

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER H2007-002

January 31, 2008

#### DRUGSTORE PHARMACY, REAL CANADIAN SUPERSTORE

Case File Number H0940

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

**Summary:** The Drugstore Pharmacy at a Real Canadian Superstore (“Custodian” or “Pharmacy”) required photographic identification (“Photo ID”) before it would sell Exact ACET C&C, which is a Schedule 2 drug to the Complainant, for his wife. The Complainant provided a driver’s licence as Photo ID. The Pharmacy said that it viewed, but did not record, the photograph on the driver’s licence in any manner in a record.

The Complainant alleged that the Pharmacy collected health information in the form of the Photo ID in contravention of the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”). The Pharmacy said that the collection of Photo ID for the purpose of sale of this Schedule 2 drug is allowed under both HIA and PIPA. Schedule 2 drugs are non-prescription medications that are sold from “behind the counter” at a pharmacy under the direct supervision of a pharmacist.

The Adjudicator found that the Pharmacy viewed, but did not record, the Complainant’s Photo ID on the driver’s licence. The Adjudicator found that the Complainant verbally provided his first and last name, which the Pharmacy entered onto a spreadsheet (which is *not* at issue). She found that the Pharmacy did not “collect” or “record” any other information about the Complainant from the driver’s licence.

For the first time, the issue of whether unrecorded “information” can be “collected” under HIA is considered in an Order. The Adjudicator found that the Pharmacy “collected” the Photo ID when the Pharmacy viewed the photograph on the driver’s licence, although the Pharmacy did not subsequently record that information in a record. Therefore, the Adjudicator found that unrecorded “information” *can* be “collected” under HIA.

The Adjudicator found that the Photo ID is “information” described in section 1(1)(i), 1(1)(o) or 1(1)(u) of HIA that is unrecorded. Unrecorded information is expressly excluded from the definition of “diagnostic, treatment and care information” in section 1(1)(i) of HIA and from the definition of “registration information” in section 1(1)(u) of HIA. However, she found that non-recorded “information” about health *does* fall under HIA.

Due to the finding that the Photo ID is “information” described in section 1(1)(i), 1(1)(o) or 1(1)(u) of HIA that is unrecorded, rather than recorded “health information”, the Adjudicator found that there is no “health information” to consider under section 20 of HIA. As there is no “health information”, the collection of Photo ID could not contravene section 20 of HIA. Therefore, she found that the Pharmacy did not contravene section 20 of HIA when collecting the Photo ID.

The Adjudicator found that sections 29 and 44 of HIA did not apply to the Photo ID as the issue before the Inquiry is the authority to *collect* unrecorded information, whereas section 29 of HIA applies to *use* of unrecorded information and section 44 of HIA applies to *disclosure* of unrecorded information. The Complainant also alleged that the Pharmacy collected the Photo ID in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“PIPA”).

The Inquiry was held concurrently with an inquiry for Case File Number P0768 under PIPA, which involved the Pharmacy and the same Applicant and resulted in Order P2007-015.

**Authorities Cited:** Alberta Health and Wellness, *Health Information Act: Guidelines and Practices Manual*, Alberta, 2006; C. DeWitt, *Privileged Communications Between Physician and Patient*, Springfield, Ill.: C.C. Thomas, 1958; Katherine Barber, Ed., *Canadian Oxford Dictionary*, 2<sup>nd</sup> ed., Oxford University Press, 2004; Office of the Privacy Commissioner of Canada, *Identity, Privacy and the Need of Others to Know Who You Are: A Discussion Paper on Identity Issues*, September 2007; Office of the Privacy Commissioner of Canada, *Guidelines for Identification and Authentication*, October 2006; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed., Markham Ontario: Butterworths, 2002.

**Cases Cited:** *McInerney v. Macdonald* (1992) 93 D.L.R. (4<sup>th</sup>) 415 (SCC).

**Investigation Reports Cited:** HIA: H2006-IR-001, H2002-IR-002.

**Orders Cited:** AB: HIA: H2007-006, H2007-004, H2007-001, H2006-002, F2006-021 & H2006-001, H2005-007, H2005-006, F2005-017 & H2005-001, H2004-004, H2004-002, F2004-005 & H2004-001, H2003-002; PIPA: P2007-015.

**Statutes Cited:** AB: *Alberta Health Care Insurance Act*, R.S.A. 1980, c. A-24, s. 13; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 1(1), 1(1)(d), 1(1)(f), 1(1)(f)(x), 1(1)(f)(xi), 1(1)(i), 1(1)(k), 1(1)(k)(i), 1(1)(k)(iii), 1(1)(m), 1(1)(m)(ii), 1(1)(p), 1(1)(t), 1(1)(u), 1(1)(u)(i), 2(a), 2(b), 2(c), 7, 8, 13, 13(6)(a), 20, 29, 44, 48, 56(6), 80, 80(3)(e), 80(3)(f), 107; *Health Information Regulation*, A.R. 70/2001 (“HIA Reg.”), ss. 3, 3(a), 3(a)(iii), 3(a)(iv); *Hospitals Act*, R.S.A. 1980, c. H-11, s. 40; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10; *Health Professions Act*, R.S.A. 2000, c. H-7, ss. 1(1)(m), 1(1)(aa), 1(1)(ll); Schedule 19, s. 3(d); *Mental Health Act*, S.A. 1988, c. M-13.1, s. 17; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(k); *Pharmacy and Drug Act*, R.S.A. 2000, c. P-13, ss. 1(1)(aa.1), 1(1)(m), 1(1)(n), 1(1)(r), 19(a); BC: *Personal Information Protection Act*, S.B.C. 2003, c. 63, s. 1; FED: *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 2(1); MAN: *The Personal Health Information Act*, S.M. 1997, c. P33.5, s. 1(1); ONT: *Personal Health Information Act*, S.O. 2004, c. 3, Schedule A, ss. 2, 4(1); SK: *The Health Information Protection Act*, S.S. 1999, c. H-0.021, ss. 2(b), 2(m).

## I. BACKGROUND

[para 1] The Drugstore Pharmacy at a Real Canadian Superstore (“Custodian” or “Pharmacy”) required photographic identification (“Photo ID”) before it would sell Exact ACET C&C, which is a Schedule 2 drug to the Complainant, for his wife. The Complainant provided a driver’s licence as Photo ID. The Pharmacy says that it viewed, but did not record, the photograph on the driver’s licence in any manner in a record.

[para 2] The Complainant alleged that the Pharmacy collected health information in the form of the Photo ID in contravention of the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”). The Pharmacy said that the collection of Photo ID for the purpose of sale of this Schedule 2 drug is allowed under both HIA and PIPA. Schedule 2 drugs are non-prescription medications that are sold from “behind the counter” at a pharmacy under the direct supervision of a pharmacist.

[para 3] As the matter was not resolved by mediation, it was set down for a written inquiry (the “Inquiry”). The Information and Privacy Commissioner, Frank Work, Q.C. (the “Commissioner”), delegated me to hear the Inquiry under HIA. At the Inquiry the parties provided written initial and written rebuttal submissions that were exchanged between the parties.

[para 4] The Complainant also alleged that the Pharmacy collected personal information in the form of Photo ID in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“PIPA”). The Inquiry was held concurrently with an inquiry for Case File Number P0768 under PIPA, which involved the Pharmacy and the same Applicant and resulted in Order P2007-015. The parties provided the same written submissions for both inquiries.

## II. RECORDS AT ISSUE

[para 5] There are no records at issue in the usual sense, as the Inquiry pertains to authority to collect rather than access to information in a record. The information at issue is viewing Photo ID on a driver’s licence. The Complainant also verbally provided his first and last name, which the Pharmacy recorded onto a computer spreadsheet (which is *not* at issue).

## III. ISSUES

[para 6] In order for section 20 of HIA to apply there must be a “custodian”, a “collection”, “individually identifying” information and “health information”. For that reason, I have added the following preliminary question to the Inquiry:

ISSUE A: Did a “custodian” “collect” “individually identifying” “health information”, as these terms are defined in HIA?

[para 7] If I find that the answer to the above question is “yes”, I will decide the following issue, which is set out in the Notice of Inquiry:

ISSUE B: Did the Custodian collect the Photo ID in contravention of section 20 of HIA (collection of health information allowed in specified circumstances)?

[para 8] The references to the “Applicant” in the Notice of Inquiry are to be read as references to the “Complainant” in this Order. In this Order, the words “collects”, “collected” and “collection” have a corresponding meaning to “collect”, which is a defined term in HIA.

#### **IV. FACTS, EVIDENCE AND ARGUMENT**

[para 9] The parties agree that the Complainant verbally provided first and last name and the Pharmacy entered that information onto a computer spreadsheet, which is *not* at issue. However, the parties disagree about whether any additional information was collected or recorded. The Complainant says that the Pharmacy took temporary possession of the driver’s licence.

[para 10] The Complainant says that this shows the Pharmacy collected and recorded further information from the driver’s licence. In contrast, the Pharmacy says that it viewed, but did not record, the Photo ID on the driver’s licence. The Pharmacy says it did not collect or record any other information about the Complainant including any other information from the driver’s licence.

[para 11] In its written initial submission, the Pharmacy provided an example of the type of information that it gathers from all purchasers of Schedule 2 drugs. The headings for the columns on the Drugstore Pharmacy spreadsheet are date, surname, first name, drug, quant (“quantity”) and initials.

[para 12] The Pharmacy provided a copy of a letter written to the Complainant from the Privacy and Ethics Officer of Loblaw Companies Limited (legal entity for Real Canadian Superstore) in response to his complaint to the Pharmacy. The Complainant says that he first received this letter during the Inquiry, when it was provided to him in the Pharmacy’s written rebuttal submission. The letter says:

As a result of your letter we did immediately undertake an investigation into your complaint. [Name of individual] our VP of Pharmacy Operations oversaw this investigation. As a result we acknowledge a customer service error on our part. As you have correctly stated in your letter, there is a requirement by the College of Pharmacists in Alberta to ensure a pharmacist tracks the sale of this product and restricts the sale of this product if necessary. In your case the pharmacist did correctly require that you to [sic] provide photo identification. We can confirm based on the results of our investigation that only your name was recorded into our prescription filling system and that no additional personal information was recorded.

## V. FINDING OF FACT

[para 13] I accept the submissions of the parties that the Complainant verbally provided first and last name, which the Pharmacy recorded on the computer spreadsheet under its standard protocol for purchasers of this Schedule 2 drug (which information is *not* at issue). I find that the Pharmacy required the Complainant to provide Photo ID for the purpose of verifying the Complainant's identity as a prospective purchaser of Exact ACET C&C (also known as TYLENOL (acetaminophen) with Codeine), which he was purchasing for his wife.

[para 14] The response letter states that an investigation was "immediately" undertaken after the complaint was received. The Complainant's letter of complaint is dated four days after the August 25, 2005 incident. The response letter says that the investigation was overseen by the Vice President of Pharmacy Operations of Loblaw Companies Limited. The date on the response letter is less than two months after the date of the incident that gave rise to the complaint.

[para 15] The Pharmacy says that the original spreadsheet with the Complainant's first and last name was destroyed in the ordinary course of business. In support of its position regarding the information recorded about the Complainant, the Pharmacy provided a copy of a redacted spreadsheet showing its standard record keeping practices. First name and surname are the only column headings on the spreadsheet for individually identifying information about purchasers of Schedule 2 drugs.

[para 16] At the time of the investigation, the investigator had access to the actual information that the Pharmacy recorded about the Complainant. The investigation finding said that the Pharmacy required Photo ID, but "only your name was recorded into our prescription filling system and that no additional personal information was recorded". The statements of fact, evidence and argument provided by the Pharmacy are consistent on this point.

[para 17] I agree with the Complainant that the Pharmacy does not explain why it took possession of the driver's licence for a time. The letter of response apologizes to the Complainant, but merely says there was a "customer service error". The letter says that steps have been taken to ensure that in future the Pharmacy provides an explanation to customers about the purpose of requiring Photo ID, and when asked, clearly verifies that no personal information other than name is being recorded.

[para 18] I disagree with the Complainant that taking possession of the driver's licence shows that the Pharmacy recorded information from the driver's licence. There is no evidence whatsoever before me to show that any information from the Complainant's driver's licence is written down, scanned, photocopied, recorded or stored in any fashion in a record by the Pharmacy.

[para 19] The Pharmacy provided some evidence to show that the Complainant's Photo ID was only viewed for the purpose of verifying the purchaser's identity at the point of sale, and that neither the Photo ID itself nor any other information from the

driver's licence such as the driver's licence number was recorded in any fashion. These factors point towards a finding that the Pharmacy viewed the Photo ID, but did not record any information in a record, except for first and last name.

[para 20] I find that the Complainant verbally provided first and last name, which the Pharmacy recorded on the spreadsheet (which is *not* at issue). I also find that the Pharmacy viewed the Complainant's Photo ID on the driver's licence, but did not subsequently record the information in a record. I find that except for name (which is *not* at issue), no information about the Complainant was written, photographed, recorded or stored in any manner in a record.

## VI. DISCUSSION OF INQUIRY ISSUES

### ISSUE A: Did a "custodian" "collect" "individually identifying" "health information", as these terms are defined in HIA?

[para 21] I will begin by considering whether there is a "custodian", then whether there is "individually identifying" "health information" and then whether there is a "collection".

#### *Custodian*

[para 22] Section 1 of Part 1 (Introductory Matters) of HIA defines "custodian" as follows:

1(1)(f) "custodian" means

(x) a licensed pharmacy as defined in the *Pharmacy and Drug Act*,

(xi) a pharmacist as defined in the *Pharmacy and Drug Act*.

[para 23] Pharmacies and pharmacists have been considered as custodians in findings issued by the Office. Investigation Report ("IR") H2002-IR-002 found that a Medicine Shoppe in Calgary is a "licensed pharmacy" and the pharmacist employee is a "pharmacist", and therefore, custodians under sections 1(1)(f)(x) and 1(1)(f)(xi) of HIA.

[para 24] In Order H2005-002, the Commissioner found the Acadia Fairview Pharmacy is a custodian under section 1(1)(f)(x) of HIA. Investigation Report H2006-IR-001 pertained to a pharmacy that is located within the premises of a Wal-Mart Canada Corp. store in Edmonton, which is operated pursuant to a licence held by the Pharmacist Manager.

[para 25] The Pharmacy says that both the Pharmacy itself and the Pharmacist Manager are custodians under HIA. I accept the submission of the Pharmacy that it is a "licensed pharmacy", and thereby, a "custodian" under HIA. Therefore, the Pharmacy is a pharmacy with respect to which a licence is issued and thereby, a "licensed pharmacy" as defined in section 1(1)(m) of the *Pharmacy and Drug Act*. As the Pharmacy

is a “licensed pharmacy” under the *Pharmacy and Drug Act*, I find that the Pharmacy is a “custodian” under section 1(1)(f)(x) of HIA.

[para 26] The Pharmacy says that it is issued its licence through the Pharmacist Manager, who is a “clinical pharmacist” and the “licensee”. I accept the submission of the Pharmacy that the Pharmacist Manager is a “pharmacist” and the “licensee” for the Pharmacy. The Pharmacist Manager is a “pharmacist” as defined in section 1(1)(r) of the *Pharmacy and Drug Act* and an individual that is registered under the *Health Professions Act* as a “regulated member” under section 1(1)(aa.1) of the *Pharmacy and Drug Act* and section 1(1)(ll) of the *Health Professions Act*.

[para 27] As a “pharmacist” under section 1(1)(r) of the *Pharmacy and Drug Act*, the Pharmacist Manager holds a “practice permit” as defined in section 1(1)(aa) of the *Health Professions Act*. As a “licensee”, the Pharmacist Manager is a “clinical pharmacist” who holds a licence under section 1(1)(n) of the *Pharmacy and Drug Act*. The Pharmacist Manager is a “pharmacist” as defined in the *Pharmacy and Drug Act*. Therefore, I find that the Pharmacist Manager is a “custodian” as defined in section 1(1)(f)(xi) of HIA.

### ***Individually identifying***

[para 28] HIA says that “individually identifying” means:

1(1)(p) “individually identifying”, when used to describe health information, means that the identity of the individual who is the subject of the information can be readily ascertained from the information.

[para 29] The definition of “individually identifying” in section 1(1)(p) of HIA refers to “health information” and “information. The Office of the Privacy Commissioner (federal) says that “identity” is “how a person is known” (*Identity, Privacy and the Need of Others to Know Who You Are: A Discussion Paper on Identity Issues*, September 2007, p. 7), and describes the meaning of individual “identification” and “authentication” as follows:

The terms identification and authentication are frequently used interchangeably but in fact mean different things. Put very simply, identification involves a claim or statement of identity: “I am John Doe,” “I am the customer associated with this account,” etc. Authentication is a verification of that claim (Office of the Privacy Commissioner of Canada, *Guidelines for Identification and Authentication*, October 2006).

[para 30] Photo ID can verify an individual’s identity, such as a photograph on an identification card that can be compared with the actual physical appearance of the individual. Photo ID can be used in combination with other information such as name to verify or authenticate whether an individual is the person that they say they are. The Complainant’s name and photograph on the driver’s licence enabled the Pharmacy to verify whether the individual standing in the Pharmacy is the same named person who is pictured on the driver’s licence.

[para 31] In order for information to be “individually identifying” under section 1(1)(p) of HIA, the identity of the individual who is the subject of the information must be able to be “readily ascertained” from the information. In my view, the identity of the Complainant can be “readily ascertained” from the information, which consists of the Complainant’s Photo ID, in combination with name. Therefore, I find the information is “individually identifying” under section 1(1)(p) of HIA.

### *Health information*

[para 32] HIA says that “health information” includes:

1(1)(k) “health information” means any or all of the following:

- (i) diagnostic, treatment and care information;
- (iii) registration information.

[para 33] “Health information” includes “diagnostic, treatment and care information” and “registration information”, as follows:

1(1)(i) “diagnostic, treatment and care information” means information about any of the following:

- (ii) a health service provided to an individual;
- (iv) a drug as defined in the *Pharmacy and Drug Act* provided to an individual;

and includes any other information about an 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.

1(1)(u) “registration information” means information relating to an individual that falls within the following general categories and is more specifically described in the regulations:

- (i) demographic information

but does not include information that is not written, photographed, recorded or stored in some manner in a record.

[para 34] HIA says that “health service” includes:

1(1)(m) “health service” means a service that is provided to an individual by a pharmacist engaging in the practice of pharmacy as defined in the *Pharmacy and Drug Act* regardless of how the service is paid for.

[para 35] The *Health Information Regulation*, A.R. 70/2001 (“HIA Reg.”) under HIA, says that “registration information” includes:

- 3 The following information, where applicable, relating to an individual is registration information for the purposes of section 1(1)(u) of the Act:

- (a) demographic information, including the following:

- (iii) photograph or electronic image of the individual's face for identification purposes.

[para 36] "Health information", in relation to a pharmacy, has been considered in findings issued by the Office. Investigation Report ("IR") H2002-IR-002 found that a computer print out in a pharmacy of the Complainant's prescription drug history is "health information" under HIA. The print out included the Complainant's name and address, prescription number, drug name, drug strength and dosage, manufacture identification code, drug identification number, refills, doctor's name, address and phone number, quantity, date filled and prescription price.

[para 37] In Order H2005-002, the Commissioner found that the applicant's father's medical prescription records were "health information" under HIA. Investigation Report H2006-IR-001 pertained to an individual who wished to buy Humulin N, a brand of insulin, which is a Schedule 2 drug. In that IR, the prospective purchaser's name, address, date of birth, phone number, allergies and medical conditions was the "health information" that was requested, but not provided, under HIA.

[para 38] HIA says that a photograph of an individual is a type of "registration information" and thereby, "health information". Section 3(a)(iii) of the HIA Reg. says that a photograph or electronic image of an individual's face for identification purposes is demographic information. Demographic information is listed as a type of "registration information" in section 3(a) of the HIA Reg. and section 1(1)(u)(i) of HIA. The definition of "health information" in section 1(1)(k) of HIA includes "registration information".

*Recorded in a record*

[para 39] In this case, in order for there to be "health information" under section 1(1)(k) of HIA, there must either be "diagnostic, treatment and care information" under section 1(1)(i) of HIA or "registration information" under section 1(1)(u) of HIA. These definitions both say that the information must be recorded in a record, and that any information that is not written, photographed, recorded or stored in some manner in a record is expressly excluded from the definition.

[para 40] The Complainant says that the Pharmacy breached HIA by requiring Photo ID to purchase Exact ACET C&C. The Pharmacy argues that the Complainant's Photo ID is not "health information", saying the Photo ID is not "registration information" as defined under HIA. The Pharmacy says that because the Pharmacy did not record the Complainant's Photo ID in a record, the information is excluded from the definition of "registration information" in section 1(1)(u) of HIA, and therefore, the information cannot be "health information" in section 1(1)(k) of HIA.

[para 41] I said that the Pharmacy did not record the Complainant's Photo ID in a record. For that reason, I find that the Photo ID is not "registration information" as defined in section 1(1)(u), and therefore, is not "health information" under section 1(1)(k) of HIA. For the same reason, I find that the Complainant's Photo ID is not "diagnostic, treatment and care information" as defined in section 1(1)(i), and therefore, is not "health information" under section 1(1)(k) of HIA.

#### *Health service*

[para 42] In order to fall within the definition of "diagnostic, treatment and care information" or "registration information" under HIA, and therefore, to fall within the definition of "health information" under section 1(1)(k) of HIA, the information must not only be recorded in a record but must also pertain to a "health service" that is being "provided to an individual." "Health service" is defined to mean "a service that is provided to an individual" under section 1(1)(m) of HIA.

[para 43] The definition of "diagnostic, treatment and care information" arises in the context of an individual who is receiving a "health service" under HIA. Orders issued under HIA have taken a broad view of the scope of the "diagnostic, treatment and care information" that falls within the definition of "health information", but have consistently said that the information must be about an individual who is receiving a health service (Orders F2004-005 & H2004-001, paras 21-76).

[para 44] HIA says that "diagnostic, treatment and care information" means information about the health of an individual, a health service provided to an individual, a drug provided to an individual, a health care aid, device, product, equipment or other item provided to an individual, the amount of a benefit paid or payable in respect of a health service provided to an individual *and includes* any other information about an individual that is collected when a "health service is provided" to the individual (section 1(1)(i)).

[para 45] The definition of "registration information" also arises in the context of an individual who is receiving a "health service" under HIA. For example, "registration information" *means* information "relating to an individual" such as an individual's name, personal health number or unique identification number that is used to identify the individual as eligible for, or as a recipient of, a health service (HIA section 1(1)(u)(i) and HIA Reg. section 3(a)(iv)) and information about a photograph or electronic image of the individual's face for identification purposes (HIA Reg., section 3(a)(iii)).

[para 46] A "health service" is a service that is provided to an individual by a pharmacist engaging in the "practice of pharmacy" as defined in the *Pharmacy and Drug Act*, regardless of how the service is paid for (section 1(1)(m)(ii) of HIA). Section 1(1)(u) of the *Pharmacy and Drug Act* says that the "practice of pharmacy" is the scope of practice set out in section 3 of Schedule 19 of the *Health Professions Act*.

[para 47] The *Health Professions Act* says that pharmacists are engaged in the “practice of pharmacy” when providing non-prescription drugs (section 3(d) of Schedule 19). As a pharmacist is providing a non-prescription drug, I find that the pharmacist is engaged in the “practice of pharmacy” as defined in the *Pharmacy and Drug Act*. As the sale of a drug falls within the “practice of pharmacy”, this means that a pharmacist in this case is providing a “health service” as defined in HIA.

[para 48] This case relates to the sale of a Schedule 2 drug, which falls within the definition of a “health service” in section 1(1)(m)(ii) of HIA. Therefore, I find that the viewing of the Photo ID pertained to an individual receiving a “health service” as defined under section 1(1)(m) of HIA.

### ***Collection***

[para 49] “Collect” and “record” are defined in HIA as:

1(1)(d) “collect” means to gather, acquire, receive or obtain health information.

1(1)(t) “record” means a record of health information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.

[para 50] The question of whether “collect” can pertain to information that is not recorded in a “record”, that is, to unrecorded information has not yet been addressed in an Order issued under HIA. The facts of this case give rise to the issue of whether a custodian can “collect” unrecorded information under HIA. In particular, did the Pharmacy “collect” Photo ID when viewing the photograph on the driver’s licence, even when the information was not subsequently recorded in a record?

[para 51] On the one hand, the HIA definition of “collect” in section 1(1)(d) refers to “health information”, which is a defined term that expressly excludes unrecorded information. This wording in this definition could be interpreted to mean that under HIA a custodian can only “collect” “health information”, which is recorded information. On the other hand, sections 29 and 44 in HIA expressly refer to custodians that “collect” unrecorded “information”. How are these seemingly contradictory provisions in HIA to be reconciled?

[para 52] Sections 29 and 44 of HIA read:

29 A custodian that collects information described in section 1(1)(i), (o) or (u) that is not written, photographed, recorded or stored in some manner in a record may use the information only for the purpose for which the information was provided to the custodian.

44 A custodian that collects information described in section 1(1)(i), (o) or (u) that is not written, photographed, recorded or stored in some manner in a record may disclose the information only for the purpose for which the information was provided to the custodian.

### *Approach to interpretation*

[para 53] The preferred approach to the interpretation of legislation is the “modern principle”, consistently adopted by the Supreme Court of Canada. The “modern principle” says I must read the words in an enactment “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” (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed., Markham Ontario: Butterworths, 2002, p. 1).

[para 54] The “modern principle” is to be applied in conjunction with the *Interpretation Act*, R.S.A. 2000, c. I-8 (“*Interpretation Act*”), which says “[a]n enactment shall be construed as being remedial, and shall be given the fair large and liberal construction and interpretation that best ensures the attainment of its objects” (section 10) (Orders H2006-002 (paras 27-39), F2006-021 & H2006-001 (paras 45-62), F2005-017 & H2005-001 (paras 25-26), F2004-005 & H2004-001 (paras 46-52) and H2004-002 (paras 50-51)).

### *Scheme and objects*

[para 55] I must read the words in harmony with the scheme and objects of HIA. It is presumed that the provisions of legislation are meant to work together as parts of a functioning whole. The purposes of HIA are set out in Part I and include to: establish strong and effective mechanisms to protect the privacy of individuals with respect to health information and to protect the confidentiality of that information (section 2(a)), enable health information to be shared and accessed to provide health services and to manage the health system (section 2(b)) and prescribe rules for collection, use and disclosure of health information (section 2(c)). HIA protects the confidentiality of “information.”

[para 56] Most of the provisions in HIA pertain to recorded information. For example, Part 2 of HIA governs access to a “record” (sections 7 and 8) and correction or amendment of “health information” (section 13). Most of the collection, use and disclosure rules in Part 3, Part 4, Part 5 and Part 6 of HIA apply to “health information”. Most of the powers and offences in HIA apply to “health information” or to a “record” (for example, orders to stop collecting, using or disclosing and to destroy “health information” (sections 80(3)(e) and 80(3)(f) of Part 7, section 107 of Part 8). Although some HIA powers are not appropriate for unrecorded information, not all powers are appropriate for recorded information either.

[para 57] I must consider the meaning of the words in the entirety of HIA. Even though there are definitions that pertain to most of HIA, there are some exceptions. For example, in most of HIA “health information” means any or all of “diagnostic, treatment and care information”, “registration information” and “health services provider information” (section 1(1)(k)). However in section 48 of HIA, “health information” has a different meaning and does not include one category of health information. Similarly, “record” means only recorded information in section 1(1)(t), but “document” in section 56(6) means a number of “materials or things” including photograph or film, “regardless of physical form or characteristics”.

[para 58] Some parts of HIA explicitly pertain to unrecorded information. The definitions of a “record” and the three categories of “health information” under HIA do not include “information that is not written, photographed, recorded or stored in some manner in a record” (section 1(1)). A “document” in HIA exists regardless of physical form or characteristics. In my view, this is an indirect acknowledgement that there is information other than recorded information; that is, *there is* unrecorded information under HIA. Additionally, HIA explicitly addresses unrecorded information. For example, custodians “collect” “information” that is not written, photographed, recorded or stored in some manner in a record in sections 29 and 44.

[para 59] HIA contemplates information that originates in unrecorded form. For example, section 13(6)(a) of HIA pertains to “professional observation”. Orders issued from the Office say that “observation” means “a comment based on something one has seen, heard, or noticed, and the action or process of closely observing or monitoring” (Orders H2005-007 (para 54), H2005-006 (para 47), H2004-004 (para 19)). This HIA term reflects the significance of unrecorded information in the provision of health services, such as the observations made about an individual. For example, health services providers may hear about allergies, clinical symptoms and medical history, see physical health or disease conditions, feel skin temperature and smell alcohol on an individual.

#### *Intention of the Legislature*

[para 60] All of the enactments of a Legislature are to be read as a cohesive whole that is internally consistent. I must read the words in HIA in harmony with the intention of the Legislature. Although I have no direct evidence about the intention of the Legislature for whether a custodian can “collect” unrecorded information, excerpts from the guidelines published by Alberta Health and Wellness, which is the ministry responsible for HIA, state:

#### LIMITS ON THE USE OF NON-RECORDED HEALTH INFORMATION

While the Act applies primarily to health information that is written or otherwise recorded and stored, it also places a duty on custodians and their affiliates to protect the confidentiality of information that is not recorded.

“Confidentiality” implies a trust relationship between the person supplying the information and the individual or organization collecting it. The relationship is built on

the assurance that the information will only be used by or disclosed to authorized persons or to others with the individual's permission.

Section 29 states that a custodian that collects diagnostic, treatment and care information (as defined in section 1(1)(i)), health services provider information (as defined in section 1(1)(o)), or registration information (as defined in section 1(1)(u)) that is not written, recorded or stored in some manner in a record, may use the information only for the purpose for which the information was provided to the custodian.

This means that if a custodian or its affiliates collect or become aware of the above types of information related to an individual but the information is not recorded, it can still only be used for the purpose for which it was collected.

#### LIMITS ON THE DISCLOSURE OF NON-RECORDED HEALTH INFORMATION

Early knowledge of various types of health information by health professionals is often oral information (i.e. not written or recorded in any manner at the time the information is collected).

Section 44 states that a custodian who collects diagnostic, treatment and care information (as defined in section 1(1)(i)), health services provider information (as defined in section 1(1)(o)), or registration information (as defined in section 1(1)(u)) that is not written, recorded or stored in some manner in a record, may disclose the information only for the purpose for which the information was provided to the custodian.

This means that if a custodian or its affiliates collect or become aware of the above types of information related to an individual but the information is not recorded, it can still only be disclosed for the purpose for which it was collected (Alberta Health and Wellness, *Health Information Act: Guidelines and Practices Manual*, Alberta, 2006, pp. 155 and 170).

[para 61] The choice of a different word or term within a piece of legislation is a signal that the Legislature intended the different word or term to have a different meaning. Words and terms used in legislation are carefully chosen. In my view, if the Legislature was referring to "health information" throughout HIA, then it would have utilized the term that it had already defined, rather than "information".

[para 62] Therefore, the choice of words in HIA indicates that the Legislature intended "information" to mean something different from "health information". In my view, the Legislature intended "information" to mean unrecorded information about health and "health information" to mean recorded health information as discussed below.

#### *Evolving legal norms*

##### *Health sector legislation*

[para 63] I must consider evolving legal norms when interpreting HIA. HIA replaced confidentiality and privacy provisions in health sector statutes that previously

applied to unrecorded information. For example the *Alberta Health Care Insurance Act*, R.S.A. 1980, c. A-24, previously required persons to “preserve secrecy with respect to all matters that come to his knowledge in the course of his employment” and to protect “information” about health services provided to individuals (section 13).

[para 64] Similarly, the *Hospitals Act*, R.S.A. 1980, c. H-11 previously protected privacy and confidentiality of “information relating to the patient” (section 40). The *Mental Health Act*, S.A. 1988, c. M-13.1 historically protected the “information relating to a person receiving diagnostic and treatment services” (section 17). These provisions recognized that information about an individual’s health may be equally sensitive regardless of form; for example, whether an individual has AIDS. Legal remedies such as defamation legislation include both libel and slander, recognizing that verbal and written information may be equally harmful.

[para 65] Recent health sector legislation such as the *Pharmacy and Drug Act*, which came into effect on April 1, 2007, says that “records” includes electronic prescriptions and other information whether in written, photographic, magnetic, electronic or other form (section 19 (a)). The *Health Professions Act* says that “document” includes recorded information in written, photographic, magnetic, electronic or other form (section 1(1)(m)).

#### *Private sector privacy legislation*

[para 66] In contrast to HIA, the private sector privacy legislation that followed HIA in Alberta does not explicitly define “collect”. In contrast to HIA and FOIP, the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“PIPA”) defines “personal information” as information about an identifiable individual (section 1(k)). PIPA defines “record” as a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or any other form, but does not include a computer program or other mechanism that can produce a record (section 1(m)).

[para 67] Also in contrast to earlier privacy legislation in Alberta, PIPA does not limit the definition of “personal information” to recorded information. Similar to FOIP, the silence of PIPA in regard to the meaning of “collect” as a defined term has not been interpreted to mean that information or “personal information” cannot be collected. The definition of “personal information” is broadly framed and is not explicitly restricted to recorded information.

[para 68] Similar to PIPA, the British Columbia and federal private sector legislation do not define “collect”. Also similar to PIPA, the British Columbia and federal private sector legislation define “personal information” as information about an identifiable individual (PIPA, section 1(k); *Personal Information Protection Act*, S.B.C. 2003, c. 63 (“BC PIPA”), section 1; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”), section 2(1)).

[para 69] In my view, the evolving legal norms show a trend towards a broader scope in privacy legislation, as the more recent private sector legislation extends to

unrecorded information. These private sector statutes do not exclude unrecorded information from the definitions of “personal information” and “record”. These private sector statutes do not explicitly define “collect”, but have rules that pertain to collection of “personal information”.

#### *Health information privacy legislation*

[para 70] In contrast to HIA, the earlier health information privacy legislation in Manitoba does not define “collect” (*The Personal Health Information Act*, S.M. 1997, c. P33.5). However, the later legislation in Saskatchewan (*The Health Information Protection Act*, S.S. 1999, c. H-0.021) and in Ontario (*Personal Health Information Act*, S.O. 2004, c. 3, Schedule A) defines “collect” to mean to gather, obtain access to, acquire, receive or obtain personal health information from any source by any means (Saskatchewan, section 2(b); Ontario, section 2).

[para 71] The health information legislation in Manitoba defines “personal health information” as recorded information about an identifiable individual (*The Personal Health Information Act*, section 1(1)). In contrast to HIA, Saskatchewan says that “personal health information” is information with respect to an individual (*The Health Information Protection Act*, section 2(m)). Ontario says that “personal health information” is identifying information about an individual in oral or recorded form (*Personal Health Information Act*, section 4(1)).

[para 72] The information that falls within the definition of “personal health information” in the more recent legislation in Saskatchewan and Ontario is not limited to recorded information. Similarly, the meaning of “collect” under these statutes is not limited to recorded information. In my view, the evolving legislative norms evident in the privacy legislation as well as in the health privacy legislation show a trend towards a broader scope that includes unrecorded information. Additionally, the evolving legal norms indicate that “collected” is not the same thing as “recorded”.

#### *Common law*

[para 73] The common law cases refer to the codes of ethics of health professionals when addressing the duty of confidentiality. The duty of confidentiality in codes of ethics exists regardless of the form of the information. For example, an excerpt from the 4<sup>th</sup> century B.C. Hippocratic Oath, says:

Whatsoever things I see or hear concerning the life of man, in any attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep secret thereon, counting such things to be as sacred secrets (C. DeWitt, *Privileged Communications Between Physician and Patient*, Springfield, Ill.: C.C. Thomas, 1958, p. 23).

[para 74] Historically, the common law protected the confidentiality as well as the privacy of information about the health of individuals regardless of whether information

was in recorded or in unrecorded form. The common law recognizes the fiduciary relationship as the legal foundation for the custodian duties that pertain to access and privacy, not whether the information is in recorded or in unrecorded form (for example, see *McInerney v. Macdonald* (1992) 93 D.L.R. (4<sup>th</sup>) 415 (SCC)). The legislation typically codifies the common law.

#### *HIA decisions*

[para 75] The issue of whether unrecorded information can be collected under HIA has not yet been explicitly addressed as an inquiry issue. However, some of the fact situations canvassed in previous Orders under HIA have involved the collection of unrecorded information. For example, in Order H2003-002, health information is collected during a telephone interview as part of conducting an investigation under the *Public Health Act* for Salmonella.

[para 76] The meaning of “collect” in the context of a pharmacy is considered under HIA in *Ping Yu, Pharmacist, Wal-Mart Canada Corp.*, Investigation Report H2006-IR-001 (the “Wal-Mart” case). Similar to the present fact situation, the Wal-Mart case involved the sale of a Schedule 2 “behind the counter” drug (Humulin N, a brand of Insulin) where a pharmacy requested a prospective purchaser to verbally provide name and other personal information. However, the purchaser refused to provide the requested information so there was no “collection” of information.

#### *Grammatical and ordinary sense*

##### *Collect*

[para 77] I must read the words in HIA in their grammatical and ordinary sense. HIA says that “collect” means to gather, acquire, receive or obtain “health information” (section 1(1)(d)). Section 1(1)(d) of HIA, when read in its grammatical sense, infers that the HIA definition of “collect” applies only to “health information” that is recorded information and therefore does not extend to unrecorded information. However, section 29 and 44 of HIA also contemplate that a custodian can “collect” unrecorded “information”, so in my view the definition of “collect” should be read to include unrecorded information.

[para 78] Section 1(1)(d) of HIA does not say that a custodian cannot “collect” “information” other than “health information”. Rather, this definition is silent about the meaning of “collect” as it relates to information other than “health information”. These meanings for the words pertaining to collect do *not* say that “collect” means that the information collected must be “recorded” or stored in some physical or permanent fashion.

### *Record*

[para 79] “Record” is defined in section 1(1)(t) of HIA to include a “record of health information in any form” that includes “any other information that is written, photographed, recorded or stored in any manner”. In contrast, “document” in section 56(6) of HIA includes “any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, videotape, machine readable record or other material or thing, *regardless of physical form or characteristics*”.

[para 80] “Record” used as a verb, means “set down in writing or some other permanent form for later reference, esp. as an official record; convert (sound, a broadcast, etc.) into permanent form for later reproduction; establish or constitute a historical or other record of” (*Ibid.*, p. 1292). “Record” used as a noun, is “a piece of evidence or information constituting an (esp. official) account of something that has occurred, been said, etc.; document preserving this; the state of being set down or preserved in writing or some other permanent form” (*Ibid.*, p. 1292).

### *Information*

[para 81] In contrast to “record” and “health information”, HIA does not define “information”. The ordinary dictionary meaning of “information” is “something told; knowledge” (*Ibid.*, p. 775). In my view the dictionary definition that “information” merely means knowledge rather than also recording in a record, is a definition that is consistent with the provisions that contemplate custodians collecting unrecorded information under sections 29 and 44 of HIA.

[para 82] The dictionary definition is consistent with the above-described interpretation under FOIP that “information” is a broader concept than “personal information” or “record” and includes unrecorded information and any known information. The dictionary definition of “information” does *not* say that “information” means “recorded”.

### *Entire context*

[para 83] When reading the words in HIA, I must consider the entire context such as the provision of health services in the health sector. Information could be collected but intentionally never recorded, such as transitory information needed only for a short time or information that is not relevant to the provision of health services. Information could be collected but inadvertently never recorded, such as when the health record is no longer available after a patient is transferred to another facility or when information is forgotten.

[para 84] It seems to me that information known or “collect(ed)” could be different from the information that is “recorded”. For example, information “collect(ed)” may be

recorded in different ways such as by videotape, audiotape, transcripts prepared from tapes or handwritten notations prepared from recollections of an event. The same information could be recorded differently. For example, the same individual's skin colour could be variously described as being "blue", "slightly blue" or "pinkish".

[para 85] More information could be collected than recorded. A record is not usually a verbatim transcript of all information collected, but rather a record is intended to be a summary of relevant information. These differences become more obvious in the virtual world, where entire programs are delivered by means of information technology and distance communications that are not necessarily recorded during the delivery of health services and where a relatively small amount of the total information gathered is recorded thereafter, such as in telephone health services.

[para 86] Alternatively, it is also possible for more information to be recorded than collected, such as when a health record contains entries that say that something happened that did not occur. For example, inadvertent charting errors could refer to the incorrect side of the body (left versus right) and entries could be recorded in or filed in the wrong health record.

[para 87] The activities of "collect" and "recorded" could be separated in time or alternatively, could occur simultaneously such as in a videotape recording. Recording typically occurs after health services are provided (for example, hand notes or computer entries made after a videoconference; dictation of diagnostic imaging findings after an x-ray procedure that is later transcribed into typewritten form).

[para 88] Occasionally, there are lengthy delays before the information collected is recorded, such as late entries. In the health sector extensive amounts of unrecorded information may be used and disclosed that is never subsequently recorded, such as in medical emergencies. It does not make sense that unrecorded information could be used and disclosed in the provision of health services, but cannot be collected.

[para 89] The vast majority of the information that is eventually recorded as "health information" originates in unrecorded form. Information recorded in laboratory and diagnostic imaging reports and in pharmacy, physician and hospital records is largely derived from information in unrecorded form such as genetic information and biosamples.

[para 90] If information in unrecorded form cannot be "collect(ed)" under HIA, then much of the information that currently exists in health records could never be collected to go on to become "health information". If information in unrecorded form cannot be collected under HIA then information provided verbally, such as an individual's name, could not be collected and subsequently recorded.

*Fair, large and liberal construction*

[para 91] I must construe HIA as being remedial and give words the “fair large and liberal construction and interpretation that best ensures the attainment of its objects”. A literal or narrow interpretation of section 1(1)(d) of HIA would mean that only recorded “health information” could be “collected”. A liberal or broad interpretation of HIA would mean that other “information” about an individual’s health including unrecorded information could also be “collected”.

[para 92] In my view, the latter interpretation that unrecorded “information” can be “collected” construes HIA in a remedial fashion that best ensures the attainment of its objects. This approach would have the effect of continuing to provide some measure of the protection that has historically been provided for the unrecorded information about an individual’s health.

*Conclusion*

[para 93] I accept the submissions of the parties that when the Pharmacy viewed the Photo ID, this was a “collection” of information. In contrast, although not part of the complaint, I accept that when the Pharmacy obtained the Complainant’s first and last name in verbal form, this was a “collection” of information about the Complainant.

[para 94] The finding that a custodian can “collect” unrecorded information under HIA is consistent with provisions such as sections 29 and 44, which pertain to custodians that “collect” information that is *not* written, photographed, recorded or stored in some manner in a record. Section 29 and section 44 of HIA refer to “information” rather than to “health information.”

**ISSUE B: Did the Custodian collect the Photo ID in contravention of section 20 of HIA (collection of health information allowed in specified circumstances)?**

[para 95] Section 20 under Part 3 (Collection of Health Information) of HIA says:

20 A custodian may collect individually identifying health information

(a) if the collection of that information is expressly authorized by an enactment of Alberta or Canada, or

(b) if that information relates directly to and is necessary to enable the custodian to carry out a purpose that is authorized under section 27.

[para 96] I said that viewing the Photo ID is not a collection of “health information” under section 1(1)(k) of HIA. Therefore, there is no “health information” to be considered under section 20 of HIA. Consequently, I find that the Pharmacy did not collect the Photo ID in contravention of section 20 of HIA.

[para 97] Sections 29 and 44 of HIA pertain to information that would be “health information” as defined, except that the information is not written, photographed, recorded or stored in some manner in a record. I said that the Photo ID is not “health information” because the information is unrecorded. However, the Photo ID would *otherwise be* health information except that it is not recorded. In my view, the Photo ID is “information” that falls under sections 29 and 44 of HIA.

[para 98] Sections 29 and 44 of HIA pertain to *use* and *disclosure* of non-recorded information. On the facts of this case, there is *use* of unrecorded information as the Pharmacy used the Photo ID information to verify or authenticate the identity of the Complainant, which is the purpose for which the information was collected. However, sections 29 and 44 do not relate to the complaint that is before the Inquiry because the complaint pertains only to *collection*.

[para 99] For these reasons, I am of the view that the unrecorded Photo ID is “information” that falls under HIA. Although there are not many rules that apply to unrecorded “information” under HIA, there are still some rules that apply. The existence of some rules in HIA that apply to unrecorded “information” means that there is unrecorded “information” under HIA.

## VII. ORDER

[para 100] I make the following Order under section 80 of HIA:

- I find that:
  - Issue A: The “Custodian” “collected” “individually identifying” “information” under HIA; and
  - Issue B: The Custodian did not collect the Photo ID in contravention of section 20 of HIA (collection of health information allowed in specified circumstances).

Noela Inions, Q. C.  
Adjudicator