

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2017-53

June 16, 2017

ALBERTA HEALTH SERVICES

Case File Number 000218

Office URL: www.oipc.ab.ca

Summary: The Complainant complained Alberta Health Services (the Public Body) used her personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the Act) when employees of the Public Body used information in her personnel file and her Occupational Health Services file. She also complained the Public Body failed to adequately protect her personal information in contravention of the Act.

The Adjudicator found the Public Body did not contravene the Act when it used the Complainant's personal information as the information related directly to and was necessary for an operating program or activity of the Public Body. She also found the Public Body adequately protected the Complainant's personal information in accordance with the Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 33, 34, 35, 38, 39, 40, 72, *Health Information Act*, R.S.A. 2000, c.H-5, s.1

Authorities Cited: **AB:** Orders 2000-002, F2015-10, F2015-27, F2015-42, H2011-001

I. BACKGROUND

[para 1] This inquiry arises from a complaint that Alberta Health Services (the Public Body) collected, used and or disclosed the Complainant's personal information in

contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the Act). Specifically, the Complainant objected to named Public Body employees having accessed or having been given access to certain records containing her personal information.

[para 2] The Complainant also alleges that the manner in which certain records were stored by the Public Body was not secure, and that some of her records had been tampered with and contained inaccuracies.

II. ISSUES

[para 3] The Notice of Inquiry sets out the following issues:

1. Did the Public Body collect the Complainant's personal information? If yes, did it do so in compliance with or in contravention of section 33 of the Act?
2. Did the Public Body collect the Complainant's personal information directly or indirectly? If indirectly, did it do so in compliance with or in contravention of section 34 of the Act?
3. Did the Public Body use the Complainant's personal information? If yes, did it do so in compliance with or in contravention of section 39 of the Act?
4. Did the Public Body disclose the Complainant's personal information? If yes, did it have authority to do so under section 40(1) and 40(4) of the Act?
5. Did the Public Body make every reasonable effort to ensure personal information of the Complainant used or to be used to make a decision directly affecting her was accurate and complete, as required by section 35(a) of the Act?
6. Did the Public Body protect the Complainant's personal information in accordance with the requirements of section 38 of the Act?

III. DISCUSSION OF ISSUES

- 1. Did the Public Body collect the Complainant's personal information? If yes, did it do so in compliance with or in contravention of section 33 of the Act?**

[para 4] With respect to this issue, the Complainant raises concerns about information contained within the Complainant's personnel file and a Occupational Health Services file. The Complainant asserts two employees of the Public Body were privy to this information without authorization under the Act (T.E. to the personnel file and L.N. to the Occupational Health Services file).

[para 5] From the documents before me (all, except one, are attached to the Complainant's original complaint to this office), I understand the timeline in these matters is as follows:

- November 17, 2010 – Performance Management discussion with Complainant and Supervisor. The Complainant refused to sign notes that were to be added to the form until her comments were added. There is a note on this form dated Nov. 22/10 indicating the Complainant had not returned the notes (attachment G1- entitled Performance Management, Performance Conversation Summary Form).
- November 25, 2010, email sent by T.E. to another employee of the Public Body (attachment E1). The body of the email states the following:

Before we go down a performance plan route for [the Complainant], we need to consider if there are any special health circumstances that we need to be aware of.

Would you be able to assist with that?

- The final response to that was contained in an email on November 30, 2010 (attachment E1) indicating the following:

From a review of Medgate, this file has always resided and been managed by an OHN.

- L.N. responded by email on December 3, 2010 (attachment C) by stating:

I now have the file. How would you like to proceed?

- The Complainant, through her union representative filed a grievance regarding her Performance Conversation Summary form on December 3, 2010 (attachment H1 of the Complainant's Request for Inquiry).
- T.E. requests the Complainant's personnel file on December 13, 2010 (attachment B).
- The Complainant is formally referred for a workplace assessment on January 27, 2011 (attachment F1 of the Complainant's Request for Inquiry).

a) Access of the information by Public Body employee T.E.

[para 6] The documents I am provided by the Complainant show a form entitled "Employee Personnel File Release Form". This form is attached to the Complainant's original complaint to this office and is marked as attachment "B". The form indicates "File retrieval (my emphasis) requests can only be made by authorized employees of Alberta

Health Services [the Public Body] – Calgary and Area. TSSI will provide the Requestor a copy of the Employee Personnel File.” The form is filled out by T.E.

[para 7] The Complainant, in her submissions and referring to this form, states the following:

The reason given on the form for the release of my medical information (my emphasis) was that they had a bonafide medical reason to release the information, in December, 2010. Then I was terminated by the public body claiming that I had no medical condition, so what was the bonafide reason for the release of my medical information.

[para 8] With respect, I do not see the form as either a request for or a release of medical information. The date of the request is December 13, 2010. It indicates the following on the form:

File retrieval requests must be made for a bona fide reason. Please check one of the following reasons for making this request:

The reasons checked off are “Performance Reviews” and “Labour/Employee Relations”.

[para 9] The following also appears on the form:

If an employee health file is required, please submit an Authorization for Release of Confidential Medical Information.

I have no evidence any such Authorization was submitted.

[para 10] The Public Body submits the following:

[T]he Public Body did not collect information in this matter but accessed existing personal information. “Collection” is not synonymous with “access”. As Commissioner Clark in Order 2000-002 [96-100] found “collection must refer to a public body’s having obtained the personal information in the first instance. He also found that “access” refers to internal retrieval of that information and each “access” of personal information within a public body was not a new “collection” for the purposes of [the then] section 32.

The Complainant’s initial submission deals with the access to her Occupational Health and Safety (“OHS”) file which by and in itself points to her personal information being pre-existing.

In the alternative, if this position is incorrect, it is submitted that any collection of employee information for OHS or employment purposes is authorized by section 33(c) of the Act. Collection relating directly to and is necessary for an activity of a public Body. In this case for the purpose of managing or administering personnel of the public body.

[para 11] The Complainant cites two cases in support of her argument the Public Body collected her personal information without authorization. Firstly, in Order F2015-42 the

Public Body (Human Services) took information from a database (Justice Online Information Network) created by another Public Body (Alberta Justice). The facts of that case distinguish it from the facts in this inquiry. The Public Body in this case points out the personal information of the Complainant already exists within the Public Body's own databases. The Public Body in this case submits it was retrieving file information it had already collected.

[para 12] In Order F2015-27 at paras. 9-11, the Adjudicator reviews Orders from this office and states the following regarding whether a collection had occurred when a Public Body used information in its own database:

As mentioned above, the issue is if the Public Body had the authority to search the ACOM database for personal information about the Complainant. The Public Body argues that the search was an authorized collection. However, it also seems to argue it is actually a use of information it already had collected to put in the ACOM database. In its submissions, the Public Body states that ACOM is "its own" database and that ACOM is managed by the Public Body.

A previous order issued by this office found that when an employee of a Public Body accesses information already in the custody and control of a Public Body it [is] not a new collection (see Order 2000-002). Another order stated that when information is put into a database by a public body, when that same Public Body retrieves it, it is a use and not a collection (See Order F2006-004 at para 12).

In this inquiry, the ACOM database was the Public Body's own database in which it stored information for the use of its employees. The DDO was an employee of the Public Body, acting in the course of her employment, when she performed the search. Based on this, and applying the precedents I have cited, I find that the ACOM search was not a new collection of the Complainant's personal information. It is therefore not necessary for me to consider the arguments the Public Body made in support of its retrieval of the information, viewed as a 'collection'.

[para 13] The Complainant also cited Order H2011-001. In that case, the complaint was the Public Body (Alberta Health Services) collected the complainant's health information without authorization. Section 4(1)(u) of the Act states 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 14] Health information is defined in the *Health Information Act* in the following way:

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 15] In Order H2011-001, at para. 32, the adjudicator states the following:

AHS is a public body that is a custodian as defined in the HIA. Thus, by virtue of section 4(1)(u) – which carves health information that is in the custody and control of a custodian out of the FOIP Act – the information collected by the AHS as custodian, from the Complainant directly, is excluded from the FOIP Act. As a result, the provisions of the FOIP Act that specifically authorize collection of personal information by public bodies for personnel management cannot be taken as authorizing the collection of this health information, which was in the custody or control of a custodian, for personnel management purposes.

[para 16] I do not have any evidence the Complainant’s health or medical information was collected by employee T.E. of the Public Body. The information requested was a personnel file and clearly NOT medical information. There was no reason given to request medical information and there is no evidence before me to suggest medical information was requested. The evidence before me clearly relates to the Complainant’s personal information contained within her employee personnel file, not her medical information.

[para 17] I agree with the former Commissioner’s statements in Order 2000-002 at paras. 99-101. I find they adequately deal with the situation in this inquiry.

“Collection” and “access” are not synonymous. “Collection” must refer to a public body’s having obtained the personal information in the first instance. “Access” in this context must refer to the internal retrieval of that information.

Each “access” of personal information within a public body is not a new “collection” for the purposes of section 32 of the FOIP Act. Nor is there a new collection within programs of a public body that share the personal information, as here.

Therefore, there is no “collection” of the Applicant’s information in this case.

[para 18] The information T.E. retrieved from existing files relating to the Complainant was not health information, and it had already been collected by the Public Body. I find this employee, acting for the Public Body, did not collect the Applicant’s personal information.

[para 19] If I am mistaken about the collection of the Applicant’s personal information by T.E., I will now deal with the issue of whether the collection was authorized by section 33(c) of the Act which reads as follows:

33 *No personal information may be collected by or for a public body unless*

...

(c) *that information relates directly to and is necessary for an operating program or activity of the public body.*

[para 20] T.E. was an employee in the Human Resources department. The form he used to retrieve the Complainant's information made it clear the information was to be used for "Performance Reviews" and "Labour/Employee Relations". The Public Body submits the information was collected for the purpose of managing or administering personnel of the Public Body which is necessary for the Public Body to do for the purpose of operating its programs and activities. I have no evidence otherwise. I find if the Public Body collected the Complainant's information, it did so in compliance with section 33(c).

b) Access of information by Public Body employee L.N.

[para 21] The Complainant states she was referred to see L.N. by other public body employees. The referral was made on January 19, 2011 and the appointment was scheduled for January 27, 2011. Attached as F1 to the Complainant's original complaint to this office is a form entitled "Formal Referral to Workplace Health and Safety". The referral names L.N. as the contact for OHS. The referral was for an assessment of the Complainant.

[para 22] The Complainant is concerned L.N. was in possession of her personal information without authorization. She refers me to the email (attachment "C" in her original complaint to this office) sent by L.N. on December 3, 2010 that reads as follows:

Re: [Complainant's name]

I now have the file. How would you like to proceed?

[para 23] I am told by the Public Body that L.N. is an Occupational Health and Safety (OHS) nurse within the OHS department. L.N. was assigned to the Complainant's unit. In that role, she had authorized access to the Complainant's OHS file.

[para 24] I apply the same reasoning with respect to L.N.'s use of the Complainant's information as I did with T.E.'s use of information. The information was in a database compiled by the Public Body and therefore L.N.'s retrieval of the file was not a collection of information.

[para 25] I find the Public Body did not collect the Complainant's personal information. If I am mistaken on that point, I find the Public Body collected the Complainant's personal information in compliance with section 33(c) of the Act when L.N. collected the information to assist T.E. in his purpose of managing or administering personnel for the Public Body which is necessary for the Public Body to do for the purpose of operating its programs and activities

2. Did the Public Body collect the Complainant's personal information directly or indirectly? If indirectly, did it do so in compliance with or in contravention of section 34 of the Act?

[para 26] As I have found the Public Body did not collect the Complainant's personal information, it is not necessary to deal with this issue.

[para 27] However if I am mistaken in this finding, I find that indirect collection of the information was authorized by section 34(1)(n) of the Act.

34(1) A public body must collect personal information directly from the individual the information is about unless

...

(n) the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body, ...

3. Did the Public Body use the Complainant's personal information? If yes, did it do so in compliance with or in contravention of section 39 of the Act?

[para 28] Section 39 of the Act states:

39(1) A public body may use personal information only

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

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or

(c) for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.

[para 29] The Complainant argues the Public Body

...used the information to conduct an investigation that they later acknowledge that they had no reason to conduct. These two pages are from a document which was submitted to the Labour Relations by my Union on November 29, 2013. At paragraph 4, the Union clearly advice (*sic*) the Labour Relations Board, that after the Union asked the Employer to provide some proof of what I had done wrong, the Employer advised that they had no proof, so they falsely obtained my medical information to conduct an investigation, then admitted they had no reason to do so.

[para 30] The documents the Complainant refers me to are Exhibits B1-B2 of her rebuttal submissions. The documents are copies of ones submitted to the Alberta Labour Relations Board on behalf of the Complainant's union in response to her "Duty of Fair Representation" complaint. The Complainant indicates the documents show the Public Body carried out an investigation. The documents state "The Union (my emphasis) performed all investigation necessary." The Complainant emphasized the following:

The Grievor protested that her performance evaluation was incorrect, and when the union asked the Employer to provide proof to substantiate the evaluation, the Employer admitted that they could not, and offered to remove the evaluation.

[para 31] The Complainant suggests these documents show "that my medical information was release (*sic*) by the public body to individuals who used the information for intentions not covered by the FOIP Act and to cover-up their unlawful acts."

[para 32] The Public Body submits the use of the Complainant's personal information was in compliance with section 39(1)(a) and 39(1)(c). They further state that with regard to section 39(1)(c), the information was used pursuant to section 40(1)(x) for the purpose of managing or administering personnel of the Public Body.

[para 33] Section 40(1)(x) states:

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

...

(x) for a purpose of managing or administering personnel of the Government of Alberta or the public body.

[para 34] I am told by the Public Body T.E. was an employee in the Public Body's human resources department. He was the HR Services Advisor who was assigned to the portfolio prior to April 2011. The Public Body states:

As such he was did not (*sic*) have access to the Complainant's OHS [Occupational Health Service] nor could he therefore have disclosed it to [L.N.]. The "Employee Personnel File Release Form" is a form wherein an authorized AHS requestor may obtain information from Telus who at that time managed personnel records. It is not a general disclosure form. In any event the information requested by [T.E.] at that time related to performance reviews and labour/employee relations not OHS records which are totally separate. Obtaining such information was necessary for the HR Services Advisor to fulfill his duties.

[para 35] Further, it is clear to me L.N. was also authorized to use the information under section 39(1)(a) as she was assigned to conduct an assessment on the Complainant. The assessment was to assist Human Resources to prepare a performance plan route for the Complainant (see Exhibits E1(email from T.E. attached to the original complaint and F1

(form entitled Formal Referral to Workplace Health & Safety) attached to the Request for Inquiry).

[para 36] I accept the Public Body's submission the Complainant's personal information was used in a manner consistent with the purpose for which it was collected and had a reasonable and direct connection to that purpose. I find the Public Body's use of the Complainant's information was necessary for an operation of a program of the Public Body, namely the management of personnel. I find the Public Body used the Complainant's personal information in compliance with the Act.

4. Did the Public Body disclose the Complainant's personal information? If yes, did it have authority to do so under section 40(1) and 40(4) of the Act?

[para 37] The Complainant suggests T.E. disclosed her personal information to L.N. without authority.

[para 38] I do not have any evidence before me to support that suggestion. The evidence before me shows T.E. used the Complainant's personal information from a personnel file. The evidence before me shows L.N. used the Complainant's personal information from an Occupational Health and Safety (OHS) file. I do not have any evidence to support a claim that either individual disclosed the contents of their respective files with each other or anyone else.

[para 39] As there is no evidence the Complainant's personal information was disclosed, this issue will not be addressed.

5. Did the Public Body make every reasonable effort to ensure personal information of the Complainant used or to be used to make a decision directly affecting her was accurate and complete, as required by section 35(a) of the Act?

[para 40] Section 35(a) of the Act reads as follows:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete,

...

[para 41] The Complainant suggests the Public Body did not keep accurate records regarding her employment records. She lists the following examples:

1. Her employment records show she was terminated from the wrong department and therefore had managers and supervisors that were not her actual managers and supervisors.
2. Her employment records show she had different position numbers that she calls employee numbers.
3. Her employment records show she was paid from the United Nurses of Alberta (UNA) account, even though she was an Alberta Union of Provincial Employees (AUPE) union member.

[para 42] In response, the Public Body provided me with an email that explains the discrepancies listed by the Complainant. Firstly, I am told that Alberta Health Services was formed in 2009. At that time, the Chronic Headache Assessment and Management Program (CHAMP) ceased reporting to Clinical Neurosciences and became part of another portfolio in the Calgary region. The actual housing of the program remained the same. Despite the Complainant's claim she only worked for Clinical Neurosciences, her reporting relationship changed with program realignment after the formation of AHS.

[para 43] I am also told position numbers are not assigned to employees, rather they are assigned to the position the employee occupies. As part of program re-alignments, new position numbers were created. This had no bearing on the Complainant's classification or employment status.

[para 44] Finally, with respect to the designation of UNA employee rather than AUPE employee, I am told this was likely a clerical error. I was also informed the Complainant was never paid as a UNA member; she was paid in accordance with the AUPE-GSS collective agreement.

[para 45] The Public Body also argues the information is not the Complainant's personal information. It submits the following:

In the present case, it is questionable whether the information would be considered "personal information". Given that the information deals with department name, position number and internal accounts AHS uses for salary payment. Information about what an individual does in the course of fulfilling their employment responsibilities is not their personal information, unless it has a personal dimension. (Order F2015-10[26]). In the case the agreement that the Complainant was paid under or department name where she worked or position numbers that are not assigned to an individual do not have a personal dimension.

[para 46] In Order F2015-10 at para. 26 the Director of Adjudication stated the following:

In accordance with many earlier decisions of this office, information about what an individual does in the course of fulfilling their employment responsibilities is not their personal information, unless it has a personal dimension. A person's name is their personal information by virtue of the definition in section 1(n) of the Act, but the description of their

employment-related activities is not. (See, for example, Order F2008-028 at para 55, Order F2006-030 at para 12.)

[para 47] In this case, I agree with the Public Body the information the Complainant is complaining about is not her personal information. Rather, as the Public Body states, the information relates to a department name, position number and internal account matters. All of this information relates to the Complainant's position as an employee of the Public Body, rather than being her personal information.

[para 48] Section 35 of the Act requires not only the Complainant's personal information be accurate, it also requires the information complained about has been used to make a decision regarding the Complainant. In this case, I have no evidence the information the Complainant takes issue with was ever used to make a decision regarding the Complainant.

[para 49] I find the Public Body, in the circumstances the Complainant complains about, did not inaccurately record the Complainant's personal information which it used to make a decision.

6. Did the Public Body protect the Complainant's personal information in accordance with the requirements of section 38 of the Act?

[para 50] Section 38 states:

38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 51] The Complainant submits a portion of an email shows the Public Body did not protect her personal information. The email (attached as E1 to the Complainant's initial complaint) states the following:

From a review of Medgate, this file has always resided and been managed by an OHN.

[para 52] The Complainant states the following about this email:

The bottom line is that **ONE NURSE**, at no time, should be in control my file (*sic*). Any individual who access my file should only access the file at the time needed and then it should be stored in a safe place. The notes states that my file has **ALWAYS RESIDED** and been managed by an Occupational Health and Safety Nurse. It is very disturbing that the public body allowed **ONE NURSE** to be **ALWAYS** in control of an individual file. This note did not come from me, it came from an employee of the public body, who was obviously viewing the history of my file at the time he wrote it. He obviously knew what he was saying when he made the notes in my file. [Emphasis in original]

[para 53] With respect, it is not obvious to me that the writer of the email was viewing the history of the Complainant's file. The email chain was in response to a query from T.E.

regarding any health issues he should consider regarding a performance plan route. The various people responding directed him to a particular department where the file was located.

[para 54] The Public Body confirms the Complainant's file "is in fact, stored in a locked drawer located in the chart room" of that department. Further, the Public Body also states the file "is only accessed by OHS staff on an "as required basis".

[para 55] The Complainant also has concerns regarding notations on the file by unauthorized personnel. She points to a Clinic Visit Progress Report and a column on that report titled "Visit ID". Since the Visit ID has differing numbers under that column, the Complainant assumes more than one person had access to her file. She believes that access was unauthorized.

[para 56] The Public Body explains "Visit ID" is a "numerical record of an encounter with OHS [Occupational Health Services]. It is not tied to the employee entering the notes. AHS can advise that the employee who entered the notes is identified in the "Practitioner" column, which shows [L.N.] as the employee who entered all of the notes in the Clinic Visit Progress Notes."

[para 57] The evidence before me shows the Complainant's personal information was located in a particular department. The evidence also shows that information was used only by those with authorized access to the information. There is no evidence of disclosure, destruction or collection of that information. I am satisfied the Public Body safeguarded the Complainant's personal information and did not allow unauthorized access to it.

IV. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I find the Public Body did not contravene the Act when it used the Complainant's personal information. I also find the Public Body adequately protected the Complainant's personal information in accordance with the Act.

Neena Ahluwalia Q.C.
Adjudicator