

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2002-026

January 19, 2004

**ST. MICHAEL'S LONG TERM CARE CENTRE
ST. MICHAEL'S EXTENDED CARE CENTRE SOCIETY**

Review Number 2304

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

Summary: The Complainant alleged that an individual employed by both St. Michael's Extended Care Centre Society and St. Michael's Long Term Care Centre, breached Part 2 of the *Freedom of Information and Protection of Privacy Act* by disclosing the Complainant's personal information to the Capital Health Authority.

The Adjudicator found that both St. Michael's Extended Care Centre Society and St. Michael's Long Term Care Centre breached Part 2 of the Act. The Adjudicator found that St. Michael's Extended Care Centre Society and St. Michael's Long Term Care Centre were public bodies under the Act and that both of these organizations were involved in the disclosure of the Complainant's personal information. The Adjudicator also found that neither of these public bodies had the authority under section 40 of the Act to disclose the information.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(g) [previously section 1(1)(g)], 1(j) [previously section 1(1)(j)], 1(n) [previously section 1(1)(n)], 1(p) [previously section 1(1)(p)], 2, 17 [previously section 16], 40(1)(b) [previously section 38(1)(a.1)], 40(1)(c) [previously section 38(1)(b)], 40(1)(bb) [previously section 38(1)(z)], 40(4) [previously section 38(2)], 41 [previously section 39], 72 [previously section 68]; *Hospitals Act*, R.S.A. 2000, c.H-12, ss. 1(b) [previously section 1(1)(b)], 28(2)(a) [previously section 44(2)(a)]; *Nursing Homes Act*, R.S.A. 2000, c.N-7, ss. 1(m) [previously section 1(q)], 2 [previously section 6]; *Nursing Homes General Regulation* A.R. 232/85, Schedule; *Nursing Homes Operation Regulation* AR 258/85, s. 2(1)(d); *Societies Act*, R.S.A. 2000, c.S-14.

Authorities Cited: AB: Orders 98-001, 99-017, 99-032, 2000-005

I. BACKGROUND

[para 1] On May 7, 2001, the Complainant made an access request to her former employer under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Complainant addressed the request to “St Michael’s Extended Care Centre” and requested access to the following:

- A) the Complainant’s employee file including a report by a private investigation agency;
- B) a list of the Board Members “for both Boards for St. Michael’s Extended Care Centre” along with addresses and phone numbers; and
- C) records regarding the mortgage subsidy funded by Alberta Health.

[para 2] I note that the Complainant’s access request did not identify the proper names of the organizations that carry the name “St. Michael’s”. There are two entities in this inquiry that carry the name “St. Michael’s”: St. Michael’s Long Term Care Centre (the “Care Centre”) and St. Michael’s Extended Care Centre Society (the “Society”).

[para 3] On May 23, 2001, the Complainant received a letter from a lawyer responding to the access request. Attached to the letter was a record containing the names of the Board Members of the Care Centre. However, the Complainant did not receive a copy of a private investigation report, the addresses and phone numbers of Board Members or any mortgage subsidy records.

[para 4] On May 25, 2001, the Complainant faxed a letter and an attachment to the lawyer who had responded to the Complainant’s access request. In the letter, the Complainant questioned the content of the response and requested clarification. The Complainant used a fax machine of her new employer, the Capital Health Authority (the “CHA”), to fax the documents.

[para 5] On June 7, 2001, the Complainant sent this Office a request for review regarding “St Michael’s Extended Care Centre’s” refusal to provide access to all of the documents requested. This Office assigned the number 2199 to this request for review and notified the Care Centre of the review on June 11, 2001. Mediation was not successful and a Notice of Inquiry was issued on September 17, 2001.

[para 6] On September 21, 2001, Mr. Bohdan Shulakewych who is an officer of the Care Centre and the Executive Director of the Society contacted the President of the CHA by phone to discuss the Applicant’s access request.

[para 7] On September 24, 2001, Mr. Bohdan Shulakewych met with the President and the Vice-President of Finance and Administration of the CHA. During that meeting, Mr. Shulakewych provided the CHA with copies of several documents relating to the access request and upcoming oral inquiry for request for review #2199. On October 2, 2001, Mr. Shulakewych also faxed copies of these same documents to the Vice-President of the CHA.

[para 8] On October 17, 2001, the CHA's Vice-President sent Mr. Shulakewych a letter which stated that the CHA had addressed, with the Complainant, the Complainant's possible use of her position, the CHA equipment and/or time for a non-work related matter.

[para 9] On November 2, 2001, the Complainant withdrew request for review #2199.

[para 10] On March 21, 2002, the Complainant sent this Office another request for review which requested that the Commissioner review whether Mr. Shulakewych's disclosure of the documents to her new employer, the CHA, was in breach of Part 2 of the Act. This Office assigned number 2304 to this request for review. Mediation was authorized but was not successful in resolving the issue. This matter was set down for an oral inquiry on October 23, 2002.

[para 11] During this inquiry, I received numerous written submissions from the parties. The CHA and the Applicant each sent a written submission to this Office in advance of the oral inquiry. The Care Centre and the Society also provided a joint advance submission that was submitted on behalf of both organizations.

[para 12] At the inquiry the Care Centre/Society provided me with a copy of the Care Centre's Mortgage and Amending Agreement and provided me with a statutory declaration signed by Mr. Shulakewych. However, as the exhibit to the statutory declaration was not properly executed, another copy of the declaration was provided to my Office after the oral portion of the inquiry was completed. The Complainant also provided me with an additional submission at the oral inquiry.

[para 13] In response to my requests for further information, the Care Centre/Society also provided my Office with three supplemental submissions dated November 25, 2002, January 20, 2003 and February 11, 2003. The Complainant also provided my Office with a written rebuttal on February 10, 2003.

[para 14] In addition, on December 26, 2002, the Complainant sent a letter to the Board Members of the Society drawing their attention to the oral inquiry and enclosing a copy of a letter from this Office which requested further information regarding the ownership of the nursing home land and premises.

[para 15] On January 10, 2003, the Care Centre/Society's lawyer sent a letter to my Office with the following concerns regarding the Complainant's letter to the Board Members:

- a) the Care Centre/Society's lawyer requested that I ask the Complainant to confine any future communications concerning the inquiry to the Care Centre/Society's lawyer or to my Office and not to the Board Members;
- b) the Care Centre/Society's lawyer complained that the Complainant may have used information about the home addresses of the Board Members that she obtained during her prior employment; and
- c) the Care Centre/Society's lawyer stated that the Complainant's willingness to share, with the Board Members, her name, home address and the fact that she made a complaint under the *Freedom of Information and Protection of Privacy Act* is a relevant circumstance which should be taken into account in determining whether the Care Centre/Society's disclosure of the Complainant's personal information was an unreasonable invasion of the Complainant's personal privacy.

[para 16] In response to these concerns, on January 13, 2003, my legal counsel wrote a letter to the Care Centre/Society's lawyer on my behalf. In that letter, this Office informed the Care Centre/Society that although I did not condone the Complainant's actions, I did not have the jurisdiction under the *Freedom of Information and Protection of Privacy Act* to require the Complainant to confine her communications in the manner requested. In that letter, my Office also informed the Care Centre/Society that the Complainant's alleged misuse of personal information did not fall within my jurisdiction under the Act, as the Complainant was not a public body as defined in the Act. Lastly, my Office informed the Care Centre/Society that I would consider, when making my decision, the Care Centre/Society's additional arguments regarding whether the disclosure of the Complainant's personal information was in contravention of Part 2 of the Act.

II. PRELIMINARY ISSUE

[para 17] The Care Centre/Society argues that I do not have the jurisdiction to hear this inquiry because the Complainant did not name a legal entity in her complaint. The Care Centre/Society states that it believes that the complaint was directed against "St Michael's Extended Care Centre" which, they argue, is not a legal entity. However, the Care Centre/Society states that the name does correspond with the name of the Society, but for the missing word "Society".

[para 18] I do not agree with the Care Centre/Society's argument that I do not have jurisdiction in this inquiry. I do not agree that an error in the name of either the Care Centre or the Society in the complaint letter prevents me from deciding the issue before me. This is especially so given that all parties were made aware of which organizations

were involved in this inquiry. The inquiry notice, dated July 2, 2002, clearly identified the parties involved.

III. ISSUE

[para 19] The issue in this inquiry is: Did the Public Body disclose the Complainant's personal information in breach of Part 2 of the Act?

[para 20] The Revised Statutes of Alberta (R.S.A. 2000) came into force on January 1, 2002. Although this did not result in substantive changes to the Act, various sections of the Act have been renumbered. Consequently, all section numbers referred to in this Order reflect the previous section numbers as well as the new section numbers under the R.S.A. 2000.

IV. DISCUSSION: Did the Public Body disclose the Complainant's personal information in breach of Part 2 of the Act?

[para 21] There are three sub-issues in this inquiry:

- A) Was there a disclosure of the Complainant's personal information?
- B) If there was a disclosure of the Complainant's personal information, did a Public Body disclose the personal information?
- C) If a Public Body did disclose the Complainant's personal information, was the disclosure in breach of Part 2 of the Act?

A) Was there a disclosure of the Complainant's personal information?

[para 22] The Care Centre/Society's submission states that on September 24, 2001, Mr. Shulakewych met with the President and the Vice-President of the CHA and provided these two individuals with the following documents:

- (a) Request for review #2199, dated June 7, 2001, from the Complainant to the Information and Privacy Commissioner;
- (b) Correspondence dated August 2, 2001 from the Office of the Information and Privacy Commissioner to the Complainant regarding Request for Review #2199;
- (c) Two copies of correspondence dated August 13, 2001 from the Complainant to the Office of the Information and Privacy Commissioner; and
- (d) A copy of the Inquiry Notice for Request for Review #2199, dated September 17, 2001, sent from the Office of the Information and Privacy Commissioner to Mr. Shulakewych.

[para 23] The Care Centre/Society's submission also states that on October 2, 2001, Mr. Shulakewych faxed these same documents to the CHA.

[para 24] After a review of the evidence and all the arguments before me, I find that Mr. Shulakewych, on September 24, 2001 and again on October 2, 2001, disclosed the above documents to the CHA. I also find that these documents contained the Complainant's personal information as defined in section 1(n) [previously section 1(1)(n)] of the Act. The personal information disclosed in these documents included the Complainant's name, address and information about the Complainant's access request and request for review #2199.

B) If there was a disclosure of the Complainant's personal information, did a public body disclose the personal information?

[para 25] The Care Centre/Society states that a public body did not disclose the personal information. The Care Centre/Society states that Mr. Shulakewych disclosed the documents on behalf of the Society which, it argues, is not a public body under the Act.

[para 26] Given the arguments by the Care Centre/Society, I must first decide whether the Care Centre and/or the Society is a public body under the Act. If I find that one or both organizations are a public body under the Act, I will then determine whether one or both of these organizations disclosed the documents to the CHA.

1. Is the Care Centre a Public Body under the Act?

[para 27] The Care Centre/Society states that the Care Centre is a public body under the *Freedom of Information and Protection of Privacy Act*. The Care Centre/Society states that the Care Centre is an approved hospital as defined in the *Hospitals Act* and an operator of a nursing home as defined in the *Nursing Homes Act*.

[para 28] Section 1(p)(vii) [previously section 1(1)(p)(vi)] states that a public body includes a "local public body". Section 1(j)(ii) [previously section 1(1)(j)(ii)] further defines a local public body as including a health care body. Sections 1(g)(i) and 1(g)(ii) [previously sections 1(1)(g)(i) and 1(1)(g)(ii)] defines a health care body as including the board of an approved hospital and the operator of a nursing home. Sections 1(g)(i) and 1(g)(ii) [previously sections 1(1)(g)(i) and 1(1)(g)(ii)] reads:

1 In this Act,

(g) "health care body" means

(i) the board of an approved hospital as defined in the Hospitals Act other than an approved hospital that is

(A) *owned or operated by a regional health authority under the Regional Health Authorities Act, or*

(B) *established and operated by the Alberta Cancer Board continued under the Cancer Programs Act,*

(ii) *the operator of a nursing home as defined in the Nursing Homes Act other than a nursing home that is owned and operated by a regional health authority under the Regional Health Authorities Act*

[para 29] After a review of the evidence and all of the arguments before me, I find that the Care Centre is an approved hospital under the *Hospitals Act* and, therefore, a public body as defined within the *Freedom of Information and Protection of Privacy Act*. Section 1(b) [previously section 1(1)(b)] of the *Hospitals Act* defines an approved hospital as “a hospital designated by the Minister as an approved hospital pursuant to Part 2”. Section 28(2)(a) [previously section 44(2)(a)] of the *Hospitals Act* (under Part 2) states that the Minister may, by order, determine which hospitals will be declared “approved hospitals” under that Act.

[para 30] Ministerial Order 37/2002 lists “St. Michael’s Long Term Care Centre” as an approved hospital. As such, I find that the Care Centre has been designated as an approved hospital.

[para 31] In addition, after a review of all of the submissions and evidence, I am prepared to accept the Care Centre/Society’s submission that the Care Centre is an “operator” of a nursing home, given the Care Centre’s practical role in the operation of the nursing home. Section 1(m) [previously section 1(q)] of the *Nursing Homes Act* defines an “operator” as “a person who operates a nursing home”. I find that the Care Centre fulfills this definition.

2. Is the Society a Public Body under the Act?

[para 32] The Care Centre/Society states that the Society is not a public body. The Care Centre/Society states that it is not an approved hospital under the *Hospitals Act* nor an operator of a nursing home under the *Nursing Homes Act*.

[para 33] I find that the Society is not an approved hospital under the *Hospitals Act*. As previously mentioned, section 1(b) [previously section 1(1)(b)] of the *Hospitals Act* defines an approved hospital as “a hospital designated by the Minister as an approved hospital pursuant to Part 2”. Furthermore, section 28(2)(a) [previously section 44(2)(a)] of the *Hospitals Act* (under Part 2) states that the Minister, by order, may determine which hospitals will be declared as approved hospitals. There is no evidence before me that the Minister designated the Society as an approved hospital. I find that the Society is not an approved hospital under the *Hospitals Act*.

[para 34] However, I find that the Society is an operator of a nursing home under the *Nursing Homes Act* and, therefore, a public body under the *Freedom of Information and Protection of Privacy Act*. In coming to this conclusion, I took into account a number of factors which include: the Society's objects, the contracts entered into by the Society relating to the operation of the nursing home, and the Society's receipt of a category 2 nursing home capital supplement.

a. The Society's Objects

[para 35] The Society's application for registration clearly states that one of the objects of the Society was to operate a nursing home. On November 11, 1975, "St. Michael's Nursing Home" made an application under the *Societies Act* to become registered as a society. The Society's application for registration states that one of the objects of the Society was to "construct, establish, maintain and operate on a non-profit basis, homes and facilities for the care of the aged, camps, schools and churches". In addition, although the special resolution of the Society dated September 17, 2002, and registered on September 26, 2002, amended the objects of the Society, the Society nevertheless retained, as one of its objects, the operation of homes and facilities for the care of the aged, adults and the sick.

b. Contracts entered into by the Society

[para 36] I find that the contracts entered into by the Society relating to the operation of the nursing home also reveal that the Society was considered to be an operator of the nursing home.

[para 37] At the oral inquiry, I requested that the Care Centre/Society provide me with a copy of any contracts entered into by the Care Centre or the Society with a regional health authority pursuant to section 2 [previously section 6] of the *Nursing Homes Act*. Section 2 [previously section 6] of the *Nursing Homes Act* states that a regional health authority may enter into a contract with a person who operates or intends to operate a nursing home for the provision of nursing home care to eligible residents.

[para 38] In response to my request, the Care Centre/Society provided me with a copy of a funding agreement dated April 28, 1995 between the CHA and "St. Michael's Long Term Care Centre Society".

[para 39] After reviewing this contract and after taking note that this contract was executed almost eight years ago and referred only to the 1995/1996 fiscal year, I instructed my legal counsel to write to the Care Centre/Society to ensure that I had all of the relevant information needed to make a decision in this inquiry. In that letter my legal counsel requested "a copy of all contracts, and all amendments to all contracts, since March 25, 1994, that were entered into by "St. Michael's Extended Care Centre Society" or St. Michael's Long Term Care Centre (or any variation of these names) with a Regional Health Authority or with Alberta Health and Wellness."

[para 40] In response to this second request, the Care Centre/Society provided me with a “Co-operation Agreement” dated April 25, 1996 between the CHA and the Society. This agreement addressed the provision of health programs and services and, in clause 1(4) of the contract, referred to five schedules that were incorporated within the contract. However, the Care Centre /Society did not provide a copy of all five schedules to the agreement. As such, on January 28, 2003, I requested that the Care Centre/Society provide a copy of the missing Schedules. I subsequently received a copy of those Schedules on February 11, 2003.

[para 41] I have reviewed each of the contracts and schedules provided by the Care Centre/Society. I find that these documents are relevant to my decision.

[para 42] One of the contracts is the April 25, 1996 Co-operation Agreement. This agreement refers to the Society as a party to the contract and addresses the method by which the CHA and the Society will co-operate to provide health services. Although the contract assumes that the Care Centre, the “Facility Board”, has the responsibility for staffing of the nursing home, it also acknowledges the Society’s over-arching involvement in the provision of services within the nursing home.

[para 43] I also found that the Schedules incorporated into the Cooperation Agreement were relevant. In particular, I took into account Schedule C which consists of an Owner’s Agreement entitled, “St Michael’s Extended Care Society Equity Agreement”, dated September 28, 1988, between the Society and the Province of Alberta. Preamble “A” of the Owner’s Agreement clearly states that the Society owns and operates the nursing home, while clause 2.01(b) states that one of the purposes of the agreement is to set out the obligations of the Society in respect of its ownership, operation and manner of dealing with the “facility operation” which, by definition, includes the nursing home operation. Clause 3.05 further reiterates that the Society is responsible to operate the nursing home. Lastly, clause 5.01 clearly states that if the Society ceases to operate the nursing home, then the Society must sell the facility operation to the Minister or his nominee. There is no evidence before me that the Society has sold the nursing home to the Minister.

[para 44] I acknowledge that the September 28, 1988 Owner’s Agreement was entered into by the Society prior to the creation of the Care Centre as a separate organization on March 25, 1994. However, I find that the Owner’s Agreement nevertheless continues to bind the Society as a stand-alone contract and by incorporation as a schedule into the Co-operation Agreement. There is no evidence before me that either the Owner’s Agreement or the Co-operation Agreement are no longer in effect.

[para 45] Lastly, I took into account the April 28, 1995 funding agreement. In that agreement, the Society is referred to as a party to the contract and an operator of a nursing home. Although this contract improperly refers to the Society as “St. Michael’s Long Term Care Centre Society”, instead of “St. Michael’s Extended Care Centre Society”, I find that this contract refers to the Society and therefore is also relevant to my decision.

[para 46] I also note that the Care Centre/Society provided my office with a contract dated, and effective, March 31, 1994, between the Care Centre and the Society, which transferred the land and premises used in the operation of the nursing home from the Society to the Care Centre. This agreement did not, however, state that the Society transferred its involvement in the operation of the nursing home solely to the Care Centre.

c. Category 2 Nursing Home Capital Supplement from Alberta Health and Wellness

[para 47] Section 2(1)(d) of the *Nursing Homes Operation Regulation* AR 258/85 states that a category 2 nursing home capital supplement is a supplement that is provided to an “operator of a voluntary nursing home”. It reads as follows:

2(1) In this section

...

(d) “category 2 nursing home capital supplement” means a daily amount determined by the Minister, not to exceed \$27, that is paid on the basis prescribed by the Minister in respect of each approved bed to the operator of a voluntary nursing home having a rated capacity of 51 beds or more that was first brought into operation during 1983;”

(underlining added)

[para 48] The Care Centre/Society’s supplemental submission dated January 20, 2003, states that the Society currently receives the category 2 nursing home capital supplement from Alberta Health and Wellness. This is also supported by a letter dated July 4, 2002 from Alberta Health and Wellness to Mr. Shulakewych which discusses the authority for these payments. I find that the Society’s receipt of the category 2 nursing home capital supplement shows that the Society was, according to section 2(1)(d) of the *Nursing Home Operation Regulation* AR 258/85, considered to be an operator of the nursing home.

3. Did the Care Centre and/or the Society disclose the personal information?

[para 49] The Care Centre/Society states that Mr. Shulakewych disclosed the personal information on behalf of the Society and not on behalf of the Care Centre. In its initial submission, the Care Centre/Society makes three main arguments in this regard.

[para 50] The first argument centers on the custody and control of the mortgage subsidy records which were the subject of the Complainant’s access request in inquiry #2199. The Care Centre/Society refers to the factors outlined in Orders 99-032 and 2000-005, and emphasizes that it was the Society that owned the nursing home land and premises and was the mortgagor of the land and premises. The Care Centre/Society

states that because the Society owned the land and premises and was the mortgagor, it follows that the Society was entitled to receive the mortgage subsidy payments and thereby had custody and control of the mortgage subsidy records. I note, however, that upon further requests for information from my Office, the Care Centre/Society, in its November 25, 2001 supplemental submission and affidavit, reversed its earlier representation contained in Mr. Shulakewych's first affidavit and confirmed that, in actuality, it is the Care Centre and not the Society that owns the land and premises. Along with the supplemental submission and affidavit, the Care Centre/Society provided this Office with a sale agreement dated, and effective, March 31, 1994. This agreement transferred the land and premises of the nursing home from the Society to the Care Centre.

[para 51] The Care Centre/Society's second argument centers on the response to the Complainant's access request. The Care Centre/Society states that it was the Society's legal counsel and not the Care Centre's legal counsel that initially replied to the Complainant's access request. As such, the Care Centre/Society states that it follows that it was the Society that later contacted and disclosed the documents to the CHA.

[para 52] The Care Centre/Society's third argument centers on the content of the October 2, 2001 fax that was sent to the CHA. The Care Centre/Society states that this fax shows that Mr. Shulakewych acted on behalf of the Society when he disclosed the documents to the CHA.

[para 53] I have reviewed the evidence and all of the arguments before me. I agree that there is some evidence that the Society was involved in the disclosure. The October 2, 2001 fax coversheet states that the fax was sent from the Society to the CHA. This is evidenced by a box beside the name of the Society being ticked off. I find that this evidence supports the finding that that Mr. Shulakewych acted on behalf of the Society when he disclosed the documents.

[para 54] However, I find that other evidence shows that Mr. Shulakewych also acted on behalf of the Care Centre when he disclosed the documents.

[para 55] In coming to this conclusion I reviewed the Care Centre/Society's submissions regarding custody and control. I agree that the custody and control of the mortgage subsidy records is a factor relevant to the issue before me. However, I find that the new revelations within the Care Centre/Society's November 25, 2002 supplemental submission and the supplemental affidavit regarding the ownership of the land and premises and the content of the sale agreement cast grave doubts on whether the Society had sole custody and control of the mortgage subsidy records. In that supplemental submission and affidavit, the Care Centre/Society states that its earlier representation regarding the ownership of the land and premises was incorrect. It now states that the Society had, in fact, sold the land and premises to the Care Centre on March 31, 1994. As part of that supplemental submission, the Care Centre/Society provided me with a copy of the sale agreement which stated that the Care Centre, as the purchaser, was to assume all the obligations under the mortgage.

[para 56] In addition, I also reviewed the May 23, 2001 reply to the Complainant's access request. I find that, contrary to the Care Centre/Society's submission, the May 23, 2001 reply shows that this letter was sent on behalf of the Care Centre and not on behalf of the Society. This is clearly shown in paragraph #2 of the letter where the lawyer specifically denies that "St. Michael's Long Term Care Centre" has the report requested in the access request. In addition, in paragraph #4, the lawyer once again indicates that he is responding on behalf of the Care Centre and refers to the Society as "another entity". Also relevant is the fact that the lawyer cc'd the letter to the Care Centre, and not to the Society.

[para 57] Lastly, in coming to this conclusion, I took into account the close functional relationship between these two entities. Although the Care Centre and the Society are separate legal entities, they share many resources.

[para 58] The Care Centre/Society states that it maintains separate files for the human resource, finance and payroll records as well as separate CCRA business numbers, income tax returns, audited financial statements, ledgers, payroll records and personnel files for each organization. However, the Care Centre/Society also confirms that they share a telephone number and fax number and share human resources and finance (including payroll), department office space and staff, common reception and secretarial services. The employees of both organizations also contribute to the Local Authorities Pension Plan.

[para 59] The close relationship between these two entities is also reflected in Mr. Shulakewych's position within both organizations. The Care Centre/Society acknowledges that Mr. Shulakewych is the Executive Officer of the Society and an officer of the Care Centre. In addition, it appears that Mr. Shulakewych's authority within each of these organizations is significant. This is seen most clearly in the March 31, 1994 sale agreement for the land and premises between the Care Centre and the Society. In that agreement Mr. Shulakewych was the sole signing authority on behalf of both entities.

[para 60] The close operation of these entities is also seen in the apparent confusion within the organizations as to whether the Complainant was employed by the Society or the Care Centre. Although the Care Centre/Society's submissions repeatedly state that the Complainant was employed by the Society, there is evidence before me that indicates that the Complainant was also considered to be an employee of the Care Centre. An example of this is found in the Complainant's "Employee History and Status Sheet" which refers to the Complainant as an employee of the Care Centre. In addition, another letter dated May 8, 2001, which responded to an earlier access request by the Complainant, was also signed on behalf of the Care Centre.

4. Summary

[para 61] After a review of the evidence and all of the arguments of all the parties, I find that the Care Centre and the Society are both public bodies under the *Freedom of*

Information and Protection of Privacy Act. I also find that Mr. Shulakewych acted on behalf of both the Care Centre and the Society when he disclosed the Complainant's personal information to the CHA on September 24, 2001 and again on October 2, 2001.

C) If a Public Body did disclose the Complainant's personal information, was the disclosure in breach of Part 2 of the Act?

[para 62] Section 40(1) [previously section 38(1)] states that a public body may disclose personal information only if the disclosure is authorized by one of the subsections within section 40(1) [previously section 38(1)]. The Care Centre/Society states that the disclosure was authorized by sections 40(1)(b) [previously section 38(1)(a.1)], 40(1)(c) [previously section 38(1)(b)] and 40(1)(bb) [previously section 38(1)(z)].

1. Did the Public Body have authority under section 40(1)(b) [previously section 38(1)(a.1)] of the FOIP Act to disclose the Complainant's personal information?

[para 63] The Care Centre/Society states the disclosure was authorized by section 40(1)(b) [previously section 38(1)(a.1)].

[para 64] Section 40(1)(b) [previously section 38(1)(a.1)] states that a public body may disclose personal information if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16]. It reads as follows:

40(1) A public body may disclose personal information only

...

(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,

[para 65] In order for a disclosure to be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16], two criteria must be fulfilled:

- (1) the information must be "personal information" of a third party; and
- (2) the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

a. Is the information "personal information" of a third party?

[para 66] Personal information is defined in section 1(n) [previously section 1(1)(n)].

[para 67] As previously mentioned, I find that the documents disclosed to the CHA contain the Complainant's personal information as defined in section 1(n) [previously section 1(1)(n)] of the Act. The personal information in these documents include the Complainant's name, address and information about the Complainant's access request and prior request for review #2199.

b. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 17(1) [previously section 16(1)] or section 17(4) [previously section 16(4)]?

Section 17(1) [previously section 16(1)]

[para 68] Section 17(1) [previously section 16(1)] states that the head of a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. This section reads:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Section 17(4) [previously section 16(4)]

[para 69] Section 17(4) [previously section 16(4)] lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[para 70] The Complainant states that the presumptions under section 17(4)(g)(i) [previously section 16(4)(g)(i)] and 17(4)(g)(ii) [previously section 16(4)(g)(ii)] apply to the information. Section 17(4)(g)(i) [previously section 16(4)(g)(i)] and 17(4)(g)(ii) [previously section 16(4)(g)(ii)] read:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party

[para 71] I find that section 17(4)(g)(i) [previously section 16(4)(g)(i)] applies to the information that was disclosed to the CHA. The information consists of the

Complainant's name which appears with other personal information about the Complainant.

Section 17(5) [previously section 16(5)]

[para 72] In determining whether the disclosure of personal information would constitute an unreasonable invasion under sections 17(1) [previously section 16(1)] and 17(4) [previously section 16(4)], a public body must consider the relevant circumstances under section 17(5) [previously section 16(5)]. Section 17(5) [previously section 16(5)] reads as follows:

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 73] I note that this list of relevant circumstances is not an exhaustive list. In deciding whether the disclosure of personal information would be an unreasonable invasion of personal privacy, a public body may take into account other relevant circumstances. In this inquiry, the Care Centre/Society states that it took into account a number of other circumstances.

[para 74] First, the Care Centre/Society argues that the disclosure of the personal information was not an unreasonable invasion of personal privacy because the personal information disclosed was not sensitive personal information. The Care Centre/Society states that the only personal information that was disclosed was the Complainant's name, address and the fact that the Complainant made an access request.

[para 75] Second, the Care Centre/Society argues that the disclosure was not an unreasonable invasion of privacy because the information was not broadly disseminated. The Care Centre/Society states that the information was only disclosed to the CHA.

[para 76] Third, the Care Centre/Society argues that the disclosure was not an unreasonable invasion of privacy because the information was not originally supplied by the Complainant in confidence.

[para 77] Fourth, the Care Centre/Society argues that the disclosure was not an unreasonable invasion of privacy as it was the Complainant who raised the potential involvement of the CHA in the first place. The Care Centre/Society argues that it was entitled to confirm whether the CHA might be involved in the access request as the Complainant worked for the CHA, sent the correspondence from the CHA fax machine, and the Complainant's correspondence referred to information that the Complainant said that the Complainant had taken from a financial record of the CHA.

[para 78] Fifth, the Care Centre/Society argues that the disclosure was not an unreasonable invasion of privacy given that the Complainant, in her December 26, 2002 letter to the Board Members of the Society, had been willing to share her name, home address and the fact that she made a complaint under the *Freedom of Information and Protection of Privacy Act* with those Board Members.

[para 79] After a review of the evidence and all of the arguments before me, I find that the factors outlined by the Care Centre/Society are not relevant circumstances that weigh in favour of disclosure.

[para 80] I find that the sensitivity of the personal information is not a relevant circumstance in this inquiry. Section 17 [previously section 16] applies to personal information. It does not only apply to what a public body would consider to be "sensitive" personal information. Furthermore, section 1(n) [previously section 1(1)(n)] of the Act also defines personal information as recorded information about an identifiable individual. Section 1(n) [previously section 1(1)(n)] does not distinguish between sensitive and non-sensitive personal information. I do not find that the "sensitivity" of the information is a relevant circumstance in this inquiry.

[para 81] I also find that the scope of the dissemination is not a relevant circumstance under section 17 [previously section 16]. Section 17 [previously section 16] protects personal information from disclosure unless very specific criteria are met. If I accepted that a limited dissemination of information as a relevant circumstance under section 17(5)

[previously section 16(5)] weighs in favour of disclosure, it would dilute the privacy protections for personal information found within section 17 [previously section 16].

[para 82] In addition, I find that the lack of evidence regarding the confidentiality of the information is not a relevant circumstance. Although the confidentiality of information is a relevant circumstance under section 17(5)(f) [previously section 16(5)(f)] that weighs against disclosure, I do not find that the lack of evidence regarding confidentiality necessarily weighs in favour of disclosure. If this were the case, I would have to take the same approach to every other subsection under section 17(5) [previously section 16(5)]. Currently the approach under section 17(5) [previously section 16(5)] has been to determine whether the criteria under each subsection has been fulfilled. If so, the subsection has been viewed as a relevant circumstance. If I were to adopt the approach suggested by the Care Centre/Society, it would mean that the failure to fulfill the subsection criteria would also render the subsection as a relevant circumstance. I do not agree that this is the proper approach to take in applying section 17(5) [previously section 16(5)].

[para 83] Furthermore, I find that the Care Centre/Society's argument that it disclosed the information because it wanted to confirm whether the Complainant was acting as an employee of the CHA is not a relevant circumstance that weighs in favour of disclosure. In coming to this conclusion, I took into account that the Complainant's access request and inquiry notice clearly identified the Complainant and not the CHA as the applicant. In addition, I took into account the timing of the disclosure. Although the Care Centre/Society received the Complainant's fax with the CHA markings on May 25, 2001, it waited until September 21, 2001, almost four months after receiving these documents, before contacting the CHA. If the Care Centre/Society was unsure whether the Complainant was acting as an employee of the CHA, it stands to reason that the Care Centre/Society would have raised the issue when it first received the documents. Furthermore, even if the Care Centre/Society was unsure whether the Complainant was acting on behalf of the CHA, there were other options available to the Care Centre/Society. The Care Centre/Society could have contacted the Complainant directly or contacted this Office in order to obtain the information.

[para 84] Lastly, I find that the Complainant's disclosure of her personal information to the Board Members of the Society during the inquiry process is not a relevant circumstance. In Orders 98-001 and 99-017, the Commissioner stated that the availability of the personal information to the public at large was a relevant circumstance that weighed in favour of disclosure. However, in this inquiry, I find that the Complainant's letter to the Board Members was not a disclosure to the public. The disclosure by the Complainant was a limited disclosure made to Board Members of a public body that was the subject of the Complainant's Request for Review. I do not find that the disclosure of the information to these Board Members is a relevant circumstance in this inquiry.

c. Summary

[para 85] I find that the Care Centre/Society's disclosure to the CHA was an unreasonable invasion of the Complainant's personal privacy as provided by section 17(1) [previously section 16(1)] and 17(4) [previously section 16(4)]. As such, I find that the disclosure of this information was not authorized by section 40(1)(b) [previously section 38(1)(a.1)] of the Act.

2. Did the Public Body have authority under section 40(1)(c) [previously section 38(1)(b)] of the FOIP Act to disclose the Complainant's personal information?

[para 86] Section 40(1)(c) [previously section 38(1)(b)] reads:

40(1) A public body may disclose personal information only

...

(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose

[para 87] Section 40(1)(c) [previously section 38(1)(b)] has two branches: the first branch authorizes disclosure for the purpose for which the information was collected or compiled; the second branch authorizes disclosure for a use consistent with the purpose for which the information was collected or compiled.

[para 88] Section 41 [previously section 39] outlines when a use will be deemed to be consistent under the second branch:

41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

[para 89] The Care Centre/Society states that the disclosure was made for a purpose for which the information was collected or compiled or for a use consistent with that purpose. The Care Centre/Society states that the disclosure of the Complainant's personal information to the CHA had a "reasonable and direct connection" with the purpose of responding to the Complainant's request for records, and was "necessary" to the fulfillment of a statutory duty to respond to the Applicant's request. The Care Centre/Society states that the information was disclosed for two purposes: (i) in order to clarify whether the Complainant was acting as the CHA's employee in making the

request, and (ii) to verify the source and the accuracy of the financial information the Complainant attached to her May 25, 2001 letter.

[para 90] I find that the Care Centre/Society collected the information in order to prepare for the inquiry. The documents disclosed consist of documents that relate to the inquiry and were created after the initial response to the access request on May 23, 2001. However, after a review of all of the submissions and all of the arguments before me, I do not find that the disclosure was made for that purpose or for a use consistent with that purpose.

[para 91] I do not accept that the reason for the Care Centre/Society's disclosure was to clarify whether the Complainant was acting as the CHA's employee. I do not find that the evidence supports that this was the purpose behind the disclosure. The Care Centre/Society was given notice regarding the identity of the Complainant. The Complainant's access request and inquiry notice clearly identified the Complainant and not the CHA as the Applicant. I also find the timing of the disclosure relevant. Although the Care Centre/Society received the Applicant's fax with CHA markings on May 25, 2001, it waited until September 21, 2001, almost four months after receiving these documents, before contacting the CHA. If the Care Centre/Society was unsure whether the Complainant was acting as an employee of the CHA, it stands to reason that the Care Centre/Society would have raised the issue when it first received the May 25, 2001 letter.

[para 92] I also do not accept that the reason for the Care Centre/Society's disclosure was to verify the source and the accuracy of the information attached to the Complainant's May 25, 2001 letter. The evidence before me shows that, although Mr. Shulakewych disclosed a number of documents to the CHA regarding the access request, Mr. Shulakewych did not, on September 24, 2001 or on October 2, 2001, disclose the May 25, 2001 letter nor the attachment to the CHA. If the Care Centre/Society had truly wanted to verify the source and accuracy of the information attached to the May 25, 2001 letter, it stands to reason that Care Centre/Society would also have disclosed this letter and its attachment.

[para 93] I also find that this disclosure does not comply with section 40(4) [previously section 38(2)]. Section 40(4) [previously section 38(2)] places a limit on what a public body may disclose under section 40(1) [previously section 38(1)]. Section 40(4) [previously section 38(2)] states that a public body may only disclose information under section 40(1) [previously section 38(1)] to the extent that it is necessary to carry out the purposes in section 40(1) [previously section 38(1)] and in a reasonable manner. Section 40(4) [previously section 38(2)] reads as follows:

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 94] I find that the Care Centre/Society's disclosure of the information was not necessary for the public body to carry out the purpose for which the information was

collected or compiled or for a use consistent with that purpose, nor do I find that the information was disclosed in a reasonable manner. Even if I had accepted that the purpose behind the Care Centre/Society's disclosure was to clarify whether the Complainant was acting as an employee of the CHA or to verify the source and accuracy of the financial information attached to the May 25, 2001 letter, I do not find that it was necessary for the Care Centre/Society to contact the CHA. There were other options available to the Care Centre/Society that did not involve the disclosure of personal information to the CHA. The Care Centre/Society could have contacted the Complainant directly or contacted this Office in order to obtain the information.

3. Did the Public Body have authority under section 40(1)(bb) [previously section 38(1)(z)] of the FOIP Act to disclose the Complainant's personal information?

[para 95] The Care Centre/Society states that the disclosure was authorized under section 40(1)(bb) [previously section 38(1)(z)].

[para 96] Section 40(1)(bb) [previously section 38(1)(z)] reads:

40(1) A public body may disclose personal information only

...

(bb) when the information is available to the public

[para 97] In Order 99-032, the Commissioner stated that in order for section 40(1)(bb) [previously section 38(1)(z)] to apply, two criteria must be fulfilled:

(1) the information disclosed must be personal information; and

(2) the personal information must be available to the public.

[para 98] In that Order, the Commissioner also stated that the phrase "available to the public" means that the personal information is available to the general public and not to a restricted public.

a. Was the information disclosed to the CHA personal information?

[para 99] As previously mentioned, I find that the documents disclosed to the CHA contain the Complainant's personal information as defined in section 1(n) [previously 1(1)(n)] of the Act. The personal information in these documents included the Complainant's name, address and information regarding the Complainant's access request and prior request for review #2199.

b. Was the personal information available to the public?

[para 100] The Care Centre/Society states that some of the personal information disclosed in the documents was available to the public and would have been readily available to the CHA as the Complainant's employer.

[para 101] I find that the personal information disclosed in the documents was not available to the public. Although the Complainant's name and home address are found within the public telephone directory, the personal information in the directory is not presented in the same context as the personal information within the documents which were disclosed to the CHA. As such, I do not find that this personal information fulfills the criteria under section 40(1)(bb) [previously section 38(1)(z)]. I find that the disclosure of the personal information was not authorized by section 40(1)(bb) [previously section 38(1)(z)] of the Act.

V. ORDER

[para 102] I make the following Order under section 72 [previously section 68] of the Act:

A) Was there a disclosure of the Complainant's personal information?

[para 103] I find that on September 24, 2001 and again on October 2, 2001, Mr. Shulakewych disclosed the Complainant's personal information to the CHA.

B) If there was a disclosure of the Complainant's personal information, did a Public Body disclose the personal information?

[para 104] I find that the Care Centre and the Society are both public bodies under the *Freedom of Information and Protection of Privacy Act*. I also find that Mr. Shulakewych acted on behalf of both the Care Centre and the Society when he disclosed the Complainant's personal information to the CHA on September 24, 2001 and again on October 2, 2001.

C) If a Public Body did disclose the Complainant's personal information, was the disclosure in breach of Part 2 of the Act?

[para 105] I find that the Care Centre and the Society disclosed the Complainant's personal information in breach of Part 2 of the Act. Under section 72(3)(a) [previously section 68(3)(a)], I order the Care Centre and the Society to comply with its duty not to disclose the Complainant's personal information in breach of Part 2 of the Act in the future.

Dave Bell
Adjudicator