

PRESENTATION TO STANDING COMMITTEE ON
INTERGOVERNMENTAL AFFAIRS AND
INFRASTRUCTURE by Saskatchewan Information and Privacy
Commissioner

RE: BILL 20, *The Gunshot and Stab Wounds Mandatory Reporting Act*

Monday, February 5, 2007 - Saskatoon

[Please note, there may be minor discrepancies between this text and the Hansard verbatim record of this committee session. The Hansard record will be available at www.legassembly.sk.ca]

Thank you for the invitation to participate in this public hearing. I applaud the Committee's initiative to hold these public hearings on Bill 20. The issues raised are important and far reaching. They deserve this kind of deliberation and opportunity for public input your Committee is providing.

As an independent officer of the Assembly, I have a mandate to provide comment on the implications for personal health information of proposed legislative schemes. This mandate is set out in section 52 of *The Health Information Protection Act* (HIPA) and section 33 of *The Freedom of Information and Protection of Privacy Act* (FOIP) and section 32 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

I have distributed to members a binder with some materials I intend to refer to in the next 15 minutes. Tab 1 is my submission of November 20, 2006 to the Assembly in the form of a letter to the Speaker.

In addition to my written commentary, I will suggest some amendments to Bill 20 for your consideration.

I suggest that this Committee has a difficult task in dealing with Bill 20. I recognize that we have, as a province, a serious problem with criminal violence, with criminal gangs and an increasing problem with the use of knives in the commission of crimes. I am certainly not here as some kind of privacy zealot to argue that privacy should trump all other considerations. Public safety is important. Privacy is not an absolute right. What we are all looking for is a reasonable means of addressing both needs.

My advice to this Committee is that Bill 20 fails to achieve that goal.

I want to acknowledge that there are lots of unknowns with Bill 20. Where is the evidence to suggest that even without legislation,

gunshot and knife wounds resulting from criminal acts are not being reported to police?

Will this discourage injured people from seeking appropriate medical attention? Will it negatively affect relationships between providers and patients? I'm not sure that anyone knows. New legislation in Ontario and Alberta is simply too new to be able to evaluate all of the long term impacts and consequences.

Please recognize that in cases where there is an imminent risk to someone's health or personal safety, there is already a provision in section 27(4)(a) in HIPA.

27(4) A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:

(a) where the trustee believes, on reasonable grounds, that the disclosure will avoid or minimize the danger to the health or safety of any person; ...

That provision certainly deals with the case of the fellow who comes in with a stab wound and is aggressive towards hospital staff. It also deals with the case where hospital staff have a reasonable concern when treating a patient with a stab wound that the perpetrator is coming back to the hospital 'to finish off the job'. From the number of questions and calls my office receives from

trustees around the province about section 27(4)(a) there is a clear need for more clarification about that provision. But I submit there is no need for new legislation for this purpose.

That important power in section 27(4)(a) is reinforced by section 27(4)(i) where trustees must comply with a court order or demand such as a subpoena or warrant issued by a court.

Really it seems to me that what is sought here is something that goes far beyond issues of immediate threats to the safety of anyone in the hospital or facility. It appears that what this is really about is facilitating police investigations. As members of the Committee will already be aware, there is no duty on citizens to volunteer information to police about how they have sustained an injury. That is not part of our criminal law.

Consider for a moment what Bill 20 will do. Let's assume Mr. Chairman that you are sharpening your hunting knife, accidentally stab yourself and go to the local hospital for treatment, perhaps stitches and a tetanus shot. Here is what will happen. The hospital will be required to call the local police detachment to advise that Ron Harper has been treated for a stab wound. They will provide to police in that telephone call not only your name, the

facility in which you were treated but also “any other prescribed information”. We have no way of knowing how broad or how narrow that “prescribed information” will be. Maybe it will be all or part of your medical chart. Maybe it will be anything you disclosed to the physician or nurses treating you. Maybe it will capture information about your mental health.

In this respect, let us assume that the police get this information. Perhaps you would have been willing to volunteer this information to police anyway. If you were not inclined to do so, the next step will be for a police officer to come to your residence or place of work to interview you. You will still be under no legal obligation to provide any information to the officer. If you wouldn't divulge this information before going to hospital or at the hospital what is the likelihood that you will volunteer information in the police interview after you leave hospital. So, even if the police are alerted that someone has an apparent stab wound they still have the problem of securing that person's cooperation.

In that case, the investigation is really no further ahead. That is why I anticipate that police will no doubt press to expand section 7(c) significantly to enable them to collect significantly more

information from the hospital. Maybe they will want to collect mental health history of the patient?

What then happens to that information? The police will presumably document this information from the phone call. Where will this go? How will it be filed or stored? It is likely that it will be somewhere in the police record that Ron Harper sustained a stabbing wound on a particular date and received treatment. Can we be certain that it will also show that this was a simple accident and not a criminal act? Maybe the investigator isn't persuaded and thinks that Mr. Harper isn't being truthful and has noted his suspicion in the file. Maybe the only notation in the police record is a brief one and does not indicate the injury was an innocent accident but is coded in the same way as a criminal assault. Maybe other officers who have reason to read this information at some future time mistakenly conclude that Mr. Harper was involved in a criminal act or at least was injured by a criminal act.

How long will this prejudicial information be kept?

Who will have access to this prejudicial information?

Will it be shared with other police departments, with correctional officers, with probation officials and under what circumstances?

Will it migrate to national police information systems?

What we do know is that you, Mr. Chairman, cannot complain to our oversight office or ask us to investigate whether your personal health information is being improperly used or disclosed? You cannot make an access request to see the information about you or to have errors corrected and then appeal to an independent commissioner's office if you are denied access or a correction. This is because in Saskatchewan municipal police forces and municipal police commissions are not subject to our FOIP or LA FOIP Acts.

To prevent this from happening what safeguards are required? In a moment I will offer some specific recommendations for this.

I refer members to Tab 8 and the CMAJ article by Merrill Pauls and Jocelyn Downie:

...the real danger is not that a few people may be deterred from seeking care, but that others, who see that physicians have become an extension of the police force, will choose not to reveal their drug use, will refuse to say how they received an injury or will not disclose their sexual practices for fear that this information will be used against them. This will make it harder for physicians to treat some of our most vulnerable patients and represents a significant breach of trust between physician and patient.

Will this be the Saskatchewan experience with Bill 20? No one can say with certainty. Surely it is a risk worth careful consideration before Bill 20 is enacted in its current form.

In the paper at Tab 2, from a University of Alberta Law Professor, Wayne Renke, there is an interesting discussion of whether a mandatory gunshot wound reporting law is within the legislative competence of any provincial legislature. I've included a copy of the Supreme Court decision, *Starr v. Houlden*, at Tab 11 that addresses the limitations on a province's ability to legislate criminal procedure. This is authority for the proposition that the investigation and determination of criminal responsibility of specific individuals for specific offences may infringe on the federally prescribed criminal procedure.

There is also the question of whether Bill 20 could survive a *Charter of Rights and Freedoms* challenge. I expect that the Justice Department officials have or will address those constitutional issues with the Committee. I flag these issues as questions that warrant careful consideration.

I have also noted in my submission, that Bill 20 is an example of "function creep". Personal health information collected for one

purpose, namely the diagnosis, treatment and care of the individual is disclosed for an entirely different purpose, without consent or even without knowledge of the individual. Function creep undermines public confidence in the integrity of our health information system and undercuts the respect our most sensitive personal health information warrants.

AMENDMENTS

I indicated at the outset that I would suggest amendments to Bill 20:

1. Defer passage of Bill 20 until the regulations have been developed so we know exactly what section 6 will mean and what will be exempted under section 7(e). The power in section 7(c) to permit regulations “prescribing any other information that must be disclosed to the local police service” is exceeding broad. It challenges the right of the citizen to a reasonable expectation of privacy in respect of his person, of his medical condition and services that he is or expects to receive.

Those holes or gaps are substantial. Until we know how they will be filled, it is tough if not impossible to know what the impact will be on the privacy of individuals. There are already plenty of questions about how Bill 20 will affect patients and providers. Why compound that uncertainty by deferring these kinds of decisions for a later date?

2. If the Committee has already addressed the constitutional issues I mentioned a moment ago and resolved them to its satisfaction, then I would encourage the Committee to at least eliminate the stab wound provision. Restrict the Bill to gunshot wounds. In this respect, I note that the Ontario Emergency Medicine Section of the OMA was a strong advocate in that province for mandatory gunshot wound reporting. Interestingly though, that same OMA opposed reporting injuries from stabbings and provided reasons for doing so. I refer you to Tab 9 of the binder, page 2 – 3rd paragraph from the bottom. Quote:

We specifically argued against reporting injuries from stabbings and beatings in our paper and provided several reasons, mainly that this type of behaviour is less lethal; a stray punch or knife will never come through the wall of a

house and kill a man watching television with his wife and child as a stray bullet did in Toronto recently.”
[emphasis added]

We will be the only jurisdiction in all of Canada that requires health care facilities to disclose stabbing wounds. It extends the net too wide, too far and captures far too many minor or innocent injuries that should not be part of a police data base. Mr. Chairman, in the example of your stab wound, I simply don't think that information belongs in a police data base that is effectively beyond the reach of independent oversight.

3. If you are not persuaded to restrict Bill 20 to gunshot wounds, you might consider the Alberta approach i.e. making the disclosure a discretionary decision of the regional health authority and not a mandatory decision. With appropriate training, the care provider is better able to screen out the accidental stab or puncture wounds. Why make this mandatory and remove the ability to exercise appropriate judgement on the particular facts of any injury?
4. If you as a Committee resolve to proceed with Bill 20, in spite of these concerns, I invite you to consider a requirement that

the hospital advise persons entering hospital for gunshot or stab wounds that there is a mandatory reporting to police requirement. This is consistent with section 9 of HIPA. Transparency is a key element of privacy legislation.

5. If you as a Committee resolve to proceed with Bill 20, in spite of these concerns, I invite you to ensure that hospitals provide timely notice to patients that certain personal health information has been shared with police. This would be in the spirit of section 10 of HIPA. This notice should detail the precise information provided to police. The innocent victim would at least know that the police now have information about him or her and an injury he or she has received that they would not otherwise have had access to. This may already be captured by section 10 but it should be explicit in Bill 20.

6. If you as a Committee resolve to proceed with Bill 20, I encourage you to ensure that municipal police forces and municipal police commissions are explicitly defined as local authorities for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act*. Currently, the RCMP when performing municipal policing services are subject to the federal *Access to Information Act* and the federal

Privacy Act. There is no equivalent protection for citizens when their personal health information is collected by their municipal police force.

That means different standards in privacy protection depending on where you live in Saskatchewan. It also means that unlike I think every other jurisdiction in Canada except for PEI, my office has no jurisdiction to oversee the collection, use or disclosure of personal information under FOIP, LA FOIP or personal health information under HIPA. With other public bodies we can deal with how long they keep personal information, how they keep it secure and ensure only those with a legitimate need to know can see the information, how it will be destroyed and when.

7. A more minor amendment for your consideration: For the last three years, both Saskatchewan Health and our office have been engaged in a major training focus on regional health authorities for HIPA compliance. To be consistent with HIPA, I recommend that if the Committee elects to proceed with Bill 20 in its present form, that it substitute “Regional Health Authority” for “hospital” wherever that appears in the bill.

Thank you again for the opportunity to present these concerns and suggestions. I would be pleased to answer any questions of the Committee.