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Access vs Privacy: A Mounting Rivalry

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Case Commented On: *Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562

Covenant Health v Alberta, 2014 ABQB 562, addresses a difficult power struggle that can develop between government facilities responsible for caring for the elderly, and the family members who question that care. It also examines the conflicting interests that arise when a public health body is asked to disclose records that contain patient data and non-patient information. In navigating the interaction between the *Health Information Act*, RSA 2000, c H-5 and the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*Freedom of Information Act*), Judge Wakeling's reasons reveal a mounting rivalry between the right to access personal information and the right to privacy. In the end, the Court, after engaging in a balancing exercise, clearly chose to favour privacy rights over access rights.

Facts

Shauna McHarg's parents are residents of the Edmonton General Continuing Care Centre, which is operated by Covenant Health. Ms. McHarg visited them regularly. However, Covenant Health imposed certain conditions on her visitation rights due to her alleged interference with her parents' care. Employees of Covenant Health concluded that some of her acts (such as supplementing her parents' nutritional and fluid intake, attempting to change their medications, and interfering with staff access to the residents' room) put her parents' health at risk. The imposed conditions limited her visitations hours, permitted and prohibited certain activities during her visit, and specified the names of Covenant Health representatives with whom she could discuss her parents' care (at para 3).

In an attempt to challenge the visitation limitations imposed by Covenant Health, Ms. McHarg filed with Covenant Health an access request under s 7(1) of the *Freedom of Information Act*. She requested access to information relating to "everything and anything that Covenant Health has a record of, relating to me" from November 1, 2009 to April 30, 2011 (at para 5). In response to this request, Covenant Health released to Ms. McHarg parts of its records which were considered responsive to her request and were required by the *Health Information Act* and the *Freedom of Information Act* (at para 5). It deleted certain information from some records and disclosed an edited version to Ms. McHarg.

Ms. McHarg filed a complaint under the *Freedom of Information Act* questioning the lawfulness of Covenant Health's disclosure and specifically, the information that was withheld. An adjudicator, who was the delegate of the Information and Privacy Commissioner ruled that, (1) the *Health Information Act* did not apply to any parts of the records that Covenant Health disclosed; and (2) the non-disclosure of certain parts of the records was not justified under the provisions of the *Freedom of Information Act*. As such, the adjudicator ordered Covenant Health to perform a new search for additional producible records (at para 6). Covenant Health applied for judicial review of this decision.

Issues at Judicial Review

Judge Wakeling was asked to consider three issues:

(1) Were Covenant Health's records referring to Ms. McHarg properly considered to be her parents' health information (and therefore protected by the disclosure principles of the *Health Information Act*)? If so, should Covenant Health refuse to disclose this health information? If not, would the disclosure be an unreasonable invasion of her parents' (or their agent's) personal privacy pursuant to the *Freedom of Information Act*?

(2) Was some of the information in Covenant Health's records properly considered "advice, consultations, or deliberations involving officers or employees of a public body", within the meaning s 24(1)(a) and (b) of the *Freedom of Information Act*? If so, was Covenant Health's decision not to disclose this information to Ms. McHarg a lawful exercise of its discretion under s 24(1)?

(3) Had Covenant Health properly discharged its duty under s 10(1) of the *Freedom of Information Act* given that s 10(1) requires a public body to make every reasonable effort to respond to an access request in an open, accurate, and complete manner (at paras 8-13)?

Decision

Issue 1

On the first issue, Justice Wakeling ruled that Covenant Health properly withheld some records that referred to Ms. McHarg because they were properly considered the health information of her parents. Specifically, her parents' patient charts, files, and a clinical review of appropriate care were all properly withheld. The Court emphasized that "health information" includes "any other information about an individual that is collected when a health service is provided to the individual" (at para 66). Through the use of hypothetical scenarios, the Court further clarified that this phrase includes:

> …information about the mental or physical health of others that relate to the physical and mental health of an individual or a health service provided to an individual and is collected when a health service is provided to an individual … (at para 78).

In addition, information about one person may, in certain circumstances, constitute health information of another person. Under s 4(1)(u) of the *Freedom of Information Act*, personal

information, which is health information under the *Health Information Act*, is considered health information for all purposes (at para 79).

Two questions were considered to examine whether the information about Ms. McHarg constituted health information under the *Health Information Act*. First, did the information pertain to or could it directly affect the physical and mental health of her parents or a health service provided to them? If so, was this information obtained when Covenant Health provided a health service to her parents? (at para 80).

Both these questions were answered in the affirmative. The information about Ms. McHarg's conduct had an effect on the physical and mental health of her parents and on the health services they need. Covenant Health concluded that some of Ms. McHarg's actions (such as feeding them in an unsafe manner and interfering with the provision of health services to them) put her parents' wellbeing at risk. Limitations on Ms. McHarg's visitation privileges were put in place to guarantee the proper care for her parents (at para 85).

In this case, Ms. McHarg's personal information was also the health information of her parents. This brought the disputed information under the protection of s 11(2) of the *Health Information Act*.

A subset of the remaining information not disclosed to Ms. McHarg included personal information of her parents' agent under the *Personal Directives Act,* RSA 2000, c P-6. Disclosing this information would have contravened s 17(1) of the *Freedom of Information Act*. While the Court recognized that the agent's decisions affected her parents, it held that the agent is a separate legal entity whose privacy interests require protection (at para 117).

Issue 2

Ms. McHarg also contested Covenant Health's decision to withhold part of a memorandum from a Covenant Health Vice-President to the Chief Executive Officer and the Board Chair. The disputed passages contain proposed strategies for future dealings with Ms. McHarg and inquiries with regard to sending copies of Covenant Health's response to Ms. McHarg's letter to other members of the organization. The Court had to determine if this constituted "advice, consultations, or deliberations" within the meaning of s 24 of the *Freedom of Information Act*. After quoting dictionary meanings of "consultation" and "deliberation," the Court was satisfied that it fell within the ambit of a "consultation" (at paras 136-144). The same conclusion was reached with regard to an email between the resident manager and a registered social worker with whom Ms. McHarg has regular communications (at paras 145-147).

Having decided that s 24 applied, Judge Wakeling next had to consider whether Covenant Health lawfully exercised its discretion to refuse to disclose the information. The Court concluded that Covenant Health properly considered Ms. McHarg's right of access along with the effect of the disclosure on Covenant Health's future decision-making capacity. The *Freedom of Information Act* requires a public body to act in good faith, to demonstrate a firm understanding of the competing interests and relevant facts, and to make a reasonable decision. Ms. McHarg was told why her visitation rights were limited. Her interests would not be furthered by being given information about the consultations and deliberations of Covenant Health employees. The Court concluded that the factors supporting non-disclosure outweighed any interests Ms. McHarg has in gaining access to the undisclosed information (at paras 149-153).

Issue 3

With regard to the third issue, the Court held that Covenant Health discharged its duty to make every reasonable effort to assist Ms. McHarg in her access request. Covenant Health released information that was responsive to her request, and it properly withheld certain health and third-party information in compliance with the *Health Information Act* and the *Freedom of Information Act*.

Commentary

This case demonstrates the increasing conflict between access and privacy. Open access and protection of privacy appear to be mutually exclusive concepts that are on two opposite sides of the spectrum. When access ascends, privacy seems to wane. In this case, the Court attempted to balance a person's right to access her own information with the privacy rights of others. In the process of finding the appropriate balance between the two interests, more difficult questions arise. First, do provisions such as s 4(1)(u) of the *Freedom of Information Act* indicate a legal regime that favours privacy over access? Should protection of "health information" always be a reasonable limitation on a person's access rights? Is there a danger that certain access requests will be disguised under the name "health information" to justify non-disclosure?

Another issue from an administrative standpoint merits attention. In particular, the Court did not clearly indicate the standard of review it used in its analysis. After quoting *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 on the difference between the correctness and reasonableness standards, the Court went on to assess the "reasonableness of the adjudicator's decision" (at para 66). In effect, however, the Court seemed to apply the correctness standard in substituting its own decision for the adjudicator's. No deference was given to the adjudicator's ruling, and the decision ultimately hinged on whether one favoured access rights over privacy rights (or vice versa). While the adjudicator's decision favoured access, the Court clearly favoured privacy. This raises the question of who, as between the Information and Privacy Commissioner and the Court, should be the proper authority performing the balancing exercise?