

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-24 / H2013-02

August 16, 2013

COVENANT HEALTH

Case File Numbers F5975 and H4555

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request for her personal information from Covenant Health so that she could learn the reasons for being banned from its premises and having restrictions imposed on her visiting privileges.

Covenant Health searched for responsive records. It decided that section 11 of the *Health Information Act* (HIA) applied to information about individuals other than the Applicant in the records. Alternatively, it withheld this information under section 17 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) on the basis that the information was the personal information of individuals other than the Applicant, and that it would be an unreasonable invasion of personal privacy to disclose the information. Covenant Health subsequently applied section 24 of the FOIP Act (advice from officials) to withhold some information.

The Adjudicator determined that the HIA did not apply to the information withheld by Covenant Health as it was not health information. She found that the information to which Covenant Health had applied section 17 was personal information, but that it would not be an unreasonable invasion of a third party's personal privacy to disclose it. She made this finding on the basis that the personal information was necessary for a fair determination of the Applicant's rights, and because most of the personal information was about an individual acting in a representative capacity.

The Adjudicator found that most of the information to which Covenant Health had applied section 24 was subject to this provision. However, she found that Covenant Health had not considered relevant private interests in disclosure when it had made the decision to withhold information under section 24. She ordered it to reconsider its decision to withhold information under section 24.

The Adjudicator found that Covenant Health had not met its duty to assist the Applicant as it had not demonstrated that it had searched for or produced all records responsive to the Applicant's access request. She ordered Covenant Health to conduct a new search for responsive records and to prepare a new response to the Applicant once it concluded the search.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 10, 15.1, 17, 18, 24, 30, 72; *Health Information Act*, R.S.A. 2000, c. H-5, s. 1, 11; *Personal Directives Act*, R.S.A. 2000, c. P-6, s. 14; *Trespass to Premises Act*, R.S.A. 2000, c. T-7

Authorities Cited: **AB:** Orders F2007-029, F2008-028, F2009-026, F2011-014

Cases Cited: *Mount Royal University v. Carter*, 2011 ABQB 28; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23

I. BACKGROUND

[para 1] On April 4, 2011, the Applicant made an access request for her personal information from Covenant Health. On June 16, 2011, Covenant Health responded to her access request, but withheld information under section 17 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), on the basis that the information was the personal information of a third party. It also withheld information under provisions of section 11 of the *Health Information Act*. No mention of section 24 was made in its response.

[para 2] On November 2, 2011, the Applicant requested review of Covenant Health's response to her access request.

[para 3] On May 4, 2012, the Applicant requested an inquiry. She indicated in her request for inquiry that she was also seeking review of Covenant Health's application of section 24 to some of the information in the records. It appears that while section 24 was not addressed in its response to the Applicant, it indicated in the records it provided to the Applicant that it had applied this provision.

[para 4] After the parties had exchanged initial submissions, the Applicant requested an oral inquiry. I determined that it was unnecessary to conduct an oral inquiry in this case, as the written submissions of the parties were sufficient to decide the issues.

[para 5] In its rebuttal submissions, Covenant Health stated that it had conducted a new search for responsive records. Covenant Health located additional records. It severed information from these records and provided the remainder to the Applicant. The Applicant requested review of Covenant Health's new severing decisions and these issues were added to the inquiry.

II. RECORDS AT ISSUE

[para 6] The records located by Covenant Health in response to the Applicant's access request are at issue.

III. ISSUES

Issue A: Does the access request fall under the *Health Information Act* (the HIA), the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), or both?

Issue B: If the HIA applies, did the Custodian correctly withhold information in those records under section 11 of the HIA (right to refuse access to health information)?

Issue C: If the FOIP Act applies, did the Public Body correctly withhold the information under section 17 of the FOIP Act (disclosure harmful to personal privacy)?

Issue D: If the FOIP Act applies, did the Public Body correctly withhold the information under section 18 of the FOIP Act (disclosure harmful to individual or public safety)?

Issue E: Did the Public Body properly apply section 24 (advice from officials) to withhold information from the records?

Issue F: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the FOIP Act (duty to assist applicants)? In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records.

As Covenant Health has removed information from the records on the basis of non-responsiveness, I have added the following issue:

Issue G: Responsiveness

IV. DISCUSSION OF ISSUES

Issue A: Does the access request fall under the *Health Information Act (the HIA)*, the *Freedom of Information and Protection of Privacy Act (the FOIP Act)*, or both?

[para 7] The Applicant has requested her personal information in the custody or control of Covenant Health. Covenant Health has withheld some of her personal information on the basis that her personal information is the health information of another individual, and on the basis that disclosure of this information would lead to the identification of a person who provided health information to the custodian explicitly or implicitly in confidence. Covenant Health has withheld information under both section 11 of the HIA and section 17 of the FOIP Act throughout the records.

[para 8] In this case, I find that the issue of whether the FOIP Act or the HIA applies may be decided on the basis that the information the Public Body has withheld from the records is not health information within the terms of the HIA. As a result, section 4(1)(u) of the FOIP Act is not engaged. I make this finding for the reasons that follow.

[para 9] Section 1(1)(k) of the HIA defines health information in the following terms:

1(1) In this Act,

- (k) “health information” means one or both of the following:
 - (i) diagnostic, treatment and care information;*
 - (ii) registration information;**

[para 10] Section 1(1)(i) of the HIA defines “diagnostic, treatment and care information”. This provision states, in part:

1(1) In this Act,

- (i) “diagnostic, treatment and care information” means information about any of the following:
 - (i) the physical and mental health of an individual;*
 - (ii) a health service provided to an individual, including the following information respecting a health services provider who provides a health service to that individual...**

...

that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record; [my emphasis]

[para 11] Section 1(1)(m) of the HIA defines “health service”:

1(1) In this Act,

(m) “health service” means a service that is provided to an individual for any of the following purposes:

(i) protecting, promoting or maintaining physical and mental health;

(ii) preventing illness;

(iii) diagnosing and treating illness;

(iv) rehabilitation;

(v) caring for the health needs of the ill, disabled, injured or dying,

but does not include a service excluded by the regulations;

[para 12] Section 1(1)(k) provides an exhaustive definition of “health information”. To be health information, the information must be about the physical or mental health of an individual, or a health service provided to an individual that is collected when a health service is provided.

[para 13] Section 4(1)(u) of the FOIP Act states:

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 14] Section 15.1 of the FOIP Act states:

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 15] The application of sections 4(1)(u) and 15.1 of the FOIP Act is limited to those situations in which a custodian under the HIA, that is also a public body under the FOIP Act, has in its custody or control health information. Neither provision applies to information that is not health information under the HIA.

[para 16] Covenant Health has withheld information regarding the Applicant and her access to its premises under section 11 of the HIA. The information cannot be construed as being registration or diagnostic, treatment, and care information. Instead, the information discusses the Applicant, and incidents or situations involving the Applicant, who is not a patient of Covenant Health, as well as security measures, restrictions, procedures, and decisions in relation to her visiting rights. Moreover, some of the information withheld from the records as health information, such as that appearing on Record 9, was not created by a health services provider. Covenant Health has also withheld information about the Applicant's parents' agent from Record 19 under section 11(2)(a) of the HIA, even though the information in issue does not refer to a health service being provided to the parents or the agent.

[para 17] I find that none of the information to which Covenant Health has applied section 11 of the HIA can be construed as diagnostic, treatment or care information that was collected when a health service was provided, or as registration information. As a result, the information cannot be construed as health information within the terms of the HIA, and therefore, section 4(1)(u) of the FOIP Act has no application to it.

[para 18] As I find that the information in issue is not health information, I must now consider whether the FOIP Act applies to the information. Given that Covenant Health is a public body within the terms of section 1(p) of the FOIP Act, and as I have found that section 4(1)(u) does not apply to the information in the records, and no other provision of section 4(1) applies, it follows that I find that the FOIP Act applies to the information withheld from the records at issue.

Issue B: If the HIA applies, did the Custodian correctly withhold information in those records under section 11 of the HIA (right to refuse access to health information)?

[para 19] As I have found that the HIA does not apply to the information in the records, I need not address this question.

Issue C: If the FOIP Act applies, did the Public Body correctly withhold the information under section 17 of the FOIP Act (disclosure harmful to personal privacy)?

Is the information the Public Body withheld under section 17 personal information?

[para 20] Section 1(1)(n) defines personal information under the Act:

I In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

- (i) the individual's name, home or business address or home or business telephone number,*
- (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
- (iii) the individual's age, sex, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- (vi) information about the individual's health and health care history, including information about a physical or mental disability,*
- (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- (viii) anyone else's opinions about the individual, and*
- (ix) the individual's personal views or opinions, except if they are about someone else;*

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

[para 21] Section 1(r) of the Act provides the following definition of "third party:"

I In this Act,

- (r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;*

[para 22] I will consider first whether the records at issue contain the personal information of a third party, as defined by section 1(r), and if so, decide whether it would be an unreasonable invasion of the third party's or third parties' personal privacy to disclose it.

[para 23] In Order F2009-026, I said:

If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:

The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then

the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

[para 24] In *Mount Royal University v. Carter*, 2011 ABQB 28, the Court denied Mount Royal University's application for judicial review, finding the above analysis reasonable. I will therefore consider whether the information in the records at issue is non-personal information about third parties acting as representatives of the Covenant Health, or conveys something personal about them as identifiable individuals.

Information about the Public Body's employees

[para 25] The Public Body explains that it severed information about two employees from Record 38 to which it believes section 17(4)(d) applies on the basis that this information is the employees' personal information. I must consider whether the information severed is information about the employees acting in their personal capacities, with the result that the information severed is their personal information, or whether the information severed is information about them acting in representative capacities and lacking a personal dimension, in which case, it may not be.

[para 26] The Public Body states:

Under section 17(4)(d), disclosure is presumed unreasonable if the "personal information relates to employment or educational history". Page 38 of the Responsive Records contains reference to the educational and employment history of an employee of Covenant Health, including the opinion of another employee about the impact of this information. This information goes beyond merely an indication that the employee participated in workplace duties. There is a personal element to this information and it therefore constitutes the personal information of this employee.

Record 38 contains an email written by a registered social worker. The email contains analysis of a situation in which another employee is involved, and advocates a course of action that the registered social worker believes should be followed.

[para 27] I disagree with the Public Body that the references to the employee in the email on Record 38 have a personal dimension, such that the information in the email about the employee is her personal information and subject to the presumptions set out in section 17(4). The employee who is described in the email is described solely as performing work duties. There is nothing in the email that indicates that this employee did anything outside the scope of her employment. The email does not present the employee's personal views, only the analysis by the author of the email of a situation in which the employee was involved in her capacity as an employee.

[para 28] I am also of the view that the author of the email wrote the email to present his analysis to the management of Covenant Health and persuade them that the course of action he advised was appropriate. One can learn something of the employee's communication style and the issues that he considered to be important. However, that is true of any communication written by an employee of a public body as a representative of

a public body intended to guide a course of action. The email was written as part of the employee's function as an employee of Covenant Health, and he does not step outside the role of employee. Moreover, this is not a case where the creation of the email could be said to have affected the employee's employment, or resulted in personal consequences to him.

[para 29] Record 20 contains an email created by the registered social worker. It is addressed to a recreational therapist and copied to another employee. The email contains advice regarding a workplace situation. There is no indication in the email that the employees have stepped outside their roles as representatives of Covenant Health or that the email would have consequences to their employment relationship with their employer or personal consequences to them.

Information about the agent under the parents' personal directive(s)

[para 30] The records also contain information associated with the person who was appointed as agent under the parents' personal directive to make personal decisions on their behalf. Section 14 of the *Personal Directives Act* explains the nature of the decisions that an agent under a personal directive may make on behalf of the maker of the directive. It states, in part:

14(1) Unless a personal directive provides otherwise, an agent has authority to make personal decisions on all personal matters of the maker.

The agent's name is her personal information, as is the fact she was appointed and acts as agent. However, the extent to which the actions and decisions of an agent acting under a personal directive are the personal information of the agent, is less clear.

[para 31] With respect to information in the records as to decisions she made and actions she took in her capacity as agent, this is information the agent created in the performance of her powers and duties that arise when a person is appointed as agent under the *Personal Directives Act*. This statute both authorizes making decisions and taking actions, and creates the obligation to make decisions and take actions in accordance with the directives of the maker or alternatively in the maker's best interests, and relieves the agent from liability as long as the agent acts in good faith. As decisions and acts made under a personal directive are performed in the exercise of a statutory authority with corresponding statutory obligations, in my view acts and decisions of an agent are not properly primarily characterized as the personal information of the agent, much the same as the acts of employees of public or private organizations exercising statutory powers and performing statutory duties are not properly so characterized. In saying this I recognize that the agent has a personal and familial relationship with the makers of the directive, which is arguably reflected in her acts and decisions regarding them and gives these acts and decisions a personal quality for her to some degree. The same may be true of the agent's decisions that affected the Applicant by reference to the personal relationship between the agent and the Applicant. Information as to the improper performance of such powers would arguably be personal information if it were to have

the consequence of her removal from the position of agent. However, that does not appear to be the case here. In the present circumstances, I believe these statutorily-governed actions and decisions recorded in the records are best characterized as *primarily* not the personal information of the agent.

[para 32] Moreover, these same acts and decisions will often also constitute the personal information of the makers of the directive to the extent the latter are affected by them. In this particular case, the decisions of the agent with respect to the Applicant's rights to visit her parents and to be present in the hospital had an effect upon, and thus also constituted, the personal information of the Applicant. Furthermore, the decisions and the acts of the agent were closely interrelated with the decisions and acts of hospital authorities in relation to these same matters, and it appears that the agent's decisions strongly influenced the hospital employees' decisions; indeed in some cases the agent arguably made some of the decisions that was the responsibility of hospital authorities to make, as evidenced by Record 28.

[para 33] Thus, in my view, the information in the records about the acts and decisions of the agent acting in that capacity are not properly primarily characterized as the agent's personal information. To the extent that they may be her personal information, in the present circumstances, for the reasons I give below, disclosure of this information is not an unreasonable invasion of her personal privacy.

[para 34] To summarize, I find that the information about employees of Covenant Health that has been withheld from the records under section 17 is not personal information to which section 17 can be applied. In addition, while I find that the name of the agent, and the fact that she is an agent, is the personal information of the agent, I find that information regarding the actions and decisions of the agent while acting in the capacity of agent, is not properly primarily characterized as personal information.

[para 35] I turn now to the issue of whether Covenant Health properly withheld the information of individuals from the records under section 17(1).

Section 17

[para 36] Section 17 states in part:

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...

...

(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, [...]

(d) the personal information relates to employment or educational history, [...]

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

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

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

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

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

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

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

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

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

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

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

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

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

[para 37] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 38] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3),

which is restricted in its application) applies. Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 39] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4). [my emphasis]

Section 17(1) requires a public body to withhold information only once the head has weighed all relevant interests in disclosing and withholding information under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 40] The Public Body states that the presumptions created by section 17(4)(a), (d), and (g) apply to the information it has severed under section 17.

[para 41] With regard to section 17(4)(a), most of the personal information removed from the records does not relate to "a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" within the terms of section 17(4)(a). I have already found that the information to which the Covenant Health applied the presumption set out in section 17(4)(d) is information lacking a personal dimension and is therefore information to which section 17 does not apply. However, to the extent that the Public Body has applied section 17 to information about individuals who are not its employees or representatives, I agree with Covenant Health that the presumption created by section 17(4)(g) applies.

[para 42] As I find that the personal information withheld from the records is subject to a presumption or presumptions under section 17(4), I will now review the factors the Covenant Health considered relevant under section 17(5).

Section 17(5)

[para 43] The Director, Information and Privacy, describes her decision to sever information in the following terms:

As noted above, prior to responding to the Access Request, I removed information that was in the nature of health information of the Patients. I considered it important to protect the privacy of this health information, and determined that I could not release this information to the Applicant, who is not the Patient's agent, pursuant to the HIA.

I also determined that the Responsive Records included a report created after an investigation or practice review as a result of concerns raised by the Applicant. I further determined that portions of the Responsive Records included health information obtained in confidence from a third party and that release of this information could serve to identify the third party.

Prior to responding to the Access Request, I also considered a number of factors, including whether disclosure of Responsive Records was an unreasonable invasion of third parties' privacy in the event that the FOIP Act applied to portions of the Responsive Records. Specifically, I considered the following factors regarding portions of the Responsive Records about which section 17 was applied ("the Section 17 portions").

- a) I have considered the individual circumstances of this particular access request, and of any responsive records;
- b) I have considered s. 17(2) of the FOIP Act and have concluded that none of the subsections of s.17(2) apply to presume that disclosure is not an unreasonable invasion of personal privacy for the Section 17 Portions;
- c) I have considered s. 17(4) of the FOIP Act and have concluded that section 17(4)(a), (d) and (g) apply to create a presumption of unreasonable disclosure in such an instance; and
- d) I have considered s. 17(5) of the FOIP Act and have concluded that the factors outlined in s. 17(5) militate against disclosure of the Section 17 Portions.

In confirming the decision to refuse access to the section 17 Portions, I have also considered the purposes of the FOIP Act, and in particular:

- a) that the Applicant does not appear to have a pressing need for any third party personal information;
- b) that there is no public interest in the disclosure of the Responsive Records and that public scrutiny is not desirable;
- c) that disclosure is not relevant to a fair determination of the Applicant's rights;
- d) that third parties may be exposed unfairly to harm;
- e) that personal information may have been supplied in confidence and that release of the information would impact Covenant Health's ability in the future to have frank discussions with third parties that had been promised confidentiality;
- f) that the requested information was not information originally provided by the Applicant;
- g) that if the personal information regarding patient care is produced in similar circumstances, the integrity and confidentiality of the health care system will be undermined
- h) that the release of the information may result in future communication with caregivers or family members being less candid and comprehensive;
- i) that information in the Responsive Records has the potential to render third parties identifiable to persons with whom these third parties are acquainted;
- j) that personal information in the Responsive Records would be difficult or impossible to sever or that severance of some information would render the remaining information meaningless; and
- k) that the decision to release some information to the Applicant would satisfy any additional need for public scrutiny.

[para 44] Having reviewed the information severed under section 17, and having reviewed the factors Covenant Health states were considered, for the reasons explained below, I find some of the factors that were considered are irrelevant, or have not been established as applicable. However, relevant factors weighing in favor of disclosure, and which in my view apply, were not considered as applicable in the decision.

Information associated with the agent

Section 17(5)(c)

[para 45] The Public Body states that it considered that “the Applicant does not appear to have a pressing need for any third party personal information” as a factor when making its decision. The Public Body also states that it considered the Applicant’s personal circumstances when making its decision. However, the Public Body did not explain which of the Applicant’s personal circumstances it considered, or what factors contributed to its decision that she does not have a pressing need for the information she is seeking.

[para 46] In her submissions, the Applicant explains the purpose of her access request:

I am requesting all of my personal information records because they were created and widely distributed, in order to coerce broad support for Covenant Health’s unethical and unprofessional decisions and actions regarding me. In order to rectify the harm caused to my parents and me, and to make Covenant Health accountable for their unethical and unprofessional decisions and actions through the dissemination of my personal information records, I am requesting these documents. Provision of verifiable documentation will ultimately produce retractions and corrections. In the spirit and intent of access of the FOIP Act, if Covenant Health would [provide] me with my personal information documents, I could then have the false allegations retracted, my visitation privileges reinstated and the resulting damage to my family and I rectified. [my emphasis]

[para 47] From the foregoing, I conclude that the Applicant disagrees with decisions made by the Public Body that have restricted her ability to visit her parents. The Applicant seeks to obtain the information she has requested in order to learn the basis of Covenant Health’s decisions so that she may understand them and possibly challenge them, with the result that it may be possible for her to spend more time with her parents. In my view, the Applicant’s request speaks to a pressing need for the information in the records, and one which weighs in favor of disclosure. Some of the personal information withheld from the records under section 17 does explain the basis for some of the decisions made to restrict her ability to visit her parents, and so would serve the Applicant’s purpose in seeking the records.

[para 48] The Applicant’s purpose in seeking the information in the records is consistent with the purpose of seeking a fair determination of her rights, which is a factor acknowledged by section 17(5)(c). The Public Body states that this factor does not apply; however, as the Applicant’s purpose in seeking the records is to learn the case she must meet in order to challenge Covenant Health’s decisions to restrict her ability to visit her parents, this factor applies to the personal information of third parties where this information reveals the Covenant Health’s reasons for restricting her visiting privileges and the processes by which it restricted her privileges. All the personal information in the records provides explanation and the basis for Covenant Health’s decisions.

[para 49] In its submissions, the Public Body argues that section 17(5)(c) of the FOIP Act has no application:

With respect to the application of section 17(5)(c), the Applicant has not identified any pressing need for the information, nor any existing proceeding relating to adjudication of her rights.

In order for section 17(5)(c) to be a relevant consideration, all four of the following criteria must be fulfilled: (a) the right in question is a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (b) the right is related to a proceeding that is either existing or contemplated, not one that has already been completed; (c) the personal information to which the applicant is seeking access has some bearing on or is significant to the determination of the right in question; and (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In my view, each consideration cited by the Public Body is met in this case. With regard to the Public Body's first point, it is clear from the Applicant's submissions that she contemplates using the information to challenge the restrictions imposed by Covenant Health. Covenant Health has restricted the Applicant's visiting privileges, I presume through exercise of its statutory authority under the *Trespass to Premises Act*. Although Covenant Health does not appear to have internal processes for challenging its bans, extraordinary remedies are available through the courts for those who seek to challenge administrative decisions. It may also be possible for Covenant Health to reconsider its decisions through informal processes.

[para 50] With regard to the second factor raised by the Public Body, it is unnecessary for a proceeding to exist before section 17(5)(c) is engaged, it need only be within contemplation. If a proceeding must already be in existence before section 17(5)(c) is engaged, an applicant would be put in the position of beginning a proceeding without first obtaining the necessary evidence to support his or her case in that proceeding. In my view, the fact that Covenant Health has made a decision affecting the Applicant that she intends to challenge is sufficient to meet the second factor.

[para 51] All the personal information in the records details and explains the evidence on which decisions were made and the reasons for them. (In saying this, I include the information about the Applicant's parents where it appears in the records.) This information is necessary for the Applicant to understand the case to be met and to make representations regarding it. As a result, both the third and fourth factors of the test cited by Covenant Health are met.

Acting in a representative capacity

[para 52] As discussed above, Covenant Health withheld some information about the Applicant's parents' agent, although it also disclosed other information about her, such as her name and the fact that she is the parents' agent, to the Applicant.

[para 53] For the reasons that follow, I find that the fact that the information has dimensions that are not personal to her, is a relevant factor weighing in favour of disclosure.

[para 54] In Order F2008-028, the Adjudicator considered cases of this office addressing information about individuals acting as representatives. He said:

I find that section 17 does not apply to the foregoing names, job titles and signatures. First, in the case of government officials and employees (although not individuals associated with other

organizations and businesses), section 17(2)(e) indicates that disclosure of their job titles and positions (i.e., employment responsibilities) is expressly not an unreasonable invasion of their personal privacy (Order F2004-026 at para. 105). Second, many previous orders of this Office have made it clear that, as a general rule, disclosure of the names, job titles and signatures of individuals acting in what I shall variably call a “representative”, “work-related” or “non-personal” capacity is not an unreasonable invasion of their personal privacy. I note the following principles in particular (with my emphases in italics):

Disclosure of the names, job titles and/or signatures of individuals is not an unreasonable invasion of personal privacy where they were acting in formal or representative capacities (Order 2000-005 at para. 116; Order F2003-004 at paras. 264 and 265; Order F2005-016 at paras. 109 and 110; Order F2006-008 at para. 42; Order F2008-009 at para. 89).

Disclosure of the names, job titles and/or signatures of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy (Order 2001- 013 at para. 88; Order F2003-002 at para. 62; Order F2003-004 at paras. 264 and 265).

The fact that individuals were acting in their official capacities, or signed or received documents in their capacities as public officials, weighs in favour of a finding that the disclosure of information would not be an unreasonable invasion of personal privacy (Order F2006-008 at para. 46; Order F2007-013 at para. 53; Order F2007-025 at para. 59; Order F2007-029 at paras. 25 to 27).

Where third parties were acting in their employment capacities, or their personal information exists as a consequence of their activities as staff performing their duties or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure (Order F2003-005 at para. 96; Order F2004-015 at para. 96; Order F2007-021 at para. 98; Order F2008-016 at para. 93).

I further note that the foregoing principles have been applied not only to the information of employees of the particular public body that is a party to the inquiry, but also to that of employees of other public bodies (Order F2004-026 at paras. 100 and 120), representatives of organizations and entities that are not public bodies (Order F2008-009 at para. 89; Order F2008-016 at para. 93), individuals acting on behalf of private third party businesses (Order 2000-005 at para. 115; Order F2003-004 at para. 265), individuals performing services by contract (Order F2004-026 at paras. 100 and 120), and individuals acting in a sole or independent capacity, such as lawyers and commissioners for oaths (Order 2001-013 at paras. 87 and 88; Order F2003-002 at para. 61). In my view, therefore, it does not matter who the particular individual is in order to conclude, generally, that section 17 does not apply to personal information that merely reveals that an individual did something in a formal, representative, professional, official, public or employment capacity. It has also been stated that records of the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at para 108; Order F2006-030 at para. 10; Order F2007-021 at para. 97). Absent a personal aspect, there is no reason to treat the records of the acts of individuals conducting the business of government – and by extension other bodies and organizations – as “about them” (Order F2006-030 at para. 12). In other words, although the names of individuals are always their personal information [as it is defined as such in section 1(n)(i) of the Act], the fact that individuals sent or received correspondence – or conducted themselves in some other way in connection with their employment, business, professional or official activities, or as representatives of public bodies, businesses or organizations – is not personal information to which section 17 can even apply.

The present inquiry provides a useful distinction. I concluded above that disclosure of the names, job titles and other identifying information of members of the general public – who wrote correspondence or otherwise interacted with the Public Body in their private or personal capacities – would be an unreasonable invasion of their personal privacy. By contrast, when the

records at issue merely reveal that individuals acted in their work-related or non-personal capacities, or did something as representatives of a public body, business or organization, section 17 does not apply to their names, job titles or signatures.

[para 55] As discussed in Order F2008-028, previous orders of this office have found that the fact that an individual acts on behalf of another is a relevant circumstance weighing in favor of disclosure. As discussed above, personal information is defined as “information about an identifiable individual.” When information is about something other than the individual, such as the fulfillment of a statutory function, and the identity of the individual is incidental to that function, then the personal dimension of the information is diminished or may be entirely lacking. For example, in Order F2011-014, the signature of a Commissioner for Oaths was considered not to be personal information in a case where the Commissioner had signed a document in her capacity as a Commissioner for Oaths.

[para 56] Record 32 contains an email written by the registered social worker on October 25, 2010 to employees and management of Covenant Health. This email contains the following reference to the agent:

Hopefully, we can conclude this matter presently and have [the Applicant] relay all of her future concerns and complaints through the resident’s legally appointed representative. [my emphasis]

[para 57] This email makes it clear that the agent represents the Applicant’s parents in relation to personal decisions regarding their care, and that she is also responsible for bringing forward the Applicant’s concerns to Covenant Health, and communicating Covenant Health’s decisions to the Applicant. Record 28 indicates that the agent contributes and in some cases, makes, or helps to make, Covenant Health’s decisions concerning the Applicant’s access to its premises because of her role as the parents’ agent.

[para 58] With the exception of the agent’s name and the fact that she is appointed as an agent, all the information about the agent in the records is information about the agent acting as an agent for the makers of a personal directive. Were it otherwise, the agent would have no authority to make any of the decisions, or to take any of the actions, recorded in the records.

[para 59] While there is a personal dimension in the agent’s actions as an agent under a personal directive because of her familial relationship with the makers of the directive and the fact that her decisions may be based on that relationship, it is not the existence of the familial relationship or the identity of the agent that are being withheld from the Applicant. Rather, it is information about the actions and decisions of the agent that the Public Body has withheld. These actions and decisions affect the Applicant and the makers of the directive, and may be seen to be the personal information of the Applicant and, to a lesser extent, the makers of the directive as well. As already discussed, in my view, the actions and decisions of the agent are less about the agent and more about the fulfillment of a statutory function as an agent under a personal directive. Moreover, the information constitutes not only her personal information, but the personal

information of the Applicant and the makers of the directive. As a result, I find that disclosing the information about the agent from the records is less invasive of her personal privacy than it would be if she were acting solely in her personal capacity, and the information were not intertwined with that of others.

Candour and confidentiality

[para 60] Covenant Health also states that it considered the following factors when making the decision to withhold personal information:

- that personal information may have been supplied in confidence and that release of the information would impact Covenant Health's ability in the future to have frank discussions with third parties that had been promised confidentiality
- that the release of the information may result in future communication with caregivers or family members being less candid and comprehensive;

[para 61] Covenant Health raises this argument in relation to communications it received from the agent and to which it has applied section 17.

[para 62] Above, I noted correspondence written by Covenant Health employees to the Applicant that refers to the identity of her parents' agent, and her role in its decision making process. An email appearing on Record 22 directs the Applicant to speak to this agent in order to raise issues or concerns with decisions made by Covenant Health together with the agent. Throughout the records are indications that the agent anticipates that her role in making decisions, and the decisions themselves, will be communicated to the Applicant.

[para 63] Given that both Covenant Health and the agent have disclosed to the Applicant the identity of the agent and her role in planning the Applicant's parents' care as well as her role in making decisions affecting the Applicant's access to the hospital premises, it cannot be said that disclosing information about the agent that serves only to indicate her role in Covenant Health's decision making and administration, and her identity, would undermine the integrity and confidentiality of the health care system. Moreover, I see no indication in the records that the information about the agent was supplied in confidence. Rather, information about her role in making decisions and the decisions themselves, were distributed to employees of Covenant Health, sometimes by the agent herself, and without any indication that there were limits as to the extent that the information could be distributed. Record 28 indicates that the agent wanted the Applicant to know about a decision she had made and intended to tell her herself. Record 28 also indicates that a representative of Covenant Health told the Applicant of the agent's role in making the decision. I am therefore unable to accept that any communications made by the agent were made in confidence or understood to be so, or that disclosing the communications made by the agent would have any effect on her ability to be candid in this case.

Information about the Applicant's parents

Integrity and confidentiality of the health care system

[para 64] Covenant Health states that it considered that if the personal information regarding patient care were to be produced in similar circumstances, the integrity and confidentiality of the health care system would be undermined and that the release of the information may result in future communication with caregivers or family members being less candid and comprehensive.

[para 65] I accept that there is some personal information about the Applicant's parents in the records such as their names and conditions, and that this information could be construed as being about patient care; however, as this information appears in the context of the Applicant's visits to them, and their condition and care is clearly known to her, it does not appear that this information was ever intended to be kept confidential from the Applicant.

[para 66] Moreover, the information referring to the Applicant's parents is not health information under the HIA. It is also not information relating to "a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" within the terms of section 17(4)(a). It is not detailed information about the manner in which Covenant Health provides the Applicants' parents with care. Rather, brief references are made in the records to the names of the Applicants' parents, or they are alternatively referred to as "residents". The nature of the conditions of the parents is referred to only in passing to provide context to statements and decisions made regarding the Applicant. Consequently, I do not believe that it can be said that disclosure of the personal information in the records could undermine the integrity and confidentiality of the health care system.

[para 67] The circumstance in this case is that an applicant has requested information about herself in the custody or control of Covenant Health that will help her to understand decisions that have been made that limit her access to Covenant Health's premises. She is a family member of the persons receiving care from Covenant Health and she is aware of the condition of her parents, as she is a family member with whom Covenant Health communicates. It is unclear to me how disclosing the information in the records about the Applicant's parents to her, or to another requestor in similar circumstances, could make communication between itself and caregivers or family members less candid or comprehensive.

[para 68] As I noted above, I also find that section 17(5)(c) applies to the information about the Applicant's parents in the records. I find that this factor outweighs any interests Covenant Health has cited in withholding their personal information.

Information about the Applicant's representative

[para 69] I note that there is personal information about the Applicant's representative on Record 16 that has been severed under section 17. The representative may be likely to consent to the disclosure of her personal information to the Applicant, given that she represents the Applicant. (I refer to the personal information of the Applicant's representative appearing in the first paragraph on Record 16.) Section 17(2)(a) states that it is not an unreasonable invasion of personal privacy to disclose personal information when the individual whom the information is about has consented to the disclosure of the information. However, Covenant Health did not provide notice under section 30 to the representative to obtain her views regarding disclosure. The evidence of the records establishes that Covenant Health is aware of the relationship between the representative and the Applicant. It is therefore unclear why Covenant Health did not provide notice under section 30 to the representative to determine her views regarding disclosure of information about her.

[para 70] It may be the case that Covenant Health did not provide notice because it has also withheld this portion of the record as nonresponsive. I find that this paragraph is responsive to the Applicant's access request, as the information regarding the representative is contained in a statement explaining a concern about the Applicant. (The portion of the sentence referring to the existence of a concern in relation to the Applicant was provided to the Applicant; the nature of the concern was withheld.)

[para 71] The representative is referred to in order to state a concern about the Applicant and to explain the concern. As the Applicant has requested her personal information in order to understand decisions made about her by Covenant Health employees, sentences containing concerns voiced by employees about the Applicant in letters discussing her restrictions and confirming their suitability, are responsive to her access request.

Exposure to harm

[para 72] Covenant Health states that it considered that disclosure of the personal information in the records may expose third parties unfairly to harm. Unfair exposure to harm is a factor addressed by section 17(5)(e), cited above.

[para 73] It is unclear to me the nature of the harm that would result from disclosing the information in the records to the Applicant. Given that the nature of the harm resulting from disclosure is not apparent, it is also unclear whether any harm resulting from disclosure of the personal information would be unfair within the terms of section 17(5)(e).

Rendering third parties identifiable

[para 74] I accept that when Covenant Health lists as a consideration that the information severed under section 17 would have the effect of rendering third parties

identifiable, it means that this is the reason it regarded it necessary to consider whether section 17 required it to withhold the information. However, the appearance of this consideration in a list of factors that may have some bearing on the weighing process under section 17(5) suggests that Covenant Health considers the fact that information would serve to identify an individual as a factor to be weighed under section 17(5). If the latter is the case, the question to be answered under section 17(5) is whether disclosing information about an identifiable individual would be an unreasonable invasion of the individual's personal privacy. That information would serve to identify an individual does not answer this question, but merely establishes that the information in question may be personal information.

Meaninglessness

[para 75] Covenant Health also states that it would be difficult or impossible to sever some of the personal information from the records, or that severance of some information would render the remaining information meaningless. However, Covenant Health did not point to the information it considers would be meaningless if it attempted to sever the personal information. Having reviewed the information to which Covenant Health has applied 11 of the HIA, or section 17 of the FOIP Act, it appears that a great deal of the information may be meaningful once identifiers have been removed. However, as I decide below in weighing the factors under section 17(5) that the personal information in the records must, in this case, be disclosed to the Applicant, I find the issue of meaninglessness to be moot.

Conclusion

[para 76] I have decided that the personal information in the records cannot be withheld under section 17(1). I have made this decision on the basis that the factor set out in 17(5)(c) of the FOIP Act is engaged and weighs strongly in favour of disclosure. The factor set out in section 17(5)(c) applies to all the personal information withheld from the records, and outweighs any interests in withholding it.

[para 77] In making this finding, I take into account that where information is about an individual acting in a representative capacity, the fact that the individual acts as a representative means that disclosure is less invasive of personal privacy because the information is not about the representative, so much as the matter the agent is addressing on behalf of someone else. The Applicant requires the personal information in the records to understand the case she must meet and to respond to it. The agent's privacy interests in her decisions and actions as agent in relation to this issue are diminished by the fact she is acting in a representative capacity and because her information is also the information of others. I therefore find that the factor set out in section 17(5)(c) outweighs the privacy interests of the agent in her personal information. I also find that section 17(5)(c) applies to the personal information of the Applicant's parents and outweighs any privacy interests in their information. I therefore find that the information to which the Public Body applied section 17(1) cannot be withheld under this provision.

Issue D: If the FOIP Act applies, did the Public Body correctly withhold the information under section 18 of the FOIP Act (disclosure harmful to individual or public safety)?

[para 78] This issue was set out in the notice of inquiry. However, the Public Body has not withheld information on the basis of section 18 of the FOIP Act, or on the basis of section 11(1)(a) of the HIA, which is similar in purpose to section 18 of the FOIP Act. As a result, I will not address this issue.

Issue E: Did the Public Body properly apply section 24 (advice from officials) to withhold information from the records?

[para 79] Covenant Health applied section 24(1)(a) and (b) to withhold information from the records. Section 24(1)(a) and (b) authorize the head of a public body to refuse to disclose information that would reveal certain kinds of advice from officials. It states:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

If information serves to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body, such as Covenant Health, then the information is subject to section 24(1)(a). If information would reveal consultations or deliberations involving officers or employees of Covenant Health, then the information is subject to section 24(1)(b).

Section 24(1)(a)

[para 80] The Public Body withheld information under section 24(1)(a) from Records 12, 13, 20 and 38. I have reviewed the information severed from these records and agree that this information is consistent with analysis and recommendations that have been provided, or were intended to be provided, to someone responsible for making a decision for that person's consideration in making the decision. I therefore find that section 24(1)(a) applies to this information.

Section 24(1)(b)

[para 81] A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 82] The Public Body withheld information on the basis of section 24(1)(b) from Records 11, 12, 13, 14, 17, 18, 19, 38 and 39. With the exceptions of records 11 and 19, I am satisfied that the information withheld from the records under section 24(1)(b) may be construed as consultations or deliberations regarding decisions that employees of Covenant Health were responsible for making.

Record 11

[para 83] Record 11 contains an email that provides a brief discussion of actions that have been taken and explains a course of action that has been adopted. The email does not seek advice regarding a possible course of action, or deliberate factors weighing for or against an action. I am unable to identify information consistent with information subject to a provision of section 24(1) in Record 11.

Record 19

[para 84] Covenant Health withheld an email from Record 19 on the basis of section 24(1)(b). The second paragraph email recounts events that had occurred. There is nothing to indicate that the employee who wrote the email was responsible for making a decision or was deliberating it. If there was a decision to be made, it is unclear from the email what the decision would be. I acknowledge that the first paragraph contains a request for instructions; however, asking for instructions as to what to do, when one is not responsible for making a decision, is not the same thing as consulting with others regarding a decision one is responsible for making. In this case, the context created by the email supports finding that the author of the email is seeking directions or orders as to what to do, rather than seeking advice.

[para 85] The second paragraph contains a recitation of facts. The facts have no relation to the request for instruction in the first paragraph and are regarding a different situation, and so I am unable to interpret this paragraph as advice intended to assist the recipient of the email to make a decision on the issues raised in the first paragraph.

[para 86] Covenant Health appears to have withheld a portion of the first paragraph of Record 19 on the basis of nonresponsiveness, in addition to section 24(1)(b). Having

reviewed the Applicant's access request, I am satisfied that the portion withheld as non-responsive, is responsive, given that it forms part of a sentence discussing the Applicant.

[para 87] I am unable to identify information consistent with information subject to section 24(1) in Record 19. I also find that all the information in this record is responsive to the access request.

Exercise of Discretion

[para 88] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

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

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

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

Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

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

In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.

The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.

Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 89] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

In addition, the fact that the Court remitted the issue of whether the head had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 90] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations where the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) states:

72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

- (b) *either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access...*

[para 91] In *Ontario (Public Safety and Security)*, the Supreme Court of Canada established the following two-part process for applying discretionary exceptions to disclosure under the FOIP Act:

As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made. [My emphasis]

[para 92] The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly. [My emphasis]

While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 93] The Director, Information and Privacy, explains how discretion was exercised in the following terms:

In exercising discretion pursuant to sections 24(1)(a) and (b) of the FOIP Act, I considered the following:

- a) The impact the disclosure would reasonably be expected to have on Covenant Health's ability to carry out similar decision-making processes in the future;
- b) That the release of the information could make consultations and deliberations between members of staff less candid, open and comprehensive in the future if they understood such information would be made publicly available;
- c) That the staff members had a reasonable expectation that their deliberations, consultations, advice, analyses and recommendations would be kept confidential;
- d) The objectives and purposes of the Act, including the Applicant's right of access, and
- e) Whether the decision to release some information to the Applicant would satisfy any need for public scrutiny.

[para 94] The first three factors referred to in the affidavit are essentially a statement of the purpose of section 24(1). The purpose of section 24(1)(a) and (b) is to enable public bodies to make sound decisions by enabling them to seek advice in confidence, free from interference, harassment, and second-guessing before or after they make decisions regarding potential courses of action. I agree with the Public Body that consideration of this factor is relevant when exercising discretion under a provision of section 24(1).

[para 95] As discussed by the Supreme Court of Canada in *Ontario (Public Safety and Security)*, the head of a public body must consider all relevant interests weighing in favor of disclosure, including private interests, when deciding whether to exercise discretion in favor of disclosing or withhold information. While I agree with Covenant Health that it is appropriate to consider the purpose of the Act, and the need for public

scrutiny generally when deciding how discretion will be exercised, Covenant Health has not addressed the Applicant's personal need to obtain the information it has withheld under section 24(1) and it does not appear that this was considered as a factor.

[para 96] The information, advice, analysis, recommendations, consultations, and deliberations that Covenant Health withheld under section 24(1) were used, or relied upon, to make decisions to impose restrictions on the Applicant's visiting privileges. It is therefore possible that some of this information led to the imposition of restrictions and that disclosure of this information may assist the Applicant to know more about the basis of decisions, which would, in turn, enable her either to accept or to challenge them. In instances where the information may have founded a decision to restrict visiting privileges, and Covenant Health has not communicated this information to the Applicant, that the information is necessary for the Applicant to learn the case she must meet could potentially outweigh Covenant Health's interest in preserving the privacy of its decision making process.

[para 97] As the Public Body did not consider the Applicant's interest in gaining access to the information in order to learn the case she must meet to challenge her visiting restrictions as a relevant consideration when exercising its discretion under section 24(1) I must ask it to exercise its discretion again by including this factor in its weighing process.

Issue F: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the FOIP Act (duty to assist applicants)? In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records.

[para 98] Section 10 of the FOIP Act states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

Adequacy of Search

[para 99] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order F2007-029, the Commissioner noted:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search

- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 100] The affidavit of the Director, Information and Privacy states at paragraph 22:

I also determined that records consisting of or containing the health information of the patients was not responsive to the access request given the specific denial of the Applicant that she was seeking this information. These records consisted of: Patient Chart entries; resident care conference records, email communications between health service providers or other Covenant Health staff regarding Patient or treatment or care issues; and email communications with the Patients' agent regarding Patient treatment or care issues. [my emphasis]

[para 101] Covenant's Health's response to the Applicant of September 2, 2011 responds to the specific items requested by the Applicant in her access request. Some of these responses state the following:

Related information may be recorded in your parents' health care records.

[para 102] In relation to the Applicant's request for information "gathered by everyone involved in producing my December 17 Concern Review Report of Covenant Health's Investigation in response to my August 23 letter...", the Covenant Health stated:

The information that is the basis for the report is considered health information and was collected from your Mother's health records.

[para 103] I also note a portion of Record 36, which was disclosed to the Applicant, states:

Resident's dtr [...] began to directly and indirectly interfere with multidisciplinary assessments and daily provision of care (extensive charting available). [my emphasis]

[para 104] The social worker who wrote the foregoing email, also swore an affidavit documenting the search for records. He states:

I searched for and located Patient chart entries mentioning the Applicant[...]

The Applicant has requested my assessment of her, and Interdisciplinary Care team members' observations of her. The Applicant is not a resident or patient of any of these team members. No formal assessments have been made regarding the Applicant. If any observations were recorded in relation to the Applicant, this would have occurred as a result of dealing with patient care issues, in relation to suspension of visitation privileges, or in relation to concerns about patient care. Any such references to the Applicant would have been recorded in the Patients' charts or other health care records in relation to direct observation of the Applicant's conduct as a caregiver or visitor of the Patients.

[para 105] The Public Body has not produced any charting regarding interference with multidisciplinary assessments and the daily provision of care on the part of the Applicant, even though it appears that this information contributed to its decisions regarding the Applicant's access to its premises. The Director, Information and Privacy determined that resident care conference records, email communications between health

service providers or other Covenant Health staff regarding patient treatment and care issues; and email communications with the patients' agent regarding patient treatment or care issues would be nonresponsive.

[para 106] I understand from Covenant Health's submissions, the affidavit of the Director, Information and Privacy, and Covenant Health's response to the Applicant that information from charts, resident care conference records, email communications between health service providers or other Covenant Health staff regarding Patient treatment or care issues; and email communications with the Applicant's parents' agent regarding patient treatment and care issues has been excluded from Covenant Health's response on the basis that this kind of information is "health information" and the Applicant had clarified that she was not seeking health information.

[para 107] As discussed above, information about incidents involving the applicant is not patient health information. Observations about the Applicant's conduct as a visitor or a caregiver are not the health information of the person she visits or provides care to, or her own health information. The Applicant confirmed with Covenant Health that she was not seeking her parents' health information; however, this does not mean that she was excluding her personal information from the scope of the access request where it has been placed or recorded on charts.

[para 108] Although Covenant Health has not included any of the information it refers to as being located in patient files, or charts in its response, the social worker's emails and affidavit indicate that information documenting incidents involving the Applicant is located in patient files and that at least some of this information was located in the search. It follows that I find that Covenant Health has not produced all information responsive to the access request, despite possibly having located it.

Did the Public Body respond to the Applicant openly, accurately, and completely?

[para 109] As the Public Body has not included all responsive records in its response to the Applicant, and has excluded areas where responsive information may be located from the scope of its search, it follows that I find that it has not met its duty to respond openly, accurately and completely.

Did the Public Body meet the duty to assist the Applicant?

[para 110] As the Public Body has not yet produced all records responsive to the access request, and has not yet conducted an adequate search for responsive records, it has not yet responded to the Applicant, openly, accurately, and completely, it follows that I find that it has not met its duty to assist her. I will therefore order it to do so by conducting a new search for responsive records and by including responsive information from charts in its response to her.

Issue G: Responsiveness

[para 111] Although Covenant Health did not indicate in its response to the Applicant that it had severed information as nonresponsive, the records indicate that it has withheld information on this basis.

[para 112] I have noted throughout my analysis that Covenant Health has withheld information as nonresponsive which I find to be responsive. Record 29 is another example of such a record. The information withheld from this record as nonresponsive is clearly responsive, given that it provides information about the basis and authority for decisions made to restrict the Applicant's ability to visit her parents on its premises and to ban her, and would assist her to understand the case she must meet in order to challenge the restrictions.

[para 113] While I agree with Covenant Health that the minutes of meetings addressing anything other than the Applicant are nonresponsive, (Records 60 – 62), I find that the information severed as nonresponsive from records other than Records 60 – 62 is responsive in all cases. In addition, I note that Covenant Health severed the date of the meeting minutes appearing on Records 60 – 62. In my view, the date is responsive as it provides context for the information referring to the Applicant in these records.

V. ORDER

[para 114] I make this Order under section 72 of the *Freedom of Information and Protection of Privacy Act*.

[para 115] I order the Public Body to reconsider its decision to withhold information contained in records 12, 13, 14, 17, 18, 20, 38 and 39 under provisions of section 24(1). When it makes the new decision, it must consider whether the Applicant needs to obtain at least some of the information in order to know the case she must meet to accept or challenge her restrictions.

[para 116] I confirm that the information withheld from Records 60 – 62 is nonresponsive, with the exception of the date of these records.

[para 117] I order Covenant Health to disclose to the Applicant all the information in the records that is not referred to in paras. 115 and 116, as well as the date of the minutes appearing on Records 60 – 62.

[para 118] I order Covenant Health to conduct a new search for responsive records and to prepare a new response to the Applicant regarding the results of the new search.

[para 119] I further order Covenant Health to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator