

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2024-06/H2024-02

July 16, 2024

SUN LIFE ASSURANCE COMPANY OF CANADA

and

DR. DERICK RAUTENBACH

Case File Numbers 009561 and 009563

Office URL: www.oipc.ab.ca

Summary: The Complainant filed two complaints regarding a transfer of his information from Dr. Derick Rautenbach (the Custodian) to Sun Life Assurance Company of Canada (the Organization). The transfer was made in the context of the Complainant's disability claim with the Organization. The complaint against the Custodian was made under the *Health Information Act* (the HIA) regarding disclosure of his health information, while the complaint against the Organization was made under the *Personal Information Protection Act* (PIPA) regarding collection and use of his personal information. The common circumstance between both complaints was whether the terms of an Authorization signed by the Complainant as part of the Organization's claim process constituted proper consent to disclosure of health information under the HIA and collection of personal information under PIPA.

The Adjudicator found that the Authorization did not satisfy the requirements of consent to disclose health information under section 34(2) of the HIA and that the HIA did not permit disclosure without consent under the circumstances of the case. The Adjudicator found that disclosure was not permitted under the HIA.

The Adjudicator found that the information collected fell outside of the scope of consent to collect personal information agreed to by the Complainant in the Authorization; as such the Organization did not have consent to collect it under section 8 of PIPA.

The Adjudicator also found that the Organization collected information beyond a reasonable extent contrary to section 11(2) of PIPA. The Adjudicator found that the Organization's method of collecting information, by obtaining a wide swath of the Complainant's medical records in order to see if any pertinent information was contained in them, was unreasonable. It was unreasonable to seek full copies of the records, spanning a period of months, when the issues for which information was needed were specific, and related to a brief period of time. It was also unreasonable to collect full copies of records without some rationale to explain why collecting the full records was reasonable in light of the specific issue for which information was needed.

The Adjudicator also noted that it was unclear how, if at all, unmet disclosure requirements under the HIA would impact the reasonableness of collection under PIPA.

The Adjudicator ordered the Custodian to cease disclosing the Complainant's health information contrary to the HIA.

The Adjudicator ordered the Organization to cease collecting the Complainant's personal information contrary to PIPA, and to destroy all information that it collected from the Custodian.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, C. H-5 ss. 1(1)(f)(ix), 1(1)(i), 1(1)(i)(i), 1(1)(i)(ii)(A), 1(1)(i)(ii)(B), 1(1)(i)(ii)(G), 1(1)(k), 1(1)(m), 1(1)(n), 1(1)(t), 1(1)(u), 34, 34(2), 34(2)(d), 34(2)(f), 80; *Health Information Regulation*, AR 70/2001 ss. 2(2)(i), 3, 3(a)(i), 3(d)(ii); *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ss. 1(1)(i), 1(1)(k); 2, 8(1), 8(2), 8(2.1), 11(2), 52.

Authorities Cited: AB: Orders: P2006-004, P2015-10, P2018-06, P2020-02
Investigation Reports: H2009-IR-001/P2009-IR-001.

Cases Cited: *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30

I. BACKGROUND

[para 1] In 2014, the Complainant was off of work and had a long-term disability benefits claim with Sun Life Assurance Company of Canada (the Organization). As part of the benefits claim process, the Complainant executed a Declaration and Authorization (the Authorization) authorizing the Organization to collect, use, and disclose information relevant to his benefits claim. The Authorization is an excerpt from a larger agreement between the Complainant and the Organization.

[para 2] During the claim, the Complainant was tended to by his family doctor, and a specialist (the Specialist). Both the Complainant's family doctor and the Specialist provided medical information to the Organization in respect of the claim.

[para 3] On one occasion, Dr. Derick Rautenbach (the Custodian) also provided the Organization with information about the Complainant. The Custodian works out of the same clinic as the Complainant's family doctor. The Custodian's disclosure of the

information and the Organization's collection of it on that occasion are the subjects of this inquiry.

[para 4] I describe the events leading to the Organization's request for information from the Custodian below. My findings of those events are based upon the Complainant's version of events, the Organization's less comprehensive description of the events, the Custodian's statements, medical notes from the treatment of the Complainant, and details from documents provided by the Complainant which he acquired from his file with the Organization. An e-mail authored by an HR Business Partner, employed by the Complainant's employer, sets out the state of affairs around the time the Complainant saw the Custodian on a walk-in basis in November 2014, which is when the relevant timeline for this inquiry begins. That e-mail was forwarded to an Abilities Case Manager employed by the Organization on November 25, 2014.

[para 5] In mid-November 2014, the prospect that the Complainant would return to work arose. At some point, a return to work was tentatively set for December 1, 2014.

[para 6] The planned return to work was thwarted when the Complainant injured his back. Based upon the Complainant's statements and notes from the Custodian's office, the Complainant saw the Custodian in respect of that injury on November 17, 2014. The Complainant was prescribed medication and several weeks later was referred for an injection.

[para 7] On November 24, 2014, the Complainant met with his employer about the possibility of returning to work. The Complainant did not feel he could work at the time. His employer was concerned about the Complainant returning to work, and required the Complainant to get a medical evaluation of his back prior to returning to work. On November 26, 2014, the Organization received a medical note which stated that the Complainant was unable to work but did not provided further explanation.

[para 8] On December 1, 2014, an Abilities Case Manager employed by the Organization sent the Complainant a letter stating that it was withholding benefits for December 2014 on the basis that he was not complying with his treatment program. The Organization asserted that the Complainant failed to comply with his treatment program, and that the medical information it had about the Complainant did not indicate that the Complainant was precluded from a gradual return to work. The letter concluded by giving the Complainant two weeks to provide the Organization with a valid reason why he was not taking medication as part of a rehabilitation plan, and proof that he continued to be under appropriate and active care.

[para 9] Subsequently, on December 23, 2014, the Complainant provided further medical information as requested in the Organization's letter of December 1, 2014. At this point it appears that the Complainant was experiencing other issues which prevented him from returning to work, in addition to any lingering back issues, as suggested by the fact that the information was provided by his Specialist, who was treating him for different condition.

[para 10] Upon review of the information provided on December 23, 2014, the Abilities Case Manager informed the Complainant that her decision to deny the claim still stood.

[para 11] At some point the Abilities Case Manager asked the Complainant to obtain still more medical information, this time for the time period of December 1, 2014 to January 11, 2015. That is the last time that the Organization requested medical information from the Complainant himself. The Specialist provided the requested information in the form of a note on February 17, 2015.

[para 12] A note from a Team Lead/Manager Referral document from the Abilities Case Manager to a Portfolio Business Expert, Group Disabilities (the Portfolio Business Expert), with a start date of February 24, 2015, states, in regard to the disability claim:

Previous medical supported rehab involvement and RTW. PM gave reasons for not RTW (no child care, ongoing bullying, not being heard from PS). PM choose not to RTW with PS, later taking another position with greater responsibility for alt workplace.

[Specialist] confirms PM's ongoing attendance, however does not provide objective information

Brackets mine

[para 13] Another Team Lead/Manager Referral document from the Portfolio Business Expert to the Abilities Case Manager, which I identify by its stated start date of February 25, 2015, states,

This LTD claim was initially accepted and later decline [sic] due to non-compliance.

In screening the file, I note we have stated medical supported rehab involvement and rtw. However, I don't see documentation anywhere on file that we received clearance from the PM's AP for the PM's participation in a grtw.

If there is no documentation missing and we did not obtain medical clearance for the grtw, please wite [sic] to the PM's GP and his [Specialist] to obtain clinical chart notes for the period Oct 20/14 to present. This information may provide treatment details that support our decision and clarify what has transpired.

Once the above records have been obtained and reviewed, if your decision remains unaltered, please update your CMP and send a new tl referral to the 2nd level of appeal.

Brackets mine

[para 14] Accordingly, the Organization elected to seek further information from the Custodian and the Specialist at this time.

[para 15] The Organization received further medical information from the Specialist on March 18 or 19, 2015.¹

[para 16] At some point after receiving information on March 18 or 19, the Organization directly contacted the Complainant's Specialist for more medical information. According to the Complainant, it was the same request that the Organization would also send to the Custodian: for chart notes and reports from October 20, 2014 to present.

[para 17] This time, the Specialist did not send any information in response to Organization's request, and contacted the Complainant. At the Complainant's request, the Specialist sent the Organization a letter regarding the Complainant's health, but nothing more. The letter is dated April 1, 2015.

[para 18] The Organization then decided that the Custodian's chart notes would be required to support the medical information that it had received. On April 6, 2015, the Organization sent a letter to the Custodian requesting further medical information.

[para 19] The Organization's letter to the Custodian requests the Complainant's, "chart notes and consultation reports for the period of October 20, 2014 to present." The letter states, "We have enclosed an authorization form signed by [the Complainant]" and included a copy of the Authorization, but not the larger agreement of which it was part.² As well, the body of the letter contained a partial image of the Authorization form signed by the Complainant bearing his signature, dated July 7, 2014. Other than the signature and date, the only legible portion of the image states,

Any reference to Sun Life Assurance Company of Canada or the Plan Sponsor include their respective agents and service providers. Any reference to medical consultants may include occupational health consultants.

[para 20] The Custodian understood the Organization's letter of April 6, 2015 to be or contain a "representation" that the Complainant had consented to the Organization's collection of the information. Here, it appears that the Custodian understood that consent to collect information amounted to consent to disclose it for the purpose of collection as well. As discussed below, consent to collect and consent to disclose are separate matters.

[para 21] Subsequently, on April 9, 2015, the Custodian provided the information requested in the Organization's letter.

¹ In a statement dated November 1, 2018, signed by the Organization's Vice-President & Chief Compliance Officer, the Organization states the date as March 18, 2015; an e-mail, dated April 1, 2015, from the Abilities Case Manager to the Complainant it refers to the date as March 19, 2015.

² There is some confusion in the parties' submissions on this point; it appears that at some places the term "Authorization" was used to refer to the whole agreement, and in others to refer to the excerpt from the whole agreement, referred to in this Order as "The Authorization." I asked the parties to address what the Organization provided to the Applicant, and concluded that the Authorization, but not the whole agreement of which it was a part, was provided to the Custodian, based upon the Custodian's statement that he received the Authorization.

[para 22] The Complainant was unaware that the Custodian had sent his medical information to the Organization in 2015. He discovered what had happened upon obtaining a copy of his claim file from the Organization in March 2018. Upon review of the file, he discovered copies of records from the Specialist that had been sent to the Organization by the Custodian. These records include information that the Specialist and the Complainant had elected not to send to the Organization. The Complainant was surprised since the Organization's previous practice throughout the course of the claim was to acquire information by asking the Complainant to obtain it from his physicians rather than seeking medical information without involving him.

[para 23] On June 25, 2018, the Complainant filed complaints against the Organization and the Custodian with this Office. The Complainant alleges that the Organization collected his personal information in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (PIPA), and that the Custodian disclosed his health information in contravention of the *Health Information Act*, R.S.A. 2000, C. H-5 (the HIA).

[para 24] Investigation and mediation were authorized to attempt to resolve the complaints, but did not do so. The matters proceeded to inquiry. Since the issues in both matters concern the same transfer of information (from the Custodian to the Organization) and the terms of the Authorization signed by the Complainant, the matters were joined into one inquiry.

II. ISSUES

- A. Did the Organization collect, use and/or disclose the Complainant's personal information in contravention of the *Personal Information Protection Act*?**
- B. Did the Custodian disclose the health information of the Complainant without an authorized purpose allowed by the *Health Information Act*?**

III. DISCUSSION OF ISSUES

[para 25] Notwithstanding that the Custodian and the Organization were dealing directly with each other in disclosing and collecting the Complainant's information, they remain subject to their respective statutory regimes for the purposes of disclosure and collection. Per section 4(3)(f) of PIPA, it does not apply to collection, use, or disclosure information that is health information under the HIA to which the HIA applies. Section 4(3)(f) of PIPA states,

(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 26] Health information under the custody or control of a custodian is health information to which the HIA applies.

[para 27] I consider Issue B first.

B. Did the Custodian disclose the health information of the Complainant without an authorized purpose allowed by the *Health Information Act*?

[para 28] The Custodian is a physician and a regulated member of the College of Physicians and Surgeons of Alberta. As such, he is a “custodian” as that term is defined in section 1(1)(f)(ix) of the HIA and section 2(2)(i) of the *Health Information Regulation*, AR 70/2001 (the HIR). The definition of “custodian” in the HIA does not include the Organization.

[para 29] The HIA regulates the Custodian’s disclosure of health information. “Health information” is defined in section 1(1)(k) as “diagnostic, treatment, and care information” and “registration information.” “Diagnostic, treatment and care information” is defined in section 1(1)(i). “Registration information” is defined in section 1(1)(u) in the HIA to include “information relating to an individual” that falls under the categories listed in sections 1(1)(u)(i) to (vi) and is more specifically described in section 3 of the HIR.

[para 30] Under the sections of the HIA mentioned above, a wide swath of information is defined as “health information” including information about the physical and mental health of an individual (section 1(1)(i)(i) of the HIA), the individual’s name (section 3(a)(i) of the HIR), and information about health services provided to the individual including the name, business title, and profession of a health services provider, providing the health service (sections 1(1)(i)(ii)(A), (B), and (G) of the HIA.³ Under section 1(1)(i), diagnostic treatment and care information also 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;

[para 31] “Record” is defined in section 1(1)(t) of the HIA as,

“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 32] While the Custodian and the Organization offer differing accounts of what information the Custodian provided to the Organization, it is clear, no matter which

³ “Health service” and “health services provider” are defined in the HIA at sections 1(1)(m) and (n), respectively.

version is correct, that the Custodian did disclose the Complainant's health information. In either case, the Custodian disclosed full report(s) from the Complainant's Specialist about his treatment, which included ample diagnostic, treatment, and care information, as well as registration information, as described above in paragraphs 29 and 30.

[para 33] Further, as described below, the Custodian had no authority to disclose any of the Complainant's health information under the HIA. Accordingly, I have left the discussion of precisely what information the Custodian disclosed to the discussion below of whether the Organization complied with PIPA, where it is germane to the question of reasonableness under PIPA.

[para 34] The circumstances under which a custodian may disclose individually identifying health information with the consent of the individual whose health information it is are set out in section 34 of the HIA:

34(1) Subject to sections 35 to 40, a custodian may disclose individually identifying health information to a person other than the individual who is the subject of the information if the individual has consented to the disclosure.

(2) A consent referred to in subsection (1) must be provided in writing or electronically and must include

(a) an authorization for the custodian to disclose the health information specified in the consent,

(b) the purpose for which the health information may be disclosed,

(c) the identity of the person to whom the health information may be disclosed,

(d) an acknowledgment that the individual providing the consent has been made aware of the reasons why the health information is needed and the risks and benefits to the individual of consenting or refusing to consent,

(e) the date the consent is effective and the date, if any, on which the consent expires, and

(f) a statement that the consent may be revoked at any time by the individual providing it.

(3) A disclosure of health information pursuant to this section must be carried out in accordance with the terms of the consent.

(4) A revocation of a consent must be provided in writing or electronically.

(5) A consent or revocation of a consent that is provided in writing must be signed by the person providing it.

(6) A consent or revocation of a consent that is provided electronically is valid only if it complies with the requirements set out in the regulations.

[para 35] Other sections of the HIA permit disclosure for various purposes without consent, but they are not engaged in this case.

[para 36] There is no evidence that the Complainant ever directly provided the Custodian consent to disclose his health information. Indeed, the Complainant's position is that the Custodian did not have consent, or any other authority to disclose his health information.

[para 37] The Custodian takes the position that the Complainant consented to disclosure of his medical information when he completed the application form for disability benefits, and that, therefore, section 34(2) does not apply. Nothing in the HIA indicates that applying for benefits renders section 34(2) inapplicable. Section 34(2) applies in this case.

[para 38] The Custodian further argues that the Authorization satisfies section 34(2) of the HIA, and that it was reasonable to disclose the Complainant's health information in reliance on the Organization's letter of April 6, 2015, which the Custodian took to be a "representation" that the Complainant had consented to collection by the Organization. The latter part of the Custodian's position is premised on the fact that the Organization has a duty to handle insurance claims in good faith as stated in *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30, at para. 63.

[para 39] I address the Custodian's argument that it was reasonable to rely on the "representation" in the April 6, 2015 letter, first.

[para 40] The Custodian notes that providing information to insurers is a common event, and that the reference to an Authorization in the Organization's letter made the request seem reasonable. I agree that the letter presents the request as reasonable on its face.

[para 41] However, there is nothing in the HIA that absolves a custodian of the responsibility to ensure proper consent to disclosure is given, on the basis that a request for health information appears reasonable. In simply relying on the Organization's "representation" the Custodian failed to assure himself that the requisite consent to disclose had been given as is required by the HIA. As a Custodian regulated by the HIA, and the one who was considering disclosing information, it was incumbent on him to do so. The Organization's consent to collect information under PIPA, is a separate matter under from the Custodian's consent to disclose under the HIA.

[para 42] As to the Custodian's argument that the Authorization satisfies section 34(2) of the HIA, in my view, it does not.

[para 43] The full text of the Authorization states,

I certify that the statements in this form are true and complete.

I understand that Sun Life Assurance Company of Canada (“Sun Life”) may investigate my claim. I authorize Sun Life and its reinsurers to collect, use, and disclose information needed for underwriting, administration, adjudicating claims under this Plan to any person or organization who has relevant information pertaining to my claim including health professionals, institutions, investigative agencies, insurers and, where applicable, my Plan Sponsor. I agree that Sun Life and my Plan Sponsor may also share financial information related to my claim for purposes relevant to the management of this Plan. I understand that information about me pertaining to my claim may be reviewed in the event this Plan is audited.

I authorize Sun Life and my Plan Sponsor and their medical consultants to collect, use, and disclose among them information about me, except for details related to diagnosis, treatment or medication, that is relevant to my claim, for the purposes described above as well as the purpose of planning and managing my rehabilitation and return to work.

In the event there is suspicion of fraud and/or Plan abuse related to my claim, I acknowledge and agree that Sun Life may collect, use and disclose information about me pertaining to my claim to any relevant organization, which may include my Plan Sponsor, regulatory bodies, government organizations, and other insurers, for the purpose of investigation and prevention of fraud and/or Plan abuse.

If there is an overpayment, I authorize the recovery of the full amount of the overpayment from any amount payable to me under my benefit plan(s), and the collection, use, and disclosure of information about me to other persons or organizations, including credit agencies and, where applicable, my Plan Sponsor for that purpose.

I agree that my consent is valid for the duration of my claim, but for the purposes of audit, for the duration of the plan. I agree that a photocopy of this authorization or electronic version is as valid as the original.

[para 44] I note that neither the Custodian nor the Organization indicate or argue that the Custodian was one of the Organization’s “medical consultants” as the term is used above. I see no indication that the Custodian was in any sort of consulting role, or that he could be construed as the *Organization’s* medical consultant. He was not engaged by the Organization to, and did not, consult with it. The Custodian was merely a doctor the Complainant happened to see, and was not acting in any sort of capacity that suggests a more specific role vis-à-vis the Organization such as the terms “consultant” implies. If the term “consultant” or “medical consultant” was defined in the larger agreement of which the Authorization was a part so as to include the Custodian under these circumstances, evidence of such was not introduced in this inquiry.

[para 45] On its face, the Authorization fails to meet the requirements of sections 34(2)(d) and (f) of the HIA. It lacks any acknowledgement that the Complainant was made aware of the risks and benefits of consenting or refusing to consent as required by section 34(2)(d). It lacks the statement that consent may be revoked at any time as required by section 34(2)(f).

[para 46] More significantly, the Authorization lacks the term required under section 34(2)(a): authorization for the *Custodian* to disclose the health information specified in

the consent. The authorization is specific and limited to the ability of the Organization, its reinsurers, the Plan Sponsor, and their medical consultants to collect, use, and disclose information. Consent for the Custodian to disclose information is absent. I note that this result is consistent with the finding in Investigation Report H2009-IR-001/P2009-IR-001 at para. 69. In that report, a portfolio officer found that a custodian did not have consent to disclose health information to a disability benefits provider (Great West Life) since Great West Life's consent form failed to meet the requirements of section 34(2) of the HIA.

[para 47] The Custodian makes no argument that any of the provisions of the HIA that permit disclosure of health information without consent are applicable in this case. I do not see that any are. Accordingly, I find that the Custodian disclosed the Complainant's health information in contravention of the HIA.

A. Did the Organization collect, use and/or disclose the Complainant's personal information in contravention of the *Personal Information Protection Act*?

What information did the Organization collect?

[para 48] Here, I first address the matter of what information the Custodian provided to the Organization.

[para 49] The Custodian provided to me for review, copies of four pages of documents which he says he provided to the Organization. Two pages consist of "case history cards" which are hand-written notes concerning treatment for Complainant's back pain on November 17 and 26, 2014, and another appointment on March 11, 2015. The other two pages consist of a report prepared by the Specialist in respect of a visit by the Complainant on March 31, 2015.

[para 50] The Organization stated that it received 14 pages of documents from the Custodian. All of the documents are part of the same 15 page fax, which was sent on April 9, 2015. Page 15 of 15 from the fax is missing.

[para 51] The "case history card" page containing the details of the Complainant's treatment on 17 and 26 November 2014 is included in the documents that the Organization states it received. I observe that the Organization's copy does not contain the Complainant's name, date of birth, and health care number that appears on the copy which the Custodian states he sent. Another of the pages is the "case history card" relating to the Complainant's appointment in March 2015. The Organization's copy has more information on it than the Custodian's copy, consisting of notes from a Health Counsellor dated April 2 and 7, 2015.

[para 52] The other 12 pages that the Organization states it received consist of the following:

- One page that is a copy of the Organization’s request letter to the Custodian of April 6, 2015.
- One page “case history card” with notes from the Health Counsellor dated April 8, 2015.
- One page containing results of a specimen test (the Specimen Report)
- One page containing a report about an injection the Complainant underwent in December 2014. (the Injection Report)
- Eight pages consisting of four reports from the Specialist (the Specialist’s reports). They do not include the March 31, 2015 report which the Custodian states he sent.

[para 53] Three of the Specialist’s reports that the Organization states it received indicate that they were copied to the Complainant’s family doctor and not to the Custodian. The fourth Specialist’s report is incomplete and does not state to whom, if anyone, it was copied.

[para 54] There is no explanation for the discrepancies between the copies of the “case history cards” that the Organization and Custodian both indicated were provided by the Custodian. However, since the copies provided to me by the Organization are part of the same fax to the Organization which included the Organization’s letter of April 6, 2015 addressed to the Custodian, it seems that the Custodian was the one who sent them. I find the same for the other documents which the Organization indicates that it received from the Custodian, even though they do not match or are in excess of what the Custodian stated he sent.

[para 55] The remaining question is whether the Custodian provided the Organization with the Specialist’s report of March 31, 2015, and the versions of the “case history cards” that he indicates he sent. Nothing in the evidence strictly contradicts the possibility that these records were sent to the Organization. The Custodian has also indicated that he sent them. Accordingly, I find that they were provided to the Organization as well. I note that in the final analysis nothing turns on this point. As discussed below, the Complainant did not consent to collection of any of the information that the Organization received from the Custodian, and collection was beyond a reasonable extent, in any case.

Is the information collected by the Organization the Complainant’s personal information?

[para 56] The Organization is an “organization” as that term is defined in section 1(1)(i) of PIPA.

[para 57] PIPA regulates the Organization’s collection of “personal information.” In contrast to the lengthy, complex, and often specific definition of “health information” under the HIA, the definition of “personal information” in section 1(1)(k) of PIPA is brief and general:

(k) “personal information” means information about an identifiable individual;

[para 58] The term “about” in the definition of “personal information” informs its scope. As stated by former Commissioner Work in Order P2006-004 at para. 12,

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 59] Information about an individual may be personal information if it has a personal dimension to it (Orders P2015-10 at para. 13, and P2018-06 at para. 29).

[para 60] While it is not necessarily the case that all health information under the HIA will always also be personal information under PIPA, in a case such as this one, where health information about an identifiable individual has been shared, that information has the characteristics of both health information under the HIA and personal information under PIPA.

[para 61] All of the pages collected by the Organization contain the Complainant’s personal information.

[para 62] Every Specialist’s report contains the Complainant’s name, telephone number, date of birth, and details about his health (at times including diagnosis), ongoing treatment, and medication. Each one also contains at least some information in the nature of detailed and sensitive information about his family affairs, financial affairs, legal considerations, and other serious personal matters.

[para 63] The Specimen Report contains the Complainant’s name, telephone number, date of birth, the tests performed, and the result which is medical information about him.

[para 64] The Injection Report contains the Complainant’s name, date of birth, symptoms, information about whether there are any contraindications to the procedure in respect of his medical status, the procedure he underwent, what medication was injected, his reported pre-procedure level of pain, and response to earlier iterations of the same procedure.

[para 65] The Health Counsellor’s notes dated April 2, 7, and 8, 2015, reveal the nature of the Complainant’s medical issues at the time, contain his reported thoughts on his health, symptoms, plans to manage potential complications, future treatment, and scheduling matters.

[para 66] The hand-written notes, dated November 17, 2014, described the Complainant’s treatment and preferences for treatment, including medication.

[para 67] The hand-written notes dated November 26, 2014, detail the Complainant's plan to receive the injection as well as the effects that medication earlier prescribed had on the Complainant's reported ability to work. The notes contain a statement reporting the Complainant's own assessment of his ability to work.

[para 68] The hand-written notes, dated March 11, 2015, describe a possible medical condition experienced by the Complainant, for which he was referred for specimen analysis.

[para 69] The copy of the Organization's request letter contains the Complainant's name and disclosed the fact that he has been claiming long term disability benefits.

The Organization's collection of personal information

[para 70] It is reasonable for the Organization to collect information included in the copy of its own request letter, returned to it by the Custodian. The Organization complied with PIPA regarding that information. I do not consider information in the request letter further.

[para 71] While the Authorization fails to meet the requirements for consent to disclose health information under the HIA, it meets the requirements of consent to collect personal information under section 8(1) of PIPA, which are less specific. The requisites of consent to collect personal information under PIPA are set out in section 8. Section 8(1) is the pertinent section for the purposes of this Inquiry.⁴

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

[para 72] I note that sections 8(2) to 8(2.2) provide that consent to collection, use, and disclosure of personal information is deemed under certain circumstances. Section 8(2.2) speaks to deemed consent for the purposes of enrollment or coverage under a benefits plan. However, earlier orders of this office have clarified the scope of section 8(2.2) and found that it does not include those who have requested payment under a benefits plan. The Adjudicator in Order P2020-02 stated at paras. 25 to 27,

Section 8(2.2) addresses the circumstance when the family members or other dependents of an applicant are to be enrolled or covered under a benefit plan. Section 8(2.2) expressly states that it does not apply to an applicant, such as the Complainant, as the applicant will be able to sign a consent allowing an insurer to collect, use, or disclose personal information in order to assess insurability and eligibility. Instead, it applies to individuals with an interest in the plan, other than the applicant for coverage.

⁴ I note that while section 8(2.1) of PIPA facilitates organization to organization transfers of information by deeming consent to collect information in favour of a collecting organization on the basis of consent to disclose being provided to a disclosing organization, neither PIPA nor the HIA contain any similar terms in respect of disclosure by a custodian to a collecting organization.

The following excerpt from Alberta Hansard supports finding that section 8(2.2) was intended to make it easier for insurers to assess eligibility for the purpose of plan enrolment when the person to be covered is not the applicant for coverage:

The process for obtaining consent from clients will be simplified by allowing an organization to obtain consent through an intermediary. Also, it will be easier to enrol groups or families into insurance or benefit programs. -Hansard November 4, 2009 Alberta Hansard 1721

In my view, section 8(2.2) does not apply to an applicant who has requested payment of benefits under a disability plan.

[para 73] I agree with the decision in Order P2020-02, and reach the same conclusion in this case. Section 8(2.2) does not apply to the Complainant, who was seeking payment under a disability plan. I now consider consent under section 8(1).

[para 74] By agreeing to the Authorization, the Complainant gave written consent for the Organization to collect his information pursuant to the terms of the Authorization. As discussed below, the information collected by the Organization fell outside of those terms; as such, the Complainant did not consent to collection of it.

[para 75] The Authorization specifies the type of information that the Complainant provided consent for the Organization to collect. In the second paragraph, it specifies that the information is that which is “...needed for underwriting, administration, adjudicating claims under this Plan...” (underlining added). The text of the third paragraph informs what information is needed for those purposes. That paragraph states,

I authorize Sun Life and my Plan Sponsor and their medical consultants to collect, use, and disclose among them information about me, except for details related to diagnosis, treatment or medication, that is relevant to my claim, for the purposes described above...

[underlining added]

[para 76] The “purposes described above” in the third paragraph only related to underwriting, administration, and adjudication of the claim in this case. The other purpose mentioned in the second paragraph of the Authorization, “purposes relevant to the management of this Plan” is specific to financial information, collected for that purpose and is not engaged in this case.

[para 77] Notably, the text of the third paragraph states that the Complainant is not consenting to collection of information related to diagnosis, treatment, or medication for the purposes stated in the second paragraph. Upon review of the personal information collected by the Organization, almost all of it consists of details related to diagnosis, treatment, or medication. This information includes the following:

- The substance of all of the Specialist’s Reports.
- The test performed and the results of the Specimen Report.

- The Complainant's symptoms, information about whether there are any contraindications to the procedure in respect of his medical status, the procedure he underwent, what medication was injected, and response to earlier iterations of the same procedure, contained in the Injection Report.
- The hand-written notes dated November 17, 2014.
- The hand-written notes dated March 11, 2015.
- The Health Counsellor's notes dated April 2, 7, and 8, 2015.
- The hand-written notes dated November 26, 2014, including the statement recording the Complainant's own assessment of his ability to work.

[para 78] I observe that the Complainant's own assessment of his ability to work could arguably be considered not to be information related to diagnosis, treatment, or medication since the Complainant was not the one diagnosing his conditions, or prescribing treatment or medication for them. My view is that the Complainant's assessment is related to diagnosis or treatment since it is a limitation reported by him as the patient in need of medical treatment. Even had I found otherwise, I still find that the Complainant did not consent to collection of it since it is not information that the Organization needed for underwriting, administering, or adjudicating the Complainant's claim.

[para 79] The Organization did not explain why it needed the Complainant's own assessment of his ability to work in order to administer or adjudicate the Complainant's benefits claim. I cannot see that it did.

[para 80] Given the circumstances under which the Organization sought information from the Custodian, it appears that the issues the Organization was trying to address were whether it had proper medical information to support its decision to end benefits in December 2014, or whether there was other medical information that would support that decision or clarify what transpired. The statement of the Complainant's own assessment of his ability to work does not address those issues. The Complainant's opinion does not constitute a medical assessment of his ability to work, or other medical information, neither does it clarify what transpired regarding the Organization's handling of his claim. Accordingly, that information was not needed, and as such, collection of it falls outside of the scope of consent provided by the Complainant.

[para 81] For the reasons above, I find that the Organization did not have the Complainant's consent to collect his personal information contained in the records provided by the Custodian. As there are no other provisions of PIPA that would permit the collection, I find that the Organization and did not have authority under PIPA to collect the Complainant's personal information.

Collection beyond a reasonable extent under section 11(2)

[para 82] In addition to finding that the Organization was prohibited from collecting the Complainant's personal information, I also find that the Organization collected

information beyond a reasonable extent, contrary to section 11(2) of PIPA. Section 11(2) states,

(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.

[para 83] The term “reasonable” in section 11(2) is defined in section 2 of PIPA, which states,

2 Where in this Act anything or any matter

(a) is described, characterized or referred to as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

[para 84] As set out under the discussion of consent under section 8(1) above, the Authorization prescribed the limits of the Complainant’s consent to collect information as that which was needed for underwriting, administration, adjudicating claims under the benefits plan, with the exception of details related to diagnosis, treatment or medication. In light of that limitation, the Organization’s collection of personal information can be said to be beyond a reasonable extent for the reasons already set out above. The Organization said it was collecting information pursuant to consent, but the consent did not extend to the specific personal information collected by the Organization.

[para 85] However, the circumstances of this case engage further, separate considerations of section 11(2) which, on their own, also indicate that collection went beyond a reasonable extent.

[para 86] For the purposes of the following discussion, I accept the Organization’s explanation that its purposes for collection was the administration, adjudication, and underwriting of the Complainant’s benefits claim. For the purposes of the following discussion, I also accept that addressing the specific issues the Organization sought to address by requesting information from the Custodian – whether there was proper medical information to support its decision to end benefits in December 2014, or whether there was other medical information that would support that decision or clarify what transpired – fall under the rubric of administrating or adjudicating his benefits claim.

[para 87] The Organization has offered no explanation or justification for why requesting records from October 20, 2014 to April 6, 2015, was a reasonable breadth of information to request when the reasons for the request were related to what happened in a much narrower window of time in December 2014. Neither has the Organization offered any explanation for why obtaining full copies of the records requested from that

time period was reasonable, when the information it was seeking was particular to specific issues, and not to the general content of the requested records. Under the circumstances of this case, I cannot see that it was.

[para 88] Rather than making a reasonably focused request for information, such as a request tailored to information about the Complainant's ability to return to work in December 2014, what the Organization appears to have done is to request a wide swath of records in order to review them to see *if* there was any relevant information in them. This approach is evidenced by the statement in the Team Lead/Manager Referral document with a start date of February 25, 2015, "This information may provide treatment details that support our decision and clarify what transpired. [underlining mine]" The use of the term "may" indicates speculation on the part of the Organization as to what information the requested records might contain, and that reviewing them, rather than requesting any such information specifically, was its means of determining what was in them.

[para 89] Given the absence of some explanation or rationale why the entire chart notes and consultation reports for the period of time specified in the request were reasonably required to address the Organization's inquiry into what happened with the Complainant's benefits claim, the Organization's collection of personal information was beyond a reasonable extent. A reasonable need for particular information does not render reasonable collecting a much larger body of information on the basis of speculation that the particular information could be included in it. That sort of needless trawling for information is the definition of unreasonable under PIPA. The result in this case was a serious breach of the Complainant's privacy, not the least of which was the collection of the sensitive information in the Specialist's Reports.

[para 90] I find that the Organization failed to comply with section 11(2) of PIPA.

Other concerns not decided upon

[para 91] In the course of reaching my decision I gave serious consideration to the fact that the Custodian did not have authority under the HIA to disclose any of the Complainant's information to the Organization. In these circumstances, the following question arises: How, if at all, is collection subject to PIPA impacted by the limitations on disclosure under the HIA? As I was able to determine the issues by considering the terms of the Authorization and breadth of collection, I leave the question unanswered. I note only that upon viewing PIPA and the HIA side by side, an obvious answer does not present itself.

[para 92] Similarly, I have not had to, and have not, addressed whether the Organization's collection of the Specialist's information from the Custodian could have been reasonable under PIPA, considering that the Complainant and the Specialist had previously elected not to provide that information to the Organization. Such circumstances will invite scrutiny of whether collection could be seen to be appropriate

under the circumstances as required by the reasonableness standard in section 2 of PIPA. Certainly the Complainant's position is that it is unreasonable.

Organization's use of the Complainant's personal information

[para 93] The Organization did not specify what of the Complainant's personal information it used to review and administer his disability claim. It is possible that it did not directly use any of the information so much as it merely reviewed it and determined that it did not address the issues for which it was collected. Regardless, any use of the Complainant's personal information was not permitted under PIPA for the reasons below.

[para 94] Use of personal information is regulated by section 16 of PIPA:

16(1) An organization may use personal information only for purposes that are reasonable.

(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.

[para 95] Since the Organization did not have consent to collect the Complainant's personal information, it was unreasonable to use it to any extent for any purpose. I find that the Organization failed to comply with sections 16(1) and 16(2).

IV. ORDER

[para 96] I make this Order under section 80 of the HIA and section 52 of PIPA.

Order to the Custodian – for case file number 009563

[para 97] I order the Custodian to cease disclosing the Complainant's health information in contravention of the HIA.

[para 98] I order the Custodian to confirm to me and the Complainant in writing that he has complied with this Order within 50 days of receiving a copy of it.

Order to the Organization – for case file number 009561

[para 99] I order the Organization to cease collecting and using the Complainant's information in contravention of PIPA.

[para 100] I order the Organization to destroy the Complainant's personal information that it received from the Custodian in response to its letter of April 6, 2015, with the exception of personal information appearing in the copy of the April 6, 2015 letter sent back to the Organization by the Custodian.

[para 101] When destroying the Complainant's personal information, the Organization shall, with its best efforts, search its files in order to locate any records which I found that

the Custodian sent to the Organization, despite that they were not included in the 14 pages of records that the Organization stated it received from the Custodian. These records include the Specialist's Report dated March 31, 2015, and the Custodian's versions of the "case history cards" containing notes regarding treatment of the Complainant on November 17 and 26, 2014, and his appointment in March 2015. The Complainant's personal information in these records is to be destroyed as well, if located.

[para 102] I order the Organization to confirm to me and the Complainant in writing that it has complied with this Order within 50 days of receiving a copy of it. In its written confirmation, the Organization shall indicate whether it located any of the records mentioned in the preceding paragraph, and confirm that they were destroyed, if found. If none of those records are found despite the Organization's best efforts, the Organization shall indicate so in its written confirmation.

John Gabriele
Adjudicator
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