SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT H-2007–001

SASKATCHEWAN CANCER AGENCY

Summary: The Applicant made application to the Saskatchewan Cancer Agency (SCA) for a copy of his complete patient file. SCA withheld 12 pages citing section 38(1) of *The Health Information Protection Act* (HIPA) as justification to deny access. The Commissioner determined that the section had no application and recommended the release of the withheld documents.

Statutes Cited: *The Health Information Protection Act*, [S.S. 1999, c. H-0.021], ss. 2(m), 2(t), 12, 32, 38(1)(a), 38(2), 47; *The Workers' Compensation Act, 1979*, [S.S. 1979, c. W-17.1], ss. 2(k), 2(r.2); *The Occupational Health and Safety Regulations, 1996*, [c.0-1.1 Reg 1], ss. 2(2), 37(1); *The Mental Health Services Act*, [S.S. 1986, c. M-13.1], s. 2(m).

Authorities Cited: **Saskatchewan** OIPC Investigation Report F-2007-001, Report H-2006-001, Investigation Report H-2005-002; **British Columbia** OIPC Order 03-10, Order 02-32, Order 01-15, Order No. 265-1998; **Nova Scotia** Freedom of Information and Protection of Privacy Review Office, Report FI-06-79.

Other Sources Cited: OIPC, *Saskatchewan FOIP FOLIO* (February 2004, February 2007); Principle 9 Individual Access, "Exceptions to the access requirement should be limited and specific", *Model Code for the Protection of Personal Information – A National Standard of Canada*, CSA Standard CAN/CSA-Q830-96; E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983); Scottish Information Commissioner *It's Public Knowledge* web-site; Alberta Health & Wellness, *Health Information Act Guidelines and Practices Manual*, 2006; Access and Privacy Services, Archives of Manitoba: *Freedom of Information and Protection of Privacy Act, Manuals & FAQ's for Public Bodies*; Interim report of The Standing Senate Committee On Social Affairs, Science And Technology, *Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada, Report 1* (Ottawa: November 2004) (Chair: The

Honourable Michael J.L.Kirby & Deputy Chair: The Honourable Wilbert Joseph Keon); U.K. Information Commissioner's Office, *Freedom of Information Act Awareness Guidance No. 19*; The Standing Senate Committee On Social Affairs, Science And Technology, *Final Report on Mental Health, Mental Illness and Addiction: Out of the Shadows at Last, Transforming Mental Health, Mental Illness and Addiction Services in Canada* (Ottawa: May 2006) (Chair: The Honourable Michael J.L.Kirby & Deputy Chair: The Honourable Wilbert Joseph Keon); J. Pearsall, ed., *Concise Oxford English Dictionary*, 10th ed. (New York: Oxford University Press, 2002); B. A. Garner (Editor in Chief), *Black's Law Dictionary*, 8th ed. (USA: Thomson West, 2004).

I. BACKGROUND

[1] The Applicant is a patient of the Saskatoon Cancer Centre operated by the Saskatchewan Cancer Agency (SCA).

[2] SCA advised that "[t]*he Saskatchewan Cancer Foundation is a corporation continued pursuant to The Cancer Foundation Act (Saskatchewan). The Saskatchewan Cancer Foundation operates under the name and style of 'The Saskatchewan Cancer Agency'*."

[3] On or about November 21, 2005, the Applicant's representative made application on the Applicant's behalf for "*all information about him that is in* [SCA's] *possession or control, including any chart notes …*".

[4] SCA provided the Applicant with copies of some responsive material by way of letter dated November 24, 2005. Apparently, not all responsive materials were released at that time as evidenced by the Applicant's representative's letter dated December 12, 2005: "*I trust that the remainder of information, or the reason for withholding will be forwarded to myself in a* [sic] *envelope marked CONFIDENTIAL*."

[5] In a letter dated December 22, 2005, SCA responded to the above noted request indicating that "*in accordance with Section 38(1)(a) of the Health Information Protection Act we have not provide* [sic] *certain non-treatment related information from* [the Applicant's] *health record*." Along with this letter, SCA released some additional documents from the Applicant's file, but withheld others.

[6] By way of letter dated January 3, 2006, the Applicant requested that we undertake a review.

[7] On January 9, 2006, we provided notice to the parties that we intended to undertake a review of the matter.

[8] During the review process, SCA advised us that it released additional records to the Applicant by way of letter dated April 18, 2006.

II. RECORD AT ISSUE

[9] Withheld portions of the patient's chart, totalling 12 pages, are as follows:

1. E-mail regarding QCC call
2. Psychosocial Oncology Note
3. Top 2 lines of Interdisciplinary Notes (continued) (29 Aug 05) entry
4. Interdisciplinary Notes (29 Aug 05) entry
5. Interdisciplinary Notes (Aug 26/05 entry
6. Patient Details Report
7. Interdisciplinary Notes (Dec 20/04) entry and (14 Jan/05) entry
8. Interdisciplinary Notes (Sept 29/04) entry and (Dec 20/04) entry
9. Interdisciplinary Notes (Sept 29/04) entry
10. Interdisciplinary Notes (June 8/04) entry
11. Interdisciplinary Notes (June 8/04) entry
12. Interdisciplinary Notes (May 31/04) entry

III. ISSUES

1. Does *The Health Information Protection Act* apply to this request for access?

2. Did SCA properly invoke section 38(1)(a) of *The Health Information Protection Act* in withholding the records in question?

IV. DISCUSSION OF THE ISSUES

[10] As a preliminary issue, we note that SCA is of the view that why the Applicant may be seeking the records in question is relevant to the access application process. Specifically, SCA expressed the following:

> *Although* **[the Applicant]** ***was provided with all the details of his medical journey*** *we became concerned when* [the Applicant] *made it clear to us (through his Cancer Society patient advocate),* ***that what he wanted was a detailed account of "who said what" including their last names. This was of tremendous concern due to his past history of verbal abuse and an escalating pattern of harassment****. We are not prepared to allow him to subject our staff to the abuse we endured for months. His past pattern of behaviour would, in our opinion, most definitely repeat itself should we provide him with our interdisciplinary notes.* ***We feel it is the sole purpose of his request for this information.***
>
> [Emphasis added]

[11] As a general rule, *The Health Information Protection Act*[1] **(**HIPA) does not permit a trustee to pick and choose what personal health information the individual is entitled to access based on the reason for the access request.[2] In the limited circumstances of section 38(1)(a) of HIPA, motive may be a relevant consideration. Those limited circumstances will, however, be considered later in this Report.

1. Does *The Health Information Protection Act* apply to this request for access?

[12] In order for HIPA to apply, the following three criteria must be met, as articulated in my Report H-2006-001:

> *For The Health Information Protection Act to apply, three elements must be present: (1) there must be personal health information as defined in section 2(m); (2) the personal health information must be in either the custody or the control of an organization; and (3) that organization must be a "trustee" as defined in section 2(t).*[3]

[1] *The Health Information Protection Act*, [S.S. 1999, c. H-0.021].
[2] OIPC, *Saskatchewan FOIP FOLIO* (February 2004) at 2. Available online at www.oipc.sk.ca under the *Newsletters* tab.
[3] SK OIPC Report H-2006-001 at 13. Available online at www.oipc.sk.ca under the *Reports* tab.

[13] I have previously determined that SCA is a trustee for purposes of HIPA.[4]

[14] SCA generally described the withheld record as follows:

> *The Saskatchewan Cancer Agency formally denied* [the Applicant's] *request to release our interdisciplinary notes regarding his treatment journey with us. These notes are operational in nature and are primarily a communication tool for our staff. We released to him all medical reports and information pertaining to his diagnosis, treatment, and medical care.*

[15] The information, though described above as operational interdisciplinary notes, constitutes the Applicant's personal health information as the information includes details of the Applicant's physical and mental health; is information with respect to health services provided to the individual; was collected in the course of providing health services to the individual; or was collected incidentally to the provision of health services to the individual.[5]

[16] As the records are clearly in SCA's custody, I find that HIPA applies to the records responsive to this access request.

2. Did SCA properly invoke section 38(1)(a) of *The Health Information Protection Act* to justify withholding the records in question?

[17] The right of a patient or client to access his/her own personal health information is fundamental to HIPA. Sections 12 and 32 state as follows:

> ***12*** *In accordance with Part V, an individual has the right to request access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.*
>
> …

[4] SK OIPC Investigation Report H-2005-002 at 22: "***Trustee*** *-- This includes all of the provincial government departments, Crown Corporations, boards, agencies and commissions listed as a "government institution" in The Freedom of Information and Protection of Privacy Regulation; regional health authorities; the Saskatchewan Cancer Foundation; a health professional body such as the College of Physicians and Surgeons; and health professionals, such as family physicians, licensed to practice in the province and other organizations specified in HIPA.*"; and at 27: "*The Saskatchewan Cancer Agency is a public body created pursuant to The Cancer Foundation Act.*"; and section 2(t)(xi) of HIPA: *"'trustee' means any of the following that have custody and control of personal health information: … the Saskatchewan Cancer Foundation"*.

[5] The information in question constitutes the Applicant's personal health information as defined by sections 2(m)(i), (ii), and (iv) of HIPA

> ***32*** *Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.*

[18] Although there is no purpose or object clause in HIPA, I note that the preamble includes the principle: *"That individuals shall be able to obtain access to records of their personal health information"*.

[19] As I noted in my Investigation Report H-2005-002, in introducing Bill 29 at First Reading, which later became HIPA, the government minister advised the Legislative Assembly as follows:

> *Mr. Speaker, The Health Information Protection Act is about the rights of individuals to protect their personal health information. The Act enshrines in legislation certain rights that every person in this province has in regard to their personal health information.*
>
> *The Act then sets out the duties and responsibilities of government and the health system to ensure that those rights are respected. Mr. Speaker, The Health Information Protection Act will ensure that people's privacy rights are protected.*
>
> …
>
> *Since 1995, the Department of Health has worked to develop a comprehensive framework of health information management principles and broad policies within the public sector. These principles, Mr. Speaker, are consistent with the best national and international information management principles in the world today.*
>
> *These principles include: accountability to the individual; collection, use and disclosure of personal health information only for legitimate health purposes; the right of individuals to access their own information; and that health professionals hold personal health information in trust for individuals, and manage it accordingly.* [6]

[20] The relevant section of HIPA that the Agency relied on in denying access is as follows:

> ***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 person;*
>
> …

[6] SK OIPC Investigation Report H-2005-002 at 149. Available online at www.oipc.sk.ca under the *Reports* tab.

> *(2) Where a record contains information to which an applicant is refused access, the trustee shall grant access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.*
>
> [Emphasis added]

[21] Since this is an exception to the right of access that is a fundamental element of HIPA and indeed all modern privacy laws[7], I intend to follow the 'modern principle' of statutory interpretation[8] as that has been interpreted by the Supreme Court of Canada. This leads me to conclude that the exception to the right of access that is permitted by section 38 of HIPA needs to be construed narrowly.

[22] In order to determine if the above provision may apply in the circumstances, I must first define the key terms.

[23] HIPA does not define physical or mental health but relies on those terms to further clarify what constitutes an individual's personal health information:

> ***2*** *In this Act:*
>
> …
>
> *(m)* ***"personal health information"*** *means, with respect to an individual, whether living or deceased:*
>
> *(i) information with respect to the* ***physical or mental health*** *of the individual;*
>
> [Emphasis added]

[24] The Scottish Information Commissioner defines mental and physical health as follows:

> *6. Section 39(1): information endangering health and safety*
>
> *Definition of key terms and concepts*
>
> …
>
> *Physical or mental health or the safety of an individual*

[7] See *Principle 9 – Individual Access, "Exceptions to the access requirement should be limited and specific", Model Code for the Protection of Personal Information – A National Standard of Canada*, CSA Standard CAN/CSA-Q830-96 at 8.

[8] This requires that the words of the legislation be read "*in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*": E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983) at 87.

> *Again, this is defined widely. Danger to physical health could mean danger to someone's person as a result of physical injury, illness or disease. Danger to mental health could mean any type of psychological illness, resulting from the information being released. The information may be exempt even if the person's physical and/or mental health could be indirectly endangered by the information being released. Mental health should not be confined to the symptoms of defined psychological pathology, but should also include consideration on the person's mental wellbeing.*
>
> *Generally there is little or no discernable difference between endangering someone's "physical and mental health" or endangering their "safety". However, the two separate terms do have slightly different definitions. In other jurisdictions, "mental and physical health" has been used to refer to immediate danger to a person's health, and "safety" has been used to refer to information that would endanger a person at some point in the future if released when the matter has come to court.*[9]

[25] A general definition for safety is "*the relative freedom from danger or risks*".[10]

[26] Saskatchewan's *The Mental Health Services Act*[11] 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;*
>
> [Emphasis added]

[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****.*

[9] Available online: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39_1_39.asp
[10] Alberta Health & Wellness, *Health Information Act Guidelines and Practices Manual*, 2006 at 61. Available online at: http://www.health.gov.ab.ca/about/HIA_chapter03.pdf. See also Access and Privacy Services, Archives of Manitoba: *Freedom of Information and Protection of Privacy Act, Manuals & FAQ's for Public Bodies*. Available online at: http://www.gov.mb.ca/chc/fippa/manuals/resourcemanual/chapter4_sec24_dis.html.
[11] *The Mental Health Services Act*, [S.S. 1986, c. M-13.1].

> *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).***
>
> *There are many different forms of mental disorders. They vary widely in terms of the course and pattern of illness, the type and severity of symptoms produced and the degree of disability experienced. An individual may have only one or may have repeated episodes of illness separated by long periods of wellness. While some mental disorders are episodic or cyclical in nature, others are more persistent with lengthy or frequently recurring episodes. Individuals with persistent illnesses usually require long term treatment and support.*[12]
>
> [Emphasis added]

[28] The United Kingdom Freedom of Information Act Awareness Guidance No. 19 suggests that:

> *it would be a mistake to equate danger to mental health with a risk of distress and the Commissioner considers that the endangerment of mental health implies that disclosure might lead to or exacerbate an existing mental illness or psychological disorder.* [13]

[12] Interim report of The Standing Senate Committee On Social Affairs, Science And Technology, *Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada, Report 1* (Ottawa: November 2004) (Chair: The Honourable Michael J.L.Kirby & Deputy Chair: The Honourable Wilbert Joseph Keon) at 2-3. Available online at: http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/soci-e/rep-e/report1/repintnov04vol1part2-e.htm

[13] U.K. Information Commissioner's Office, *Freedom of Information Act Awareness Guidance No. 19 at 2*. Available online at:

[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. See Order 01-15 at para. 74.***"[14] [Emphasis added]

[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.

[31] In assessing whether section 38 of HIPA may apply, a useful consideration may be whether the potential resultant harm, "the injury," would be compensable under provincial WCB legislation.

[32] In the present case, SCA asserted that if the Applicant receives the withheld documents, he may harm the authors, SCA's employees. When harm comes to an employee in the course of, or arising out of employment, depending on the injury sustained, he/she may make a claim for compensation. One publication, after surveying all provinces and territories, observed that Workers' Compensation Boards (WCBs) not only receive mental health-related claims (referred to as "occupational stress"), but also compensate many such claims. Table 8.1 from that publication states that for Saskatchewan "[c]*ompensation for* ***occupational stress*** *is specifically allowed for as a matter of policy where* ***clear and convincing evidence is provided*** *that the* ***work stress was excessive and unusual****; routine industrial relations actions taken by the employer are considered normal and not unusual."* [15] [Emphasis added]

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_19_-_health_and_safety.pdf

[14] BC OIPC Order 03-10. Available online at http://www.oipc.bc.ca/orders/.

[15] The Standing Senate Committee On Social Affairs, Science And Technology, *Final Report on Mental Health, Mental Illness and Addiction: Out of the Shadows at Last, Transforming Mental Health, Mental Illness and Addiction Services in Canada* (Ottawa: May 2006) (Chair: The Honourable Michael J.L.Kirby & Deputy Chair: The Honourable Wilbert Joseph Keon). Available online at: http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/soci-e/rep-e/rep02may06part3-e.htm#_Toc133223141.

[33] To be compensable under *The Workers' Compensation Act, 1979*[16], the resultant harm to a Saskatchewan worker must constitute one of the following:

> ***2*** *In this Act:*
>
> *(k)* ***"injury"*** *means:*
>
> *(i) the results of a wilful and intentional act, not being the act of the worker;*
>
> *(ii) the results of a chance event occasioned by a physical or natural cause;*
>
> *(ii.1)* ***a disabling or potentially disabling condition caused by an occupational disease****; or*
>
> *(iii) any disablement;*
>
> ***arising out of and in the course of employment****;*
>
> *…*
>
> *(r.2)* ***"occupational disease"*** *means* ***a disease or disorder*** *that arises out of, and in the course of, employment and that results from causes or conditions that are:*
>
> *(i) peculiar to or characteristic of a particular trade, occupation or industry; or*
>
> *(ii) peculiar to a particular employment;*
>
> [Emphasis added]

[34] *The Occupational Health and Safety Regulations, 1996*[17] further elaborates on the definition of injury as follows:

> ***2****(2) For the purposes of the Act and in these regulations and all other regulations made pursuant to the Act,* ***"injury" includes any disease and any impairment of the physical or mental condition of a person****.*
>
> [Emphasis added]

[35] Next I will address what is required in order to demonstrate that the anticipated harm (physical or mental health or safety) "could reasonably be expected" to come to a particular individual.

[36] In Nova Scotia Report FI-06-79, when dealing with a refusal to disclose a video or audio tape because of the related property security, law enforcement, and health and safety issues, the Review Officer commented as follows:

[16] *The Workers' Compensation Act, 1979*, [S.S. 1979, c. W-17.1].
[17] *The Occupational Health and Safety Regulations, 1996*, [c.0-1.1 Reg 1].

The second additional exemption cited by Justice was s. 18(1)(a), which provides:

> ***18****(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 health;*

…

Justice argues that the release of the Record could threaten both the correctional worker and his or her family at home. ***For disclosure to meet the test that it could reasonably be expected to threaten anyone else's safety there must be a rational connection between the disclosure and the threat to safety and not simply amount to a fear of a possibility****.*[18]

[Emphasis added]

[37] In another BC decision, Order 01-15, I found the following to be relevant:

> *[72]* ***Returning to the evidence before me, the Ministry says the applicant is likely to behave in what it says would be a "threatening" way. The Ministry argues, at para. 8.02 of its reply submission, that various individuals continue to feel that their health or safety, or both, are affected by the applicant and that disclosure of the withheld information would threaten their health or safety****. It has not provided specific examples of the applicant's "threatening" behaviour or his "abusive language", although the labels "threatening" and "abusive" have been offered. The Ministry also argues - and Peter Smith deposed - that the applicant will "aggressively pursue" his interests or case. The Ministry did not elaborate on what this means, although it is clearly intended to be negative. The applicant is said to be "unpredictable", but details are not given about what that means. The records themselves refer to his having been "verbally abusive" in at least one telephone conversation, and in meetings, but no details are given as to what the applicant said or how he said it. It is also said that if any personal identifiers are disclosed, the applicant will seize on any identified Ministry employee as "an additional avenue through which to aggressively pursue his case."*
>
> *[73]* ***It is clear Ministry employees and others perceive the applicant to be difficult and challenging to deal with, as regards issues involving the association at any rate. The applicant does appear to be, at times, intense in his feelings about issues involving the association and about the Ministry's perceived role in those issues.*** *He is frank in expressing his views - in writing, certainly - about what he believes to be the injustice of his situation.* ***It does not follow from this alone, however, that there is a reasonable expectation that the applicant is, in a general sense, a threat to the safety or mental or physical health of others****.*

[18] Nova Scotia Freedom of Information and Protection of Privacy Review Office, Report FI-06-79 at 14. Available online at: http://foipop.ns.ca//rep_recent.html.

> *[74] The question under s. 19(1)(a), moreover, is whether disclosure of the information actually in dispute could, in light of the relevant circumstances (including respecting an applicant's statements or behaviour), reasonably be expected to threaten anyone's safety or mental or physical health.* ***I note, first, that it is not enough that disclosure of information could reasonably be expected to lead to someone being upset and therefore troublesome, difficult and unpleasant to deal with.*** *It is not enough that the disclosure could reasonably be expected to cause a third party (in this case Ministry employees or others) to be upset.* ***The section clearly requires more, since it explicitly refers to a reasonable expectation by someone's unpleasant behaviour of a threat to "safety" or to the mental or physical "health" of others. A threat to "mental ... health" is not raised merely by the prospect of someone being made upset****. In Order 00-02,* ***I spoke of "serious mental distress or anguish****" (pp. 5-6), i.e., at* ***least something approaching a clinical issue. The inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person does not suffice****.*
>
> *[75] After careful consideration, I have decided that the material does not, in this case, support a reasonable expectation that disclosure of the severed information could threaten the mental or physical health of anyone. Nor am I persuaded that disclosure of the withheld information could reasonably be expected to threaten anyone's safety.* ***Among other things, the applicant already knows the identities*** *and office addresses of the Ministry employees involved. Disclosure of that specific information does not create the necessary reasonable expectation under s. 19(1)(a). Further, much of the disputed information is innocuous factual material and* ***a good deal of it is already known to the applicant.*** *I am not persuaded that disclosure of this factual information could reasonably be expected to threaten the safety or mental or physical health of anyone. Nor does the evidence of the applicant's behaviour change this conclusion.*
>
> *[76] I find that s. 19(1)(a) does not apply to the information withheld under s. 19(1)(a). It should be noted, for clarity, that some of the information I have found cannot be withheld under s. 19(1)(a) must, in any case, be withheld under s. 22(1) for the reasons given above.*[19]
>
> [Emphasis added]

[38] The Concise Oxford Dictionary defines "endanger" as "*put at risk or in danger*."[20] Black's Law Dictionary defines "endangerment" as "[t]*he act or an instance of putting someone or something in danger; exposure to peril or harm*."[21] "Harm" is defined by the same source as "[i]*njury, loss, damage; material or tangible detriment*."[22]

[19] BC OIPC Order 01-15 at 14. Available online at http://www.oipc.bc.ca/orders/.
[20] J. Pearsall, ed., *Concise Oxford English Dictionary*, 10th ed. (New York: Oxford University Press, 2002) at 470.
[21] B. A. Garner (Editor in Chief), *Black's Law Dictionary*, 8th ed. (USA: Thomson West, 2004) at 568.
[22] Ibid at 734.

[39] The parallel provisions in both British Columbia and Nova Scotia use the word "threaten" instead of "endanger" as used in the Saskatchewan Act. I find that the terms are nonetheless interchangeable.

[40] British Columbia Order No. 265-1998 is useful as it provides insight into the reasonable expectation of harm test as follows:

> *The issue under review is the hospital's application of section 19 of the Act to the requested records. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body, in this case the hospital, to prove that the applicant has no right of access to the record or part. The relevant section under review reads as follows:*
>
> > ***Disclosure harmful to individual or public safety***
> >
> > *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 health****,*
> >
> > *…*
> >
> > *(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.*
>
> *…*
>
> *The records in dispute consist of all of the medical records relating to the applicant.*
>
> *There are several hundred pages of records that primarily relate to the applicant's admission to hospital for psychiatric issues.* ***They indicate the history of this applicant's relationship with the hospital and several psychiatrists.*** *They include records of his medications and copies of forms that he filled out himself for purposes of self-diagnosis. The psychiatrists' own notes of interviews with the applicant are in the standard format for such interactions with medical specialists.*
>
> *…*
>
> *The hospital's in camera paragraph is a vague opinion about two particular interactions with the applicant. The evidence before me of those interactions, and the applicant's submissions themselves, indicate that the applicant is angry and suspicious about the hospital's diagnosis of the medical condition and about not being permitted access to his medical records.* ***I interpret the phrase "could reasonably be expected to" in section 19 as requiring a sufficient and rational basis for a reasonable expectation of the described harms****. There are elements of the irrational in the materials concerning and from the applicant. The evidence, including the hospital's in camera paragraph, fails however to present*

any sufficient or rational basis for concluding that, if the applicant is granted access to his medical records, there is a reasonable expectation of any of the harms in section 19.

…

The Council of the Canadian Medical Association approved a Health Information Privacy Code in August 1998. *Because of the importance of the participation of physicians in public debates on data protection, and its relevance to the present inquiry, I quote as follows from Principle 6, Individual Access:*

> ***Patients have the right of access to their health information. In rare and limited circumstances, health information may be withheld from a patient if there is a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or substantial harm to a third party. The onus lies on the provider to justify a denial of access****.*

…

Although my role in inquiries is to apply the Act, I am of the view that my decision in this inquiry is also in compliance with the important standards set by the Canadian Medical Association.

…

I find that the Dawson Creek & District Hospital is not authorized to refuse access to the records in dispute….[23]

[Emphasis added]

[41] This test is further explored in another British Columbia Order 02-32 as follows:

[9] As I indicated in Order 01-29, [2001] B.C.I.P.C.D. No. 30, at para 17:

> ***… the reasonable expectation of harm test requires evidence the quality and cogency of which is commensurate with a reasonable person's expectation that disclosure of the disputed information could cause the harm specified in the relevant section of the Act. Although it is not necessary to establish a certainty of the harm being caused, evidence of speculative harm will not suffice. There must be a rational connection between the disclosure and occurrence of the feared harm.***

[10] I note that the ***Supreme Court of Canada has very recently said, in a case involving access to information under the federal Privacy Act, that the phrase "could reasonably be expected" requires evidence of "a clear and direct connection between the disclosure of specific information and the injury that is alleged.****" See Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53, [2002] S.C.J. No. 55, at para. 58 (Q.L.). This formulation is consistent with the above passage from Order 01-29.*[24]

[Emphasis added]

[23] BC OIPC Order No. 265-1998 at 1-3. Available online at http://www.oipc.bc.ca/orders/.
[24] BC OIPC Order 02-32 at 3. Available online at http://www.oipc.bc.ca/orders/.

[42] In our February 2007 Saskatchewan FOIP FOLIO, we advised trustees as follows:

> *Some trustees have requested clarification as to how broad section 27(4)(a) of The Health Information Protection Act (HIPA) will be construed by the OIPC in our HIPA oversight role. That section provides:*
>
> > ***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 a danger to the health or safety of any person;…*
> >
> > *[emphasis added]*
>
> ***It is common in all access and privacy laws[25] 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 probably*** [sic] ***harm;***
>
> ***b) harm must constitute damage or detriment and not more*** [sic] ***inconvenience***
>
> ***c) must be a causal connection between disclosure and the anticipated harm.***
>
> *Generally, this means the trustee 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. This would involve the responsible trustee exercising the kind of professional judgment and experience common to Saskatchewan health care professionals.*[26]
>
> [Emphasis added]

[43] I made this observation again in my Investigation Report F-2007-001 as follows:

> *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.*[27]

[44] The burden of proof is borne by the party resisting release of the records in question.[28]

Where there is a reasonable basis for believing that a person's health (physical or mental)

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[25] The orders referenced in the article are Alberta OIPC Orders 96-003 and 96-004. Available online at: http://www.oipc.ab.ca/orders/. See also BC OIPC Order PO6-02. Available online at http://www.oipc.bc.ca/orders/.

[26] OIPC, *Saskatchewan FOIP FOLIO* (February 2007) at 4. Available online at www.oipc.sk.ca under the *Newsletters* tab.

[27] SK OIPC Investigation Report F-2007-001 at 107. Available online at www.oipc.sk.ca under the *Reports* tab.

or safety will be endangered by disclosing a record or portions therein to the requestor, the trustee of the record will have properly invoked the section.

[45] When applying section 38(1)(a) of HIPA, firstly, the trustee should consider if there is documented evidence of the individual's background that suggests mental or physical problems/concerns or instability that would lead the trustee to conclude that release would result in harm to the requestor or another individual (i.e., a history of violence or mental breakdown that, upon accessing information, would likely trigger a violent response directed at him/herself or others).[29]

[46] Secondly, the trustee should consider if it is necessary to consult a medical professional (or other expert) in order to substantiate the basis for withholding the information from the requestor. For instance, the U.K. Information Commissioner's Office recommends the following in their *Freedom of Information Act Awareness Guidance No. 19*:

> ***ASSESSING THE RISK TO THE MENTAL HEALTH OF ANY PERSON***
>
> ***As mentioned above, it would be wrong to equate endangerment of mental health with the causing of distress***. ***There are some obvious difficulties for FOI officers and other officials who have no medical training or any particular knowledge of the individual whose health might be endangered by a disclosure in judging whether it is legitimate to rely upon this part of the exemption***. *This difficulty is not, however, insuperable.*
>
> *For instance a request may be received for the police photographs of a murder scene. The public authority may fear that disclosure might endanger the mental health of a surviving relative of the victim.*
>
> *The first step may be for the authority to consider whether it holds any information as to surviving relatives and, if so, whether it has any particular information which would lead it to think there was a risk to the mental health of a survivor. This information might take the form of medical or social work reports.*
>
> ***Assuming that no information is held, or that the information held is not conclusive, the authority may consider taking advice from an expert or other suitably qualified person who may be able to advise upon the possible effect of***

[28] HIPA section 47.

[29] See Alberta Health & Wellness, *Health Information Act Guidelines and Practices Manual*, 2006 at 61: "*Evidence to support the decision not to provide the individual with his or her own health information, or a portion of his or her own health information, should be provided. This might include documentation or observations of past behaviour of the individual in relevant situations, statements the individual made in the past, a pattern of behaviour discernible in his or her health records, or other details that might indicate a reasonable expectation of harm to the individual, another person, or a threat to public safety*."

> ***disclosure.*** *This need not be a medical opinion of someone who has treated the relative, although in some cases that may be appropriate.* ***However it should be an authoritative opinion upon which the authority is able to rely in the event of an appeal against refusal***.[30]
>
> [Emphasis added]

[47] In order to make the case, however, even if a medical professional or duly qualified expert expresses an opinion, the evidentiary threshold must be met before the trustee will be entitled to withhold the information at issue from the requestor.[31]

[48] In terms of the anticipated harm that may result if the records are released to the Applicant, SCA asserted that:

> *there is a* ***serious risk of mental harm to SCA staff anytime they are confronted by a threatening or abusive patient***" and "*SCA takes the security and well-being of its staff extremely seriously and is not prepared to put its staff at risk of physical or mental harm by* ***releasing non-care related records to patients in circumstances where it is reasonable to believe that the patient will become inflamed by the content of the record and once again engage in threatening or abusive behaviour***.
>
> [Emphasis added]

[49] SCA further elaborated as follows:

> *In particular, the opinion of the SCA is that knowledge of the information contained in the Records* ***could reasonably be expected to result in mental or physical harm to the SCA staff****. Such harm could reasonably be expected to manifest itself by the way of the Applicant confronting the SCA staff referenced in the Record and/or involved in the associated incidences.* ***The harm could also reasonably be expected to manifest itself by way of the Applicant becoming upset and, as a result, confronting other SCA staff in an abusive or threatening manner***.
>
> [Emphasis added]

[50] SCA asserted that the record "*relates to various incidences where the Applicant acted in an abusive or threatening manner towards SCA staff.*" SCA withheld portions of the Applicant's file indicating that, "[s]*ection 38(1)(a) of HIPA provides that endangerment of either physical or mental harm provide a basis to withhold records. It is evident from*

[30] Supra note 13 at 4-5. (UK Commissioner)
[31] Supra note 24 (BC Order 02-032)

the police records related to the Fall 2004 incidence that the Applicant has demonstrated a willingness to manifest his feelings in a physically threatening way."

[51] SCA provided us with what it views as the best example of the Applicant's abusive and threatening behaviour. This took the form of an internal SCA email which documented the above referenced incident in the fall of 2004. This indicated that the Applicant came to the Saskatoon Cancer Centre (Centre) for treatment. Once completed, he entered the office of a social worker and closed the door. He was "*verbally abusive and intimidating*." He then left. He returned to the Centre the following day. After treatment he returned to the Social Worker's office. In her absence, he sat down and waited. When security guards came to remove him, he resisted. He was charged with mischief under the Criminal Code. He subsequently received a conditional discharge subject to a six month probation order.

[52] Following the incident, SCA notified the Applicant of the following:

> [y]*our behaviour and conduct, including your* ***refusal to leave our building*** *when asked, your* ***use of profanity and intimidation*** *within the Saskatoon Cancer Centre has:*
>
> - *been recognized a risk to our staff, patients and their families;*
> - *caused workers to believe that they are at risk of injury; and*
> - *had an impact on the psychological well-being of several employees and patients.*
>
> [Emphasis added]

[53] In the same letter, SCA imposed the following terms and conditions to which the Applicant had to agree in order:

> *to enter the Saskatoon Cancer Centre or receive treatment or services from the Saskatoon Cancer Centre:*
>
> 1. *You are to have no contact with staff of the Saskatoon Cancer Centre outside the Saskatoon Cancer Centre building.*
> 2. *You must not be violent or abusive to our staff, security staff, other patients or their families. This includes, but is not limited to outbursts or use of profanity.*
> 3. *You will not be permitted anywhere in the Saskatoon Cancer Centre or on its grounds without the presence of a member of Royal University Hospital Security.*
> 4. *You will be required to contact security staff at least 24 hours prior to any scheduled appointment by calling…and arranging to have security staff meet*

> *you at the main information desk at Royal University Hospital. When you arrive you are to identify yourself to the security staff who will then escort you to and from your treatment or services.*
>
> 5. *You must accept having security staff present with you at all times during any service being provided at which a staff member is present.*
> 6. *You must accept a search of yourself if security staff feel it is warranted.*
>
> *If you breach any of these terms and conditions:*
>
> 1. *You will no longer be permitted in the Saskatoon Cancer Centre; and,*
> 2. *You will no longer be permitted on the Saskatoon Cancer Centre grounds.*
>
> *As a result we would not be in a position to provide treatment to you.*
>
> *If you are prepared to accept these terms and conditions, I would ask that you sign both ….*

[54] The Applicant agreed to the terms as evidenced by his signature on the agreement. The stipulations of the agreement mirror those of the Probation Order.

[55] As a follow-up to the above noted incident, SCA notified its staff via email that it deemed the Applicant "violent".

[56] SCA's Violence Prevention Policy defines violence as "*…the attempted, threatened or actual conduct of a person that causes or is likely to cause injury, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that the worker is at risk of injury*." In the policy, violence includes physical or verbal. Verbal violence is defined as "*threats of physical harm, negative insinuation or accusations, defamation, sexual suggestion, profanity, intimidation.*"

[57] The above definition is inconsistent with the term as defined by *The Occupational Health and Safety Regulations, 1996* as the only part of the above definition that appears in the one below is threat of physical injury. That definition as found in the Regulations is as follows:

> ***37****(1) In this section,* ***"violence"*** *means the attempted, threatened or actual conduct of a person that causes or is likely to cause injury, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that the worker is at risk of injury.*

[58] SCA also added that:

> [t]*he SCA has had in place, at all relevant times, zero-tolerance policies with respect to Violence Prevention (Policy HR-703.02) and Harassment in the Workplace (Policy HR-703.01). … It is the position of the SCA that its decision to withhold the Records is entirely consistent with these policies, which the SCA strongly believes are necessary to help ensure a safe workplace for its staff.*

[59] The employer appropriately has an obligation to protect the health and safety of its workers. It is a legal requirement and the right thing to do. However, I find that insofar as the policy purports to justify denial of access under section 38(1)(a) of HIPA, the threshold in the policy is set too low.

[60] SCA asserted that the Applicant continues to confront SCA staff in an aggressive manner:

> *The on-going nature of the Applicant's improper behaviour toward SCA staff further supports that* [sic] *reasonableness of the SCA's belief that the Applicant, possessed of the information contained in the Record, would not be guided by the consequences previously suffered by him for his behaviour, but would once again engage in abusive or threatening behaviour toward SCA staff.*

[61] Conversely though, in a May 8, 2006 synopsis of the Applicant's visitations to Royal University Hospital/Saskatoon Cancer Centre subsequent to signing the agreement, documented is that on all visits after that date, the Applicant "*behaved cordially throughout the visit*". The last note dated April 24, 2006 includes the following: "*Visits to the SCC by this subject have continued up until the present and in accordance with the terms outlined by the SCC. The subject has been cooperative and pleasant in person and on the telephone to security and clerical staff.*"

[62] The Applicant appears to have complied with the terms and conditions described in [53] above. I note that at no time, to our knowledge, did SCA ban him from its facilities.

[63] SCA stated that it made its decision to withhold the record only after lengthy consultations with applicable SCA personnel (medical, administrative, and social worker). SCA did not, however, include testimonials from those affected or professionals/experts to further support its claims other than to provide generalized statements. Based on materials before us, it is clear that on several occasions over the phone and in person, the Applicant acted aggressively raising his voice, swearing, and

insulting various individuals. SCA has also demonstrated that the Applicant was also at times uncooperative in refusing to follow instructions.

[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.

[65] Furthermore, SCA has taken a blanket approach to withholding those records that document interactions between SCA staff and the Applicant. To rely on section 38(1)(a) of HIPA the trustee that withholds personal health information must identify those elements or portions of the record that it alleges will lead to endangerment. I find that this particularity is required by section 38(2).[32]

[66] I find that SCA has not met its burden as it has not made the linkage between release of the records or portions thereof and what resultant harm(s) may reasonably be anticipated in the circumstances.

[32] Section 38(2) of HIPA: *"Where a record contains information to which an applicant is refused access, the trustee shall grant access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access."*

V. RECOMMENDATION

[67] SCA should release all 12 withheld pages of the Applicant's chart forthwith to him.

Dated at Regina, in the Province of Saskatchewan, this 21st day of November, 2007.

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