

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2021-13

December 20, 2021

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

Case File Number 008923

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint under the *Personal Information Protection Act* (PIPA) alleging the College of Physicians & Surgeons of Alberta (the Organization) contravened the Act. The Complainant alleges the Organization collected, used and disclosed his personal information in contravention of the Act. He also alleged that the Organization collected patient information without authority.

The Adjudicator found it was unclear that the billing codes used by the Complainant to bill for services constitute his personal information; however, if it is, the collection and use of that information was authorized. The Adjudicator made the same finding regarding a consultation letter authored by the Complainant.

The Adjudicator found that information about complaints made about the Complainant to the Organization constitute the Complainant's personal information. However, there was insufficient evidence to conclude that the Organization disclosed this information.

The Adjudicator found that the Organization was authorized to collect medical information of the Complainant's patients, for the purpose of conducting an investigation.

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 14, 17, 52, *Health Professions Act*, R.S.A. 2000, c. H-7, ss. 51.1, 56, 62, 63

Orders Cited: AB: Orders P2006-005, P2008-010, P2009-009, P2011-004, P2012-08, P2015-01, P2015-10, **Ont:** Orders PO-1933, PO-2225, PO-3617

Cases Cited: *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 (CanLII), *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673 (CanLII)

I. BACKGROUND

[para 1] The Complainant made a complaint under the *Personal Information Protection Act* (PIPA) alleging the College of Physicians & Surgeons of Alberta (the Organization) contravened the Act. The Complainant is a physician, and the Organization is the regulatory organization for physicians. The Complainant requested that the Commissioner investigate the complaint, and the matter has now proceeded to inquiry.

[para 2] The Complainant provided copies of communications between the Organization and the Complainant, which indicate that the Organization opened more than one investigation against the Complainant. Neither the Organization nor the Complainant have provided much detail or explanation of the various complaints or investigations, or how they relate to each other.

[para 3] From what I understand, the Organization received at least one complaint against the Complainant about inappropriate conduct while seeing a patient. In the course of the investigation into that complaint, in 2016 the Complainant signed an undertaking with the Organization to see only male patients. This complaint about the Complainant has moved to a hearing stage; the Organization's Hearing Tribunal has issued a Notice of Hearing, which states that the hearing will address complaints made by several patients. The hearing is set for 2022. Therefore, the proceedings related to this complaint about the Complainant's conduct have not been completed.

[para 4] The Complainant has alleged that the Organization collected medical information of his patients without authority. As I understand, the medical information relates to this matter to be heard by the Hearing Tribunal.

[para 5] The Complainant also alleges that the Organization used a consultation letter written by the Complainant on February 28, 2012, to initiate a complaint against the Complainant. The Complainant argues that this letter constitutes his personal information, and that the Organization used this information without authority. This consultation letter also appears to relate to this matter before the Hearing Tribunal.

[para 6] In 2018, the Organization initiated an investigation into whether the Complainant was compliant with his 2016 undertaking. The Complaint Director for the Organization reviewed the Complainant's billing records from December 24, 2016 to June 1, 2018. That investigation concluded in 2020, finding that the Complainant complied with his undertaking. The Complainant argues that this billing information constitutes his personal information, and that the Organization did not have authority to collect or use it for this complaint.

[para 7] The Complainant states that he received a copy of a chart note of another physician, which includes a note that a patient, who made a complaint to the Organization about the Complainant, had been told by the Organization that the Complainant had previously been the subject of a complaint. The Complainant states that this disclosure of his personal information was unauthorized.

[para 8] The Complainant also raised concerns that the Organization repeatedly requested that he provide consent for the Organization to collect information about him or his practice. These requests for consent relate to monitoring by the Organization of various practice permit conditions placed on the Complainant. It is not clear how these permit conditions relate to the other complaints discussed.

[para 9] The Complainant's complaint to this Office was initially made in 2017. Despite this, the records of communications between the Organization and Complainant, provided by the Complainant, are all dated 2018 or later. The communications contain patient-related records that pre-date 2017, and refer to actions that took place prior to 2018; however, I do not have copies of communications between the Organization and Complainant relating to complaints about the or investigations dated before 2018.

II. ISSUES

[para 10] The Notice of Inquiry, dated August 5, 2021, states the issues for inquiry as follows:

1. Are billing codes the Complainant's personal information as defined by section 1(1)(k) of PIPA?

If the answer to Issue 1 is yes, did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

In particular, did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 17 or 20 of PIPA?

2. Is a consultant letter, authored by the Complainant, personal information as defined by section 1(1)(k) of PIPA?

If the answer to Issue 2 is yes, did Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

In particular, did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 17 or 20 of PIPA?

3. Is the fact the Complainant was involved in other matters with the Organization, personal information as defined by section 1(1)(k) of PIPA?

If the answer to Issue 3 is yes, did Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

In particular, did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 17 or 20 of PIPA?

[para 11] As discussed above, the Complainant had raised concerns about the Organization's collection and use of medical information about his patients. By letter dated November 2, 2021, I added this issue to the inquiry.

[para 12] The Complainant had attached 18 pages of medical records to his complaint form submitted to this Office. In the Notice of Inquiry, I informed the Complainant:

Please note that the 18 pages of medical records attached to the Complainant's Request for Review/Complaint Form have been removed from the documents moving forward to inquiry (see enclosures). This is because these medical records contain sensitive personal health information of a third party that does not appear to relate to the issues for this inquiry. If the Complainant believes this information (or other information) to be relevant to the inquiry, he may submit this information with his initial submission, with an explanation as to its relevance.

[para 13] The Complainant provided some medical records with his initial submission; in most cases, patient names were removed.

III. DISCUSSION OF ISSUES

Preliminary issue – scope of inquiry

[para 14] In his request for inquiry, the Complainant detailed allegations and complaints beyond those determined to be within the scope of the investigation and which are outside the jurisdiction of the OIPC. For example, the Complainant asks:

If indeed the CPSA's actions are outside of your scope then an inquiry could be used to clarify that alternate legislation (such as abuse of public trust, intimidation, harassment, misuse of a computer, manufacture of evidence, and conspiracy) better applies. Your office could then request intervention by alternate authorities (for example, I believe the Elections Officer has so enrolled the RCMP in recent pre-election matters). You have made public appeals to other authorities in the past.

[para 15] The Complainant was informed the investigation is limited to the collection, use or disclosure of personal information under PIPA. This inquiry will not include a request for intervention from other authorities where the Complainant's concerns fall outside the jurisdiction of this Office.

[para 16] In his initial 2017 complaint to this Office, his request for inquiry, and his initial submission, the Complainant raises concerns about the Organization's collection and use of medical information of eight patients. This concern was not reflected in the issues set out in the

Notice of Inquiry. I informed the parties by letter dated November 2, 2021, that I was adding this issue to the inquiry, and asked the parties to make submissions on that issue.

[para 17] In his initial submission, the Complainant raised additional concerns about matters that occurred after the date of his request for inquiry (July 2019). Those concerns do not fall within the scope of this inquiry.

1. Are billing codes the Complainant’s personal information as defined by section 1(1)(k) of PIPA?

Applicable legislation and case law

[para 18] Personal information is defined in section 1(1)(k) of the Act as information about an identifiable individual. PIPA does not limit an organization’s ability to collect, use or disclose information that does not fall within the scope of ‘personal information’.

[para 19] Previous Orders of this Office have stated that information about individuals acting in a professional capacity (information about work duties) is not personal information within the meaning of the Act, unless it has a personal dimension. In Order P2006-005 the Commissioner stated (at para. 46-47, 50):

In Order P2006-004, I considered the meaning of “personal information about an individual” within the meaning of the Act:

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.

This reasoning applies equally to an individual’s work, which may be associated with an individual, but is not necessarily about the individual who performed the work.

...

I agree with the Organization’s position that the “work product” or records produced by an employee in the course of employment is generally not the personal information of the employee. Pipeline reports, asset allocation reports, client agreements, tapes of calls, customer satisfaction and referrals are records created by employees as a part of their employment duties. These records are not about the employee as an individual, but about the task at hand.

[para 20] In Order P2009-009, the Director of Adjudication considered whether the views of a psychologist, recorded while treating a patient, had a personal dimension. She found (at para. 26):

Much of the information in a psychologist’s treatment file is, in my view, the personal information of the person being treated. I recognize that parts of such a file consist of information related to the psychologist – their thoughts and actions relating to the therapeutic relationship

with the person being treated. However, I do not regard this as information “about” the psychologist. In the context of the Applicant’s treatment file, which records the Psychologist acting in her professional capacity, this information is not the Psychologist’s personal information. Numerous decisions of this office have held that records of a person’s “work product” are not “personal information” about them (unless there is something about the context which gives the information a personal dimension). Work product will often reflect the thought processes of its creator, yet in the present context it is more properly regarded as about the work than about the person doing it. In my view, the records in the treatment file form part of the “work product” of the Psychologist. The history of the therapy that they record is an important part of the therapy itself.

[para 21] Past Orders of this Office have also found that disciplinary situations will give the information a personal dimension such that it is not merely about the performance of work duties but is also personal information of the employee (see Orders P2012-08 at para. 19, P2015-01 at para. 12, P2015-10, at para. 15).

[para 22] Past Orders from the Ontario Information and Privacy Commissioner’s Office have considered whether physician billing information is the personal information of the physicians.

[para 23] In Order PO-1933 an access request was made for the names of physicians who inappropriately billed the system, as identified by a particular medical committee (the MRC). The request included information about the physicians, such as their place of practice, and amounts they inappropriately billed. The adjudicator concluded that the MRC’s review of physician’s billing was comparable to an internal investigation of an employee’s conduct. The adjudicator concluded:

In my view, the fact that the physician is identified by the MRC as having anomalous billings and then required to submit a random selection of charts for review is evidence that the physician’s billing practices are being called into question. Although a physician’s accounts may eventually be approved by the MRC, by invoking the review process, the MRC is signalling a concern that takes the situation outside the normal billings process. The physicians are no longer simply being reimbursed by OHIP for services rendered in the normal course. Instead, the physicians are being asked to defend the integrity of their billing histories which, in my view, is sufficient to bring this activity outside the parameters of regular professional capacity and within the scope of “personal information” for the purposes of the *Act*.

[para 24] In a later Ontario Order, Order PO-3617, an access request had been made for records about the physicians who billed the highest amounts to the provincial insurance plan, including the dollar amounts billed, medical specialty and names of the physicians.

[para 25] The adjudicator noted that past Orders of that Office, including Order PO-1933, had found that billing information of professionals other than physicians was not personal information. The adjudicator referred to a two-step test used by that Office in determining whether information in a business, professional or official context is about an “individual” and is therefore personal information, or whether it is information about a business, profession or office. The adjudicator noted that this test had not been applied in past Orders that discussed whether physician billing was personal information; the adjudicator referred to this as an anomaly that must be addressed (at para. 70).

[para 26] The two-step test was developed in Ontario Order PO-2225, which states:

Based on the principles expressed in these orders, the first question to ask in a case such as this is: “in what context do the names of the individuals appear”? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

...

The analysis does not end here. I must go on to ask: “is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[para 27] The adjudicator in Order PO-3617 applied this test to the records revealing the billing history of particular physicians. He concluded (at paras. 75-77, footnotes omitted):

In my view, the application of the first part of the two-step analysis in Order PO-2225 is relatively straightforward. The provision of medical services is a professional and/or business activity. Accordingly, I conclude that the act of submitting billings to OHIP and receiving remuneration for those medical services is in a business or professional context that is removed from the personal sphere. This is true whether or not the physician’s practice is carried on by a corporation, and whether or not it is a sole practice or a group of physicians providing services.

The next question to ask is whether disclosure of the names and specialties, when connected to the total annual OHIP fee payments to each physician, would reveal something that is inherently personal in nature.

Very compelling evidence in that regard is provided in the context of the argument that the information is not accurate or reliable because it presents a false picture of physicians’ incomes. The foundation of this argument is that the OHIP payment figures represent gross revenue, and are “inaccurate” because allowable business expenses such as office, personnel, lab, equipment, facility and/or hospital expenses have not been deducted. This argument is made by a significant number of affected parties. Payments that are subject to deductions for business expenses are clearly business information. Since it is not an accurate reflection of personal income, it does not reveal anything that is “inherently personal in nature.”

[para 28] This Order was upheld on judicial review by the Ontario Divisional Court, as well as the Ontario Court of Appeal (*Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673 (CanLII)). The latter Court approved the two-part test used in Order PO-3617.

[para 29] Both of the Ontario Orders cited above involve a response to an access request under Ontario’s *Freedom of Information and Protection of Privacy Act*. Specifically, they both address

whether records containing physician billing information is subject to an exception to access for personal information. In this case, the Complainant has argued that the Organization collected his personal information without authority under PIPA when it collected his billing information. Despite these differences, the question of whether physician billing is personal information is the same. I find the two-step test from the Ontario decisions to be helpful in this case.

Arguments of the parties

[para 30] The Complainant states (initial submission, at para. 20, footnotes omitted):

Billing records contain personal information of both the patient and service provider. The billing records includes the name of the patient, the Alberta Health Care number for the patient, the date of services, the diagnosis treatment code for billing and the name of the service provider. In this case, the relevant information is the name of the service provider include along with the diagnosis treatment undertaken by the doctor.

[para 31] The Complainant argues that his name and diagnosis treatment in the billing records has a personal dimension; he states “[t]here is nothing inherently more personal than the treatment a physician provides to their patients” (initial submission, at para. 23).

[para 32] The Complainant also cites past Orders finding that information about an individual who is the subject of disciplinary proceedings have a personal dimension. The Complainant cites the following from Order P2008-010 (at para. 31, footnote omitted):

However, if the information that is entered is a record or report of a disciplinary process, it does not come in pure form – it comes associated with personal information as well. Information in the database that reveals what was done by the officer but that at the same time reveals something that is personal to the officer – for example, the fact that a disciplinary proceeding was conducted and that particular conclusions were drawn, or that a penalty was imposed (which might speak to the conduct itself insofar as it shows how egregious the person who heard direct evidence saw it to be), has both non-personal and personal aspects which are inextricably interwoven. Since the personal information revealing what was done cannot be separated from the pure fact of what was done, such information must be regarded in totality as having a dual – non-personal as well as personal – character. A similar duality might exist in relation to an entry that both records what was done or allegedly done by an officer, and that has a personal aspect for some other reason, for example, that it was highly publicized.

[para 33] The Organization’s initial submission states:

Billing codes are a series of numbers associated with the many professional health services provided by physicians (and others); these codes are used by physicians when submitting their billing to Alberta Health for services provided. The billing codes are not specific to an individual physician. All physicians use the same billing codes. You cannot identify a physician by looking at the billing code(s).

Further, [the Complainant’s] affidavit and argument fails to consider the monitoring of practice conditions under Part 3 (with no investigative powers) and the investigation of conduct under Part 4 with the investigation powers in section 63.

Analysis

[para 34] In Order P2008-010, cited by the Complainant, the Director of Adjudication considered whether a law firm contravened PIPA in creating a database for the purpose of collecting and disseminating information about members of the EPS who had allegedly used force against individuals. The database included copies of court transcripts and decisions, newspaper articles, records obtained through access requests to public bodies, and so on. The Director of Adjudication found that while the information related to officers performing their job duties, some of the information in the database had a personal dimension such that PIPA applied to the collection, use and disclosure of that information. The Complainant quoted paragraph 31 of that Order in support of his arguments; however, the preceding paragraphs provide context to the conclusions in paragraph 31. The Director said (at paras. 28-31, 33):

Returning to the database, based on the Organization's description, it contains not only information about what officers did or allegedly did in the course of performing their employment duties. Insofar as the database contains *records or reports of disciplinary or criminal or civil proceeding* against officers and their outcomes, or related information, it also contains information about the consequences to officers that flowed from their actions. The latter, although also work-related, could fairly be said to be the personal information of the officers. However, as just discussed above, information as to how an officer discharged their work duties when it is to be used for the purpose of defending against an offence proceeding is a work-related use of records of their work, and is not personal information of the officer in that context.

In my view, the most satisfactory way to characterize information in the database about past proceedings against officers is to say that the same information – as to what the police officer did – has both a non-personal and a personal aspect.

The very fact of what the officer did is not their personal information – it is their discharge of their work and of their duties to the public as a member of a public institution. This could be said of any records that reveal nothing other than what was done – for example, a video recording of an incident, or a factual account from an observer.

However, if the information that is entered is a record or report of a disciplinary process, it does not come in pure form – it comes associated with personal information as well. Information in the database that reveals what was done by the officer *but that at the same time* reveals something that is personal to the officer – for example, the fact that a disciplinary proceeding was conducted and that particular conclusions were drawn, or that a penalty was imposed (which might speak to the conduct itself insofar as it shows how egregious the person who heard direct evidence saw it to be), has both non-personal and personal aspects which are inextricably interwoven. Since the personal information revealing what was done cannot be separated from the pure fact of what was done, such information must be regarded in totality as having a dual – non-personal as well as personal – character. A similar duality might exist in relation to an entry that both records what was done or allegedly done by an officer, and that has a personal aspect for some other reason, for example, that it was highly publicized.

...

As already discussed above, in my view, a disciplinary, civil or criminal proceeding taken against an officer is personal to them even though it relates to their employment and may, in the case of a disciplinary matter, also be conducted in their working sphere. Thus any information in the database as to how police officers fulfilled their employment responsibilities that is entered

for the purpose of initiating or pursuing such an action is, in my view, information about the officer and is their personal information. (Again, insofar as it is records their performance of their work, it also has a non-personal aspect.)

[para 35] I understand from this discussion that information revealing only what officers did in performing their job duties did not have a personal dimension. However, where the information appears as part of a disciplinary process it *also* has a personal dimension. Further, there may be situations in which information *not* having a personal dimension is intertwined with information that *does* have a personal dimension; in such situations, it should be treated as personal information. I agree with this analysis.

[para 36] I also understand this discussion to mean that there may be a personal dimension to work-related information if it is to be used to bring a proceeding against the individual it is about.

[para 37] I have noted that the two-step test in the Ontario Orders cited may be helpful in this case. The first question from that test is: in what context does the information appear? The Complainant argues that the billing information was used to determine whether he contravened his undertaking, which is a disciplinary context. However, the College collected the information before it was used this way. The question is from where did the College collect the information and what was the context of the information at the time of collection?

[para 38] The Complainant states that the billing information was obtained by the Organization from Alberta Health and/or Alberta Health Services (AHS). Presumably, the billing information is provided by the Complainant to Alberta Health and/or AHS for the purpose of obtaining payment for his services. There is no indication before me that Alberta Health and/or AHS had this information for any other reason than that. Given this, the billing information with Alberta Health and/or AHS is professional information, as the information described in Ontario order PO-3617, rather than personal information.

[para 39] The second question discussed in the Ontario Orders is whether there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Again, the Ontario Orders related to access requests, where there is a question about whether to disclose the information. In my view, were the Organization to disclose the Complainant's billing information in manner that revealed that it had been collected as part of monitoring the Complainant's conduct, I would agree this context would give the information a personal dimension.

[para 40] However, in terms of the *collection* of the information from Alberta Health/AHS, it is not clear that the collection provides any additional context such that the billing information becomes personal information. The Organization requested billing information for a particular time period, whether or not that information showed any problematic conduct of the Complainant. Had the Organization requested billing information that Alberta Health/AHS had already flagged as problematic, that context might arguably give the collected information a personal dimension. However, those are not the facts in this case.

[para 41] In my view, the billing information in the possession of Alberta Health and/or AHS is professional information that does not have a personal dimension. As that is the same information collected by the Organization without any additional context, it seems reasonable to conclude that the information collected by the Organization does not have a personal dimension. This finding would mean that PIPA does not apply to the Organization's collection of the billing information.

[para 42] That said, once the Organization used that information for a discipline-like purpose, such as investigating a complaint, the information takes on a 'personal dimension'. Therefore, the Organization's use of the Complainant's billing information to investigate a complaint against the Complainant is a use of his personal information.

[para 43] In Order P2008-010, cited above, the Director of Adjudication considered the organization's collection and use of information together, finding that where the organization intended to *use* otherwise non-personal information in a manner that provided a personal dimension to the information, then the information was considered to be personal information for the purpose of the collection *and* the use.

[para 44] As stated, I am not convinced that the Organization's collection of the billing information is properly characterized as a collection of personal information. However, in order to consider all avenues, I will treat the billing information as personal information for the purposes of both the collection and the use, and consider whether the Organization had authority to collect and use that information under PIPA.

If the billing codes are personal information, was the collection and use authorized under PIPA?

[para 45] Where the issue in an inquiry involves the collection, use and/or disclosure of personal information, the Complainant has the initial burden of proof, in that he has to have some knowledge, and adduce some evidence, regarding what personal information was collected used, and/or disclosed; the Organization then has the burden to show that its collection, use and disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 46] An organization is permitted to collect, use and disclose personal information without consent in the circumstances set out in sections 14, 17, and 20 of the Act, respectively.

[para 47] The Complainant has not argued that the Organization disclosed the billing information; only that the Organization did not have authority to collect it to review his actions. Therefore, I will consider only whether the Organization had authority to collect and use the billing information.

[para 48] Given the submissions of the Organization, the relevant sections of sections 14 and 17 are those permitting the collection and use of personal information as authorized by law, and for the purpose of an investigation or legal proceeding. These sections state:

14 An organization may collect personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

- ...
- (b) *the use of the information is authorized or required by*
 - (i) *a statute of Alberta or Canada*
 - (ii) *a regulation of Alberta or a regulation of Canada*
 - (iii) *a bylaw of a local government body, or*
 - (iv) *a legislative instrument of a professional regulatory organization;*
- ...
- (d) *the use of the information is reasonable for the purposes of an investigation or a legal proceeding;*

17 *An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*

- ...
- (b) *the use of the information is authorized or required by*
 - (v) *a statute of Alberta or Canada*
 - (vi) *a regulation of Alberta or a regulation of Canada*
 - (vii) *a bylaw of a local government body, or*
 - (viii) *a legislative instrument of a professional regulatory organization;*
- ...
- (d) *the use of the information is reasonable for the purposes of an investigation or a legal proceeding;*

[para 49] Section 1(1)(f) of the Act defines the term “investigation” for the purposes of the Act. It states:

1(1) In this Act,

- (f) *“investigation” means an investigation related to*
 - (i) *a breach of agreement,*
 - (ii) *a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
 - (iii) *circumstances or conduct that may result in a remedy or relief being available at law,*

if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation [...]

[para 50] Section 1(1)(g) of the Act defines the term “legal proceeding” for the purposes of the Act. It states:

1(1) In this Act,

(g) “legal proceeding” means a civil, criminal or administrative proceeding that is related to

- (i) a breach of agreement,
- (ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or
- (iii) a remedy available at law

[para 51] In *Leon’s Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 (CanLII), the Court of Appeal discussed how the reasonable standard is to be interpreted under PIPA. It said that ‘reasonableness’ is not “necessity”, “minimal intrusion” or “best practices” (at para. 39). It further stated that an organization need only show that “its policies were ‘reasonable’, not that they were the ‘best’ or ‘least intrusive’ approaches” (at para. 57).

[para 52] The Organization has cited various provisions in Part 4 of the *Health Professions Act* (HPA) as authority to collect and use billing information in investigating the Complainant’s conduct.

[para 53] The relevant provisions of the HPA state:

56 Despite not receiving a complaint under section 54, but subject to section 54(3) and (4), if the complaints director has reasonable grounds to believe that the conduct of a regulated member or former member constitutes unprofessional conduct, receives a referral under Part 3, Part 3.1, Schedule 7 or Schedule 21, is given notice under section 57, is given information orally or is aware of non-compliance with a direction under section 118, the complaints director may treat the information, notice or non-compliance as a complaint and act on it under section 55.

62(1) An investigator may investigate a complaint.

(2) In the course of an investigation under subsection (1), an investigator may investigate matters that are related to the conduct of the investigated person that could give rise to a finding of unprofessional conduct.

63(1) An investigator

(a) may, at any reasonable time,

(i) require any person to answer any relevant questions and direct the person to answer the questions under oath, and

(ii) require any person to give to the investigator any document, substance or thing relevant to the investigation that the person possesses or that is under the control of the person,

(b) may require any person to give up possession of any document described in clause (a) to allow the investigator to take it away to copy it, in which case the investigator must return it within a reasonable time of being given it but must return it no later than after a hearing is completed,

(c) may require any person to give up possession of any substance and thing described in clause (a) to allow the investigator to take it away to examine it and perform tests on it, in which case the investigator must return it, if appropriate and possible, within a reasonable time of being given it but must return it, if appropriate and possible, no later than after a hearing is completed, and

(d) subject to subsection (8), at any reasonable time enter and inspect any building where a regulated member provides professional services, but if the building contains a private dwelling place may not enter any part of the building designed to be used as and is being used as a permanent or temporary private dwelling place.

(2) The investigator may copy and keep copies of anything given under subsection (1).

(3) The complaints director, on the request of an investigator or without a request if the complaints director is the investigator, may apply to the Court of Queen's Bench for

(a) an order directing any person

(i) to produce to the investigator any documents, substances or things relevant to the investigation in the person's possession or under the person's control,

(ii) to give up possession of any document described in subclause (i) to allow the investigator to take it away to copy it, in which case the investigator must return it within a reasonable time after receiving it but return it no later than after a hearing is completed, or

(iii) to give up possession of any substance or thing described in subclause (i) to allow the investigator to take it away, examine it and perform tests on it, in which case the investigator must return it, if possible, within a reasonable time of being given it but return it, if possible, no later than after a hearing is completed;

(b) an order directing any person to attend before the investigator to answer any relevant questions the investigator may have relating to the investigation.

(4) An application for an order under subsection (3) may be made without notice if the Court is satisfied that it is proper to make the order in the circumstances.

(5) A person may comply with a request to give documents under subsection (1)(a)(ii) or an order under subsection (3)(a)(i) by giving copies of the documents to the investigator.

(6) If a person gives copies under subsection (5), the person must on the request of the investigator allow the investigator to compare the copies with the original documents at the person's place of business during regular business hours.

(7) An investigator who makes a comparison under subsection (6) may take away the original documents to perform tests on them and must return them within a reasonable time of taking them but must return them no later than after a hearing is completed.

(8) No investigator may enter a publicly funded facility, as defined in section 51, except with the consent of the person who controls or operates the publicly funded facility.

[para 54] The Organization also cites section 51.1 in Part 3 of the HPA, which addresses continuing competence programs.

51.1(1) The competence committee, registration committee or registrar must make a referral to the complaints director if, on the basis of information obtained from a practice visit or continuing competence program, the competence committee, registration committee or registrar is of the

opinion that a regulated member has intentionally provided false or misleading information under this Part.

(2) The competence committee must make a referral to the complaints director if, on the basis of information obtained from a practice visit, it is of the opinion that

(a) the regulated member displays a lack of competence in the provision of professional services that has not been remedied by participating in the continuing competence program,

(b) the regulated member may be incapacitated, or

(c) the conduct of the regulated member constitutes unprofessional conduct that cannot be readily remedied by means of the continuing competence program.

Arguments of the parties

[para 55] The Complainant argues that in 2018 the Organization collected billing information from 2016-2018 to assess whether the Complainant complied with his undertaking. The Complainant argues that this collection contravened the Act.

[para 56] The Complainant argues that the Organization's subsequent requests for the Complainant to provide consent for the Organization to collect information were unnecessary. He states (initial submission, at para. 32):

The repeated nature of the attempts by the College to obtain information to create new complaints against the Complainant went beyond the scope of professional regulation and further emphasizes the personal dimension of the information.

[para 57] The Complainant argues that the fact that the Organization sought the Complainant's consent to collect the billing information indicates that consent was required for the collection.

[para 58] The Organization states that the billing information was collected in order to monitor the practice permit conditions imposed on the Complainant by the Organization. The Organization explained the process in an affidavit sworn by its Chief Information Officer and Privacy Officer (CIO), provided with rebuttal submission. The CIO states (at paras.16 -23):

The monitoring of practice permit conditions is done by the Competence Department of the CPSA, that operates under Part 3 of the HPA.

[LM], who is noted in Exhibit A of [the Complainant's] October 21, 2021 Affidavit, works in the Competence Department of the CPSA.

Monitoring of practice conditions sometimes includes the review of billing information from Alberta Health.

[LM] was required to request for consent from [the Complainant] for gathering billing information from Alberta Health because there is no statutory power under Part 3 of the HPA to obtain information without consent.

If there is a concern about non-compliance with a practice condition or the monitoring of a practice condition by a regulated member, the Competence Department can refer the matter to the Complaints Director under section 51.1 of the HPA.

A referral to the Complaints Director under section 51.1 of the HPA results in an investigation being undertaken under Part 4 of the HPA.

An investigation under Part 4 includes the powers of an investigator set out in section 63 of the HPA, which includes the authority to obtain records from third parties without consent of the investigated regulated member.

Section 63 of the HPA authorizes the Complaints Director to obtain information about [the Complainant's] billing claims made to Alberta Health.

Analysis

[para 59] As noted above, this inquiry includes any collection and use that occurred prior to the Complainant's request for inquiry (July 2019).

[para 60] The Organization collected billing information from AHS for the time frame of December 2016 – June 2018.

[para 61] According to the Organization's investigation report, dated February 26, 2020, the Organization received information about the Complainant, which was treated as a complaint under section 56 of the HPA. The Complaints Director authorized an investigation under section 55(2)(d) of the HPA. The investigation was regarding whether the Complainant contravened the Organization's Standards of Practice and/or Code of Conduct; specifically, the issue was whether the Complainant was complying with his 2016 undertaking not to treat female patients. The billing information was reviewed to determine if the Complainant was treating female patients.

[para 62] A contravention of the Standards of Practice or Code of Conduct falls within the definition of "unprofessional conduct" under section 1(1)(pp) of the HPA. Section 56 states that where the Organization's Complaints Director has reasonable grounds to believe that the conduct of a member constitutes unprofessional conduct, the Complaints Director may treat that information as a complaint, and conduct an investigation, per section 55(2)(d).

[para 63] The report states that in the course of the investigation, the billing information was requested from AHS. The report indicates that the Complainant was given an opportunity to respond to the complaint. The report concludes that the Complainant did not contravene his undertaking.

[para 64] Section 63 of the HPA permits the investigator to collect billing information without consent.

[para 65] I find that the Organization had authority to collect the Complainant's billing information from 2016-2018 to investigate a complaint under the HPA. The collection was therefore authorized under section 14(b) of PIPA. Section 14(d) of PIPA also authorizes the collection, as it was reasonable for the purpose of an investigation.

[para 66] There is no indication that the Organization used the information for any purpose other than to investigate the complaint; therefore, I find that the use was authorized under sections 17(b) and (d) of PIPA.

[para 67] The Complainant also provided several copies of letters to him from the Organization requesting consent to review data relating to a condition on his practice permit, to ensure compliance with other conditions that had been placed on his practice permit. These letters are dated November 2018, January 2019, February 2019, and April 2019.

[para 68] The Organization states that it monitors practice permit conditions, and that it requires consent to collect information to do so. I understand from the Complainant that he refused to provide consent. Therefore, it seems that no information was collected as a result of these letters to the Complainant. I therefore do not need to consider whether the Organization collected or used that information with authority.

[para 69] I also understand that in 2021, the Complaints Director appears to be acting on information regarding the Complainant's 2016 undertaking. This action is outside the scope of this inquiry.

[para 70] The Complainant argues that the Organization's continued attempts to collect billing information were attempts to "create new complaints" against the Complainant. As the Organization has said, it regularly monitors conditions placed on practice permits; the November 2018, January 2019, February 2019, and April 2019 letters requesting consent from the Complainant clearly stated that they relate to monitoring practice permit conditions. In any event, I do not have jurisdiction to comment on how the Organization monitors its members.

2. Is a consultant letter, authored by the Complainant, personal information as defined by section 1(1)(k) of PIPA?

Arguments of the parties

[para 71] The Complainant states that the Organization collected a consultation letter the Complainant had written regarding a patient in February 2012. He states that the letter includes information related to his treatment of the patient. He argues (affidavit attached to initial submission, at para. 13):

This consultation letter was used by the College to manufacture a complaint against me that involved inappropriate conduct, despite the allegations being not supported by the information contain within the letter itself. The use of this consultation letter for this purpose engages a personal dimension such that it contains my personal information. I have at no time consented to the College's use and disclosure of this consultation letter.

[para 72] The Organization's initial submission states:

The February 28, 2012 consult letter was gathered as part of an investigation under

Part 4 of the HPA. Further, the consult letter relates to the patient visit that is the subject of the second charge in the Notice of Hearing.

Analysis

[para 73] The consultation letter was written in 2012 by the Complainant to another physician who had referred a patient to the Complainant. The letter sets out the reason for the consultation, the patient's relevant history, and a description of the physical examination the Complainant undertook during the consultation.

[para 74] For the same reasons as discussed regarding the billing information, I am not entirely persuaded that the consultation letter constitutes, or contains, the Complainant's personal information. The letter was created by the Complainant in performing his job duties. It contains only information about the manner with which he performed his duties.

[para 75] However, as with the billing information, the Organization's use of the consultation letter for disciplinary purposes gives the information a personal dimension, such that PIPA applies to that use. As with the billing information, I will consider whether the Organization had authority to collect and use that information.

[para 76] The Organization states that the consultation letter relates to a complaint made against the Complainant. This complaint has led to a proceeding before the Organization's Hearing Tribunal. The Organization provided a copy of the relevant Notice of Hearing. The Notice sets out the issues for the hearing as relating to complaints about care provided by the Complainant to several female patients. The Organization states that the consultation letter relates to the second complaint set out in the Notice. The date of the consultation letter and the date relating to that complaint are the same; the content of the consultation letter also matches details of the complaint set out in the Notice. Therefore, it appears that the consultation letter is directly related to the complaint and any investigation of the complaint.

[para 77] Regarding the Complainant's allegation that the consultation letter was used by the Organization to manufacture a complaint against him, it is unclear what the Complainant means by this. Possibly the Complainant means that the Organization initiated the complaint under section 56 of the HPA (reproduced above). Even if this is the case, as discussed in relation to the billing information, the Organization has authority to initiate a complaint in this manner. The authority to conduct an investigation are the same, whether the complaint is initiated by a patient, or under section 56.

[para 78] Other than his allegation, the Complainant has not provided reason to conclude that the consultation letter was collected for a purpose other than an investigation into the Complainant's conduct. Nor has he provided reason to conclude that it does not relate to the investigation.

[para 79] Given the connection between the consultation letter and the issue set out in the Notice of Hearing, I accept that the consultation letter relates to a complaint, and that the Organization investigated that complaint under the HPA, leading to a hearing.

[para 80] As such, I find that the Organization was authorized to collect and use the consultation letter for the purpose of its investigation. Sections 14(b) and (d), and 17(b) and (d) of authorize the collection and use, respectively.

3. Is the fact the Complainant was involved in other matters with the Organization, personal information as defined by section 1(1)(k) of PIPA? If so, did the Organization collect, use and/or disclose the information contrary to, or in compliance with section 7(1) of PIPA?

Arguments of the parties

[para 81] The Complainant states that he obtained a copy of a patient’s chart note written by another physician (Dr. K). The Complainant provided a copy of the chart note with his initial submission. The note is handwritten and some words are difficult to decipher; however, the patient appears to have told Dr. K about an interaction with the Complainant that Dr. K believed to be inappropriate. The physician notes that she helped the patient fill out a complaint form to provide to the Organization. A subsequent note apparently written by Dr. K states that the Organization contacted the patient and “acknowledged this isn’t the first complaint!”

[para 82] The Complainant states that this indicates the Organization disclosed information about his disciplinary record, which is his personal information.

[para 83] The Organization states that the Complainant had raised this concern with the Organization directly, and that the concern was investigated by the Organization’s former Director of Professional Conduct and Privacy Officer (Privacy Officer). The Privacy Officer provided a letter to the Complainant, dated May 2, 2017, outlining the results of the investigation. The Organization provided a copy of this letter with its November 2021 submission.

[para 84] The Privacy Officer’s letter explains that the Complainant became aware of Dr. K’s note after receiving an Investigation Report from the Organization, relating to a complaint made against the Complainant. The complaint was made by the patient referred to in Dr. K’s notes.

[para 85] The Privacy Officer states that she met with the Patient Advocate and the investigator assigned to the investigation that resulted in the Investigation Report. She also spoke with the patient and Dr. K. The Privacy Officer observes that Dr. K’s note is dated January 7, 2016. She states that there is no documentation of Organization staff speaking with that patient prior to that date.

[para 86] The Privacy Officer explains that upon receiving a complaint, the Organization’s practice is for a Privacy Advocate to contact the complainant. The relevant complaint was received by the Organization on December 15, 2015; the Patient Advocate contacted the patient via email. The Patient Advocate and patient agree that the patient did not respond to this email. According to the Privacy Officer, the patient recalls speaking with the investigator, but not with the Patient Advocate. The Privacy Officer notes that the Investigator spoke with the patient when interviewing her in May 2016, well after the January 7, 2016 note was made by Dr. K.

According to the Privacy Officer, the patient denied hearing the information about prior complaints made against the Complainant from the Organization. Organization employees deny disclosing this information. The Privacy Officer further states:

Both the patient/complainant and Dr. K agree that the visit of January 7, 2016 was emotionally charged and that it is possible there was a miscommunication or misunderstanding on the part of one or both of them.

[para 87] The Complainant argues that Dr. K's note is sufficient evidence that the Organization disclosed the existence of a complaint about him.

Analysis

[para 88] Information about prior complaints made to the Organization about the Complainant constitutes his personal information.

[para 89] The notation in Dr. K's patient notes indicate that the Organization disclosed information about prior complaints made against the Complainant. However, the Organization's Privacy Officer investigated the matter and concluded that the Organization did not disclose this information. The Privacy Officer's investigation was thorough. Her conclusion was based on the fact that the patient denies obtaining this information from the Organization, and the Organization's documentation showing that its employees did not speak with the patient until several months after Dr. K's note was made.

[para 90] I accept the information provided by the Organization on this issue. On a balance of probabilities, I find that the Organization did not disclose information about prior complaints made against the Complainant.

4. Did the Organization collect and use patient information?

Arguments of the parties

[para 91] The Complainant states that the Organization requested that he provide medical records of at least eight female patients to the Organization. The Complainant states that the Organization identified these patients by reviewing billing information, looking for specific diagnoses.

[para 92] The Organization states that it requested patient information from the Complainant during an investigation that ultimately led to a proceeding before the Organization's Hearing Tribunal. The Organization provided a copy of the relevant Notice of Hearing. The Notice sets out the issues for the hearing as relating to complaints about care provided by the Complainant to several women.

[para 93] Neither party has provided details about what medical information was requested and collected by the Organization, or from where. I do not have copies of any communications between the Organization and Complainant relating to these requests for patient information.

[para 94] The Organization states that Part 4 of the *Health Professions Act* (HPA) permits the Organization to collect and use information in conducting an investigation. The Organization states that section 63 of the HPA permits an investigator to obtain information about the Complainant's billing claims and patient records.

[para 95] The Complainant states (rebuttal submission, at para. 12):

The College's request for this information was made prior to May 2017, at which point the Complainant had asked the Information and Privacy Commissioner to investigate the matter, as per Exhibit K of the Affidavit of [the Complainant]. In response to this, the College relies on a Notice of Hearing, dated October 20, 2021, that was issued after the Complainant's initial submissions in this Inquiry. This is yet another discrepancy in the College's submissions to the OIPC.

Analysis

[para 96] The Notice of Hearing from the Organization's Hearing Tribunal states that the matters for the hearing are complaints about the Complainant's conduct with particular female patients. The alleged conduct occurred in 2010, 2012 and 2015. The Organization states that the patient information it collected relates to the investigation into complaints about the Complainant, which have led to the hearing.

[para 97] The Complainant states that this information was collected prior to 2017. I do not have copies of any correspondence between the Organization and the Complainant prior to 2018. I have very little information about the Organization's collection of patient information other than the parties' submissions, cited above.

[para 98] Regarding the Complainant's allegation that the Organization identified these patients by reviewing billing information and looking for specific diagnoses, he did not provide any information to support this allegation.

[para 99] It is not clear why the Complainant does not accept the Organization's explanation that the patient information relates to the investigation of complaints, which ultimately led to the hearing. That the hearing has not yet occurred does not seem to refute the fact that it is taking place as a result of an investigation.

[para 100] The Complainant has not provided reason to conclude that the patient information was collected for a purpose other than an investigation into the Complainant's conduct, or that the patient information does not relate to the investigation.

[para 101] As such, and given the Organization's explanations, I conclude on a balance of probabilities that the request for, and collection of, patient information prior to 2017 related to the investigation into the Complainant's conduct.

[para 102] Given the Organization's authority to conduct investigations under the HPA discussed earlier in this Order, I am satisfied that the Organization had authority under the HPA

to collect information relating to the Complainant's patients, in order to investigate the complaints about the Complainant.

[para 103] As such, I find that the collection is authorized under sections 14(b) and (d) of PIPA.

[para 104] Lastly, I note that the Complainant complains that the Organization requested the patient information from him, and then again from his clinic. He states that the Organization did not justify why it made multiple requests for the information.

[para 105] I do not know why or whether the Organization made multiple requests for the same information. It may be that the Organization required more information than the Complainant initially provided. In any event, even if the information was requested or collected more than once, this does not negate the Organization's authority to collect it.

IV. ORDER

[para 106] I make this Order under section 52 of the Act.

[para 107] I find that the Organization had authority to collect and use the Complainant's billing information and consultation letter for the purpose of conducting an investigation.

[para 108] I find that the Organization did not disclose information about prior complaints made against the Complainant.

[para 109] I find that the Organization had authority to collect patient information for the purpose of conducting an investigation.

Amanda Swanek
Adjudicator