

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2003-003

January 28, 2004

Alberta Mental Health Board

Review Number H0236

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Summary: The Applicant complained that the Alberta Mental Health Board (“AMHB”) disclosed her health records/information in contravention of the *Health Information Act* (“the Act”). The AMHB disclosed the Applicant’s mental health records to a regional health authority when transferring some of its former functions to the health authority during restructuring.

The Commissioner found that the AMHB disclosed the health records/information in accordance with its authority under section 35(1)(q) and section 36(a) of the Act to transfer records to a successor custodian. The Commissioner did not find it necessary to consider whether the Custodian also had the authority to disclose under sections 35(1)(a), 35(1)(b) and 35(1)(p) of the Act.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(f)(iii), 1(1)(f)(iv), 1(1)(i), 1(1)(k), 1(1)(u), 2(b), 2(c), 35(1)(a), 35(1)(b), 35(1)(p), 35(1)(q), 36(a); *Regional Health Authorities Act*, R.S.A. 2000, c. R-10; *Alberta Mental Health Board Regulation*, A.R. 286/94, as amended; Ministerial Order #49/2003

Cases Cited: *R. v. Sharpe*, [2001] 1 S.C.R. 45

Authorities Cited: E.A. Driedger, *Construction of Statutes* (2nd ed. 1983); R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002)

I. BACKGROUND

[para 1] The Applicant made a complaint about the Alberta Mental Health Board (the “Custodian” or “AMHB”) under the *Health Information Act* (the “Act”), saying that the Custodian transferred her mental health records to the Palliser Regional Health Authority in contravention of the Act.

[para 2] I authorized an investigation under the Act, but the Applicant was not satisfied with the outcome of the investigation. The Applicant made a request for review under the Act. The matter was set down for a written inquiry.

[para 3] The Applicant and Custodian provided written initial submissions and the Applicant provided a written rebuttal submission. Copies of the submissions and the rebuttal were exchanged between the parties.

II. ISSUES

[para 4] The issues before this inquiry are:

- Did the Custodian make the disclosure of health records/information in accordance with section 35(1)(q) of the Act?
- Did the Custodian make the disclosure of health records/information in accordance with section 36(a) of the Act?
- Did the Custodian make the disclosure of health records/information in accordance with section 35(1)(a) of the Act?
- Did the Custodian make the disclosure of health records/information in accordance with section 35(1)(b) of the Act?
- Did the Custodian make the disclosure of health records/information in accordance with section 35(1)(p) of the Act?

III. DISCUSSION OF THE ISSUES

A. General Application

[para 5] The Applicant says the Custodian disclosed her mental health records in breach of the Act and that the records/information were disclosed without her consent. To address this issue, I must first determine whether the situation falls under the Act.

[para 6] “Registration information” and “diagnostic, treatment and care information” both fall within the definition of “health information” in sections 1(1)(k)(i) and 1(1)(k)(iii) of the Act. The mental health records at issue include diagnostic, treatment and care information as defined in section 1(1)(i) of the Act, as well as

registration information as defined in section 1(1)(u) of the Act. The Applicant's mental health records fall under the definition of "health information" in the Act.

[para 7] In her submission, the Applicant says the AMHB is a public body and not a custodian under the Act. Section 1(1)(f)(iii) of the Act defines a custodian to include a provincial health board established by a regulation under the *Regional Health Authorities Act*. The AMHB is such a board pursuant to the *Alberta Mental Health Board Regulation* under the *Regional Health Authorities Act*. I find that the AMHB fell within the definition of a "custodian" under the Act at the time the records/information were transferred.

[para 8] Section 1(1)(f)(iv) of the Act defines a custodian to include a regional health authority established under the *Regional Health Authorities Act*. It is not disputed that the Palliser Regional Health Authority is such a regional health authority. The Palliser Regional Health Authority falls within the definition of a "custodian".

[para 9] As I have determined that the records/information in question fall under the Act, I will now consider whether the Custodian disclosed the information in accordance with the Act. Part 5 of the Act establishes the rules that apply to custodians when disclosing health information.

[para 10] Section 35 of the Act provides custodians with authority to disclose health information without consent. A custodian may disclose to another custodian for purposes that are prescribed under section 35(1)(a), for purposes of continuing treatment and care under section 35(1)(b), when authorized or required by an enactment under section 35(1)(p) and to a successor of a custodian under section 35(1)(q) of the Act.

B. Application of Section 35(1)(q) (Disclosure to Successor)

[para 11] Section 35(1)(q) of the Act says:

35(1) A custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information

.....

(q) to its successor where

- (i) the custodian is transferring its records to the successor as a result of the custodian ceasing to be a custodian, and
- (ii) the successor is a custodian.

[para 12] Section 36(a) of the Act says:

36 A custodian may disclose individually identifying registration information without the consent of the individual who is the subject of the information

- (a) for any of the purposes for which diagnostic, treatment and care information may be disclosed under section 35(1) or (4).

[para 13] Section 35(1) of the Act gives custodians the authority to disclose diagnostic, treatment and care information without consent in certain circumstances.

Section 35(1)(q) gives a custodian the authority to disclose health records/information to a successor when the custodian is transferring its records to its successor as a result of ceasing to be a custodian.

[para 14] Section 36(a) of the Act gives custodians the authority to disclose registration information without consent for the same purposes as diagnostic, treatment and care information can be disclosed under section 35(1). Therefore, a custodian may disclose registration information to another custodian for the purpose of transferring records/information to its successor as a result of ceasing to be a custodian.

[para 15] The AMHB says it disclosed the Applicant's mental health records in accordance with section 35(1)(q). In its submission, the AMHB says:

...the Alberta Mental Health Board (AMHB) was ordered to provide for the assumption of its operations by the Regional Health Authorities (RHA's). In order to provide continuous seamless transfer of service, the successor required the information in advance of April 1, 2003. The office of the Information Access and Privacy Services of the Alberta Mental Health Board physically ceased to exist on March 28, 2003. The release of the files within its last week of operations did not seem unreasonable in order to guarantee a client's right and ability to access clinical services.

[para 16] The Applicant says the AMHB did not have the authority to disclose her mental health records without her consent. In her rebuttal submission the Applicant says, "Clients could have been informed by their therapists and request for consent could have been made at that time".

[para 17] The Applicant objects to the legislative authority that exists in the Act for custodians to disclose health information without consent, including disclosure to a successor of a custodian. The Applicant disagrees with the law. Nonetheless, I find that section 35 of the Act provides legislative authority for the disclosure of health records/information without consent in certain situations.

[para 18] The Applicant says the AMHB did not have legislative authority under the Act to transfer the records/information to the Palliser Regional Health Authority. In her rebuttal submission the Applicant says that section 35(1)(q) of the Act only applies in situations where a doctor, due to retirement, transfers a file to another doctor. However, I find that section 35(1)(q) of the Act is not limited to a custodian who is a retiring physician.

[para 19] Three criteria must be met to satisfy section 35(1)(q) of the Act. First, a custodian must be disclosing records/information to its successor. Secondly, a custodian must be transferring its records as a result of ceasing to be a custodian. Thirdly, the successor must be a custodian.

[para 20] At the time of the transfer, the AMHB was the custodian of the records/information that were disclosed. The AMHB disclosed the information to its successor, the Palliser Regional Health Authority. Therefore, I find the first criteria of

section 35(1)(q) is met. The successor was the Palliser Regional Health Authority, which is a custodian. Therefore, I find the third criteria of section 35(1)(q) is satisfied.

[para 21] Was the second criterion met; that is, was a custodian transferring its records as a result of ceasing to be a custodian? The AMHB provided a copy of Ministerial Order #49/2003, which was effective as of April 1, 2003. The Order provided for winding up and transferring certain portions of the affairs of the AMHB and for the assumption of those affairs by the regional health authorities. The effect of the Ministerial Order is that the AMHB would no longer be delivering mental health services and would no longer be operating its three hospitals and 78 clinics. The AMHB says it transferred the Applicant's health records "within its last week of operations".

[para 22] However, the AMHB did not wind up in all respects. Could the AMHB continue to exist for certain purposes but for other purposes be "ceasing to be a custodian" within the meaning of section 35(1)(q) of the Act? The proper approach to the interpretation of legislation has been described by Justice McLachlin, C. J., in the majority decision in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para.33, which says:

Much has been written about the interpretation of legislation...E.A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'

The above described approach to statutory interpretation is confirmed in the most recent edition of the text (*Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), p. 1).

[para 23] The objects of the Act include sharing health information to provide health services (s. 2(b)) and prescribing rules to enable the disclosure of health information (s. 2(c)). The ordinary meaning of section 35(1)(q) allows custodians who are ceasing to be custodians to wrap up affairs and transfer health records to successors. This enables individuals to continue to access health services. Records transferred from custodian to custodian are protected by the same privacy rules and safeguards. The restructuring of health services may require clinical programs, services or clinics and the relevant records/information to be transferred between custodians.

[para 24] A custodian may cease to provide a specific health service but continue to provide other health services. The object of section 35(1)(q) is to enable custodians to transfer relevant records/information to successor custodians. In my view a custodian may be "ceasing to be a custodian" for some purposes but not entirely cease to be a custodian. To interpret this provision otherwise would create an absurdity and preclude custodians from transferring records/information for specific programs or services, for example between regional health authorities.

[para 25] I find that the third criteria of section 35(1)(q) is met as the AMHB was transferring the records/information as a result of ceasing to be a custodian. As all

three criteria of section 35(1)(q) are satisfied, I find that the Custodian made the disclosure of diagnostic, treatment and care information in accordance with the Act. As registration information can be disclosed for section 35(1) purposes, I find that the disclosure of registration information was made in accordance with section 36(a) of the Act.

C. Application of Other Sections of the Act

[para 26] As I have found that the Custodian made the disclosure in accordance with its authority under section 35(1)(q) and section 36(a), I do not find it necessary to consider whether the Custodian also had the authority to disclose the information under section 35(1)(a), section 35(1)(b) or section 35(1)(p) of the Act.

IV. ORDER

[para 27] In summary, I find that:

- ❑ The Custodian made the disclosure of the records/information in accordance with its authority under section 35(1)(q) of the Act to disclose diagnostic, treatment and care information to its successor custodian;
- ❑ The Custodian made the disclosure of the records/information in accordance with its authority under section 36(a) of the Act to disclose registration information to its successor custodian; and
- ❑ I do not find it necessary to consider whether the Custodian also had the authority to disclose the health records/information under sections 35(1)(a), 35(1)(b) and 35(1)(p) of the Act.

[para 28] As I have found that the Custodian has complied with the Act, there is no Order to be made.

Frank Work, Q. C.
Information and Privacy Commissioner