did not fall within any legislation in section 15(2) of the FOIP Regulation that was inconsistent or in conflict with the FOIP Act.

[para 109.] For the same reasons stated above with respect to the Alberta Cancer Board, I find that the information withheld by the Capital Health Authority does not fall within section 40(3) of the *Hospitals Act*.

**ii) Is there an inconsistency or conflict between the FOIP Act and section 40(3) of the *Hospitals Act*, in relation to the information withheld?**

[para 110.] Since the information contained in the records does not fall within section 40(3) of the *Hospitals Act*, I do not have to decide whether there is an inconsistency or conflict.

**iii) Conclusion regarding the Capital Health Authority**

[para 111.] The information withheld by the Capital Health Authority does not fall within a provision of a statute (or its regulations) set out in section 15(2) of the FOIP Regulation. Therefore, section 5(2) of the FOIP Act is not engaged.

[para 112.] Since the information withheld by the Capital Health Authority, as set out on in Appendix B of this Order, is therefore subject to the FOIP Act, I have jurisdiction over that information.

**d) The Calgary Regional Health Authority**

[para 113.] The Calgary Regional Health Authority did not withhold any information from the Applicants. Therefore, it is not necessary that I make any decision about my jurisdiction with respect to the information of the Calgary Regional Health Authority.

**ISSUE B: Custody or control of records**

[para 114.] As in Issue A, this Order will only deal with the information withheld by the Public Bodies. The records containing the information withheld by the Public Bodies have been provided to my Office. I can therefore assume that the records containing this information are in the custody, if not the control, of the Public Bodies.

[para 115.] Much of the discussion regarding custody or control of records at the inquiry centered on general principles. There was concern expressed by the Applicants regarding who should have custody or control of certain types of records.

[para 116.] However, for my purposes, all the records at issue are in the custody or under the control of some part of the Public Bodies, which are subject to the FOIP Act.

## **VI. ORDER**

[para 117.] I make the following Order under section 68 of the FOIP Act.

### **Issue A: Jurisdiction**

[para 118.] I do not have jurisdiction over access to any of the information withheld from the records of Alberta Health and Wellness, as set out in Appendix B of this Order. Therefore, I do not have the authority to decide whether Alberta Health and Wellness properly withheld that information from the Applicants.

[para 119.] I have jurisdiction over all the information withheld from the records of the Alberta Cancer Board and the Capital Health Authority, as set out in Appendix B of this Order. Therefore, I have the authority to decide whether the Alberta Cancer Board and the Capital Health Authority properly withheld that information from the Applicants.

[para 120.] The Calgary Regional Health Authority did not withhold any information from the Applicants. Therefore, it is not necessary that I make any decision about my jurisdiction with respect to the information contained in the records of the Calgary Regional Health Authority.

### **Issue B: Custody or control of records**

[para 121.] It is not necessary that I decide the issue of custody or control of records because the records containing the information withheld by the Public Bodies are in the custody, if not the control, of the Public Bodies.

Robert C. Clark  
Information and Privacy Commissioner

## Appendix A

### **Questions about the interpretation of section 5(2) of the FOIP Act**

1. What does it mean to be “inconsistent” or “in conflict with” in the context of section 5(2)? Please see *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4<sup>th</sup>) 1 (S.C.C.) and *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4<sup>th</sup>) 585 (N.B. C.A.) (two legislative enactments cannot stand together; compliance with one law involves breach of the other).
2. Does section 5(2) provide a legislative solution for resolving inconsistency or conflict?
3. Does section 5(2) clearly express what is to prevail if there is an inconsistency or conflict? Please refer also to section 15(1), (2) of the FOIP Regulation.
4. Does the exception contained in section 5(2) (“unless...”) clearly express that other legislation or a provision of it is to prevail despite the entire FOIP Act? Please refer also to section 15(1), (2) of the FOIP Regulation.
5. If the exception contained in section 5(2) does not clearly express that other legislation or a provision of it is to prevail despite the entire FOIP Act, does the Commissioner have to determine what, if any, provisions of the FOIP Act are inconsistent or in conflict with the provisions of other legislation set out in section 15(2) of the FOIP Regulation (for example, section 40 of the *Hospitals Act*)?
6. In considering what provisions of the FOIP Act are inconsistent or in conflict with the provisions of other legislation set out in section 15(2) of the FOIP Regulation (for example, section 40 of the *Hospitals Act*), does the Commissioner apply the common law rules, such as the implied exception rule (both provisions operate, unless there is such inconsistency that the two provisions cannot stand together)?

## **Appendix B**

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The Alberta Cancer Board

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The Capital Health Authority

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Patient Concerns	6	1-2
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Legal Services	11	1
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