

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

**ORDER H2007-005
ORDER P2007-013**

March 25, 2008

**ALBERTA HEALTH AND WELLNESS
NOR-DON COLLECTION NETWORK**

Case File Numbers H1109, P0360

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that Nor-Don Collection Network (Nor-Don) had disclosed his health information to his spouse contrary to the *Health Information Act* (HIA) during a telephone call. In the alternative, he complained that Nor-Don had disclosed his personal information to his spouse contrary to the *Personal Information Protection Act* (PIPA). He also complained that Alberta Health and Wellness disclosed his health information to Nor-Don and that Nor-Don had used this information in contravention of the *Health Information Act*.

The Adjudicator found that Alberta Health and Wellness had disclosed the Complainant's health information to Nor-Don in compliance with the Act, and that Nor-Don had used the information as permitted by the Act. The Adjudicator determined that the evidence did not establish that the Complainant's health information or personal information had been disclosed by Nor-Don.

Statutes Cited: *Health Information Act* c. H-5 ss. 1, 36, 73, 80, 104; *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss.1, 52; *Health Insurance Premiums Act* RSA 2000 c. H-6 s. 3

Regulation Cited: Health Information Regulation AR 70/2001 s.3

Authorities Cited: AB: P2006-004, P2006-008

I. BACKGROUND

[para 1] On January 5, 2006, the Complainant made a complaint to this office that Nor-Don had disclosed his personal information to his wife in a telephone conversation. He complained:

AB Health had no reason to give any information about my wife to this agency as it is a (personal) business matter...This is / was between myself, AB Health and now Nordon Collection Agency. It is a (personal) business matter and should not have anything to do with my spouse. Nordon Collection Agency discussed all this with my spouse which I feel is wrong.

[para 2] The Commissioner authorized mediation. However, as mediation was unsuccessful, the matter was scheduled for a written inquiry. Alberta Health and Wellness, Nor-Don and the Complainant all provided initial submissions. Alberta Health and Wellness and the Complainant also provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 3] There are no records at issue.

III. ISSUES

Issue A: Is Nor-Don an “affiliate” of Alberta Health and Wellness as this term is defined in section 1(1)(a) of the HIA?

Issue B: Did Nor-Don use and/or disclose “individually identifying health information” of the Complainant as these terms are defined in HIA?

Issue C: Did Nor-Don disclose the information with the Complainant’s consent, in accordance with section 34 of HIA?

Issue D: Did Nor-Don have authority to disclose “registration information” of the Complainant without consent, as provided by section 36 of HIA (disclosure permitted under specified circumstances)?

Issue E: Did Nor-Don disclose the information contrary to, or in compliance with, section 58 of HIA (disclosure in a limited manner)?

Issue F: If Nor-Don is not an affiliate of Alberta Health and Wellness, did Nor-Don use and/or disclose “personal information” of the Complainant as that term is defined in PIPA?

Issue G: Did Nor-Don use and/or disclose the information contrary to section 7(1) of PIPA?

Issue H: Did Nor-Don have the authority to use or disclose the information without consent, as permitted by sections 17 and 20 of PIPA?

Issue I: If Nor-Don did not have the authority to use or disclose the information without consent, did it obtain the Complainant’s consent in accordance with section 8 of the Act before using or disclosing the information?

Issue J: Did Nor-Don Collection Network use or disclose the information contrary to, or in compliance with, sections 16(1) and 19(1) of PIPA (use and disclosure for purposes that are reasonable)?

Issue K: Did Nor-Don Collection Network use or disclose the information contrary to, or in compliance with, sections 16(2) and 19(2) of PIPA (use and disclosure to the extent reasonable for meeting the purposes)?

IV. DISCUSSION OF ISSUES

Issue A: Is Nor-Don an “affiliate” of Alberta Health and Wellness as this term is defined in section 1(1)(a) of the HIA?

[para 4] Section 1(1)(a) of HIA defines an “affiliate”. It states:

1(1) In this Act,

- (a) “affiliate”, in relation to a custodian, includes*
 - (i) an individual employed by the custodian,*
 - (ii) a person who performs a service for the custodian as an appointee, volunteer or student or under a contract or agency relationship with the custodian, and*
 - (iii) a health services provider who has the right to admit and treat patients at a hospital as defined in the Hospitals Act, but does not include*
 - (iv) an operator as defined in the Ambulance Services Act, or*
 - (v) an agent as defined in the Health Insurance Premiums Act;*

[para 5] Nor-Don has entered a contract with Alberta Health and Wellness, a custodian under the HIA, to collect premiums. As a result, Nor-Don is an affiliate of Alberta Health and Wellness.

Issue B: Did Nor-Don use and/or disclose “individually identifying health information” of the Complainant as these terms are defined in HIA?

[para 6] In his rebuttal submissions, the Complainant clarified his complaint. He stated:

In response to the upcoming inquiry of the above case files I would like to respond to the inquiry and update the file.

I wrote to the Privacy Commissioner stating that Alberta Health had contravened my privacy by providing information to Nor-Don Collection Network Inc. about my personal business and information to this business. Also that Nor-Don contravened the Act in that they disclosed a personnel (sic) business matter to my spouse without my consent or authority.

I wrote to the Privacy Commissioner stating that in my opinion both agencies had violated the Privacy act in that Ab. Health had provided my personal information and that of my dependents to Nor-Don Collection agency and that Nor-Don contravened the Act in that it disclosed my personal business without my consent or authority.

I interpret the Complainant's complaint to be that Alberta Health and Wellness provided information about him to Nor-Don in contravention of HIA and that Nor-Don spoke to his spouse without first obtaining his consent. I will therefore consider whether Nor-Don improperly used health information disclosed by Alberta Health and Wellness, and whether Nor-Don disclosed the Complainant's health information to his spouse in contravention of HIA.

[para 7] Alberta Health and Wellness argues that under section 62 of HIA, any use of health information by an affiliate is considered a use by the custodian. Alberta Health and Wellness submits that Nor-Don did disclose the Complainant's health information to the Complainant's spouse, but that this disclosure was authorized by s. 36 of the Act.

[para 8] Nor-Don argues that it was authorized by HIA to use the information provided by Alberta Health and Wellness to contact the Complainant and the Complainant's spouse. It contends that there is no evidence to support that Nor-Don disclosed health information under HIA. Rather, it argues that the Complainant's spouse contacted a Nor-Don employee and was already apprised of the Complainant's account information.

[para 9] The Complainant contends that his personal business was used and disclosed by Nor-Don. As HIA does not address "personal business" but personally identifying health information, I will consider whether the Complainant's personally identifying health information was used or disclosed by Nor-Don in contravention of HIA.

Use

[para 10] The evidence of the parties establishes that Alberta Health and Wellness supplied Nor-Don with information about the Complainant's account and a debt that was owed. In addition, the evidence supports that Nor-Don used this information to leave a message on the Complainant's answering machine and later, to speak with the Complainant in person about his account. No evidence was submitted in relation to the contents of the message.

[para 11] To determine whether Nor-Don used the Complainant's health information contrary to HIA, it is important to review the definitions in HIA and the

Health Information Regulation. “Health information” is defined in section 1(1)(k) of HIA as:

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

- (i) diagnostic, treatment and care information;*
- (ii) health services provider information;*
- (iii) registration information;*

[para 12] “Registration information” is defined in section 1(1)(u) of HIA as:

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, including the individual’s personal health number;*
- (ii) location information;*
- (iii) telecommunications information;*
- (iv) residency information;*
- (v) health service eligibility information;*
- (vi) billing information,*

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

[para 13] “Billing information” is defined in section 3 of the Health Information Regulation as:

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

- (d) billing information, including the following:*
 - (i) information about amounts owed by the individual to the custodian;*
 - (ii) method of payment;*
 - (iii) the individual’s account number;*
 - (iv) if another person is liable for or will be billed for the amount owed by the individual, that person’s name and account number.*

[para 14] Section 36 of HIA explains when a custodian, such as Alberta Health and Wellness, may disclose registration information. This section states in part:

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

- (b) to any person for the purpose of collecting or processing a fine or debt owing by the individual to the Government of Alberta or to a custodian, or*

Consequently, Alberta Health and Wellness did not contravene HIA when it provided the Complainant's registration information to Nor-Don for the purposes of collecting a debt.

[para 15] Section 62(2) explains the relationship between custodians and affiliates. It states:

62(2) Any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection, use or disclosure by the custodian.

I have already found that Nor-Don is an affiliate of Alberta Health and Wellness under HIA. Section 62 makes any use of health information by an affiliate, such as registration information, a use by Alberta Health and Wellness. As the statute permits Alberta Health and Wellness to use and disclose registration information for the purpose of collecting a debt, Nor-Don is also permitted to use and disclose registration information for that purpose.

[para 16] For these reasons, I find that Nor-Don used registration information in compliance with HIA.

Disclosure

[para 17] HIA and PIPA are silent as to where the burden of proof rests for an inquiry into a complaint about the collection, use and disclosure of health or personal information. In Order P2006-008, the Commissioner discussed the burden of proof in complaints about collection, use and disclosure of personal information, both in relation to the *PIPA* and the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Commissioner said:

In *R. v. Stone* [1999] 2 S.C.R. 290, the Supreme Court of Canada cited Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* which contrasted the evidential burden with the legal or persuasive burden as follows:

The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also arises when there is a question as to whether sufficient evidence has been adduced to raise an issue for determination by the trier of fact. The legal burden of proof normally arises after the evidence has been completed and the question is whether the trier of fact has been persuaded with respect to the issue or case to the civil or criminal standard of proof. The legal burden, however, ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue.

The *Personal Information Protection Act* ("PIPA") like the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") is silent with regard to where the burden of proof rests for an inquiry into a complaint about the collection, use and disclosure of personal information. In Order P2005-001, I adopted the approach previously taken in Order 97-004 with regard to the FOIP Act that addressed the burden of proof issue and applied the following criteria:

- a) who raised the issue; and
- b) who is in the best position to meet the burden of proof

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act...

As stated by the Supreme Court of Canada in *R. v. Schwartz* [1988] 2 S.C.R. 443 at paragraph 38:

The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed.

As the Complainant has raised the initial issue as to the reasonableness of the Organization’s collection of personal information, it will be the Organization who will be best placed to demonstrate the reasonableness of such collection and the other issues raised in this inquiry. The Complainant has raised a *prima facie* case. The Organization is far better placed than the Complainant to meet the burden of proof with regard to the issues touching its commercial activities, the authority and reasonableness of its collection of personal information and the security and notification arrangements undertaken...

I do not envision complainants having a legal burden under the Act. The Complainant’s burden ends with having met the evidential burden, as discussed. The Organization then bears the evidential burden to demonstrate that its collection, use and disclosure of information is in accordance with the Act.

I believe that the Organization is concerned that I am placing a “reverse onus” on it to prove a negative, that is, to prove that it did not breach the Act. On the contrary, the burden is on an organization to show that it has the authority under the provisions of the Act to collect, use or disclose personal information. This is the same burden of proof that is on a public body under the FOIP Act and a custodian under the *Health Information Act*.

[para 18] As with PIPA and the FOIP Act, the individual initiating the complaint under HIA has the onus of pointing to evidence that suggests his or her health information has been collected, used, or disclosed. Once a complainant has met this evidential burden, the onus then shifts to the custodian to establish that its collection, use or disclosure of the complainant’s personal information was authorized by HIA.

[para 19] The Notice of Inquiry advises the parties that “neither party will have the burden of proof for Issues 1 and 2. However, the Commissioner asks that both parties provide submissions on the factual and legal questions in Issues 1 and 2.” As the Commissioner noted in Order P2006-008, the requirement to point to evidence relating to disclosure or use of information is not a burden of proof. The “evidential burden” as described in that order simply requires a complainant to make submissions on facts and law in relation to his or her issue, as set out in the Notice of Inquiry.

[para 20] In the present case, the Notice of Inquiry proposes that both parties make submissions regarding the factual and legal questions in Issues 1 and 2. To make submissions regarding the factual and legal questions, the Complainant could refer to the

evidence and to provisions of the statute to establish the basis for his complaint that Nor-Don disclosed his health information to his spouse.

[para 21] Nor-Don provided a letter written by the employee who spoke with the Complainant's spouse in support of its position that Nor-Don did not disclose the Complainant's health information.

[para 22] The Complainant introduced no evidence in relation to the information he complains was used or disclosed by Nor-Don, nor did he make arguments as to how he views HIA to apply to the facts of the case. In his submissions, he argues:

The second issue is that Nor-Don carried on a conversation with my spouse about my personal business matters without my knowledge or consent.

However, he provided no details as to what information he considers was disclosed. In his submissions, the Complainant did not point to any evidence that would lead me to conclude that his health information under the HIA had been used or disclosed by Nor-Don. The fact that the Complainant's spouse spoke with a representative from Nor-Don does not, in and of itself, establish that his health information has been used or disclosed.

[para 23] As noted above, the only evidence relating to the conversation between the Complainant's spouse and Nor-Don was supplied by Nor-Don. A statement by an employee of Nor-Don who spoke with the Complainant's spouse notes:

On December 15th 2005 I received a phone call from (the Complainant's spouse). She had received my message earlier in the day and wanted to call back and advise Nor-Don that Alberta Health and Wellness... was to be recalling the file from the office and cease collection activity. I asked the reasoning behind the file recall and (she) advised me that an error occurred with (the Complainant's) place of employment, as they were to be forwarding the funds to AHAW to cover the premiums. I advised (her) to have a group commencement form faxed to my office so we can close the file. (She) advised me the documents were already forwarded to AHAW. I advised (her) no notes were on file from AHAW until such time collection activity will continue, but I assured her we would close the file upon receipt of the group commencement form. (She) advised me she would look into it and call me back.

[para 24] The evidence does not establish that Nor-Don disclosed the Complainant's health information within the meaning of HIA. While the fact that a matter has been referred to collection is "billing information" within the definition in the Health Information Regulation, and therefore "health information" within the meaning of the Act, the evidence does not establish that Nor-Don disclosed this information to the Complainant's spouse. It is more likely, based on the evidence, that Nor-Don did not disclose billing information, but that the Complainant's spouse already had knowledge of the situation when she contacted Nor-Don.

[para 25] Even if Nor-Don had disclosed the Complainant's billing information, which I do not find, the billing information would also be the spouse's own billing information under section 3(d) of the Health Information Regulation, *supra*.

[para 26] Section 33 of HIA permits a custodian to disclose health information to the individual who is the subject of the information. It states:

33 A custodian may disclose individually identifying health information to the individual who is the subject of the information or to a person referred to in section 104(1)(c) to (i) who is acting on behalf of that individual.

[para 27] Section 3(d) of the Health Information Regulation and section 33 of HIA in combination allow individuals who are listed as dependents to have access to their billing information, even if another individual is liable for or billed for their coverage. In this way, individuals can insure that their accounts are kept up to date and that they have health care coverage, even though they are not liable under section 3 of the *Health Insurance Premiums Act* to pay premiums. A spouse who is listed as a dependent would not be entitled to billing information about his or her health coverage if this were not the case. The spouse in this scenario would not be able to determine whether his or her account was up to date, or to take steps to ensure that he or she had adequate health care coverage, or that dependent children had adequate coverage. Section 3(d)(iv) of the Regulation is intended to avoid this situation, by making the information regarding the person who is liable to pay bills, the billing information of the dependent, and therefore, the health information of the dependent.

[para 28] The evidence submitted by Alberta Health and Wellness and Nor-Don establishes that the Complainant's spouse was listed as an active spouse on the Complainant's AHCIP family account. Consequently, any disclosure of the Complainant's name and account number, and his employer's name and account number would be the spouse's billing information. However, as noted above, the evidence does not establish that Nor-Don disclosed billing information as that term is defined by HIA.

[para 29] Had I found that Nor-Don had disclosed the Complainant's billing information, I would have found that this disclosure was also permitted by section 36, as communication between Nor-Don and the Complainant's spouse was for the purpose of collecting a debt in the circumstances set out in section 36(b).

[para 30] As I have found that Nor-Don did not disclose or use the Complainant's health information, it is unnecessary to address issues C-E.

Issue F: If Nor-Don is not an affiliate of Alberta Health and Wellness, did Nor-Don use and/or disclose "personal information" of the Complainant as that term is defined in PIPA?

[para 31] Section 4 of PIPA states, in part:

4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.

4(3) This Act does not apply to the following:

(f) *health information as defined in the Health Information Act to which that Act applies;*

[para 32] PIPA could apply in the event that I found that the information discussed in the telephone conversation was the Complainant's personal information, but not the Complainant's health information. This is because Nor-Don is an organization within the meaning of PIPA, in addition to being an "affiliate" under HIA. If an organization is an "affiliate" under HIA, it does not necessarily mean that PIPA does not apply to the organization, although the issue, as stated by this office, appears to suggest that conclusion. Rather, the question of whether HIA or PIPA applies to an organization turns on the nature of the information collected, used or disclosed.

[para 33] "Personal information" is defined in section 1(k) of PIPA as:

1(k) "personal information" means information about an identifiable individual;

[para 34] In Order P2006-004, the Commissioner considered the meaning of "personal information about an identifiable individual" within the meaning of PIPA.

The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily "about" that person.

[para 35] The evidence establishes only that information about Alberta Health and Wellness, the Complainant's workplace, the Complainant's spouse, and Nor-Don were discussed during the telephone conversation. I am not satisfied that Nor-Don disclosed or used information about the Complainant within the meaning of PIPA. In addition, the Complainant has not pointed out any disclosures by Nor-Don taking place during the telephone call that he believes reveals his personal information.

[para 36] I find that the Complainant has not met the evidential burden to establish that Nor-Don used or disclosed his personal information. Consequently it is unnecessary to address issues G – K.

V. ORDER

Case File Number H1109

[para 37] I make this Order under section 80 of HIA:

[para 38] As I found that Nor-Don did not use or disclose the health information of the Complainant, there is no order that I may make.

Case File Number P0360

[para 39] I make this Order under section 52 of PIPA:

[para 40] As I found that Nor-Don did not use or disclose the personal information of the Complainant, there is no order that I may make.

Teresa Cunningham
Adjudicator