

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2012-002

Kelsey Trail Regional Health Authority

Summary:

The Applicant made application to the Kelsey Trail Regional Health Authority (KTRHA) for the names of Registered Nurses on duty at the Melfort Hospital on a certain date. KTRHA withheld all three pages citing sections 20 and 23(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* as justification to deny access. The Commissioner determined that the employee numbers of the nurses qualified as personal information under section 23(1)(d) and should be severed from the pages. The remaining information in the pages did not qualify as personal information under section 23(1). The Commissioner also determined that KTRHA failed to meet the burden of proof in establishing the applicability of section 20. The Commissioner therefore recommended release of the remaining portions of the records at issue.

Statutes Cited:

The Local Authority Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. L-27.1 ss. 2(f)(xiii), 8, 20, 23(1)(a), 23(1)(b), 23(1)(k), 28(1), 51; *The Health Information Protection Act*, S.S. 1999, c. H-0.021 ss. 27(4)(a), 38(1); *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 21; British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C.1996, c. 165, as am, s. 19(1)(a).

Authorities Cited:

Saskatchewan OIPC Review Reports H-2007-001, F-2005-001, F-2006-001, Investigation Report F-2007-001; ON IPC Reconsideration Order R-980015, Order MO-2521; BC IPC Order 01-15; Newfoundland Labrador IPC Order 2007-013; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 402; *R. v. Sillipp*, (1997), 209 AR 253, 55 Alta LR (3d) 263.

Other Sources

Cited: SK OIPC: *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests.*

I BACKGROUND

[1] In a letter dated July 7, 2008, the Applicant made an access request to Kelsey Trail Regional Health Authority (KTRHA) for the following: “what are the names of the Registered Nurses who were on duty at the Melfort Hospital at approximately 1:00 AM to 3:00 AM, August 18, 2004?”

[2] KTRHA responded to the Applicant’s request on July 7, 2008 stating that:

Your request is for “personal information” in the custody of the Kelsey Trail Regional Health Authority (KTHR) as defined by the Local Authority Freedom of Information and Protection of Privacy Act (LAFOIP) which governs my ability to release to you the information requested in this case.

As a result I regret to inform you that I cannot release the identity of the nurses on duty in accordance with Part IV – Protection of Privacy, section 23(1) of the LAFOIP act. The following subsections are primarily applicable in this case:

- a) *Information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;*
- b) *Information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;*
- k) *The name of the individual where:*
 - i) *It appears with other personal information that relates to the individual; or*
 - ii) *The disclosure of the name itself would reveal personal information about the individual.*

[3] We note that section 23 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) is simply a definition of personal information.¹ Section 28(1) of LA FOIP would be the exemption on which a local authority would rely if it was alleged that the record contained personal information of a third party.

¹ *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

- [4] Our office received a request for review from the Applicant on July 14, 2008.
- [5] My office provided notice of its intention to Review the matter to both parties by way of letter dated August 13, 2008.
- [6] On October 31, 2008, my office received a letter from KTRHA indicating that it was no longer relying on section 23(1) of LA FOIP but rather section 20 of LA FOIP.

II RECORDS AT ISSUE

- [7] Parts II and III of LA FOIP was designed with a focus on access to “records” not to information.
- [8] The information requested by the Applicant is contained in a three paged spreadsheet titled “Work Record A – Weekly Scheduled Hours”. It lists the names of thirteen nurses and the times they worked during the period of August 15, 2004 to August 21, 2004. Only five of the thirteen worked during the timeframe requested by the Applicant. Only this portion of the three page spreadsheet constitutes the responsive record.
- [9] Employee numbers of the nurses are evident on the record.

III ISSUES

- 1. Does section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* have any applicability in this case?**
- 2. Did Kelsey Trail Regional Health Authority properly apply section 20 of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record in question?**

IV DISCUSSION OF THE ISSUES

1. Does section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* have any applicability in this case?

[10] Section 2(f)(xiii) of LA FOIP states:

2 In this Act:

...

(f) “**local authority**” means:

...

(xiii) a regional health authority or an affiliate, as defined in *The Regional Health Services Act*²

[11] Therefore KTRHA is a ‘local authority’ pursuant to section 2(f)(xiii) of LA FOIP.

[12] KTRHA originally denied the Applicant access to this record because it claimed it was personal information. Our office advised that it would not likely constitute personal information and KTRHA has since been relying on section 20 of LA FOIP.

[13] Section 28(1) of LA FOIP, however, is a mandatory exemption therefore I must consider it nonetheless. It states:

28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.³

[14] KTRHA claimed that the names of the five nurses would qualify as personal information pursuant to sections 23(1)(a), 23(1)(b) and 23(1)(k) of LA FOIP.

[15] Section 23(1) of LA FOIP defines personal information and provides some examples of the kinds of information that could constitute personal information:

² *Ibid.* at section 2(f)(xiii).

³ *Ibid.* at section 28.

23(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.⁴

[16] The information contained in the record does not appear to contain information that would constitute “the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual.”

[17] Therefore, the record does not contain personal information within the meaning of section 23(1)(a) of LA FOIP.

[18] The information in the record might appear to contain employment history of an individual.

[19] The following excerpts from Information and Privacy Commissioners’ (IPC) Orders from Ontario and British Columbia and an IPC Report from Newfoundland and Labrador discuss employment history.

[20] The Ontario IPC Reconsideration Order R-980015 stated the following:

⁴ *Ibid.* at section 23.

The Commissioner's orders have established that, as a general rule, a record containing information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or a private sector setting, is not the individual's personal information simply because his or her name appears on the document.

...

A wide range of employment or work-related information is captured by the definition of personal information, including records relating to such things as job competitions (Orders 11, 20, 43, 97, 99, 159, 170, P-222, P-230, P-282, M-7, M-99 and M-135), **information generated in the course of investigations of improper conduct or disciplinary proceedings** (Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122), and specific details of individual employment arrangements with an institution (Orders 61, 170, 183, P-244, P-380, P-432, M-18, M-23, M-26, M-35, M-102, M-129 and M-141).

...

The Commissioner's orders have consistently found that discrete pieces of information which might reveal information about a particular episode in a person's employment do not constitute "employment history" for the purposes of sections 2(1)(b) and 21(3)(d) of the Act. (Orders P-235, P-611 and P-1180).⁵

[emphasis added]

[21] The British Columbia IPC Order 01-15 stated the following:

[41] Section 22(3)(d), in relevant part, protects information related to the "employment history" of a third party. **In my view, someone's "employment history" includes information about her or his work record and reasons for leaving a job** (see, for example, Order 00-53). **It also includes information about disciplinary action taken against an employee** (see, for example, Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; and Order 00-13, [2000] B.C.I.P.C.D. No. 16). I see nothing in the withheld portions of records 5 and 7 that could even remotely be construed as information "that relates to employment ... history" of any third party.

[42] The only withheld item in record 5 which is connected to anyone's employment in any way is the first severed line, a comment on a Ministry **employee's efforts in dealing with the applicant. It does not relate to the employee's work history. It merely records action taken by that employee - information as to what was done and by whom...**⁶

[emphasis added]

⁵ Ontario Information and Privacy Commissioner (hereinafter ON IPC) Reconsideration Order R-980015, pp. 4 to 16.

⁶ British Columbia IPC Order 01-15 at [41] to [42].

[22] The Newfoundland and Labrador IPC Report 2007-013 stated that:

[24] I will apply the interpretation of the term “employment history” that has been given by the Commissioners of Ontario, British Columbia, and Alberta. Therefore, in order for information to be about an individual’s “employment history” within the meaning of section 2(o)(vii) of the *ATIPPA* that information must relate to an individual’s work history and must be the type of information that would be found in an employee’s personnel file... **the type of information that would be found in a personnel file such as performance reviews or evaluations, disciplinary actions taken, reasons for leaving a job, or leave transactions...**⁷

[emphasis added]

[23] Upon examination of the quotations above, it appears to be the consensus of other Commissioners that information that would be found in a personnel file, such as details of disciplinary action, would constitute employment history which is personal information. I am of the same view.

[24] Conversely, in my Report F-2006-001, I found that the names of firefighters in the course of their work did not qualify as personal information.⁸

[25] Further, the Supreme Court of Canada considered whether work hours were personal information in *Dagg v. Canada (Minister of Finance)*. The majority ruled that hours of work pertain more to the job description of an individual than personal information. The majority agreed with Justice La Forest’s description as follows:

Generally speaking, **information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description.** ...

It will comprise the terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range.⁹

[emphasis added]

⁷ Newfoundland and Labrador IPC Report 2007-013 at [24].

⁸ Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Report F-2006-001 at [113].

⁹ *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at [6] and [95].

[26] Therefore it appears that the names of the nurses and the shifts they worked on August 18, 2004 would not be personal information pursuant to section 23(1)(b).

[27] Finally, KTRHA originally argued also that the information in the record is personal information pursuant to section 23(1)(k) of LA FOIP. It does not appear that releasing the name alone of the nurses in question would reveal personal information about them.

[28] However, section 23(1)(k)(i) states that a name that “appears with other personal information that relates to the individual” would be personal information. It appears that the employee number of the nurses are also listed.

[29] Section 23(1)(d) states that “any identifying number, symbol or other particular assigned to the individual” constitutes personal information.

[30] Furthermore, in my Report F-2005-001, I found that an employee number, when linked with a name also constitutes the individual’s personal information.¹⁰

[31] It appears that the record does contain some of the nurses’ personal information; however it can easily be severed for the purposes of complying with the Applicant’s request which would be in keeping with section 8 of LA FOIP.

[32] Section 8 of LA FOIP states the following in this regard:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.¹¹

[33] Therefore, in releasing the five names of the nurses on shift at the responsive time in question, KTRHA would not be disclosing personal information.

¹⁰ SK OIPC Report F-2005-001 at [19] to [22].

¹¹ *Supra* note 1 section 8.

2. **Did Kelsey Trail Regional Health Authority properly apply section 20 of the *The Local Authority Freedom of Information and Protection of Privacy Act* to the record in question?**

[34] Section 20 of LA FOIP provides for the following:

20 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.¹²

[35] Section 51 of LA FOIP is relevant in this situation. Section 51 states the following:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.¹³

[36] As such, it is up to KTRHA to show, on the balance of probabilities, that the release of the names of the five nurses could cause physical or mental harm to the individuals.

[37] However, KTRHA provided very little in the way of meeting this statutory burden of proof.

[38] I considered provisions similar to section 20 of LA FOIP in *The Freedom of Information and Protection of Privacy Act* (FOIP)¹⁴ and *The Health Information Protection Act* (HIPA).¹⁵ The section in FOIP that deals with the health and safety of an individual (section 21) is identical to section 20 of LA FOIP.

[39] In my Investigation Report F-2007-001, I commented on section 21:

[107] We have commented in the past that **the threat to safety or health should be capable of a reasonable expectation of harm and that harm must be causally connected with the possible access to the information...**¹⁶

[emphasis added]

¹² *Ibid.* section 20.

¹³ *Ibid.* section 51.

¹⁴ *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.0, section 21.

¹⁵ *The Health Information Protection Act*, S.S. 1999, c. H-0.021, section 27(4)(a).

¹⁶ SK OIPC Investigation Report F-2007-001 at [107].

[40] I expanded on the criteria for making a decision on this exemption in my Report H-2007-001 as follows:

It is common in all access and privacy laws to either provide that disclosure should occur to avoid harm to anyone or that access should be denied to an applicant for the same purpose. Criteria used in other provinces to make this decision include:

- a) must be a reasonable expectation of probable harm;
- b) harm must constitute damage or detriment **and not more inconvenience**
- c) must be a causal connection between disclosure and the anticipated harm.

Generally, this means the [local authority] must make an assessment of the risk and determine whether there are reasonable grounds for concluding there is a danger to the health or safety of any person. That assessment must be specific to the circumstances of the case under consideration.¹⁷

[emphasis added]

[41] I will use this test going forward in assessing KTRHA's arguments in support of the exemption, section 20 of LA FOIP.

[42] Furthermore, it is also relevant to note the views of other Canadian provincial Information and Privacy Commissioners on dealing with access requests from those perceived to be difficult individuals in relation to similar health and safety provisions in their respective laws.

[43] The Ontario IPC commented in Order MO-2521 that:

It has been acknowledged by this office that individuals working in public positions will occasionally have to deal with "difficult" individuals. In a postscript to Order PO-1939, Adjudicator Laurel Cropley stated the following with regard to section 20 of the provincial *Act* (the equivalent of section 13 of the *Act*):

In these cases, individuals are often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently aggressive body language and gestures. **In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is**

¹⁷SK OIPC Report H-2007-001 at [42].

not sufficient to engage section 20... claim. Rather... **there must be clear and direct evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established should the records be disclosed.**¹⁸

[emphasis added]

[44] The British Columbia's *Freedom of Information and Protection of Privacy Act* has a similar section to Saskatchewan's section 20 of LA FOIP. Section 19(1)(a) of British Columbia's Act states the following:

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health¹⁹

[45] In my Report H-2007-001, I also took note of the comments of British Columbia's then Information and Privacy Commissioner with regards to that section as follows:

[29] In Order 03-10 of the Office of the Information and Privacy Commissioner for British Columbia, the Adjudicator observed that **"inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person" is not sufficient to trigger s. 19(1)(a) of the Act...**²⁰

[emphasis added]

[46] I am guided by these decisions as I evaluate KTRHA's arguments in support of their reliance on section 20 of LA FOIP.

[47] In its letter of December 12, 2008, KTRHA outlines several arguments as to its reliance on section 20 of LA FOIP. Its letter dated April 20, 2010 summarizes the arguments made on December 12, 2008 and provides updates on events that had transpired. I have grouped these arguments together for the sake of clarity in this analysis.

¹⁸ ON IPC Order MO-2521, pp. 13-14.

¹⁹ British Columbia, *Freedom of Information and Protection of Privacy Act*, R.S.B.C.1996, c. 165, section 19.

²⁰ *Supra* note 17 at [29].

(a) Applicant's Concerns with His Care

[48] KTRHA has argued that the Applicant was dissatisfied with a decision by Parkland Place (a physiotherapy center under KTRHA) to end his physiotherapy treatment. In its letter of December 12, 2008 KTRHA outlined the following observations of the Applicant's behaviour:

- On March 8, 2005, the Applicant contacted the region's Quality of Care Coordinator to discuss his discharge from the Physiotherapy program. According to KTRHA, he made several allegations about unfair treatment that were not true. A meeting was set up for March 17, 2005 in which alternative treatment programs were suggested to the Applicant. It is reported by KTRHA that the Applicant refused the options presented to him.
- KTRHA also reported that on or about April 8, 2005, the region's Quality of Care Coordinator made efforts to secure some funding so that the Applicant could participate in some alternative programs. He did not take advantage of these opportunities.
- KTRHA stated that: "[The Applicant] was adamant that he wanted continued [physiotherapy] service and a renewed full thoracic assessment."
- KTRHA also stated in its submission of December 12, 2008 that: "It is also noteworthy that file information shows that some physicians had recommended mental health services which [the Applicant] continued to refuse to access."

[emphasis added]

[49] Upon review of the material provided by KTRHA we found only one reference to mental health services in the handwritten notes of a treating physiotherapist. One physician had told the treating physiotherapist that he had arranged for a "psych consult for the patient" and requested the physiotherapist continue to treat the Applicant until the consult had been completed. The physician also indicated that he believed the Applicant had "mental health issues". At this time, the Applicant was extremely concerned about the decision by KTRHA to end his physiotherapy treatments. It was apparent that the Applicant had been dealing with chronic pain due to a disability he had for several years.

[50] KTRHA provided no further evidence to suggest that the 'psych consult' occurred or that it resulted in a diagnosis of a mental health disorder.

[51] I addressed the difference between a ‘mental health issue’ and a ‘mental health disorder’ in my Report H-2007-001 as follows:

[26] Saskatchewan’s *The Mental Health Services Act* does not define mental health, but defines “mental disorder” as follows:

2 In this Act:

...

(m) “mental disorder” means a disorder of thought, perception, feelings or behaviour that seriously impairs a person’s judgment, capacity to recognize reality, ability to associate with others or ability to meet the ordinary demands of life, in respect of which treatment is advisable,

[27] A useful publication explores the concept of “mental health” in depth as follows:

Mental health is defined as the capacity to feel, think and act in ways that enhance one’s ability to enjoy life and deal with challenges. Expressed differently, mental health refers to various capacities including the ability to: understand oneself and one’s life; relate to other people and respond to one’s environment; experience pleasure and enjoyment; handle stress and withstand discomfort; evaluate challenges and problems; pursue goals and interests; and, explore choices and make decisions.

Good mental health is associated with positive self-esteem, happiness, interest in life, work satisfaction, mastery and sense of coherence. It is well recognized that good mental health enables individuals to realize their full potential and contribute meaningfully to society.

By contrast, mental health problems refer to diminished capacities – whether cognitive, emotional, attentional, interpersonal, motivational or behavioural – that interfere with a person’s enjoyment of life or adversely affect interactions with society and environment. Feelings of low self-esteem, frequent frustration or irritability, burn out, feelings of stress, excessive worrying, are all examples of common mental health problems. Over the course of a lifetime, every individual will be likely, at some time, to experience mental health problems such as these. Usually, they are normal, short-term reactions that occur in response to difficult situations (e.g., school pressures, work-related stress, marital conflict, grief, changes in living arrangements) which people cope with in a variety of ways, employing internal resilience, family and community support, etc.

Mental health problems that resolve quickly, do not recur and do not result in significant disability do not meet the criteria required for the diagnosis of a mental illness. Mental disorders or illnesses generally refer to clinically significant patterns of behavioural or emotional function that are associated with some level of distress, suffering (even to the point of pain and death), or

impairment in one or more functional areas (e.g., school, work, social and family interactions).

...

[30] The Saskatchewan provision does not require the trustee to prove that the disclosure would cause or exacerbate an individual's existing mental illness or mental disorder; rather, the trustee must demonstrate that this result may reasonably be anticipated. If the reasonably anticipated harm falls short of this, resulting instead in serious mental distress or anguish bordering on the clinical, the provision may still properly be applied. Mere risk of distress alone, however, is insufficient to trigger the provision.²¹

[emphasis added]

[52] Therefore, KTRHA has not established how the non-validated opinions of one physician support KTRHA's refusal to release the record to the Applicant. Furthermore, KTRHA implied that more than one doctor offered mental health services to the Applicant when the evidence KTRHA provided suggests otherwise.

[53] There are a number of issues arising from KTRHA's arguments:

1. KTRHA is suggesting that the non-validated opinion of one physician is evidence the Applicant had 'mental health issues';
2. The Applicant had requested the names of nurses working a specific shift on August 18, 2004 at Melfort Hospital. Parkland Place physiotherapy is a completely different building than the Melfort Hospital and the access request involved nurses in the emergency ward at the Melfort Hospital; and
3. The timeframe for the information requested by the Applicant is for August 2004. The issues related to the Applicant's physiotherapy treatments did not begin until 2005.

[54] It seems the Applicant refused several physiotherapy treatment options presented to him by KTRHA. It is also apparent from the material provided by KTRHA that some KTRHA staff were frustrated with the Applicant.

²¹ *Ibid.* at [26] to [30].

[55] However, KTRHA draws no link between the issues involving the Applicant and his physiotherapy treatments and a threat to the safety or health of nurses working a particular shift a year prior to the issues relating to the physiotherapy.

(b) Actions Taken by the Applicant to Resolve his Concerns

[56] Although it does not support the application of section 20 of LA FOIP it is still important to note that KTRHA also argued that the Applicant had raised his physiotherapy treatment concerns with different agencies within and apart from KTRHA.

[57] Some of the channels the Applicant pursued to resolve his concerns regarding his physiotherapy treatment issues were:

- He contacted the regional Quality of Care Coordinator;
- He contacted the provincial Quality of Care Coordinator;
- He contacted the office of the Member of the Legislative Assembly (MLA);
- He launched a complaint against four of the KTRHA Physiotherapists with the Saskatchewan College of Physical Therapists;
- He contacted the Board Chairperson for KTRHA;
- He sought resolution through the Saskatchewan Ombudsman Office; and
- He served a Statement of Claim for malicious prosecution against KTRHA staff who testified against him in an harassment trial. The Applicant had been found not guilty of the harassment charge.

[58] KTRHA claimed that most of the Applicant's accusations were false and unfounded. It stated that:

Given the history noted above, including multiple attempts through various means and agencies, it appears that [the Applicant] **is clearly on a personal mission to destroy the reputation, safety and well-being of a number of individuals** from the region's therapy department.

[emphasis added]

[59] KTRHA provided our office with documentation of the Applicant's physiotherapy complaint to the Saskatchewan College of Physical Therapists.

- [60] KTRHA did not provide a copy of the decision letter of any proceeding or investigation; nor that of the Ombudsman, to show that the Applicant's claims were all unsubstantiated or that he was treated fairly by KTRHA. Our office only has the assertion from KTRHA that this was the case.
- [61] In his submission dated September 4, 2009, the Applicant stated: "I strongly believe that every patient in Saskatchewan has a fundamental right to raise concerns in regard to the quality of health care they receive."
- [62] Upon review of the material provided by KTRHA, it appears that the primary concern the Applicant brought to the regional Quality of Care Coordinator, the provincial Quality of Care Coordinator, his MLA, the Board Chairperson of KTRHA and the Office of the Ombudsman related to his care in general.
- [63] It is unclear how the Applicant's actions taken through the appropriate lawful channels available to him and any patient of KTRHA to address his concerns related to his physiotherapy treatments beginning in 2005 justify the claim made by KTRHA. That claim was that section 20 of LA FOIP should apply to the record so as to deny the Applicant the names of five nurses working a year earlier on August 18, 2004.
- [64] As noted earlier, the Applicant filed a Statement of Claim for malicious prosecution against KTRHA staff who testified against him in an harassment trial.
- [65] KTRHA has argued that one of the four physiotherapists (Physiotherapist A) who treated the Applicant complained to the RCMP in April or May 2005 that the Applicant may have been stalking her.
- [66] In the submission received from KTRHA dated December 12, 2008 it states the following regarding this issue:

In **April/May 2005** the Director of Therapies informed me that a young female therapist on her staff [name of Physiotherapist A] had indicated that she felt she was being stalked by [the Applicant]. He was frequently seen at her place of work, driving

around her home, following her at the grocery store, parked in her back alley, and the like. The young woman notified the RCMP, but was told there was little they could do at the time. However, my understanding is that the RCMP did become involved when a neighbor reported observing [Applicant's] car either parked or driving around the area continually. The RCMP itself laid charges against [Applicant].

[67] The matter proceeded to trial in 2006 where the Applicant was found not guilty of the harassment charges. This will be discussed further in section (c) of this analysis.

[68] KTRHA stated in its submission of December 12, 2008 in regard to the Applicant's complaint to the Board Chairperson for KTRHA that:

I received a call from the Kelsey Trail Regional Health Authority board Chairperson advising me that she had been contacted at home by [the Applicant]... She reported that... he also made false accusations regarding KTHR's involvement in his criminal trial, alleging that KTHR paid for court and staff etc. (The KTHR was, of course, not involved in the trial at all and the only assistance provided to staff was time away from work to attend the trial, in accordance with the subpoenas, and the opportunity to have a brief discussion with the Region's legal counsel well in advance of trial concerning the general procedures involved in a trial, so that the formalities of the courtroom would not be overwhelming for them)...

[69] The Board Chairperson's notes of this conversation, provided to our office by KTRHA, only indicate that the Applicant was concerned that the staff sitting in court were paid by KTRHA to be there.

[70] KTRHA's submission of April 20, 2010 to our office stated the following:

I have made inquiries of legal counsel representing the KTHR staff (previous and current) who have been named in the current civil litigation and some assistance has been provided regarding the findings of Provincial Court Judge Morgan.

[71] The civil litigation referred to in this statement is the Statement of Claim in which the Applicant is the Plaintiff alleging malicious prosecution referred to earlier.

[72] KTRHA has submitted that KTRHA's legal counsel provided only minor representation to its staff members at the time of the trial and the harassment charge.

- [73] I do not see the relevance to the particular matter under consideration which is whether the release of the record to the Applicant would result in alleged harm to any particular individual.
- [74] On a different note, KTRHA's letter of December 12, 2008 stated: "In his conversation with the board chairperson, [the Applicant] made a particular reference to [Physiotherapist A], saying '... she hurt me and now she treats me like this'...".
- [75] Upon review of the Board Chairperson's notes, no context is provided for this comment.
- [76] As noted above, the test that my office uses to determine if there is a threat to health or safety states that: "harm must constitute damage or detriment and not more inconvenience" and that harm must be directly related to disclosure of the record to the Applicant.
- [77] The Applicant's concerns with the care he received from KTRHA has no direct bearing on the section 20 claim made by KTRHA. KTRHA has not made a case that release of the record would result in damage or detriment to the five nurses in the responsive record.

(c) Court Decision of Criminal Harassment Charge Against the Applicant

- [78] KTRHA argued that:
- ...the entire department of five physiotherapy staff and director, including the victim, [name of Physiotherapist A], received subpoenas to appear in court on [date removed] to testify in connection with the criminal charges laid against [the Applicant].
- [79] KTRHA has not shown the linkage between past subpoenas and any alleged future harm that may come to the five nurses or any other individual if the record is disclosed to the Applicant.
- [80] In its submission of December 12, 2008, KTRHA reported:

[The Applicant] **was found “not guilty due to mental status”**. I am informed that the judge, however, advised the victims and the mother of [Physiotherapist A] that he felt that [the Applicant] had indeed done what he was accused of, but that [the Applicant] was **not aware of what he was doing**.

[emphasis added]

[81] The Applicant provided our office with a copy of Provincial Court Judge Morgan’s decision. It appears the Applicant was acquitted of the charges against him.

[82] The transcript of the trial decision has been reviewed. Nowhere did it say “not guilty due to mental status” as quoted by KTRHA, nor does it address the Applicant’s mental status anywhere in the decision.

[83] As for KTRHA’s claim that Judge Morgan felt that the Applicant “had indeed done what he was accused of, but that [the Applicant] was not aware of what he was doing”, it appears to be an exaggeration. Judge Morgan’s ruling states the following:

Looking at all the circumstances, **I cannot conclude that this is a situation where it could be said that** the defendant had to have known that his conduct would cause the complainant to be harassed or was reckless or willfully blind to that possibility, nor can I conclude, if I must if I’m to find [the Applicant] guilty of this charge, that **the Complainant’s fear was, in all circumstances, reasonable**. As I said earlier, I have my suspicions respecting [the Applicant’s] behavior; however, suspicion is not enough to ground a conviction. [The Applicant] is entitled to be acquitted unless I am satisfied of his guilt beyond a reasonable doubt. For this reason, I am not satisfied of that guilt on that burden and, in the result, I find the defendant not guilty.²²

[emphasis added]

[84] In its letter of April 10, 2010, KTRHA also added this explanation about the ruling:

Judge Morgan noted that there was both an *actus reus* and *mens rea* element to a charge under section 264(2)(c) of the *Criminal Code*, which I understand means both physical action and a mental intent. The judge also emphasized that the standard of proof in the criminal context is “beyond a reasonable doubt”.

²² Although this court decision is a public record, the citation has been removed to protect the anonymity of the Applicant consistent with the practices of this office.

[85] It is unclear what KTRHA was implying by making this statement in its letter. In the course of giving his decision, Judge Morgan discussed *actus reus* and *mens rea* as elements of a charge under section 264(2)(c) of the *Criminal Code*. He did so by referencing an Alberta Court of Appeal decision *R. v. Sillipp* that established the burden for justifying a conviction.²³ The judge did not find that there was either *actus reus* and *mens rea* in the Applicant's case.

[86] Given the aforementioned submissions by KTRHA, it appears that KTRHA has not accurately described the decision of Judge Morgan.

[87] KTRHA has failed to make the linkage between Judge Morgan's decision and any harm that may come to any particular individual if the record was released to the Applicant.

(d) Fears of Employees

[88] In its first submission of December 12, 2008, KTRHA claims that its employees were fearful of the Applicant. The submission stated as follows:

August 2007: At this time the region suffered the resignation of [Physiotherapist A]. [She] resigned from KTHR citing that she continued to feel unsafe in the community.

...

December 2008: I have been advised by the Director of KTHR Therapies Department that all members of the Therapies Department, including herself, will resign immediately upon being advised that they are required to re-assume [the Applicant] as a client of KTHR or that the names of other workers may be released to him. They remain fearful of him when they encounter him in the community of Melfort. They continue to report feeling harassed and stalked by [the Applicant] when they encounter him in the community or elsewhere. Be it coincidence or otherwise, the Director reports that each time she encounters him somewhere, it appears to "re-fuel his efforts and his requests for something to escalate again".

[emphasis added]

²³ *R. v. Sillipp*, (1997), 209 AR 253, 55 Alta LR (3d) 263.

[89] Firstly, there appears to have been a privacy breach with respect to the Applicant's access to information request. The Director of KTRHA Therapies Department and all members of the Therapies Department should **not** have known about the Applicant's access to information request.

[90] I have commented on this issue many times. This includes our office's Resource Document, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*:

Identity of Applicant is Protected Personal Information

Some public bodies/trustees have asked whether there are any rules around the identity of someone who has made an access request. You will have noticed that in our formal Reports, we refer to the 'applicant' and do not identify that person. At the initial stage of a request for access a couple of considerations apply. Our view is that a public body/trustee should not disclose the identity of the applicant to anyone who does not have a legitimate 'need to know'. A legitimate need to know relates to the specific knowledge an individual requires in order to process an access request. For example, if the applicant is making an access request for their own personal information then their identity is clearly relevant when searching for records. On the other hand, if the applicant is requesting access to general information their identity would almost always be irrelevant, and few outside of the FOIP/HIPA Coordinator should have a need to know their identity.

Our view is that it is improper to treat applicants differently depending on who they are or what organization they may represent. **It would also be improper to broadcast the identity of an applicant throughout a public body/trustee or to disclose the identity outside of that particular department. To avoid differential treatment, we encourage the FOIP/HIPA Coordinator to mask the applicant's identity.** This approach is consistent with direction from the Federal Court of Canada and practices in other provinces.²⁴

[emphasis added]

[91] My office referred KTRHA to this document in our letter of August 13, 2008, in which we notified KTRHA of our intention to commence a Review.

²⁴ SK OIPC, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*, pp. 4 to 5, available at <http://www.oipc.sk.ca/resources.htm>.

[92] In the future, KTRHA's access to information coordinator should not share the identity of Applicants to those within the organization without sufficient 'need-to-know'.

[93] KTRHA also submitted that the employees continued to be: "**feeling harassed and stalked** by [the Applicant] when they encounter him in the community or elsewhere".

[94] Secondly, KTRHA claimed that one of their therapists left KTRHA because she did not feel safe in the community. Again, KTRHA did not provide any evidence (ie. written statements, affidavits, etc.) to support this claim and appears to be relying on hearsay.

[95] I am left to assume the Applicant is the reason that she does not feel safe in the community. I note that there may have also been other life factors that caused this therapist to move out of Melfort. Even so, KTRHA again did not explain how granting access to the record could cause physical or mental harm to this particular individual.

[96] In Judge Morgan's decision of the Applicant's harassment case, he stated that:

Despite the complainant's evidence that she felt uneasy around [the Applicant] when she was dealing with him, **she also acknowledged that he was always polite with her and never acted inappropriately towards her**. There was no ongoing contact between the parties. There was no evidence of any threats of any kind being made to the complainant or to anyone at the health centre.²⁵

[emphasis added]

[97] The Applicant was found not guilty of harassment and there was no evidence of threats toward the staff of KTRHA. In addition, the therapist noted above that seemed to be fearful of the Applicant testified that he was always polite.

[98] KTRHA provided no evidence that any other employees were fearful (i.e. affidavits from employees or names of employees who identified as being fearful) other than the bare assertion by KTRHA and not the individuals themselves.

²⁵ *Supra* note 24.

[99] My Report H-2007-001 dealt with a similar situation in which a ‘difficult client’ of the Saskatchewan Cancer Agency (SCA) requested records regarding its staff. The SCA denied the record pursuant to section 38(1)(a) of HIPA which states the following:

38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:

(a) in the opinion of the trustee, knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the applicant or another person²⁶

[100] Section 38 of HIPA is similar to section 20 of LA FOIP. I stated in my Report H-2007-001:

[64] Every professional at one time or another will have to deal with difficult, unreasonable people. Some will have better coping mechanisms than others. Any negative feelings/distress arising from the actual encounter, however, should be fleeting for the average person, and should end with the encounter or shortly thereafter. Occupational health and safety, workplace injury compensation, and privacy legislation recognize that at times, the resultant harm to the individual is unacceptable and may result in the employee suffering serious distress or anguish to the point that his/her job performance or personal life or both are detrimentally affected. Based on the fact that the responsive documents in the present case provide a record of the Applicant’s interactions with SCA’s employees, if a true reflection, the Applicant should already have a reasonably accurate sense of the content. Most likely the Applicant will be displeased that SCA provided a detailed accounting of those incidents and may well vocalize his concerns. **Consistent with the authorities cited above, dealing with a difficult, aggressive, angry individual though clearly stressful, in my view, fails to meet the evidentiary threshold to trigger section 38 of HIPA in the absence of detailed and convincing evidence that a specific anticipated harm may reasonably be anticipated to result from disclosure of the record to the Applicant.**²⁷

[emphasis added]

[101] In summary, KTRHA’s contention that its staff fears the Applicant is not sufficient proof that disclosure of the record could result in the harm anticipated by section 20 of LA FOIP.

²⁶ *Supra* note 15 section 38.

²⁷ *Supra* note 17 at [64].

[102] The threshold to deny access is not a low one. That threshold cannot be achieved on the basis of unfounded, unsubstantiated allegations. It is clear in this case that the foundation for the KTRHA decision to deny access was woefully weak. There appears to have been a total lack of rigor in the assessment of the alleged threat. This was compounded by representations from the KTRHA to our office about a court proceeding that were exaggerated and inaccurate.

[103] The arguments raised by KTRHA at their strongest were not even connected to the specific access request in issue. KTRHA did not indicate who is under the threat of harm, what the harm may be or how the release of the record to the Applicant could contribute to any alleged harm.

[104] I should add that the evidence in this case suggests that KTRHA failed to discharge its implied duty to assist the Applicant seeking access to records.

[105] Therefore, I find that KTRHA has failed to meet the burden of proof for establishing that section 20 of LA FOIP applies in this case.

V FINDINGS

[106] The employee numbers contained in the record constitute personal information in accordance with section 23(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

[107] The remainder of the record which includes the names of the five nurses and details of the shifts worked do not constitute personal information under section 23(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

[108] The record does not qualify for exemption under section 20 of *The Local Authority Freedom of Information and Protection of Privacy Act* as Kelsey Trail Regional Health Authority failed to meet the burden of proof in establishing its application.

VI RECOMMENDATIONS

[109] Kelsey Trail Regional Health Authority should sever the employee numbers from the record and release the remainder of the responsive record to the Applicant; and

[110] Ensure that all access to information requests received by Kelsey Trail Regional Health Authority are kept confidential and that the identity of the Applicant is not revealed to anyone in the organization unless necessary for the purpose of processing the request.

Dated at Regina, in the Province of Saskatchewan, this 26th day of April, 2012.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy
Commissioner