SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT H-2008–002

Dr. Val Mary Harding, carrying on business as Harding Psychological Services and also as Lebell & Associates

Summary: The Applicant attended on Dr. Harding, a Regina psychologist, for purposes of an independent medical examination (IME) in the form of a psychological assessment, at the request of the Applicant's employer. Before commencing the IME, Dr. Harding received a five page letter from a third party dated March 12, 2007 (March 12, 2007 letter). This letter contained personal health information concerning the Applicant and also a number of prejudicial statements about the Applicant. Dr. Harding denied access to the March 12, 2007 letter and personal health information in other documents concerning the Applicant. She did so citing section 38(1)(a) of *The Health Information Protection Act* (HIPA) (reasonable expectation of injury to any person) and section 38(1)(c) of HIPA (disclosure of identity of source of confidential information). The Commissioner determined that the Applicant was entitled to access to his personal health information in Dr. Harding's file including the March 12, 2007 letter subject to appropriate severing. He recommended that portions of the letter be severed on account of information that did not qualify as "personal health information" and other portions on account of the requirement to not disclose the source of confidential information supplied by a third party.

Statutes Cited: *The Health Information Protection Act*, (S.S. 1999, C. H-0.021, as amended) ss. 2(m), (t), (u), 6, 16, 38(1)(a), (c), 38(2), 47 and 64(1)(e); *The Freedom of Information and Protection of Privacy Act*, (S.S. 1990-91, C. F-22.01 as amended) ss. 2(l)(j), 24(1)(h); *The Local Authority Freedom of Information and Protection of Privacy Act*, (S.S. 1993 c. L-27 Reg.1 as amended) ss. 2(k), 23(1)(h); *Privacy Act* (RSC 1985, c. P-21 as amended) s. 3; *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c.5 as amended) s. 2(1); *Personal Health Information Protection Act* (S.O. 2004, c.3 as amended) s. 2; *Personal Information Protection Act* (S.A. 2003, c P-6.5 as amended); *Personal Health Information Act* (S.M.

1997, c.51 as amended); *The Psychologists Act, 1997* (S.S. 1997 c. P-36.01).

Authorities Cited: Saskatchewan Information and Privacy Commissioner (IPC) Reports: H-2004-001, H-2004-006, H-2007-001, H-2008-001, F-2006-002, and Investigation Report H-2005-002; Privacy Commissioner of Canada Case Summaries: 322, 287, 223, and 284; Alberta IPC Orders: P-2008-IR-003, 97-002, 2000-003, 2000-029 and 2001-010; Ontario Information and Privacy Commissioner Adjudication Summary HC-050014-1; British Columbia IPC Inquiry Order 00-4; *Wyndowe* v. *Rousseau*, 2008 FCA 39.

Other Authorities: *Alberta Health Information Act Guidelines and Practices 2007* (available online at http://www.health.alberta.ca/about/HIA_Guidelines-Practices-Manual.pdf).

I. BACKGROUND

[1] The Applicant was employed by a private corporation (the employer) that operated a business in Saskatchewan. The Applicant was off work due to a work-related injury.

[2] The Applicant's employer wrote to the Applicant on February 15, 2007 requesting that he visit Dr. Val Harding Ph.D., a Registered Doctoral Psychologist, to have an independent medical examination (IME) done. The purpose was for developing treatment goals for the client, and identifying any psychological concerns which would affect his ability to return to full-time duties. At all material times, Dr. Harding worked in Regina under the names Harding Psychological Services and Lebell and Associates.

[3] The Applicant proceeded to contact Dr. Harding and scheduled an appointment to have the IME completed. The scheduled date was February 20, 2007. Dr. Harding then advised the Applicant that the employer had rescheduled the IME appointment for March 14, 2007. A third party provided Dr. Harding with a five page letter dated March 12, 2007 (March 12, 2007 letter) that contained prejudicial statements about the Applicant. The Applicant advised our office that he was told by Dr. Harding that the letter contained prejudicial allegations about him. The evidence is conflicting as to how much granular detail was provided to the Applicant about the third party's letter. On March 28, 2007, the Applicant met with S. S. (the full name would serve no useful purpose for this Report), a student psychologist working with Dr. Harding, and the psychological testing of the Applicant was done. At about that time, Dr. Harding advised the Applicant that the third party had requested that she not share the March 12, 2007 letter with the Applicant.

[4] Subsequent to March 28, 2007, the Applicant made numerous requests to Dr. Harding and her office for a copy of his entire file. On April 30, 2007, Dr. Harding completed her Psychological Assessment. In a May 10, 2007 email to Dr. Harding, the Applicant requested access to "*the mental health assessment*" and to review "*my medical file in it,s* [sic] *entirety*." He made at least two trips to Regina to obtain those documents from Dr. Harding's office. On the first occasion, he was advised that the file was missing. On the second trip, he was advised by Dr. Harding and S. S. that he could not obtain his file. When the Applicant called Dr. Harding on or about May 24, 2007, he was advised by Dr. Harding that his file no longer contained the March 12, 2007 letter from the third party.

Dr. Harding advised the Applicant that she no longer had the letter and she led the Applicant to believe that she had shredded it.

[5] The Applicant sent a letter to Dr. Harding on May 25, 2007. This letter requested access to his file and also that Dr. Harding confirm in writing that she had shredded the letter of March 12, 2007 from the third party.

[6] Although there is no explicit provision in *The Health Information Protection Act*[1] (HIPA) for notice to anyone other than the Applicant and the relevant trustee, I invited representations from the employer who had requested the IME. In response to that invitation, I received a letter from the employer dated September 6, 2007 containing submissions. The third party that authored the March 12, 2007 letter was invited to make a submission. I received a submission from the third party.

II. RECORD AT ISSUE

[7] The record that is responsive to the Applicant's request for access to his file consists of the following:

1. Psychological Assessment dated April 30, 2007 (IME Report);
2. Letter from [Third Party] to Dr. Harding, five pages, dated March 12, 2007; (March 12, 2007 letter);
3. CBI Tertiary Mental Health Assessment dated March 30 and 31, 2006;
4. STAXi-2 Testing Material;
5. PAI Personality Assessment Inventory dated March 28, 2007;
6. PAI Clinical Interpretive Report dated March 28, 2007;
7. SASSI-3 dated March 28, 2007;
8. Clinical interview dated March 28, 2007;
9. Health interview dated March 28, 2007;
10. Copy of email dated November 10, 2005 and letter to WCB dated November 6, 2005 from Dr. R. (disclosing the full name would serve no useful purpose);
11. Copy of acknowledgement signed by the Applicant regarding conducting the independent assessment;
12. February 16, 2007 WCB fax cover sheet;

[1] S.S. 1999, c. H-0.021, as amended.

13. February 20, 2007 Request to Release Confidential Records and Information;
14. February 20, 2007 WCB Psychology Consultation;
15. February 22, 2007 email to Dr. Val Harding;
16. March 5, 2007 email to Dr. Val Harding;
17. March 28, 2007 Consent to Psychological Testing and Authorization for Release of Confidential Information (consent form);
18. Email correspondence from the period April 3, 2007 to April 16, 2007 to or from Lebell & Associates;
19. April 25, 2007 letter from Dr. R. to Dr. Val Harding with attached Release of Information;
20. May 10, 2007 email to Dr. Val Harding;
21. May 11, 2007 letter from Harding Psychological Services;
22. May 15, 2007 letter from Dr. R. to Dr. Val Harding;
23. May 25, 2007 letter from Dr. R. to Dr. Val Harding with attached Release of Information; and
24. June 1, 2007 email to Dr. Val Harding.

[8] I understand that Dr. Harding has no objection to furnishing the Applicant with copies of all of the items above, with the exception of items 1 and 2. Therefore, the analysis that follows is focused exclusively on those two items.

III. ISSUES

1. Does *The Health Information Protection Act* apply to the independent medical examination report and the March 12, 2007 letter?

2. Did Dr. Harding properly invoke section 38(1)(a) of *The Health Information Protection Act*?

3. Did Dr. Harding properly invoke section 38(1)(c) of *The Health Information Protection Act*?

- **(a) Third party requirement**
- **(b) Information supplied under circumstances in which confidentiality was reasonably expected**

4. What is the effect of the consent form signed by the Applicant?

5. Has Dr. Harding met the requirements of section 16 of *The Health Information Protection Act*?

IV. DISCUSSION OF THE ISSUES

1. Does *The Health Information Protection Act* apply to the independent medical examination report and the March 12, 2007 letter?

[9] The employer has argued that the IME is not treatment, diagnosis or care and that documents related to the IME do not qualify as personal health information. The third party has argued that the March 12, 2007 letter does not contain personal health information of the Applicant. The third party asserted that the March 12, 2007 letter was "*not a 'medical record' but rather an exchange of information between two parties intended to produce an 'independent medical opinion' regarding* [the Applicant's] *fitness for duty*."

[10] This is a first impression case for this office in terms of dealing with an IME. An IME is a common procedure in the processing of compensation claims or return to work cases. An insurer or an employer requires that the employee or claimant attend on a physician or other health care professional chosen and paid by the employer or insurer. The purpose is for the health care professional to undertake a formal assessment of the injury including diagnosis and prognosis and then to provide the instructing insurer or employer with a written report.

[11] The health care professional, in this case, is not providing treatment or care for the subject individual.

[12] Earlier this year, the federal Court of Appeal, in the case of *Wyndowe* v. *Rousseau*, (2008 FCA 39), held that an insured person has the right to access the handwritten notes of a physician, which were taken during an IME of the insured person at the request of an insurance company. These notes constituted "*personal information*" of the insured person under the federal private-sector privacy law - *Personal Information Protection and Electronic Documents Act*[2] (PIPEDA). I also have considered the Investigation Report P2008-IR-003[3] of the Alberta Information and Privacy Commissioner (IPC) Office under Alberta's *Personal Information Protection Act*[4] (PIPA). In that Report, Jill

[2] S.C. 2000, c.5 as amended, s. 2(1).
[3] Available online at www.oipc.ab.ca.
[4]. S.A. 2003, c P-6.5 as amended.

Clayton, Director of the Alberta IPC Personal Information Protection Act office, considered Case Summaries 223 and 284[5] from the Privacy Commissioner of Canada and concluded that the health information collected about an employee for purposes of a return to work assessment was a collection of personal employee information under PIPA.

[13] I note that in Ontario, IMEs are not covered by the *Personal Health Information Protection Act 2004*[6] (PHIPA). In that jurisdiction, the Ontario IPC has determined that the definitions of a "*health information custodian*", "*health care practitioner*" and "*health care*"[7] are explicitly tied to the provision of health care. If the Legislative Assembly in this province intended that IMEs should be excluded from the scope of HIPA it could easily have so provided in HIPA in the fashion that the Ontario Legislative Assembly did in PHIPA.

[14] In Saskatchewan, the definition of "*trustee*" in section 2(t) of HIPA requires only that a psychologist (a) "*have custody or control of personal health information*"[8] and (b) be a "*health professional licensed or registered pursuant to an Act for which the minister is responsible*".[9] Dr. Harding qualifies as a trustee for purposes of HIPA.

[15] Also, in Saskatchewan, the definition of "*personal health information*" is as follows:

> ***2****(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;***
> >
> > *(ii) information with respect to any health service provided to the individual;*
> >
> > *(iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;*
> >
> > *(iv) information that is collected:*
> >
> > > *(A) in the course of providing health services to the individual; or*

[5] Available online at www.privcom.gc.ca.
[6] Ontario Information and Privacy Commissioner Adjudication Summary HC-050014-1, available online at www.ipc.on.ca .
[7] S.O. 2004, c.3, Schedule A as amended, s.1.
[8] This was considered by SK OIPC in Reports H-2006-001 [15] and Investigation Report H-2007-001 [29] to [31] and in the February 2006 FOIP FOLIO.
[9] Supra note 7, s. 2(t)(xii)(A) and *The Psychologists Act, 1997* (S.S. 1997 c. P-36.01).

> *(B) incidentally to the provision of health services to the individual;*
>
> ***or***
>
> *(v) registration information*
>
> [emphasis added]

[16] It may well be that subclauses (ii) and (iv) are tied to the provision of a health service, but each of these four subclauses is disjunctive and if any one of those subclauses applies, then the definition has been satisfied.

[17] In this case, the information in the IME Report and much of the information in the March 12, 2007 letter is information "*with respect to the physical or mental health*" of the Applicant. That information is therefore "*personal health information*" for purposes of HIPA. Portions of the March 12, 2007 letter would likely be "*personal information*" within the meaning of PIPEDA but do not qualify as personal health information for purposes of HIPA.[10] By a separate document, I have identified to Dr. Harding those portions that would not be responsive to the Applicant's access request.

2. Did Dr. Harding properly invoke section 38(1)(a) of *The Health Information Protection Act*?

[18] Dr. Harding contends that disclosure to the Applicant of the March 12, 2007 letter from the third party could result in some harm to someone under section 38(1)(a) of HIPA.

[19] Section 38(1)(a) of HIPA provides 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;*
>
> …
>
> *(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.*

[10] Since HIPA has not been determined to be "substantially similar" to PIPEDA, both PIPEDA and HIPA apply to health professionals in Saskatchewan who are collecting, using or disclosing personal health information in the course of commercial activity. The Privacy Commissioner of Canada oversees PIPEDA and deals with complaints under that federal privacy law.

[20] The burden of proof is addressed in section 47 of HIPA as follows:

> ***47*** *Where a review relates to a decision to refuse an individual access to all or part of a record, the onus is on the trustee to prove that the individual has no right of access to the record or part of the record.*

[21] The right of an individual to access his personal health information in the custody or control of a trustee under HIPA is one of the most important features of HIPA. We have in past Reports [H-2007-001 (Saskatchewan Cancer Agency) and H-2008-001 (Saskatoon Regional Health Authority)][11] discussed the threshold that must be met to justify withholding records under section 38(1)(a) of HIPA.

[22] Remarkably, in this case, I have had the benefit of reviewing three different psychological assessments on the Applicant. One is Dr. Harding's own assessment dated April 30, 2007, the IME Report. There is also an earlier assessment completed by Dr. S. (the full name would serve no useful purpose for this Report), a registered doctoral psychologist, in the spring of 2006. This was a tertiary mental health assessment of the Applicant done at the request of the Saskatchewan Workers' Compensation Board. In addition, I have had the benefit of expert advice from registered doctoral psychologist, Dr. R. (the full name would serve no useful purpose for this Report).

[23] Dr. R. provided counseling to the Applicant from the fall of 2004 until the present. This included bi-weekly treatment from late 2004 until November 2005. In November 2005, Dr. R. concluded that the Applicant was ready to return to work. She has reported that she is unaware of any restrictions or condition that would prevent the Applicant from returning to work. She shared those opinions with Dr. Harding in 2007.

[24] I note that in the IME Report, authored by Dr. Harding and her colleague S. S., Registered Psychologist (Provisional), they concluded that in their professional assessment, the Applicant did not pose a danger to others.

[25] When examined under oath, Dr. Harding testified that when she does such an assessment,

> 162 A *…of course I'm going to be concerned about anxiety, depression, suicidal tendencies. Of course I'm going to look at that. Now, if anything was said, and I don't recall saying anything of that sort, but if anything was said he would say why would they be concerned of not giving me the letter? And I would say they're concerned, just like any*

[11] Both reports are available online at www.oipc.sk.ca under the *Reports* tab.

> *other company is concerned, that somebody might go postal. Somebody might be, you know, unbalanced, somebody might be suicidal. But never did I talk about what was in the letter, never.*

[26] I am relying on the following exchange when I examined Dr. Harding under oath:

> 62 Q *And generally would you say that your conclusions, as evidenced in the report we have marked as Exhibit 1* [Item #1 from the list on page 4], *would have been more or less consistent with the conclusions drawn from that earlier assessment* [done for WCB] *that you had a chance to review?*
>
> A *Yes, it was consistent with the testing that was done with Workers' Comp., and even though we used different tests we came up with similar results.*

[27] When Dr. R. wrote about the Applicant to Dr. Harding on April 25, 2007, she stated that:

> *My opinion of* [the Applicant's] *preparedness to return to work has not changed, in fact I believe his inability to return to the worksite, at this point, is causing him considerable emotional stress as well as financial stress.*

[28] On May 11, 2007, Dr. Harding and S. S. co-signed a letter dated May 11, 2007 addressed "*To Whom It May Concern*". This stated that:

> *Please be advised that according to the testing and interviews conducted on* [the Applicant], *he did not evince at the time of testing any deficiencies or psychological concerns which would prevent him from returning to full-time duties at his current place of employment.*

[29] Not only is there a high degree of agreement by at least four mental health professionals in terms of the Applicant's mental health but this reflects assessments by those professionals of the Applicant over a period of at least four years.

[30] Nonetheless, Dr. Harding now asserts that shortly after completing the IME Report of April 30, 2007, she concluded that knowledge of the information in the March 12, 2007 letter from the third party could, in the words of HIPA section 38(1)(a), *"**reasonably be expected to endanger the mental or physical health or the safety of applicant or another person**."* [emphasis added]

[31] To deal with this assertion, I have carefully examined the evidence of what transpired after April 30, 2007.

[32] Given the body of opinion on the Applicant's mental health over the four years, one would expect that Dr. Harding's new evidence that supports her new and different opinion would be compelling.

[33] What is that new evidence? When all is said and done, the only significant difference I can find is that the Applicant became angry and insistent that he obtain a copy of the IME Report as well as a copy of the March 12, 2007 letter.

[34] There were no specific threats from the Applicant to harm anyone. When Dr. Harding wrote to me on September 2, 2007, she stated:

> *I believe that it is not in the best interest of* [third party] *who has sent me the letter in question on an understanding of confidentiality, or* [the Applicant], *that* [the Applicant] *receive a copy of this letter to* ***pursue possible further actions*** *based on the information contained in it.*
>
> [emphasis added]

[35] She concluded that letter by stating:

> *At this juncture, I can only recommend that* [the Applicant] *not be given access to the letter in question. A* ***potential for negative consequences*** *following the letter's release to* [the Applicant] *is, in my view, a distinct possibility, and can be avoided.*
>
> [emphasis added]

[36] These vague concerns were explored further during the examination of Dr. Harding under oath. I found that any testimony by Dr. Harding on the question of the applicability of section 38(1)(a) of HIPA, i.e. threat of injury to any person, was very vague and generalized. For example, Dr. Harding spoke of "…*his meta-communication, his tone, his attitudinal change and his body language on that day, and I was responding to that. There was no actual threat"* (Q. 293). Later in her examination, she observed that "[a]*nd so what I was noting was a complete change in his meta-communication, which is, of course, his tone, his attitude, his behavior, and it became increasingly apparent with phone calls and e-mail messages that were coming through to me that he was not going to give up"* (Q. 297). In discussing the changes in the Applicant's behaviour she observed: "[a]*nd I would rather err on the side of caution as a health care professional rather than otherwise*" (Q. 291). What is clear is that the Applicant was angry and insistent on obtaining a copy of the March 12, 2007 letter from the third party that was in

her custody. What is also clear is that Dr. Harding was anxious about legal steps that the Applicant may take to obtain access including seeking a remedy through HIPA and our office. She also was concerned about potential legal exposure to the third party.

[37] It is necessary to address the undated letter from an employee of Dr. Harding received by our office on September 7, 2007. This employee apparently does reception/clerical work in Dr. Harding's office. This letter relates to an encounter on a Friday afternoon in May of presumably 2007. The Applicant and his wife and child had come to Dr. Harding's office at about 4:30 p.m. According to this employee, the adults appeared agitated and the Applicant "… *requested/demanded to see his file.*" She further stated that "…[the Applicant] *demanded that I find the file, copy the contents, and give him the copies, that the information was his and he couldn't be denied access to it.*" Apparently voices were raised by both the Applicant and Dr. Harding's employee. She states that "[w]*e are occasionally faced with anxious and distraught clients, but* [the Applicant] *and his wife were extremely angry, and as the individual in the office, their anger was directed towards me. I did feel threatened.* [The Applicant] *must have realized he had frightened me as he called the following week to apologize for his actions.*" Significantly, the reported threat articulated by the Applicant in that encounter was to ensure that a government office would compel Dr. Harding to produce the March 12, 2007 letter to him.

[38] I accept that the employee of Dr. Harding found this a very unpleasant encounter with the Applicant in which he was angry and insistent on obtaining his file. I have carefully considered her description of this interaction. I am mindful that the employee is not a mental health professional.

[39] I considered the right of access under HIPA in detail in Report H-2007-001, [17] to [65][12]. In that Report at [21], I concluded that the exception to the right of access that is permitted by section 38 of HIPA needs to be construed narrowly. In that same Report, I made the following observation:

> *[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*

[12] Available online at www.oipc.sk.ca.

> *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. … 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.*

[40] I find that this evidence from Dr. Harding's employee, even when considered together with other evidence on the issue of risk to health or safety, does not provide justification to withhold the letter in question under section 38(1)(a) of HIPA.

[41] Dr. Harding suggested to me that, as evidence of the Applicant's potential instability and threat posed to others, I must consider that prior to the issuance of her IME Report to his employer, he had been advised that he could not get from her a copy of the March 12, 2007 letter and yet as soon as the IME Report had been issued, he abruptly started to demand the March 12, 2007 letter. She indicated that this alleged change in position and the stridency of his demand was troubling for her.

[42] The Applicant insists that prior to April 30, 2007, he communicated to Dr. Harding his desire to obtain a copy of the March 12, 2007 letter. He did not at any time advise Dr. Harding that he no longer wished to obtain a copy of that letter. He advises that Dr. Harding told him that she would not provide him with a copy of that letter but she did suggest an alternate course of action to obtain that letter. The Applicant took that advice, but that alternate action was not fruitful. He resumed his demands on Dr. Harding for a copy. Dr. Harding suggests that this resumption of demand for a copy occurred when the Applicant was in her office on or about May 11, 2007 (Q. 180 and 181).

[43] I accept much of the evidence of the Applicant with respect to his efforts to obtain a copy of the March 12, 2007 third party letter in the months of April and May 2007. I note that Dr. Harding produced no notes or records of these discussions that occurred by telephone or by in-office conversation. When the Applicant sent her emails purporting to confirm statements made by her office, she chose not to respond to those emails (Q. 202 – 209). When examined under oath, Dr. Harding was candid in acknowledging that her recall of

events and discussions was vague (Q. 19, 80, 89, 110, 112, 142 - 146, 152 - 153, 157, 162 - 164, 176, 199, 202, 221 - 223, 227, 255, 257 - 262, 325). The Applicant on the other hand, has provided me with detailed notes of those telephone and in-person conversations. Those notes were made at or shortly after the time of those conversations and interactions. I also find the Applicant's account of discussions more consistent with the balance of evidence for that same period. Although the evidence from Dr. Harding and the Applicant is at times in conflict, there is also much agreement in their respective accounts of the most significant events in their interaction.

[44] In assessing the evidence, I am concerned that Dr. Harding appears to have viewed the Applicant's complaint to our office as further evidence that he posed a threat (Q. 337). I reject any suggestion that whenever a citizen exercises his or her right under HIPA to seek a review or investigation with respect to those statutory provisions, that action could support the application of section 38(1)(a) of HIPA.

[45] Further, in assessing the evidence, I note Dr. Harding's acknowledgement that for the Applicant to be denied access to the March 12, 2007 letter was irregular. She acknowledged that she was concerned when the third party instructed her not to share the March 12, 2007 letter with the Applicant:

> 281 Q *Did you ever share with* [the Applicant] *that you thought he should be able to get a copy of that letter* --
>
> A *Oh, absolutely.*
>
> 282 Q -- *that was coming from* [the third party]*?*
>
> A *Absolutely, he had a right to it.*

[46] Not only was the Applicant unable to get a copy of the March 12, 2007 letter, but he was led by Dr. Harding to believe that it had been destroyed. The Applicant sent Dr. Harding an email dated June 1, 2007 that included the following statement:

> …[a]*s of May/23/07 you informed me that this letter is no longer in my file at your office and that you had a conversation or letter from* [the third party's] *lawyer. Could you please send me a letter of confermation* [sic] *that the letter I asked you for was from* [the third party], *that the letter has been shredded.*

[47] When I asked Dr. Harding under oath whether she ever advised the Applicant that his statement was incorrect, she replied as follows:

> 209 A *No, I didn't. I did not tell him that his statement was incorrect. And at that particular point I was exasperated, upset, concerned, and I basically told him, if I remember right, I said, you know what, the letter is gone. We're done, it's gone. And I think what happened is he said it's shredded? And I didn't disabuse him of that notion.*

[48] I am frankly troubled by Dr. Harding's failure to deny the suggestion that she had destroyed the March 12, 2007 letter the moment it was first raised by the Applicant. It is an offence under section 64(1)(e) of HIPA to "*wilfully destroy any record that is governed by this Act with the intent to evade a request for access to the record*". I am concerned that Dr. Harding by her actions likely inflamed the situation with the Applicant and likely contributed to the anger on his part which is then cited by Dr. Harding as justification to continue to deny him access to that document.

[49] A consideration identified above in assessing the Applicant's reaction to his frustrated efforts to obtain a copy of the March 12, 2007 letter is that Dr. Harding refused to respond to a number of emails sent to her by the Applicant. I am concerned that emails from the Applicant to Dr. Harding subsequent to April 30, 2007, related to his efforts to get access to the March 12, 2007 letter, were not responded to by Dr. Harding or her staff.

[50] Dr. Harding testified that her practice was not to respond to emails but she has provided no evidence that this practice was clearly communicated to the Applicant. Further, Dr. Harding testified that, "*I didn't even respond to* [the third party's] *e-mails*" (A. 208). Yet that practice seems to have been more selective judging from emails in the file that indicate Dr. Harding or at least her office did respond to the third party by email.

[51] I note that on numerous occasions during this investigation, Dr. Harding insisted that she had done nothing with the March 12, 2007 letter and that it had no bearing on her assessment of the Applicant. Indeed, she relied on that claim to support her surprise and concern about the Applicant's pursuit of a copy of the March 12, 2007 letter in her custody from the third party.

[52] It is not difficult to imagine the anxiety of the Applicant whose job prospects would largely hinge on her assessment. I would have expected that if Dr. Harding decided that she would not use the March 12, 2007 letter from the third party, she would have immediately put the document in an envelope, sealed it and couriered it back to the third

party and confirm that she would make no use of it in her assessment. Dr. Harding instead retained the letter in her files. This satisfies the HIPA custody requirement.

[53] Although when Dr. Harding was examined under oath, she minimized her use of the letter, she did acknowledge that both she and her colleague S. S. reviewed the March 12, 2007 letter. That letter, as provided to us by Dr. Harding, includes marginal notes and interlineations added by either Dr. Harding or S. S. (Q. 112–116). This includes a marginal note on page 3 of the March 12, 2007 letter. A question mark appears on page 2. I counted at least 27 items in the letter that have been underlined presumably by either Dr. Harding or S. S. acting under Dr. Harding's authority. There can be little doubt that the March 12, 2007 letter was reviewed and annotated by Dr. Harding or her staff. This activity by Dr. Harding's office constitutes a "*use*"[13] of that March 12, 2007 letter and its contents by Dr. Harding under HIPA.

[54] I find that Dr. Harding was very concerned with releasing the March 12, 2007 letter to the Applicant. What is clear is that her concern was exposure she might have if action was taken by the third party regarding release of the letter.

[55] I am satisfied that, in her assessment of the Applicant's meta-communication, she was giving considerable weight to his insistence that he wanted a copy of the March 12, 2007 letter even though she did not want to give it to him. She was clearly wary of acting contrary to the instructions from the third party.

[56] Although when examined under oath, Dr. Harding also mentioned a general concern that after she issued her IME Report, the Applicant became insistent on obtaining a copy of the March 12, 2007 letter and she suggested that might be evidence warranting a reassessment of the Applicant's mental health. I find this very vague and generalized concern to fall far short of the requirements of section 38(1)(a) of HIPA.

[57] That leaves us with the alternate ground advanced by Dr. Harding to justify withholding the documents in question.

[13] HIPA s. 2(u).

3. Did Dr. Harding properly invoke section 38(1)(c) of *The Health Information Protection Act*?

[58] Section 38(1)(c) of HIPA provides 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:*
>
> …
>
> *(c) disclosure of the information could reasonably be expected to identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;*
>
> …

[59] This is the first occasion our office has had to consider this particular exception to the right of access. I have found useful the portion of the Alberta's *Health Information Act, Guidelines and Practices Manual 2007* (Alberta Manual) described as 3.3.2 DISCLOSURE LEADING TO IDENTIFICATION OF A CONFIDENTIAL SOURCE OF HEALTH INFORMATION.[14] I have not seen anything similar produced by the Saskatchewan Ministry of Health or other institutional trustees in this province.

[60] It is common to privacy laws in Saskatchewan and other jurisdictions that the "*personal information*" of an individual includes opinions of others about that subject individual. This is evident in the definition of "*personal information*" in *The Freedom of Information and Protection of Privacy Act* (FOIP)[15] [section 24(1)(h)], *The Local Authority Freedom of Information and Protection of Privacy*[16] [section 23(1)(h)], and the federal *Privacy Act*[17] [section 3]. It appears that in drafting HIPA, section 38(1)(c) was carefully written in such a way that the focus is not on whether someone views the opinions about another as confidential or not but rather whether providing access will identify a source who provided information with a reasonable expectation of confidentiality.

[61] Like the stand-alone health information legislation in Ontario, Alberta and Manitoba,[18] the focus in the Saskatchewan legislation is on confidential information that would allow

[14] Available online at http://www.health.alberta.ca/about/HIA_Guidelines-Practices-Manual.pdf.
[15] S.S. 1990-91, c. F-22.01 as amended.
[16] S.S. 1993, c. L-27.
[17] R.S.C. 1985, c. P-21 as amended.
[18] *Personal Health Information Protection Act*, 2004 [S.O. 2004, c.3 as amended], *Health Information Act* [R.S.A. 2000, c.H-5 as amended], *Personal Health Information Act* [S.M. 1997, c.51 as amended].

the identification of a third party who supplied the information in confidence. If personal health information, when made accessible to an individual applicant, could not reasonably be expected to identify the source of the information, section 38(1)(c) of HIPA has no application.

[62] In other words, this provision does not allow a trustee to withhold from an applicant personal health information even though supplied in confidence by a third party unless the circumstances create a reasonable expectation that the third party could be identified by means of access to the information.

[63] To avoid revealing the identity of the third party, I am constrained in how much detail I can reveal in this public report. Consequently, this portion of my Report will be more skeletal than is customary. Under separate cover I have provided more detailed reasons to Dr. Harding that have led me to my disposition of the section 38(1)(c) issue.

(a) Third party requirement

[64] "*Third party*" is not defined in HIPA but if I consider the parallel provisions in FOIP section 2(1)(j) and LA FOIP section 2(k), I would view a third party to be a person, including an unincorporated entity, other than an applicant or another trustee. In this case insofar as the March 12, 2007 letter is concerned, there is one identifiable third party.

[65] There is no procedure in HIPA equivalent to the third party intervention provisions in FOIP.[19] Nonetheless, at the outset of this review, I invited the one party who might qualify as an identifiable third party to make any submission that party wished to make in respect of this review. I received both verbal and written submissions from the third party.

[66] In the circumstances of this case, there is some evidence that the identity of the third party was known to the Applicant. The source of that knowledge is not clear from the evidence of the Applicant and Dr. Harding and in fact is contradictory.

(b) Information supplied under circumstances in which confidentiality was reasonably expected

[19] Part V, FOIP.

[67] This office has not previously considered in a formal report the phrase from HIPA section 38(1)(c): "*…supplied the information in confidence under circumstances in which confidentiality was reasonably expected*". Generally, to successfully invoke section 38(1)(c) of HIPA there should be supporting evidence to prove that the personal health information has been treated consistently in a confidential manner.

[68] I did consider in detail a related phrase from FOIP section 19(1)(b): "*...information that is supplied in confidence, implicitly or explicitly…*" in Report F-2006-002 (Saskatchewan Research Council).[20] On the basis of that Report, the focus in this case needs to be on the intention of the third party and not the intention of Dr. Harding as recipient.

[69] In Report F-2006-002 [56], I utilized the following standard from the *Annotated Alberta Freedom of Information and Protection of Privacy Act*:

> *In the past, factors that have been cited to support a funding that information has been supplied to a public body a third party in confidence include:*
>
> *a. the existence of an express condition of confidentiality in an agreement between a public body and the third party (Orders 97-013 [23-27], 2001-008 [54], 2001-019 [15]);*
>
> *b. the fact that the public body requested the information be supplied in a sealed envelope (Order 97-013 [23-27]);*
>
> *c. the third party's evidence that it considered the information to have been supplied in confidence (Order 97-013 [23-27]);*
>
> *d. the fact that the third party supplying the information was promised by the public body that he or she would not be identified (Order 2000-003 [122]); and*
>
> *e. the passing of a motion that the information remain private (Order 2001-019 [15]).*

[70] On the evidence, the third party communicated to Dr. Harding the requirement that the March 12, 2007 letter be treated as confidential and not shared with the Applicant. The letter was faxed to Dr. Harding's office. The cover sheet that accompanied that letter makes no reference to the attachment being confidential. The fax transmittal page dated March 13, 2007 from the third party makes reference to "*as discussed*" but Dr. Harding testified that she didn't know what that phrase referred to and she could not recall what discussions preceded that fax transmission (Q. 108-109, 142-146). On the basis of the evidence, including Dr. Harding's testimony, there was some discussion with the

[20] Available online at www.oipc.sk.ca.

Applicant about concerns raised by the third party in the March 12, 2007 letter, albeit obliquely (Q.160-177).

[71] The Alberta Manual[21] cited earlier indicates that,

> *It is not sufficient to accept a stamp marked "Confidential" on a document from a source or a statement by the source that information was supplied in confidence. There must also be supporting evidence to prove that the information has been treated consistently in a confidential manner.*

[72] The confidential stamp that appears on the document provided to our office by Dr. Harding was placed there by Dr. Harding's office at the time it was sent to our office.

[73] I adopt the definition of "*in confidence*" from the Alberta Manual as "*usually describes a situation of mutual trust in which private matters are related or reported*"[22]. I also apply the same list of factors, modified slightly for this jurisdiction, that are cited in that source as considerations when determining whether information was supplied explicitly or implicitly in confidence:

- Whether there is documentary evidence indicating that confidentiality exists;
- The representations of the source as to his or her understanding of confidentiality;
- Past practice of the health information trustee, particularly whether similar information has normally been kept confidential in the past;
- The confidentiality with which it is maintained by the source;
- Whether the information was supplied voluntarily; at the request of the trustee; or as required by law, and the consequences for the source if it does not supply the information; and
- Actions taken by or conduct of, the trustee and the source, which may indicate an understanding of confidentiality.

[74] Considering all of the representations to our office, I am satisfied that, at all material times, the third party viewed the March 12, 2007 letter as a confidential document that would not be shared with the Applicant. Further, I find that the expectation of confidentiality on the part of the third party was explicitly conveyed to Dr. Harding.

[75] I am satisfied from all of the evidence, that certain portions of the March 12, 2007 that reveal or may reveal the identity of the third party need to be severed to account for

[21] Supra Note 14, p. 67.
[22] Ibid p. 67.

section 38(1)(c) of HIPA. Together with this Report, I am providing Dr. Harding with a copy of the March 12, 2007 letter on which I have indicated the severing that would be appropriate before providing that document to the Applicant.

4. What is the effect of the consent form signed by the Applicant?

[76] Dr. Harding has produced a *Consent to Psychological Testing and Authorization for Release of Confidential Information* (consent form) signed by the Applicant and dated March 28, 2007. This document includes the statement that "*I understand that I have a right to be informed of the results but that I will not be provided a copy of the evaluation.*"

[77] This raises the question of whether anyone can contract out of their right to seek access to their own personal health information under Part V of HIPA. I note that Canadian courts have considered privacy laws as special laws that have a 'quasi-constitutional' character.[23] Before the federal *Privacy Act*[24] was enacted, the statutory protection for privacy was an element of the *Canadian Human Rights Act*. Generally, my view is that it is contrary to the public interest to permit individuals to contract out or to surrender by contract their right to exercise basic rights. Even though the Legislature has not explicitly prohibited contracting out from HIPA, my position is that public policy nonetheless prevents the Applicant in this case from doing that.

[78] My view is reinforced by numerous decisions of Information and Privacy Commissioners in Alberta and British Columbia (B.C.). These include B.C. Inquiry Order 00-47[25] and Alberta IPC Orders 97-002, 2000-003, 2000-029 and 2001-010.[26]

[79] If individuals could contract out of HIPA rights, then it creates opportunities for trustees to insist they will withhold services from individuals unless the individual surrenders

[23] [See *Nautical Data International Inc.* v. *Canada (Minister of Fisheries and Oceans)*, 2005 FC 407 at para.8; *Canada (Attorney General)* v. *Canada (Information Commissioner)*, [2004] 4 F.C.R. 181 at para. 20, 255 F.T.R. 56, 15 Admin. L.R. (4th) 58, 32, C.P.R. (4th) 464, 117 C.P.R. (2d) 85, 2004 F.C. 431, rev'd (2005), 253 D.R.R. (4th) 590, 335 N.R. 8, 40 C.P.R. (4th) 97, 2005 FCA 199, leave to appeal to S.C.C. requested; *Canada (Attorney General)* v. *Canada (Information Commissioner)*, [2002] 3 F.C. 630 at para. 20, 216 F.T.R. 247, 41 Admin. L.R. (3d) 237, 2002 FCT 128, 3430901 *Canada Inc.* v. *Canada (Minister of Industry)*, [2002] 1 F.C. 421 at para. 102, (2001), 282 N.R. 284, 45 Admin L. R. (3d) 182, (2001) 14 C.P.R. (4th) 449, 2001 FCA 254, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 537 (Q.L.)].

[24] Supra note 17.

[25] Available online at www.oipc.bc.ca.

[26] Available online at www.oipc.ab.ca.

their HIPA rights. That result would be unconscionable. My view is that it would not have been contemplated by the Legislative Assembly that individuals could be required to forfeit their privacy rights in order to obtain a service such as an IME.

[80] In the result, it appears that the consent form meets the requirements of section 6 of HIPA and allows for the collection, use and disclosure of personal health information of the Applicant to the extent necessary for completion of the IME. It does not, however, operate to preclude an applicant from complaining to our office under Part VI of HIPA or from seeking access to the individual's own personal health information.

5. Has Dr. Harding met the requirements of section 16 of *The Health Information Protection Act*?

[81] Section 16 of HIPA requires that a trustee have policies and procedures to meet the requirements of the statute. It provides as follows:

> ***16*** *Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:*
>
> *(a) protect the integrity, accuracy and confidentiality of the information;*
>
> *(b) protect against any reasonably anticipated:*
>
> *(i) threat or hazard to the security or integrity of the information;*
>
> *(ii) loss of the information; or*
>
> *(iii) unauthorized access to or use, disclosure or modification of the information; and*
>
> *(c) otherwise ensure compliance with this Act by its employees*

[82] This includes dealing with and responding to access requests from clients. I have previously determined that those policies need to be in writing.[27] Dr. Harding has candidly acknowledged that her office did not have a formal policy or training with respect to HIPA. Dr. Harding has however joined an adhoc committee established through the Saskatchewan College of Psychologists in an effort to bring awareness of HIPA to fellow psychologists. Her expectation is that such a committee will work to

[27] SK OIPC Report H-2004-001 (Saskatchewan Government Insurance) at [44]; H-2004-006 (Saskatchewan Human Rights Commission) at [76]; and Investigation Report H-2005-002 (Saskatchewan Cancer Agency) at [81].

establish universal policies and procedures to allow psychologists to meet statutory requirements.

[83] I encourage both the Saskatchewan Ministry of Health and the Saskatchewan College of Psychologists to consider educational materials about HIPA and training sessions for psychologists and their staff to ensure that these trustees have a comfortable understanding of HIPA and its requirements. Such materials and sessions should specifically include issues related to IMEs. This office is available to assist such an initiative.

[84] I acknowledge the excellent cooperation provided by Dr. Harding and her solicitors throughout this review. Dr. Harding has agreed to release to the Applicant the IME Report as well as the March 12, 2007 letter after appropriate severing.

V. FINDINGS

[85] HIPA does apply to the IME Report, documents 3 to 24 inclusive from [7] and portions of the March 12, 2007 letter in the custody of the trustee.

[86] Dr. Harding has not met the burden of proof and cannot rely on section 38(1)(a) of HIPA to deny the Applicant access to the IME Report and to the March 12, 2007 letter from the third party.

[87] Dr. Harding has met the burden of proof in respect to section 38(1)(c) of HIPA in respect to portions of the March 12, 2007 letter from the third party.

[88] Section 38(1)(c) of HIPA can be adequately addressed by severing those portions of the March 12, 2007 letter in accordance with a copy of that letter on which severing is indicated by our office and provided to Dr. Harding together with this Report.

[89] Dr. Harding has not met her obligations under section 16 of HIPA in that she has not developed written policies and procedures to ensure technical, physical and administrative safeguards for the personal health information in her custody or control

and her staff have not received appropriate training with respect to HIPA obligations of a trustee and best practices to ensure HIPA compliance.

VI. RECOMMENDATIONS

[90] That Dr. Harding forthwith provide the Applicant with true copies of documents #1, 3 to 24 (see pages 4 and 5).

[91] That Dr. Harding forthwith provide the Applicant with a true copy of document #2 (see page 4) subject to the severing indicated on the copy provided to Dr. Harding with this Report.

[92] That Dr. Harding immediately take steps to develop written policies and procedures for administrative, technical and physical safeguards for her office in compliance with section 16 of HIPA.

[93] That Dr. Harding immediately ensure that all of the staff in her office receive comprehensive training with respect to HIPA with particular attention to the process for clients to obtain access to their personal health information.

Dated at Regina, in the Province of Saskatchewan, this 11th day of September, 2008.

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