ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDERS F2012-04 and H2012-01

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OUT-OF-COUNTRY HEALTH SERVICES COMMITEE

Case File Numbers F5625 and H3713

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Summary: The Applicant, a journalist, asked for copies of the minutes of meetings of the Out-of-Country Health Services Committee (the "OOCHSC"). The OOCHSC withheld some of the information in reliance on provisions of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") and the *Health Information Act* (the "HIA"). The information at issue consisted of the nature of out-of-country health services requested by individuals who had asked the OOCHSC for funding, their provisional diagnoses, whether funding was approved or denied, and the name of the treating hospital or treatment centre, and its geographic location, where funding was approved.

Because the OOCHSC is both a public body for the purposes of the FOIP Act and a custodian for the purposes of the HIA, the first issue in the inquiry was whether the requested information was subject to the FOIP Act or the HIA. The Adjudicator concluded that the information was subject to the FOIP Act, as the HIA permits an access request for one's own health information only, and the Applicant was not requesting her own health information. While section 4(1)(u) of the FOIP Act excludes the application of that Act to health information as defined in the HIA that is in the custody or under the control of a public body that is also a custodian, the Adjudicator interpreted section 4(1)(u), in so far as an access request is concerned, as referring to an applicant's own health information, not the health information of other individuals. To interpret otherwise, so that an applicant could not request the health information of another individual under either Act, would create a gap in the overall scheme for access to information, which the Legislature had not intended.

As the requested information was subject to the FOIP Act, the next issue was whether section 17(1) of that Act applied so as to preclude disclosure to the Applicant on the basis of that it would be an unreasonable invasion of the personal privacy of third parties. The Applicant argued that the information at issue would not identify any third parties and therefore that there was no personal information, within the meaning of section 1(n) of the FOIP Act, to which section 17(1) could apply. However, the Adjudicator found that the requested information about health conditions, treatments, treating hospitals/centres and geographic locations – even without any names, birthdates or personal health numbers – consisted of personal information, as there was a serious possibility that at least some of the acquaintances of the third parties would be able to identify them in a future news story, which was the intention of the Applicant to produce.

The Adjudicator noted that there was a presumption against disclosure of the third party personal information under section 17(4)(a) of the FOIP Act, as the information related to medical, psychiatric or psychological histories, diagnoses, conditions, treatments or evaluations. There was also a relevant circumstance weighing against disclosure of some of the personal information under section 17(5)(f), as it was supplied in confidence.

The Adjudicator found no relevant circumstances weighing in favour of disclosure of the third party personal information. The Applicant argued that the information was likely to promote public health under section 17(5)(b) of the FOIP Act, but the Adjudicator found that there was an insufficient connection between disclosure of the information and the promotion of public health. The Applicant also argued in favour of disclosure on the basis that it was desirable for the purpose of subjecting the activities of the OOCHSC to public scrutiny under section 17(5)(a). She suggested that the information at issue would shed light on how public money is spent on out-of-country health services, on the nature of the services that are not available in Alberta or Canada (particularly those for common conditions), on why the OOCHSC approves funding for certain services, on where individuals must travel to obtain the services, and on whether any out-of-country facilities provide more than their fair share of approved services. However, the Adjudicator found that the activities of the OOCHSC had not been called into question so as to warrant public scrutiny in any of the foregoing respects. Moreover, the Applicant had already been provided with information indicating why the OOCHSC approves or refuses funding for various out-of-country health services, including generally stated information about the provisional diagnoses of patients and the nature of the health services. Finally, the limited sample of information that the Applicant had requested would not provide a better understanding of how public money is spent, whether the provincial health system is effectively addressing the health needs of Albertans, or whether there are patterns of repeat locations where out-of-country health services are provided.

As disclosure would be an unreasonable invasion of the personal privacy of third parties under section 17(1) of the FOIP Act, the Adjudicator confirmed the decision of the OOCHSC to refuse the Applicant access to the specific details regarding the provisional diagnoses of patients and the out-of-country health services requested by them, as well as the names of the treating hospitals and centres, and their geographic locations. While he found that more generally stated information regarding the provisional diagnoses and out-of-country health services did not identify individuals and therefore did not fall within the scope of section 17(1), the Applicant had already received this information, so there was no point in ordering disclosure again.

Statutes and Regulations Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(vi), 1(p)(ii), 1(q), 4(1)(u), 7(1), 12(2)(b), 15.1, 17, 17(1), 17(2), 17(4)(a), 17(5)(a), 17(5)(b), 17(5)(f), 71(2), 72 and 72(2)(b); *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(f)(xiv), 1(1)(i)(i), 1(1)(i)(ii) [parts of which were previously in 1(1)(o)], 1(1)(k), 1(1)(k)(i), 1(1)(k)(ii) [the content of which was previously in 1(1)(k)(iii)], 1(1)(p), 1(1)(r), 1(1)(u)(v), 1(2), 2(a), 2(d), 7, 7(1), 8, 11(1)(a)(ii), 11(1)(b), 11(2)(a), 16, 16(1), 32(1), 37(2)(a) [now repealed], 73(1), 73(2) and 80; *Alberta Health Act*, S.A. 2010, c. A-19.5 (awaiting proclamation), preamble; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, s. 1(2) and Schedule 1; *Health Information Amendment Act, 2009*, S.A. 2009, c. 25; *Health Information Regulation*, Alta. Reg. 70/2001, s. 2(1)(j); *Out-of-Country Health Services Regulation*, Alta Reg. 78/2006, ss. 2(1) and 6(1). **CAN:** *Canada Health Act*, R.S.C. 1985, c. C-6, s. 3.

Authorities Cited: AB: Orders 97-002, F2002-015/H2002-006, F2004-015, F2005-016, F2006-014, F2008-012/H2008-003, F2008-025 and H2011-011; *University of Alberta v. Pylypiuk*, 2002 ABQB 22. **ON:** Order MO-2199 (2007). **CAN:** *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Sharpe*, 2001 SCC 2; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Gordon v. Canada (Minister of Health*), 2008 FC 258.

Other Sources Cited: Legislative Assembly of Alberta, *Alberta Hansard*, 24th Legislature, 3rd Session; Government of Alberta; E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983).

I. BACKGROUND

[para 1] As set out in sections 2(1) and 6(1) of the *Out-of-Country Health Services Regulation*, the Out-of-Country Health Services Committee (the "OOCHSC") reviews, evaluates and decides whether to approve or deny the payment of expenses for insured medical and hospital services received outside of Canada, where the individual requesting payment has endeavoured to receive the services in Canada but they are not available here.

[para 2] The Applicant is a journalist with the Canadian Broadcasting Corporation. While her inquiry submissions sometimes refer, more broadly, to the Canadian Broadcasting Corporation as being the applicant, I have opted to refer to her in the singular for the purpose of this Order (as she herself did, in her access request, request for review and request for inquiry). In correspondence dated May 25, 2010, the Applicant made the following request for information:

> *I am requesting all records under section 1(Q) of the Freedom of Information and protection of privacy act regarding the identity of the members of the Out-of-Country Health Services Committee and Appeal Panel. I am further requesting minutes from their committee meetings held in 2010 without disclosing the identity of patients requesting coverage.*

Section 1(q) of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") defines the term "record".

[para 3] The Applicant's access request was addressed to Alberta Health Services, but it was transferred on June 3, 2010 to Alberta Health and Wellness ("AHW"), which responded on behalf of the OOCHSC. By letter dated July 5, 2010, the OOCHSC granted partial access to the requested information. It withheld some information under section 17(1) of the FOIP Act (disclosure harmful to personal privacy). It determined that other information was excluded from the application of the FOIP Act by section 4(1)(u), on the basis that it was health information as defined in the *Health Information Act* (the "HIA")[1] that is in the custody or under the control of a public body that is a custodian as defined in the HIA. Noting that it went on to consider the application of the HIA, the OOCHSC withheld some information under that Act, citing sections 11(1)(a)(ii), 11(1)(b) and 11(2)(a) (right to refuse access to health information) as well as section 37(2)(a) (non-disclosure of health services provider information).

[para 4] In a form dated August 12, 2010, the Applicant requested a review of the response of the OOCHSC. The Commissioner authorized a portfolio officer to investigate and attempt to settle the matter. The parties note that, by letter dated December 9, 2010, the OOCHSC provided the Applicant with a table setting out the general nature of health services requested by individuals, their provisional diagnoses in general terms, whether the requests for funding were approved or denied, and the reasons why they were denied (the "Table"). The information in the Table was for the period from January 1, 2008 to June 7, 2010, which was longer than the time period associated with the records initially requested by the Applicant, being January 1, 2010 to June 7, 2010. The OOCHSC explained that its use of a longer period for the purpose of the Table was to protect the identity of individuals (i.e., it would be more difficult to identify any particular individual in a larger sample).

[para 5] Mediation between the parties was, ultimately, not successful. The Applicant requested an inquiry in a form dated February 8, 2011. A written inquiry was set down.

II. RECORDS AT ISSUE

[para 6] In her access request, the Applicant sought the identities of the members of the OOCHSC as well as of the Out-of-Country Health Services Appeal Panel. She also requested copies of the minutes of the meetings of both entities in 2010.

[para 7] The records before me consist of approximately 50 pages of minutes from meetings of the OOCHSC held in January, February, March, April and May 2010. The names of the members of the OOCHSC appear in the minutes and were disclosed to the Applicant, so they are not at issue.

[para 8] The records before me do not include the minutes of any meetings of the Out-of-Country Health Services Appeal Panel, which is a separate public body and custodian from the OOCHSC. Although the minutes of the OOCHSC refer to the Out-of-Country Health Services Appeal Panel, the minutes do not indicate the names of the members of the Appeal Panel. By letter dated November 17, 2011, I therefore asked AHW, which responded to the Applicant's

[1] On September 1, 2010, being subsequent to the Applicant's access request and the OOCHSC's response, amendments to the HIA came into force by virtue of the *Health Information Amendment Act, 2009*. For the purpose of cross-reference, I note where there has been an amendment to a section of the HIA that I discuss in this Order.

access request on behalf of the OOCHSC, whether and when anyone responded to the Applicant's request for information relating to the Appeal Panel, and if not, why not. AHW responded that it effectively treated the Applicant's access request as two requests, one in respect of the OOCHSC and one in respect of the Appeal Panel. It applied the Applicant's $25 initial fee to her request for information pertaining to the OOCHSC, and requested another $25 initial fee in order to process her request for information pertaining to the Appeal Panel. AHW provided a copy of an e-mail dated June 8, 2010, which conveyed this information to the Applicant, but advised me that the Applicant never paid the additional fee or otherwise responded.

[para 9] I also asked AHW whether the OOCHSC has information that is responsive to the Applicant's request for information relating to the Appeal Panel (e.g., the names of Appeal Panel members, and possibly copies of the minutes of meetings of the Appeal Panel held in 2010). AHW responded that the OOCHSC does not have copies of the minutes prepared by the Appeal Panel and no record of the names of members of the Appeal Panel for 2010.

[para 10] Following the AHW's response to my letter of November 17, 2011, the Applicant indicated that she would pay the requested $25 fee and proceed with a separate access request for the information relating to the Appeal Panel. The Applicant stated that, in the interest of time, she preferred for the present inquiry to deal only with the requested information relating to the OOCHSC.

[para 11] Given the forgoing, the records at issue in this inquiry do not include any information relating to the Appeal Panel.

[para 12] As for the information relating to the OOCHSC and contained in its meeting minutes requested by the Applicant, not all of it is at issue in this inquiry, given the scope of the Applicant's access request, request for review and request for inquiry. In her access request, the Applicant stated that she was not seeking the identity of patients requesting coverage, meaning – as she explains in her submissions – that she does not want access to the names of patients, dates of birth, or personal health numbers. The foregoing personal identifiers are therefore not at issue.

[para 13] In her request for review, the Applicant wrote that she wished "to have severed information… that would have disclosed the conditions and treatment sought". In her request for inquiry, she wrote that the "disclosures failed to include the location of where health treatment was sought outside of Alberta". In her submissions, she states that she "is only interested in the details of what out-of country health services are approved/denied and where treatment is sought (name of hospital and/or treatment centre, and geographic location)". Given these indications, the records at issue consist of information regarding the provisional diagnoses of patients, the nature of the out-of-country health services requested by them, and whether funding for the health services were approved or denied by the OOCHSC. Where funding was approved, the records at issue also include the names of the treating hospitals and centres, and their geographic locations (which I will collectively call the "Location Information").

[para 14] Given the scope of what the Applicant is seeking, I find that the records at issue do not include any information in some of the entries of the meeting minutes, being those regarding miscellaneous updates/correspondence from patients, appeal hearing outcomes, and some (but not all) of the requests for extensions of prior approvals. These entries include nothing about the nature of the particular health condition or treatment of a patient, or the location of the services that were approved.

[para 15] Where the minutes set out the nature of an out-of-country health service, the date of the service and the name of the treating doctor is sometimes included. However, I find that all of the dates, and most of the names, are not at issue, again given the Applicant's indications of what she is seeking. I say most of the names, as the Applicant indicated in her request for review that she was not trying to identify the specific health care providers, yet there are few instances where only the name of a doctor is given without any reference to a particular hospital or treatment centre. In such instances, I characterize the name of the doctor as falling within the scope of the Location Information, as it indicates where the health service was or would be obtained (i.e., the office, treatment centre or hospital where the doctor works).

[para 16] In its submissions, the OOCHSC notes that the Applicant did not indicate, in her request for review, that she was seeking the Location Information. She did not express an interest in the Location Information until her request for inquiry. While it notes this, the OOCHSC does not actually object to a determination of whether the Applicant is entitled to the Location Information, but instead makes submissions on that issue. In any event, I have jurisdiction to determine whether the Applicant is entitled to the Location Information. This inquiry involves a review of the response of the OOCHSC to the Applicant's access request, and the Location Information, as it appears in the meeting minutes, forms part of the information that she initially requested.

III. ISSUES

[para 17] The Notice of Inquiry, dated April 20, 2011, set out the following issues, the second of which I have rephrased in a more proper fashion:

> Are the records subject to the *Freedom of Information and Protection of Privacy Act* or the *Health Information Act*?
>
> Are the records excluded from the application of the *Freedom of Information and Protection of Privacy Act* by section 4(1)(u) (Act does not apply to health information as defined in the *Health Information Act*)?
>
> If the *Freedom of Information and Protection of Privacy Act* is found to apply to the records at issue, does section 17(1) (disclosure harmful to personal privacy) apply to the records/information?
>
> If the *Health Information Act* is found to apply to the records at issue, did the Custodian properly apply sections 11(1)(a)(ii), 11(1)(b) and 11(2)(a) (right to refuse access to health information) to the records/information?

If the *Health Information Act* is found to apply to the records at issue, does section 37(2)(a) of the Act apply to the records/information (non-disclosure of health services provider information)?

[para 18] In the course of the inquiry, I requested submissions on the following additional issue:

Are the records excluded from the application of the *Health Information Act* by section 1(2) (Act does not apply where a custodian provides services that are not health services)?

IV. DISCUSSION OF ISSUES

A. Are the records subject to the *Freedom of Information and Protection of Privacy Act* or the *Health Information Act*?

B. Are the records excluded from the application of the *Freedom of Information and Protection of Privacy Act* by section 4(1)(u) (Act does not apply to health information as defined in the *Health Information Act*)?

[para 19] Section 4(1)(u) of the FOIP Act reads as follows:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
> …
>
> > *(u) health information as defined in the Health Information Act that is in the custody or under the control of a public body that is a custodian as defined in the Health Information Act.*

[para 20] The OOCHSC is a public body under the FOIP Act. Under section 1(p)(ii), a "public body" means, among other things, a "body designated as a public body in the regulations". In turn, section 1(2) of the *Freedom of Information and Protection of Privacy Regulation* lists designated public bodies in Schedule 1 to the regulations, and the OOCHSC is listed there.

[para 21] The OOCHSC is also a custodian as defined in the HIA. Under section 1(1)(f)(xiv)[2] of the HIA, a "custodian" means, among other things, a "committee… designated in the regulations as a custodian". In turn, section 2(1)(j) of the *Health Information Regulation* designates the OOCHSC as a custodian.

[para 22] In her access request, the Applicant cited the FOIP Act, meaning that she made her access request under section 7(1) of that Act, which reads as follows:

[2] Effective September 1, 2010, section 1(1)(f)(xiv) of the HIA was subject to a minor amendment in that "or other entity" was added to the list of committees, etc. that may be designated as a custodian in the regulations.

> *7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.*

However, section 15.1 of the FOIP Act reads as follows:

> *15.1(1) If a request is made under section 7(1) for access to a record that contains information to which the Health Information Act applies, the part of the request that relates to that information is deemed to be a request under section 8(1) of the Health Information Act and that Act applies as if the request had been made under section 8(1) of that Act.*
>
> *(2) Subsection (1) does not apply if the public body that receives the request is not a custodian as defined in the Health Information Act.*

[para 23] Section 15.1 contemplates that, if an access request is for a record containing information to which the HIA applies, all or part of the access request may be deemed to be made under the HIA. For further context, sections 7, 8 and 16 of the HIA read, in part, as follows:

> *7(1) An individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian.*
>
> *(2) The right of access to a record does not extend to information in respect of which a custodian is authorized or required to refuse access under section 11, but if that information can reasonably be severed from a record, an individual has a right of access to the remainder of the record.*
> …
>
> *8(1) To obtain access to a record, an individual must make a request to the custodian that the individual believes has custody or control of the record.*
> …
>
> *16(1) If a written request is made under section 8(1) for access to a record that contains information to which the Freedom of Information and Protection of Privacy Act applies, the part of the request that relates to that information is deemed to be a request under section 7(1) of the Freedom of Information and Protection of Privacy Act and that Act applies to that part of the request as if it had been made under section 7(1) of that Act.*
> …
>
> *(3) This section does not apply if the custodian that receives the request is not a public body as defined in the Freedom of Information and Protection of Privacy Act.*

[para 24] The OOCHSC submits that most of the records at issue are subject to the HIA. It notes that the minutes of its meetings include information about provisional diagnoses of patients, the nature of health services requested by them, and the out-of-country health services provider who provided or will provide the approved services, including the provider's location.

The OOCHSC submits that all of this is "diagnostic, treatment and care" information within the terms of sections 1(1)(i)(i) and 1(1)(i)(ii)[3] of the HIA which in turn is "health information" within the terms of section 1(1)(k)(i). The OOCHSC further says that some of the information at issue is health service eligibility information and therefore "registration information" within the terms of section 1(1)(u)(v), which in turn is "health information" within the terms of section 1(1)(k)(ii).[4] The OOCHSC then submits that, because all of the foregoing is health information as defined in the HIA, the records at issue are excluded from the application of the FOIP Act by virtue of that Act's section 4(1)(u).

[para 25] The Applicant makes no submissions of the issue of which Act applies to the information that she requested, instead deferring to my conclusions.

[para 26] In the inquiry that resulted in joint Orders F2008-012/H2008-003, an applicant had requested records that included the name of a third party and details about that third party's condition and treatment. Orders F2008-012/H2008-003 concluded as follows (at paras. 35 and 36):

> The Applicant's access request cannot be treated as a request for health information under the HIA because section 7 of HIA permits access requests only for one's own health information. The Applicant has requested his own personal information, which happens to include information about the condition and treatment of another individual. HIA does not create the ability to make an access request for the health information of another individual. Section 7 of the FOIP Act does contemplate that requests can be made for records that include the personal information of third parties, while section 17 of the FOIP Act ensures that a third party is protected from an unreasonable invasion of personal privacy in the event that a record containing the third party's personal information is responsive to an access request. Specifically, section 17(4)(a) creates a presumption that disclosure of medical information about an identifiable individual is an unreasonable invasion of the individual's personal privacy. In my view, the existence of this provision supports the interpretation that the FOIP Act applies to personal information that is also health information.
>
> For these reasons, I find that the *Freedom of Information and Protection of Privacy Act* applies to the email, the letter attachment, and to all the information contained in both these records.

[para 27] The above excerpt effectively means that, where an applicant requests the health information of another individual, the access request is necessarily an access request for personal information under the FOIP Act because such a request is not permitted under the HIA. However, I note that this conclusion is inconsistent with earlier joint Orders F2002-015/H2002-006. In that inquiry, an applicant had requested information relating to an investigation of the conduct of a physician, which included the health information of the physician's patients but no health information of the applicant. With respect to the application of the HIA, Orders F2002-015/H2002-006 concluded as follows (at paras. 35 to 37):

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[3] Parts of section 1(1)(i)(ii) of the HIA ("information respecting a health services provider") were, prior to September 1, 2010, in section 1(1)(o).

[4] The content of section 1(1)(k)(ii) of the HIA ("registration information") was, prior to September 1, 2010, in section (1)(k)(iii).

> Section 7(1) of the HIA states that an individual has a right of access to any record containing the health information about the individual. Section 7(1) does not, however, give the individual the ability to access the health information about another individual. This is further supported by section 11(2)(a) of the HIA which states that a custodian must refuse to disclose health information to an applicant if the health information is about another individual. Section 11(2)(a) reads as follows:
>
> > *11(2) A custodian must refuse to disclose health information to an applicant*
> >
> > *(a) if the health information is about an individual other than the applicant, unless the health information was originally provided by the applicant in the context of a health service being provided to the applicant,*
>
> After a review of the records and all the arguments of all the parties, I find that section 11(2)(a) applies to all of the records at issue under section 15.1…
>
> These records consist of health information of an individual other than the Applicant. In addition, this health information was not originally provided by the Applicant to the CHR. As such, I uphold the CHR's decision to withhold these records from the Applicant. The Applicant cannot get access to these records under the HIA.

Then, as for the application of the FOIP Act to the same records and after citing section 4(1)(u) of that Act, Orders F2002-015/H2002-006 (at para. 41) concluded as follows:

> This section [section 4(1)(u)] states that the FOIP Act will not apply to health information, as defined in the HIA, that is in the custody or under the control of a custodian as defined in the HIA. I have already decided that the records at issue under section 15.1 … consist of health information. I also find that all of these records are in the custody or under the control of a custodian. As such, these records are excluded from the application of the FOIP Act. The Applicant cannot get access to these records under the FOIP Act.

[para 28] Unlike Orders F2008-012/H2008-003, Orders F2002-015/H2002-006 effectively concluded that an individual wishing to obtain access to another individual's health information cannot do so under either the HIA or the FOIP Act. While Orders F2002-015/H2002-006 started with the same premise that the HIA permits access to one's own health information only, they then turned to section 4(1)(u) of the FOIP Act – which Orders F2008-012/H2008-003 did not address – finding that, because section 4(1)(u) states that the FOIP Act does not apply to health information as defined in the HIA, the FOIP Act also does not permit an access request for someone else's health information.

[para 29] In my view, and for the reasons that follow, Orders F2008-012/H2008-003 set out the proper approach because the result of the conclusion in Orders F2002-015/H2002-006 is an absurd and unintended gap in Alberta's legislative scheme for access to information.

[para 30] Section 2(d) of the HIA states that one of its purposes is "to provide individuals with a right of access to health information about themselves, subject to limited and specific exceptions as set out in this Act". This purpose is again reflected in section 7(1) of the HIA. However, I do not believe that this stated purpose was intended to preclude access requests for

anyone else's health information under other legislation, namely the FOIP Act. Prior to enactment of the HIA, the FOIP Act already allowed access requests for what the HIA later defined as health information. The point of enacting the HIA, in so far as access requests were concerned, was to make it *easier* for individuals to obtain their own health information, not to make it *impossible* for others to obtain it by way of the existing scheme for access requests to public bodies under the FOIP Act.

[para 31] At the conclusion of second reading of Bill 40, which introduced the HIA in 1999, the Member of the Legislative Assembly who sponsored the bill said the following:

> Before closing, Madam Speaker, I'd just like to remind members of the seven basic principles of this legislation, which I think may have been overlooked in all of the rhetoric in the various speeches we have heard. The first one is a very important principle, and that is that this legislation gives every Albertan the right of access to their own health information. This is a first, because we don't have that entrenched properly right now, and there are many obstacles to one getting access to one's own health information. This bill will cure that. […]
>
> [Legislative Assembly of Alberta, *Alberta Hansard*, 24th Legislature, 3rd Session, p. 2101 (November 29, 1999, Marlene Graham, MLA Calgary-Lougheed)]

In my view, by pointing to the difficulty that individuals had been having in gaining access to their own health information, the above excerpt shows that the intention of the HIA was to improve that particular situation, not alter the existing ability to access information about someone else's health.

[para 32] Of course, the HIA is also intended "to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information", as set out as a purpose in section 2(a). On this basis, it might be argued that HIA did, in fact, intend to preclude one's health information from ever being obtained by a third party by way of an access request, including one under the FOIP Act. This would certainly protect privacy and confidentiality. In my view, however, this gap in the ability to make an access request for information about another individual's health creates the unfair and unfortunate result of precluding such an access request where, for example, the information of another individual is relevant to a fair determination of the applicant's rights or, as argued by the Applicant in this inquiry, disclosure is desirable for the purpose of public scrutiny. Again, the FOIP Act allowed these relevant circumstances to be considered prior to enactment of the HIA, so I fail to understand why consideration of them is now precluded on the basis that the Legislature meant for the HIA to put a definitive end to access requests for the health information of someone else.

[para 33] Rather, in my view, section 2(a) of the HIA primarily sets out the purpose of protecting the privacy and confidentiality of health information when it is shared among custodians and others in order to provide health services and manage the health system. This was reflected as follows by the Member of the Legislative Assembly who sponsored the bill to enact the HIA:

> Just to remind members, Madam Speaker, the purpose of this legislation I say has been achieved, and that is that the right balance has been achieved between the protection of privacy of one's personal health information as well as clear rules for the collection, use, and disclosure of that health information for two very important purposes, which are patient care and the management of the health system. This legislation has been designed to reflect the operation of the health system as it operates today as well as to look forward to the future operation of the health system. There has been a growing recognition of the use of information technology not just in the health sector but in all sectors of society, and these rules are in place to guide us now for the types of information systems we have, the paper system and certainly the information technology that is in existence. It also looks to the future, when an electronic network in the nature of Alberta Wellnet may be in place.
>
> Many have spoken about why we need this legislation now. That would seem, Madam Speaker, to presuppose that we have clear, good rules in place to guide the collection and use of health information now. Well, I'd just like to make it very clear that the rules we have are scattered. They are scattered amongst different pieces of legislation, codes of practice and just informal practices. They are often inconsistent, and there are gaps in the rules. So Albertans need this legislation to ensure that their privacy is protected as well as to ensure that we have good information for making good decisions about the operation of the health system.
>
> [Legislative Assembly of Alberta, *Alberta Hansard*, 24th Legislature, 3rd Session, p. 2101 (November 29, 1999, Marlene Graham, MLA Calgary-Lougheed)]

Essentially, the above excerpt focuses on the privacy and confidentiality of health information in the context of the collection, use and disclosure of health information by health care providers and administrators (particularly by electronic means), not in the context of an access request.

[para 34] Finally, a gap in the ability to make an access request for another individual's health information under both the HIA and the FOIP Act creates the absurd result of precluding such a request where the information is in the custody or under the control of an entity that is both a custodian and a public body, but allowing it where the entity is a public body but not a custodian. For instance, a school board may have a copy of a medical note from a student's doctor, or the Workers' Compensation Board may have a copy of a claimant's hospital chart. It would be odd that a third party could make an access request for the medical note or hospital chart because the school board and WCB are public bodies subject only to the FOIP Act, yet the third party could not request the same information from a regional health authority, which happens to have the same information, because the regional health authority is both a public body and a custodian.

[para 35] At one point in its submissions, the OOCHSC argues that there would be a danger to the public interest if health information were exposed to the access principles in the FOIP Act, which it says were never intended to apply. I have already explained why I believe, to the contrary, that the Legislature's intention was not to set aside the possibility of access under the FOIP Act when an applicant is requesting records that contain a third party's health information. Further, one should not be overly worried about another person obtaining access to one's health information by way of an access request under the FOIP Act. As noted in Orders F2008-012/H2008-003, section 17(4)(a) sets out a presumption against disclosure of personal

information that relates to a third party's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Additionally, section 71(2) places the burden on an applicant to show why disclosure would not be an unreasonable invasion of a third party's personal privacy. Finally, in appropriate cases, it may be open to a public body to rely on section 12(2)(b) of the FOIP Act, so as to refuse to confirm or deny the existence of a record containing information about the health of another individual, on the basis that disclosing the mere existence of the information would be an unreasonable invasion of personal privacy.

[para 36] Accordingly, I conclude that section 17 of the FOIP Act , or section 12(2)(b) in appropriate cases, is the proper provision for an entity that is both a public body and custodian to consider when an applicant requests what amounts only to the health information of another individual. It is not section 11(2)(a) of the HIA, as suggested by Orders F2002-015/H2002-006. Section 7(1) of the HIA already precludes a request for another individual's health information under the HIA, in that it sets out a right of access only to a record containing one's own health information. There is therefore no need to apply an exception to disclosure under section 11(2)(a). Rather, my reading of section 11(2)(a) is that it sets out a mandatory exception to disclosure where an applicant requests information that is both his or her own health information and the health information of another individual (and the applicant did not originally provide the information), or the two sets of health information are so intertwined that they cannot be separated. If the information subject to the access request can be separated, the applicant's request for his or her own health information is to be addressed under the HIA, but the request for the other individual's information is to be treated, by virtue of section 16(1) of the HIA, as an access request for personal information under the FOIP Act. In any event, while section 11(2)(a) of the HIA may be engaged in cases where there is health information of both an applicant and another individual, the main point to bear in mind, in this inquiry, is that the Applicant has in no way requested her own health information. On this basis alone, the FOIP Act applies to her access request.

[para 37] I now turn to reconciling the wording of section 4(1)(u) of the FOIP Act with my conclusions above.

[para 38] Both sections 4(1)(u) and 15.1 of the FOIP Act address situations where an entity is both a public body under the FOIP Act and a custodian under the HIA. Insofar as an access request is concerned, section 15.1 deems all or part of it to fall under the HIA if it is for "information to which the *Health Information Act* applies". Somewhat inconsistently, section 4(1)(u) of the FOIP Act excludes that Act's application to "health information as defined in the *Health Information Act*". There is inconsistency because, on their bare wording, "health information as defined in the *Health Information Act*" is a broader concept than "information to which the *Health Information Act* applies". Some information may otherwise appear to be "health information" as defined in the HIA under section 1(1)(k) of that Act, yet the HIA does not apply to it because the information is properly characterized as "personal information", albeit about someone's health.

[para 39] Given the bare wording of the sections, information about the health of an individual other than an applicant is arguably "health information as defined in the *Health Information Act*" within the terms of section 4(1)(u). However, the same information is not information "to which

the *Health Information Act* applies" within the terms of section 15.1, as an applicant is not entitled under that HIA to request another individual's health information. The result is that the requested information is neither deemed under section 15.1 to be part of an access request under the HIA, nor is it subject to the access provisions of the FOIP Act as a result of section 4(1)(u). For reasons already set out, this creates an absurd gap in Alberta's overall legislative scheme for access to information.

[para 40] Section 4(1)(u) of the FOIP Act was drafted with the additional intention of excluding the application of that Act insofar as disclosure of health information outside the context of an access request is concerned. As I noted above, the HIA was enacted to govern the sharing of health information between custodians and others, taking the sharing of that information outside the scope of the FOIP Act. In this way, the wording of section 4(1)(u) achieves its purpose by excluding the application of the FOIP Act, insofar as disclosure outside the context of an access request is concerned, to all health information, no matter to whom it relates. It would, of course, defeat the intention of the Legislature if a custodian that could not collect, use or disclose health information under Part 5 of the HIA could then turn to Part 2 of the FOIP Act for alternate authority. The fact that section 4(1)(u) precludes a public body that is also a custodian from collecting health information in reliance on the FOIP Act was noted, for instance, in Order H2011-001 (at paras. 30 to 32).

[para 41] In achieving its purpose of excluding the application of the FOIP Act to the disclosure of health information outside the context of an access request, section 4(1)(u) resulted, on its bare wording, in a similar but what I find to be an unintended exclusion in the context of an access request. The modern approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" [*R. v. Sharpe*, 2001 SCC 2 at para. 33, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), p. 87]. Bearing in mind this approach, I conclude that, *insofar as an access request is concerned*, section 4(1)(u) is more properly read as excluding the application of the FOIP Act to *the applicant's* health information as defined in the HIA. As explained in detail above, this interpretation is based on my consideration of sections 4(1)(u), 15.1 and 17 of the FOIP Act, sections 2(d), 7(1), 11(2)(a) and 16 of the HIA, the way the two Acts interrelate, the Legislature's intention when enacting the HIA to strengthen the ability of an individual to access his or her own health information as opposed to preclude others from requesting or obtaining access, and the gap in the scheme for accessing information that results from a contrary interpretation of section 4(1)(u) of the FOIP Act.

[para 42] Alternatively put, and to better accord with section 15.1 of the FOIP Act, section 4(1)(u) of the FOIP Act is more properly read as excluding from the application of the FOIP Act information to which the HIA applies. Such an interpretation excludes, from the application of Part 2 of the FOIP Act, all health information for the purpose of collection, use and disclosure, but only excludes, for the purpose of an access request under Part 1 of the FOIP Act, information falling within the scope of an access request permitted by the HIA and to which the HIA applies, being an access request for one's own health information. To put the point differently still, "health information as defined in the *Health Information Act*", within the terms of section 4(1)(u) of the FOIP Act, can only be such "health information" if the HIA applies in the first place.

Because the Applicant here cannot make an access request under the HIA for the information that she has requested, the HIA does not apply, meaning that the requested information cannot constitute "health information" under the HIA. Section 4(1)(u) of the FOIP Act is therefore not engaged.

[para 43] Given the foregoing, I conclude that all of the records at issue in this inquiry are subject to the FOIP Act. They are not subject to the HIA.

[para 44] Before leaving this part of the Order, I would like to discuss one last point, with the assumption for the moment that it is really the HIA that applies to the information at issue. In their submissions, both parties address the application of section 32(1) of the HIA, which reads as follows:

> *32(1) A custodian may disclose non-identifying health information for any purpose.*

The Applicant argues that section 32(1) of the HIA permits disclosure of the records at issue to her because they consist of non-identifying health information within the terms of section 1(1)(r) of the HIA, and asks me to order disclosure to her on that basis. The OOCHSC submits that section 32(1) does not permit disclosure, as the records at issue consist instead of individually identifying health information within the terms of section 1(1)(p) of the HIA.

[para 45] If HIA were to apply, I would have no jurisdiction to decide whether section 32(1) permits disclosure of the records at issue to the Applicant. Under section 73(1), the Applicant may request a review of the OOCHSC's response to her access request, but section 32(1) is not a section of the HIA that is relevant to a custodian's response to an access request. Section 32(1) contemplates a disclosure by a custodian outside the context of any access request. In this respect, it is section 73(2) of the HIA that sets out the mechanism by which this Office may review such a disclosure. However, section 73(2) only allows a request for review by an individual who believes that his or her health information was disclosed in contravention of the HIA. It does not permit, as here, an individual to request a review of a decision *not to* disclose health information, including in reference to section 32(1).

[para 46] I note the foregoing to again demonstrate what I perceive to be an oddity if I were to have concluded that that the records at issue are subject to the HIA rather than the FOIP Act. If I had done so, the Applicant would be left with having to rely on the possible discretion of the OOCHSC to make a disclosure under section 32(1) of the HIA. Further, assuming for the moment that the information requested by the Applicant is non-identifying health information, it would still be health information to which the FOIP Act could not apply. In other words, even where health information does not identify a third party, there would still be no ability to make an access request under either Act – again because section 7(1) of the HIA does not permit such an access request, and section 4(1)(u) of the FOIP Act would exclude the application of that Act. In my view, the proper interpretation is that the Applicant in this inquiry is able to make her access request under the FOIP Act, regardless of whether the requested information appears to be identifying health information of a third party, non-identifying health information of a third party, or personal information of a third party.

C. Are the records excluded from the application of the *Health Information Act* by section 1(2) (Act does not apply where a custodian provides services that are not health services)?

[para 47] Section 1(2) of the HIA reads as follows:

> *1(2) Where a custodian provides services that are not health services, this Act does not apply*
>
> > *(a) to the custodian in respect of those other services, or*
> >
> > *(b) to information relating to those other services.*

[para 48] I added the above issue to the inquiry because section 1(2) of the HIA might have informed the question of which Act applies to the records at issue. However, given that I have already found that the FOIP Act applies following my consideration of other sections in both Acts, I do not have to discuss the above issue.

D. If the *Freedom of Information and Protection of Privacy Act* is found to apply to the records at issue, does section 17(1) (disclosure harmful to personal privacy) apply to the records/information?

[para 49] Section 17 of the FOIP Act reads, in part, as follows:

> *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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *[various circumstances, none of which exist here]*
>
> …
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> >
> > …
>
> *(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,*
> …
>
> *(f) the personal information has been supplied in confidence,*
> …

[para 50] The OOCHSC applied section 17(1) to some of the information at issue, having determined for itself that the information was personal information subject to the FOIP Act. While it applied provisions of the HIA to the remaining information at issue, it states in its inquiry submissions that, in the event that I conclude that this information is also subject to the FOIP Act, it alternatively applies section 17(1) of the FOIP Act to the information.

[para 51] In the context of section 17, the OOCHSC must establish that the severed information is the personal information of a third party, and may present argument and evidence to show how disclosure would be an unreasonable invasion of the third party's personal privacy. If a record does contain personal information about a third party, section 71(2) states that it is then up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

1. Do the requested records consist of the personal information of third parties?

[para 52] Under section 1(n) of the FOIP Act, "personal information" means "recorded information about an identifiable individual". Under section 1(n)(vi), it expressly includes information about an individual's health and health care history, including information about a physical or mental disability.

[para 53] Here, I find that the records at issue consist of information about health and health care history, and about physical or mental disability. However, the parties disagree on whether the records consist of information about any identifiable individuals, which is necessary for the information to be personal information within the meaning of section 1(n).

[para 54] When determining whether information is about an identifiable individual, one must look at the information in the context of the record as a whole, and consider whether the information, even without personal identifiers, is nonetheless about an identifiable individual on the basis that it can be combined with other information from other sources to render the individual identifiable [Order F2006-014 at para. 31, citing Ontario Order MO-2199 (2007) at para. 23]. Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information [Order F2008-025 at footnote 1, citing *Gordon v. Canada (Minister of Health*), 2008 FC 258 at para. 34].

[para 55] The Applicant has not requested the names of any third parties, dates of birth or personal health numbers appearing in the minutes of the OOCHSC that form the records at issue. However, the OOCHSC submits that other information still identifies third parties. It argues that information is identifying not only if the Applicant could identify the individual to whom the information relates, but if anyone handling or accessing the information, such as through a news article, could identify the individual. It says that a media report about an unnamed patient receiving services at a specific clinic in a specific location outside of Canada could make the patient's identity apparent to his or her acquaintances, particularly given the often unique conditions and treatments involved in applications for funding from the OOCHSC. It submits that identification could reasonably be expected given the small number of individuals who request funding and/or are approved. It notes that, in the records at issue, 44 individuals requested funding, and 24 of them were approved to obtain health services outside the country. It adds that, in 10 of the approved cases, the health condition was noted in the minutes of the OOCHSC to be "rare", "uncommon" or " rare and unusual", making it even more possible for the individual to be identified. Finally, it argues that the Applicant is in a position to use the information in the Table that was disclosed to her to identify the patients whose information has been withheld in the minutes.

[para 56] Conversely, the Applicant argues that the information at issue would not identify any third parties, given the overall size of the provincial population, the fact that many of the health conditions set out in the Table are very common, and the fact that the treatments are often described in the Table in very general terms (e.g. "surgery", "consultation", "second opinion", "testing", "assessment", etc.). She says that, without any names, birthdates or personal health numbers, disclosure of the information at issue could not reasonably lead to identification of any patients. She submits that there is no way for her to make connections between the information in the Table and the meeting minutes of the OOCHSC so as to isolate and determine who specific individuals are.

[para 57] The information in the Table may or may not assist the Applicant in identifying any third parties, depending on whether she were to obtain access to all or only some of the information in the minutes. If she were to obtain access to all of the information at issue in the minutes, the Table would be superfluous, given that it sets out the same information in more general terms and is included among information for a longer period than that set out in the Applicant's access request. In other words, the information withheld in the minutes of the OOCHSC would be the more specific and detailed information to use for the purpose of identifying the patients. On the other hand, if I were to order disclosure of only the Location Information appearing in the minutes, the Applicant could possibly use that information to identify an individual, for instance if a particular hospital or treatment centre outside the country is known to treat a rare condition, and that condition appears in the Table alongside other facts, albeit generally stated, which the Applicant could combine so as to identify someone.

[para 58] However, I raise the latter as a remote possibility. I doubt that the Applicant (or the Canadian Broadcasting Corporation, more broadly) is in a position to use the information at issue to identify any of the individuals who requested funding from the OOCHSC, at least not any individuals whose identity the Applicant does not already know. Even if there is a health condition set out in the meeting minutes that only one individual in the province has, the

Applicant would have to already know the particular individual who has that condition. If the Applicant or her colleagues have already interviewed patients who requested funding from the OOCHSC, the Applicant already knows the identity of those patients, and very likely the nature of the patients' health conditions and treatments, separate and apart from any information in the records at issue.

[para 59] While the Applicant herself is unlikely to be able to identify the individuals whose information is found in the records at issue, I find that there is a reasonable possibility that others, apart from the Applicant, could use the information to identify the third parties, thereby rendering the information their personal information within the meaning of section 1(n) of the FOIP Act.

[para 60] The Applicant is a journalist who is interested in reporting a story containing some or all of the information at issue. She states in her submissions that, if she obtained access to the requested information, she would be able to communicate the information to Albertans and other Canadians to provide an increased public understanding of our healthcare system. In my view, if friends, relatives, neighbours, colleagues or acquaintances of an individual who requested or received funding from the OOCHSC were to read or hear a news story from the Applicant or the Canadian Broadcasting Corporation, it is reasonably likely that some of those friends, relatives, neighbours, colleagues or acquaintances would be able to identify the individual. For instance, a person might become aware, from a news story reported by the Applicant, that an unnamed individual obtained funding from the OOCHSC for a specific health service in a specific location in relation to a specific health condition. That same person might already know of an individual who requested funding from the OOCHSC (but knows nothing more), or already knows of an individual who obtained a health service outside the country (but knows nothing more, including the nature of the health service), or already knows of an individual who has the specific health condition (but knows nothing more). The person may then link the previously known information with the new information so as to identify the individual and learn other personal information about him or her. While I am certainly not saying that every friend, relative, neighbour, colleague or acquaintance of a patient would be in a position to do this, it is likely that at least one of them could, which is sufficient to render the information about an identifiable individual.

[para 61] As noted above, only 44 individuals sought funding for an out-of-country health service in the time period associated with the Applicant's access request, and only 24 were approved. The small number of individuals who seek and/or obtain funding from the OOCHSC militates in favour of my finding that the records contain information about identifiable individuals. While the overall size of the provincial population makes it unlikely that the Applicant could identity any of the patients, the small number of patients with information in the records at issue makes it likely that some of those patients' friends, relatives, neighbours, colleagues or acquaintances could identify them. Again, an acquaintance of an individual might know some but not all information about an individual's health condition or treatment and/or about the fact of his or her application for funding from the OOCHSC. With such a small pool of patients who turn to the OOCHSC, I find it more likely than not that an acquaintance could connect previously known information with newly learned information so as to identify a particular patient.

[para 62] Having already been given a synopsis of the conditions and treatments of patients in the Table, the Applicant is especially interested in the Location Information, being the names of the treating hospitals and centres, and their geographic locations. For clarity, the Location Information that is at issue consists only of such information appearing in the 2010 minutes of the OOCHSC requested by the Applicant, not such information dating back to January 1, 2008, being the time period associated with the Table. Also for clarity, I find that the Location Information, by itself, is information that could serve to identify a patient to his or her acquaintances and is therefore personal information. An acquaintance might know that an individual went to a particular hospital, treatment centre or geographic location for an out-of-country health service and proceed to link that information with a news story reported by the Applicant, in which the individual's particular health condition and treatment is disclosed, even though the individual is not named.

[para 63] Finally, the fact that some of the health conditions and treatments set out in the records at issue may be common does not alter my finding that the information is personal information. An acquaintance of an individual may nonetheless be able to link details in relation to the common condition or treatment with information previously known about the individual, such as the fact that the individual applied to the OOCHSC for funding or attended a particular hospital or treatment centre outside the country.

[para 64] Given the foregoing, I conclude that the records requested by the Applicant consist of the personal information of third parties, within the terms of section 1(n) of the FOIP Act.

[para 65] At the same time, some of the information at issue in the meeting minutes of the OOCHSC is not the personal information of third parties, as the information does not identify them. I am referring to the fact that funding for a health service was approved or denied, along with the provisional diagnosis, and health service requested or obtained, where these are stated only in general terms and are not so rare or unusual that they would serve to identify an individual given the short time period associated with the Applicant's access request (i.e., information about a rare or unusual condition or treatment reviewed by the OOCHSC sometime between January and June 2010). As the generally stated information is non-identifying and therefore non-personal information, section 17(1) of the FOIP Act cannot apply to it. However, where there is generally stated information in the minutes that would not identify a particular patient, this same information has already been disclosed to the Applicant in the Table, so there is no point ordering its disclosure again.

2. Would disclosure be an unreasonable invasion of personal privacy?

[para 66] When I refer to the records or information at issue in the discussion that follows, I am referring to what I have found to constitute personal information, being the more specific details of the provisional diagnoses of patients, the more specific details of the out-of-country health services requested or obtained by them, and the Location Information.

[para 67] Under section 17(2) of the FOIP Act, a disclosure of personal information is expressly not an unreasonable invasion of a third party's personal privacy in certain circumstances. I find that none of the circumstances exist in this inquiry.

[para 68] Rather, there is a presumption against disclosure of the records at issue under section 17(4)(a), as the information relates to medical, psychiatric or psychological histories, diagnoses, conditions, treatments or evaluations.

[para 69] As for relevant circumstances weighing against disclosure, the OOCHSC argues that the information at issue was supplied in confidence under section 17(5)(f). It says so essentially on the basis that it receives information about the health of the individuals who make applications to it for the payment of health-related expenses, and it believes that most individuals provide their health information in confidence. The OOCHSC also notes that it discusses the applications for funding in meetings that are not open to the public.

[para 70] I have insufficient evidence to find that every individual with personal information in the records did, in fact, supply that personal information to the OOCHSC in confidence. I do not have, for instance, copies of the application forms completed by the individuals, or other correspondence that they sent to the OOCHSC, which may or may not have indications of express or implied confidentiality. On the other hand, I am quite sure that at least some of the individuals provided their personal information to the OOCHSC with a reasonable expectation of confidentiality, given the nature of some of the health conditions and treatment revealed in the records. Given the foregoing, I find that the relevant circumstance under section 17(5)(f) weighs against disclosure of some of the information at issue, but not all of it.

[para 71] As for relevant circumstances weighing in favour of disclosure, the Applicant argues that the information at issue is likely to promote public health and safety under section 17(5)(b). The OOCHSC counters that the Applicant provides no evidence to support this. In response, the Applicant submits that any kind of increased disclosure regarding the inner workings of the OOCHSC would promote public health and safety.

[para 72] I find that the relevant circumstance under section 17(5)(b) of the FOIP Act is not present in this inquiry. The OOCHSC makes funding decisions that relate to the health of various individuals, and those individuals form a segment of the public. However, the mere fact that information in some way relates to public health, and is held by an entity responsible for administering an aspect of the health care system, does not mean that disclosure of the information is likely to promote public health, within the terms of section 17(5)(b). In those instances where the OOCHSC has approved the payment of expenses for health services outside of Canada, health has already been promoted, independent and regardless of any disclosure of the information at issue. To the extent that public health may be promoted by making it known that the OOCHSC is available to fund out-of-country health services, this fact is already apparent from the information disclosed to the Applicant, so disclosure of additional information is not necessary for the purpose of promoting public health in this respect.

[para 73] Where funding has been denied by the OOCHSC, the individuals may or may not have decided to pay for the requested health service themselves, and may or may not have received an alternate service in Canada covered by health care insurance. If individuals have foregone treatment, or hesitated to obtain treatment due to the cost, it is possible that public health has not been promoted. However, even if some of the individuals, whose personal information is found in the records at issue, did not receive a health service at all or had to pay

for it themselves, the records do not indicate this information. Arguably, the mere fact that individuals have been denied funding from the OOCHSC suggests that public health has not been promoted, and it might be promoted if the public knew that individuals have been denied funding. However, disclosure of the details of the health conditions and requested treatments, as set out in the meeting minutes of the OOCHSC, is not necessary to promote public health in this respect. The fact that some individuals did not receive funding from the OOCHSC, in relation to various generally stated health conditions and treatments, was already disclosed to the Applicant in the Table.

[para 74] The Applicant also argues in favour of disclosure of the information at issue on the basis that is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny under section 17(5)(a). For public scrutiny to be a relevant circumstance, there must be evidence that the activities of the government or a public body have been called into question, which makes the disclosure of personal information desirable in order to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88). In determining whether public scrutiny is desirable, I may consider whether more than one person has suggested that public scrutiny is necessary; whether the Applicant's concerns are about the actions of more than one person within the public body; and whether the public body has not previously disclosed sufficient information or investigated the matter in question (Order 97-002 at paras. 94 and 95; Order F2004-015 at para. 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk*, 2002 ABQB 22 at para. 49). What is most important to bear in mind is that the desirability of public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 75] The Applicant's submissions on the matter of public scrutiny are, at various points, as follows:

> The Applicant is requesting this specific information in order to review and analyze how public monies are being spent and how the provincial health system is effectively (or inefficiently) dealing with health emergencies that the province is unable to properly address. If the province is unable to adequately provide health services to Albertans, citizens of the province have the right to know how their money is being spent and what services they can expect to be treated for out-of-country. There is a compelling public interest for disclosure in the matter at hand.
>
> […]
>
> In keeping with the mandate of the *Canada Health Act*, which states [at section 3] that the primary objective of federal health care policy is "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers," it is imperative that Canadian provinces are providing services that are needed by Canadians – and in this instance, specifically by Albertans.

> The Government of Alberta is committed to improving the health care system for its citizens and has mandated itself to "create the best-performing publicly-funded health system in Canada" [see Government of Alberta news release entitled "Alberta passes new health legislation – *Alberta Health Act* focuses on putting people first", December 1, 2010]. In order to be efficient and judicious in applying monies to health care services, it's necessary that the public be aware of how money is spent on out-of-country health services.
>
> […]
>
> The Applicant submits that the requested parts of the information of the Record be disclosed in order to better inform the public of how their money is being spent, what kinds of health services are available in Alberta or the rest of the country, and which health services must be obtained elsewhere.
>
> Furthermore, the disclosure of the requested information would add some much-needed transparency with respect to the Alberta Government and its distribution and management of health care services.
>
> Canada's top court, the Supreme Court of Canada has recognized the importance of government transparency and public accountability. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010 SCC 23 at para. 1], the Court stated that
>
> > Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance open and democratic society.
>
> […]
>
> It is imperative that the Custodian be held accountable for its decisions. There is no basis to deny access to the requested records. Given that the health of Albertans and access to specific services are involved, it's necessary that the Custodian be forthcoming on this most vulnerable and salient issue. There is a compelling public interest in the disclosure of the records and in subjecting Alberta Health and Wellness and the Out-of-Country Health Services Committee to public scrutiny. Disclosure of the requested information would not compromise the privacy rights of patients…

[para 76] In further support of her view that disclosure of the information at issue is in the interest of public scrutiny, the Applicant notes that "strengthening the measurement and reporting of health system performance" is a priority in the *Health and Wellness Business Plan 2011-14*, and that the preamble to the *Alberta Health Act* acknowledges that "health decisions, financial stewardship and the allocation and use of resources are done in such a way that they are transparent to Albertans". She also notes comments made by the Supreme Court of Canada, in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61, that the overarching purpose of access to information legislation is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process, and that politicians and bureaucrats remain accountable to the citizenry.

[para 77] In her rebuttal submissions, the Applicant elaborates on the desirability of public scrutiny as follows:

> Given that many of these health conditions that have been approved for out-of-country/province treatment are fairly common within the general population, the Applicant would like to come to an understanding of why the OOCHSC approves these out-of-country/province treatments. Or more specifically, the Applicant would like to know more about why the provincial healthcare system or the Canadian healthcare system is unable to treat its citizens for what can reasonably be considered as routine health conditions (albeit, severe in some cases).
>
> Disclosure of the Requested Information would enable the Applicant to better understand what kinds of health services are available within the province and country and where one must travel if they, too, need to obtain proper medical treatment. By disclosing the Requested Information, the Applicant would be able to communicate the information to Albertans and other Canadians to provide an increased public understanding of our healthcare system's possible shortcomings. Given the paramount importance of the health and safety of Canadians, the Applicant submits that the public interest in this matter calls for the immediate disclosure of the Requested Information.
>
> […]
>
> Disclosure of the Requested Information would also answer some simple questions such as whether or not there are patterns or repeated locations of where out-of-country/province health services are approved. Does one facility in a particular jurisdiction have a monopoly on approved health services?
>
> Another simple, but essential question that may get answered through the disclosure of the Requested Information is why Albertans with relatively common health conditions are being treated out-of-province and out-of-country. Surely the provincial health system is equipped to deal with conditions that are not rare or unusual (i.e. anorexia, narcolepsy, etc.). But why is the OOCHSC still approving treatment out-of-province and out-of-country? Disclosure of the Requested Information would facilitate meaningful analysis and discussion of the essential and paramount issue of whether the Albertan health system is or is not able to meet the medical demands of its citizens.

[para 78] In response to the Applicant's submissions regarding public scrutiny, the OOCHSC submits as follows:

> There may be a valid argument that there is a public interest in knowing how public money is spent on out-of-country health services. However, the initial request submitted by the Applicant does not ask for this information. Rather, the Applicant simply requests the minutes from the Respondent's meetings. Furthermore, the Applicant's later characterization of the request [in her request for inquiry] did not indicate that the Applicant was looking for monetary amounts related to out-of-country health services.
>
> […]
>
> Additionally, the amount of public money spent on out-of-country health services can be provided as an aggregate amount that does not identify any patients. Further, the cost per

> insured health service provided out-of-country is publicly available through the *Alberta Health Care Insurance Plan Statistical Supplement 2009/2010*, which is accessible online… As such, the public interest cited by the Applicant does not align with the scope of the Applicant's request and should not be relied upon for determining whether the disclosure is desirable for the purpose of subjecting the Respondent's activities to public scrutiny.
>
> The Applicant has also argued that the disclosure of the Severed Information "would add an increased transparency to the activities of the OOCHSC and to the provincial ministry of Health and Wellness overall"…. In response, the Respondent respectfully submits that, through the Initial Response and the Second Response [i.e., the Table], it has been very transparent as to its activities and decisions but that the release of the Severed Information (for the reasons discussed throughout) would result in transparency at a level which compromises personal privacy contrary to FOIP and the HIA. Such transparency cannot be said to be in the public interest.

[para 79] The OOCHSC further argues that the decision in *Dagg v. Canada (Minister of Finance)* has no applicability to the facts of this case, other than in the most general sense. The OOCHSC acknowledges that the Supreme Court provides general direction regarding the approach to and interpretation of access to information legislation, but submits that the Court equally values the importance of privacy protection. For instance, the Court stated (at para. 65) that the protection of privacy is a fundamental value in modern democratic societies.

[para 80] On my review of the parties submissions and the records at issue, I find that disclosure of the information at issue is not desirable for the purpose of subjecting the activities of the OOCHSC to public scrutiny under section 17(5)(a) of the FOIP Act.

[para 81] The Applicant raises the desirability of public scrutiny in several respects. She argues that the information at issue will shed light on how public money is spent on out-of-country health services, on the nature of the services that are not available in Alberta or Canada and therefore must be obtained out-of-country (particularly those for common conditions), on why the OOSCHC approves certain services and therefore what types of services are available for funding, on where individuals must travel to obtain health services that are not available in Alberta or Canada, and on whether any out-of-country facilities provide more than their fair share of approved services. While the Applicant submits that the foregoing is important to know – and she points to legislation, court decisions, a business plan and a news release that all recognize the importance of public health, and the importance of transparency, accountability, efficiency and effectiveness in government decision-making – she has not explained or shown how the activities of the OOCHSC have been called into question so as to warrant public scrutiny in this particular case. The fact that transparency and the like are desirable, in and of themselves, is not sufficient to warrant the disclosure of the personal information of third parties. Something more is required in order to engage section 17(5)(a). The Applicant merely speculates as to the "healthcare system's possible shortcomings".

[para 82] Further, for the relevant circumstance under section 17(5)(a) to be present, disclosure of the information must serve the purpose of achieving the desired public scrutiny. Here, the requested information reveals little, if anything, about how public funds are spent on out-of-country health services, or how they are spent on services available in Alberta or Canada.

While the fact that 24 individuals were approved for funding between January and June 2010, being the time period associated with the access request, necessarily means that some amount of money was spent, no dollar figures appear in the records. Further, the Applicant can obtain a general idea of the amount of money spent by reviewing the *Alberta Health Care Insurance Plan Statistical Supplement* noted by the OOCHSC. For instance, Table 2.18 of the *Statistical Supplement* indicates that, in the 2009/2010 fiscal year, 194 patients received a total of 818 services in the United States, at a total cost of $73,795. It likewise provides figures, globally, regarding out-of-country services in countries other than the United States. I realize that the foregoing does not break down the dollar amounts per type of service, but I reiterate that the minutes requested by the Applicant do not contain any financial information at all.

[para 83] I also note the Applicant's statement that she has never sought financial statistics or exact figures spent on out-of-country health services. If she means that the records at issue will simply reveal that some unspecified amount of public money is being spent on out-of-country health services, and that some amount is therefore not being spent to make services available in Alberta, I find that she has already been given sufficient information, in this regard, in the Table. The Table indicates, albeit in a more general fashion than the Applicant would like, the nature of the health services that individuals were not able to obtain in Alberta or Canada, and therefore the fact that public money is not being spent to make those services available here.

[para 84] As for the Applicant's interest in gaining a better understanding of whether the provincial health system is effectively addressing the health needs of Albertans, I do not believe that a six-month sample of 24 cases, in which out-of-country health services were approved, will provide that better understanding. The sample is limited and arbitrary in that it exists simply as a function of who happened to request out-of-country health services in that short timeframe. While the minutes of the meetings of the OOCHSC reveal greater detail about the nature of the health conditions and treatments, the Table disclosed to the Applicant already provides useful information, in my view, about what services have been approved by the OOCHSC and for what provisional diagnoses, particularly given that it is for a longer timeframe. In other words, the OOCHSC has already disclosed information to serve the purpose of public scrutiny, which is a factor militating against a finding that the relevant circumstance under section 17(5)(a) is present in this particular case.

[para 85] With respect to the Applicant's desire to know why the OOCHSC approves out-of-country health services, she has already been given access to the relevant information in the minutes, as well as additional information in the Table. The minutes indicate that funding was approved, for instance, where the "treatment requested is not available in Canada for this rare condition", "[o]utside expertise is needed to assist in obtaining a diagnosis for this patient", "[t]reatment is not available locally for this very complicated case", "[c]onservative treatments have failed for this uncommon problem", "[i]t would be appropriate to refer this patient to the out-of-country surgeons who formerly treated [him or her]", or "[o]nce the delayed diagnosis was made locally, it became imperative that the patient seek treatment on an urgent basis". While I acknowledge that the Applicant has not been granted access to the nature of the conditions and treatments corresponding to the foregoing statements, the Table does give the general nature of conditions and treatments, along with the reason why the particular out-of-country service was refused, being ""experimental/applied research, clinical trial", "same/similar

service available in Alberta/Canada", "uninsured service", "no prior approval" or "past 365-day period". In my view, the information already disclosed to the Applicant permits sufficient public scrutiny of the reasons for which the OOCHSC approves or refuses funding for various out-of-country health services. It also provides sufficient information about the general nature of the health conditions for which the public might expect to receive funding for treatment outside the country.

[para 86] The OOCHSC withheld the names of the treating hospitals and centres, and their geographic locations, in the minutes requested by the Applicant, and it did not include any of this Location Information in the Table. With respect to the Applicant's desire to gain a better understanding of the health services that are not available in Alberta or Canada because it may show deficiencies in our own health care system, disclosure of the hospital, treatment centre or geographic location is not necessary, as it is sufficient to know simply that the service was obtained out-of-country (i.e., not in Alberta or Canada). While the Applicant also argues that disclosure of the names of the hospitals and treatment centres, and their geographic locations, may show whether there are patterns of where out-of-country/province health services are approved, the six-month sample of Location Information in the minutes is again insufficient to show any such patterns. As for whether facilities in particular jurisdictions have monopolies on approved health services, the Applicant has provided no evidence to suggest that there is a concern in this regard. In other words, the Applicant has again failed to explain or show how the activities of the OOCHSC have been called into question in such a way as to warrant public scrutiny of its activities under section 17(5)(a).

[para 87] Insofar as the Applicant wishes to know where individuals must travel to obtain medical treatment that is not available in Alberta or Canada, I likewise find that the random and limited sample of information in the minutes of the OOCHSC between January and June 2010 would not shed light on this to any great degree or in any particularly useful way. The hospitals, treatment centres and geographic locations where the 24 patients obtained their out-of-country health services are a function of where those individuals themselves requested to have their treatment. Their particular choices would not, in my view, be sufficient to show a pattern that would indicate to the Applicant, or to the public, where an individual with a similar condition must necessarily go to obtain a similar health service.

[para 88] Finally, to the extent that the Applicant seeks access to the information at issue in order to know whether there is something problematic that requires public scrutiny – rather than to scrutinize something that has already been called into question – I still find that there is an insufficient public component in this case so as to engage section 17(5)(a). Disclosure of the limited amount of information withheld in the minutes, when compared to the information already in the public domain and/or disclosed to the Applicant in the Table, would not increase public accountability, further satisfy public interest or further promote public fairness to any great extent.

[para 89] To summarize then, there is a presumption against disclosure of the details of the provisional diagnoses of patients, the details of the out-of-country health services requested or obtained and the Location Information under section 17(4)(a) (information relating to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation), as well as a

relevant circumstance weighing against disclosure of some of this information under section 17(5)(f) (personal information supplied in confidence). Conversely, there are no relevant circumstances weighing in favour of disclosure. I therefore conclude that disclosure of the foregoing information would be an unreasonable invasion of the personal privacy of third parties under section 17(1) of the FOIP Act, and that the OOCHSC was required to withhold it.

E. If the *Health Information Act* is found to apply to the records at issue, did the Custodian properly apply sections 11(1)(a)(ii), 11(1)(b) and 11(2)(a) (right to refuse access to health information) to the records/information?

F. If the *Health Information Act* is found to apply to the records at issue, does section 37(2)(a) of the Act apply to the records/information (non-disclosure of health services provider information)?

[para 90] As I have concluded that the records at issue are subject to the FOIP Act rather than the HIA, I will not be discussing the above two issues.

V. ORDERS

Order F2012-04

[para 91] I make this Order under section 72 of the FOIP Act.

[para 92] I find that the records at issue are subject to the FOIP Act.

[para 93] I find that section 17(1) of the FOIP Act does not apply to some of the records at issue, being the fact that funding for a health service was approved or denied, along with the provisional diagnosis of the patient, and the out-of-country health service requested or obtained, where these are stated only in general terms. This information does not identify third parties and is therefore not personal information to which section 17(1) can apply. However, this generally stated information was already disclosed to the Applicant in the Table prepared for her, so there is no point ordering its disclosure again.

[para 94] I find that section 17(1) of the FOIP Act applies to the remaining records at issue, being the more specific details regarding the provisional diagnoses of patients and the out-of-country health services requested or obtained by them, as well as the names of the treating hospitals and treatment centres, and their geographic locations. Disclosure of this information would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(b) of the FOIP Act, I confirm the decision of the OOCHSC to refuse the Applicant access to the foregoing information.

Order H2012-01

[para 95] I make this Order under section 80 of the HIA.

[para 96] I find that the records at issue are not subject to the HIA.

Wade Riordan Raaflaub
Adjudicator