OFFICE OF THE
INFORMATION & PRIVACY COMMISSIONER
for Prince Edward Island

INVESTIGATION REPORT IR-16-002
Re: Health PEI
May 31, 2016

Summary:

The Complainant questioned the information handling practices of Health PEI resulting from his attendance at the Emergency Department of the Queen Elizabeth Hospital, and subsequent admission. The Complainant submitted that his personal information was disclosed in a manner that contravenes Part II of the *Freedom of Information and Protection of Privacy Act,* RSPEI 1988, c F-15.01.

The Commissioner found that the Complainant's personal information was disclosed to two employees of the Workers Compensation Board, contrary to Part II of the *Freedom of Information and Protection of Privacy Act.* The Commissioner found no other violation of the *Freedom of Information and Protection of Privacy Act* resulting from her investigation. With regard to the disclosure of the Complainant's personal information to a police agency, the Commissioner found that this disclosure was authorized by clause 37(1)(o) of the *Freedom of Information and Protection of Privacy Act.*

As a result of her investigation, and in order to comply with subsection 37(2) of the *FOIPP Act,* the Commissioner recommended that the head of Health PEI create a detailed record of any personal information of clients or patients that Health PEI discloses to third parties. In accordance with subsection 33(a) of the *FOIPP Act,* the Commissioner also recommended that the head of the Public Body be mindful of the Public Body's obligation to make reasonable efforts to ensure the accuracy and completeness of facts used to make decisions that directly affect an individual. Accuracy includes keeping a record of the reasons for disclosure of an individual's personal information, and completeness includes creating a detailed record of any personal information of clients or patients which the Public Body discloses to third parties.

Statutes and Regulations Cited:	*Freedom of Information and Protection of Privacy Act,* RSPEI 1988, c F-15.01, s. 1 (e), 1(i), 2(b), 37(1)(b), 37(1)(o), 37(1)(cc), 37(2), 50(1)(h), 50(2)(e), 66(3)(e); *Criminal Code*, RSC 1985, c C-46, s . 246.1, *Health Information Act* S.P.E.I. 2014, c 31, s. 24(1)(a)
Authorities Considered:	Order F2012-01, 2012 CanLII 70614 (AB OIPC) Order No. PP-08-003, *Prince Edward Island (Health) (Re)*, 2008 CanLII 67689 (PE IPC) Order No. PP-09-001, *Prince Edward Island (Attorney General) (Re)*, 2009 CanLII 78372 (PE IPC) Order 96-007, 1996 CanLII 11528 (AB OIPC) *Smith v. Jones*, [1999] 1 SCR 455, 1999 CanLII 674 (SCC)
Others References:	Gary Chaimowitz & Graham Glancy, "The Duty to Protect" (2002) Can J Psychiatry, September, 47(7): sup 1-5

I. BACKGROUND

[1] A privacy complaint was received from a complainant (the "Complainant"), alleging that, during the time the Complainant was a patient at the Queen Elizabeth Hospital, a psychiatrist inaccurately collected his personal information, and inappropriately disclosed his personal information to two employees of the Workers Compensation Board and a police agency without the Complainant's knowledge or consent. The Complainant further alleges that these disclosures subsequently resulted in an unreasonable delay in the Complainant receiving health treatment.

[2] Former Commissioner Maria MacDonald initially established two components to the complaint, namely, (i) whether there is inaccurate information in the record about how the Complainant presented at the hospital; and (ii) whether an employee of the Queen Elizabeth Hospital improperly disclosed personal information to two employees of the Workers Compensation Board. She asked the head of Health PEI (the "Public Body") to carry out an internal investigation and provide a concise summary of his findings, confirming whether or not the Public Body contravened Part II of the *Freedom of*

Information and Protection of Privacy Act, RSPEI 1988, c F-15.01 (the "*FOIPP Act*"). The Complainant was also asked to provide detailed submissions and evidence.

[3] Based on a review of relevant records and the submissions of the parties, former Commissioner MacDonald established that inaccurate information about how the Complainant presented at the hospital is not contained in the Complainant's health record and, as such, is not an issue to the investigation.

II. JURISDICTION

[4] Clause 2(e) of the *FOIPP Act* provides for the resolution of complaints under the *FOIPP Act*. In fulfilling this purpose, the *FOIPP Act* sets out powers of the Information and Privacy Commissioner. Pursuant to clause 50(2)(e) of the *FOIPP Act*, the Information and Privacy Commissioner may investigate and attempt to resolve complaints that personal information has been collected, used or disclosed by a public body in violation of Part II. Further, clause 66(3)(e) permits the Commissioner, by order, to require a public body to stop collecting, using or disclosing personal information in violation of Part II. In addition, clause 50(1)(h) permits the Commissioner to give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under the *FOIPP Act.*

III. ISSUE

[5] The key issue of this investigation is as follows: ***Did the Public Body disclose the Complainant's personal information contrary to Part II of the FOIPP Act?***

IV. ANALYSIS

[6] For every investigation carried out by this office, I must examine the purposes of the *FOIPP Act*. Of particular significance to this investigation is clause 2(b) of the *FOIPP Act*, which states:

> 2. The purposes of this Act are
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> . . .
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> (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information.

[7] The Complainant states that he attended at the Queen Elizabeth Hospital Emergency Department because he was having suicidal thoughts. He had been experiencing chronic pain resulting from a workplace accident for some time. The Complainant made a general reference to what he would do if he could get his hands on someone at the Workers Compensation Board. The Complainant states that the psychiatrist on duty pressed him, while under the influence of medication, for a name of a person he would like to seek justice from at the Workers Compensation Board. The Complainant states that, upon the psychiatrist's third request, in order to receive health care, he provided the psychiatrist with the name of his case worker. At that point, the psychiatrist indicated to the Complainant that they would have to call the police and the Workers Compensation Board to advise them of the threat made by the Complainant against the case worker. The Complainant states he was then involuntarily admitted to the Queen Elizabeth Hospital. In addition, the Complainant states that the actions of the psychiatrist in reporting the threat resulted in the delay of treatment for his physical injury by one year.

[8] For investigations into claims of unauthorized disclosure of personal information, the burden of proof lies with both parties. I agree with the adjudicator in Alberta Order

F2012-01, 2012 CanLII 70614 (AB OIPC), that a complainant must prove a disclosure of personal information, and a public body must prove that the disclosure was authorized under the *FOIPP Act*:

> [para 8] In inquiries involving the alleged unauthorized disclosure of personal information, the initial burden of proof normally rests with the complainant, in that the complainant has to have some knowledge, and adduce some evidence, regarding what personal information of his or hers was disclosed, and the manner in which that personal information was disclosed; the public body then has the burden to show that its disclosure of the personal information was in accordance with the Act.

[9] Former Commissioner Maria MacDonald established three components to the analysis of the issue of whether an employee of the Queen Elizabeth Hospital improperly disclosed personal information to two employees of the Workers Compensation Board, with which I agree. I also agree that these three components apply to the analysis of whether that same employee, a psychiatrist, improperly disclosed personal information to a police services agency:

(i) whether the information at issue is personal information;

(ii) if the information is personal information, whether it was disclosed; and

(iii) if the personal information was disclosed, whether its disclosure is permitted by law.

If the information at issue is not found to be personal information, then, logically, the Complainant's personal privacy cannot be found to be breached, and the investigation ends there.

Personal Information

[10] The information that is the subject of this complaint involves an alleged threat against a third party by the Complainant, which threat was allegedly relayed by the Complainant to an employee of the Public Body, a psychiatrist.

[11] "Personal information" is defined at clause 1(i) of the *FOIPP Act, supra*, and includes a description of nine types of information that satisfy the definition. I have determined that the following clauses of section 1 of the *FOIPP* Act pertain to the information at issue in this complaint:

> 1. In this Act
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> . . .
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> (i) "personal information" means recorded information about an identifiable individual, including
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> (i) the individual's name, home or business address or home or business telephone number,
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> . . .
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> (iii) the individual's age, sex, marital status or family status,
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> . . .
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> (vi) information about the individual's health and health care history, including information about a physical or mental disability,
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> . . .
>
> (viii) anyone else's opinions about the individual, and
> (ix) the individual's personal views or opinions, except if they are about someone else;

[12] The Public Body provides a description of the information at issue, as contained in the records under the Public Body's custody and control, provided during the course of this investigation, as follows:

> There are several notations in the complainants record by various health care providers regarding the expression of threats of harm towards the complainant's case worker at WCB. The specific records are included here for your ease of reference.
>
> 1. The 'History and Physical' indicates that the complainant expressed threatening remarks against his WCB case worker. It is written that he said he could kill him with his bare hands.
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> 2. A progress note dated 9.6.11 by [a second psychiatrist], psychiatrist, which states that the complainant expressed 'harming others before self' and went on to state specifically the

physician at workers compensation and the case manager but did not mention names.

3. [The psychiatrist] writes in her physician consultation note on June 15, 2013 that the complainant stated he was angry with his case worker at WCB and said on more than one occasion that he would like to kill him with his bare hands. [The psychiatrist] writes that she questioned him repeatedly as to whether "he was just talking and didn't mean it" and he was told that if he continued with the threats that she would have to inform the case worker at WCB and the police. [The psychiatrist] writes that this was done.

[13] The Complainant disputes the interpretation of the second notation about a progress note dated 9.6.11 by a second psychiatrist, stating, as follows:

> It's clear from reading this report that this was written after [the second psychiatrist] spoke with [the attending physician]. I never [met] [the second psychiatrist] then and [as] I've always said I've never threatened any one.

[14] While the above submissions focus on the Complainant's health records, the information which is the subject of this investigation was disclosed verbally. I observe that there are no records which indicate, in any detail, the precise information which was disclosed by the Public Body. As noted below, I have found this to be a shortcoming of the Public Body's procedure. Despite this lack of detail, and based on the evidence provided by the Public Body, I find that the information that was ultimately disclosed to two employees of the Workers Compensation Board and to a police agency is personal information of the Complainant, including, as defined by clause 1(i) of the *FOIPP Act*:

- the Complainant's name [subclause 1(i)(i)];
- the Complainant's sex [subclause 1(i)(iii)];

- the Complainant's admission to hospital and the state of the Complainant's mental health [subclause 1(i)(iv)];

- the psychiatrist's opinion of the Complainant's state of mind [subclause i(i)(viii); and

- the Complainant's personal views or opinions of what he may be capable of doing [subclause 1(i)(ix)].

Disclosure of Personal Information

[15] The Public Body states that, due to suicidal and homicidal threats, the Complainant was involuntarily admitted to the psychiatric unit under the *Mental Health Act* by the psychiatrist, who informed the Complainant's case worker, the Medical Director of the Workers Compensation Board and the Charlottetown Police of the threats allegedly made by the Complainant.

[16] The Public Body concedes that the psychiatrist employed by the Public Body disclosed the Complainant's personal information. Based on the Complainant's health records, it is notable that the Complainant was advised that his personal information would be disclosed to the alleged victim of the threat, and to the police, but that the Complainant was not advised in advance that another person at the Workers Compensation Board would be informed. Thus, the Complainant had no notice of the disclosure of his personal information to the second employee of the Workers Compensation Board. While notice is usually necessary for disclosures of personal information under the *FOIPP Act*, I note that clause 37(1)(o), relied upon by the Public Body, does not contain a requirement of notice to the individual to whom the personal information relates.

[17] As it has been established by the evidence that the information at issue is personal information of the Complainant, and that the Public Body disclosed the Complainant's

personal information, to the three parties indicated, I continue my analysis of whether the Public Body was legally authorized to disclose the Complainant's personal information pursuant to the provisions of Part II of the *FOIPP Act*.

Disclosure of Personal Information pursuant to Part II of the *FOIPP Act*

[18] Subsection 37(1) of the *FOIPP Act* lists circumstances under which disclosure of personal information is permitted. The Public Body originally relied on clause 37(1)(cc), but has subsequently relied upon clause 37(1)(o), which clauses state, as follows:

> 37. (1) A public body may disclose personal information only
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> . . .
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> (o) to a public body or a law enforcement agency in Canada to assist in an investigation
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> (i) undertaken with a view to a law enforcement proceeding, or
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> (ii) from which a law enforcement proceeding is likely to result;
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> . . .
>
> (cc) if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person.

Clause 37(1)(cc)

[19] The Public Body initially relied upon clause 37(1)(cc) of the *FOIPP Act* to support its disclosure of the Complainant's personal information. A reading of section 37 leads to a clear observation: there are approximately 32 various circumstances listed under subsection 37(1) that authorize the disclosure of an individual's personal information, and of those 32 circumstances, clause 37(1)(cc) is the only clause that requires the involvement of the head of the public body.

[20] A previous order of this office dealt with clause 37(1)(cc) of the *FOIPP Act*. In Order No. PP-08-003, *Prince Edward Island (Health) (Re),* 2008 CanLII 67689 (PE IPC), at page 13, former Commissioner Judith M. Haldemann states:

> With regard to the Public Body's reliance on clause 37(1)(cc), the situation is quite different. It is irrelevant for the Public Body to argue that there may have been an imminent danger to the health or safety of anyone, because the Public Body has not fulfilled the requirements of clause (cc). Clause (cc) requires more than just someone's belief that a person might be in danger. Reliance on that clause must be predicated on the involvement of the head of the Public Body, and not just the reasonable belief of an employee of the Public Body at the Office building. The wording of clause 37(1)(cc) is a very important determining factor in whether that clause may be relied on in such a case as this one. The words "if the head of the public body believes, on reasonable grounds" cannot be ignored. The "head of the public body" means the Minister responsible or the Deputy Minister; no one else. There is nothing in the submissions of the Public Body in this case that leads me to believe that the Minister or Deputy Minister decided that an application for a peace bond should be made. There is nothing that leads me to believe that the Minister or Deputy Minister specifically communicated a belief that information collected about the Complainant should be released in the context of clause 37(1)(cc). This clause is inoperative until a belief of imminent danger is expressed by the head of the Public Body and followed through by taking the action sought to be justified; in this case, the application for a peace bond. I must therefore find that clause 37(1)(cc) is not applicable in this case as a ground for releasing the Complainant's personal information in support of a peace bond application.
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> All public bodies need to be vigilant in ensuring that they fall within the actual wording of any section, or portion of a section, of the FOIPP Act, if they intend to rely on that section, or portion of a section, as grounds for a disclosure of personal information.

[21] There is no evidence before me that the head of the Public Body made the decision to disclose the Complainant's personal information. Rather, the evidence clearly shows that a psychiatrist employed by the Public Body exercised their discretion to disclose the Complainant's personal information. Thus, I find that clause 37(1)(cc) of the *FOIPP Act* does not apply to the circumstances of this disclosure of personal information.

Clause 37(1)(o)

[22] Upon reconsidering the wording of clause 37(1)(cc) of the *FOIPP Act* and Order No. PP-08-003, *supra,* the Public Body amended its position, arguing that it has not violated Part II of the *FOIPP Act*, as it was authorized to disclose the personal information of the Complainant pursuant to clause 37(1)(o). The Public Body submits,

> As noted in previous correspondence on this complaint, there are standards of care and examples from case law to be considered regarding a health professional's duty to protect where he/she is made aware of a potential risk to an individual's safety. We feel that the information available to the psychiatrist who disclosed personal information would lead a reasonable person to conclude that a risk requiring such action existed: chart documentation shows that the Complainant made serious, specific threats to an identifiable person. Furthermore, the statements made by the Complainant were considered to be uttering threats, which is an offence under the Criminal Code of Canada, section 264.1 (1).
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> . . .
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> . . . The disclosure to law enforcement was for the purpose of investigating the threat. The officer who received the information regarding the threat completed the Law Enforcement Disclosure form used by Health PEI when disclosing under section 37(1)(o). . . .

[23] Former Commissioner Haldemann analyzed clause 37(1)(o) of the *FOIPP Act* in Order No. PP-09-001, *Prince Edward Island (Attorney General) (Re)*, 2009 CanLII 78372 (PE IPC), by first looking at the definition of "law enforcement". Starting at page 6, she states, as follows:

> The FOIPP Act defines "law enforcement" at clause 1(e) as follows:
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> 1. In this Act
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> (e) "law enforcement" means
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> (i) policing, including criminal intelligence operations,
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> (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another

> body to which the results of the investigation are referred, or
> (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings, or by another body to which the results of the proceedings are referred;
>
> In the definition of "law enforcement", the tone of the definition obviously intends criminal or quasi-criminal acts that are being investigated. Subclauses (i) and (ii) uses words like "policing", "police" and "criminal". In my opinion, subclause (iii) is *ejusdem generis* with subclauses (i) and (ii). In other words, the proceedings envisioned by subclause (iii) are proceedings of a similarly serious nature to subclauses (i) and (ii), and may result in similarly serious sanctions.

[24] A copy of a "Law Enforcement Disclosure" form, completed by the constable to whom the disclosure was made, is dated one day after the Complainant was involuntarily admitted to the Queen Elizabeth Hospital. In support of this part of its 3-party disclosure, the Public Body submits the Complainant made statements that are considered to be threats, which is an offence under the *Criminal Code*, RSC 1985, c C-46, s 264.1 (1). I find that the disclosure of the Complainant's personal information to the Charlottetown Police would assist in an investigation of a law enforcement proceeding, as "law enforcement" includes a complaint giving rise to the investigation [clause 1(e)(ii) of the *FOIPP Act*], which, in these circumstances, involves the *Criminal Code* offence of uttering threats. This finding raises the application of subclause 37(1)(o)(i) of the *FOIPP Act*. An analysis of whether the Public Body reasonably exercised its discretion to apply subclause 37(1)(o)(i), follows.

Duty to Warn and the Assessment of Risk:

[25] The Public Body supports its position to disclose by raising case law regarding a health professional's duty to protect when made aware of a potential risk to an individual's safety. In its initial submissions, the Public Body draws attention to a 1976 case from

the Supreme Court of the United States, which establishes a reporting policy. The Public Body states:

> The standard of care related to patients who threaten another individual with homicide is guided by a case in the United States, Tarasoff v. UCLA. This case resulted in the death of a woman by a patient of a psychologist. The patient expressed his plan to kill a woman to the psychologist but the psychologist did not take any steps to warn the woman or her family. The case went to the Supreme Court of California. The ruling held that mental health professionals have a duty to protect their patient as well as any individual who is being threatened with bodily harm by a patient. The original 1974 decision mandated warning the threatened individual, but a 1976 rehearing of the case by the California Supreme Court called for a "duty to protect" the intended victim. The professional may discharge the duty in several ways, including notifying police, warning the intended victim, and/or taking other reasonable steps to protect the threatened individual. Other reasonable steps could include committing a patient to a psychiatric unit.

[26] The Public Body also provided a copy of a position paper from the Canadian Psychiatric Association's Standing Committee on Professional Standards and Practice relating to a psychiatrist's duty to warn and protect[1], which paper refers to a Canadian Supreme Court of Canada decision, *Smith v. Jones*, [1999] 1 SCR 455, 1999 CanLII 674 (SCC). At pages 3 and 4 of the paper, the following comments are made:

> . . . Although the Supreme Court declined to outline the exact steps to take in discharging this duty, the steps could include detaining the patient, treating the patient, or breaching confidentiality and informing the target(s) or the police. In the event of informing, the information disclosed should be limited to that which would provide protection.
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> . . .
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> . . . The psychiatrist should address threats of serious violence or death and assess whether they are more likely to be carried out than not. The mere mention of a threat to harm someone, when made within the physician-patient relationship, is in itself not a justifiable reason to breach confidentiality.

[1] Gary Chaimowitz & Graham Glancy, "The Duty to Protect" (2002) Can J Psychiatry, September, 47(7): sup 1-5

[27] In my view, this common law duty to warn or to protect is partially incorporated into the hospital admission procedure adopted by the Public Body when changing the status of a patient's admission from voluntary to involuntary, and partially incorporated into clause 37(1)(o) of the *FOIPP Act*. A psychiatrist has the professional discretion to change the status of a patient's admission from a voluntary basis to an involuntary basis, upon reasonable grounds, thus limiting risk and enabling an opportunity for treatment and observation, which occurred in these circumstances. Further, a psychiatrist is entitled to assess whether an offense of uttering threats has occurred, and to report the assessment to a police services agency, pursuant to clause 37(1)(o) of the *FOIPP Act*, which also occurred in these circumstances. However, I find that, in the complaint before me, the authority of the psychiatrist to warn the alleged victim and another employee of the Workers Compensation Board is not supported by statute, which will be discussed in more detail below.

[28] The Complainant has consistently claimed he made no threat towards a specific person, until pressed, and he presented evidence to support his contention. I accept the Complainant's evidence, as it is consistent with the Complainant's health records provided by the parties. However, as noted below, the psychiatrist's assessment of risk is a professional judgment based on their experience and their interaction with the Complainant. As the position paper of the Canadian Psychiatric Association points out, predicting a risk is notoriously difficult [page 2].

[29] In initial submissions, the Public Body states, as follows:

> Health PEI does not feel that there was a violation of Part II of the *Freedom of Information and Protection of Privacy Act.* Based on the notes in the complainant's record, [the psychiatrist] felt the threats were significant enough to warrant warning the intended victim and the police. Health care providers make clinical judgments based on what is before them. In a case such as this, the health care provider assesses the situation and makes a determination as to the real risk of harm and then takes appropriate steps to mitigate that risk.

[30] Upon application by the Complainant to the *Mental Health Act* Review Board, the Complainant's involuntary admission to the psychiatric unit was subsequently changed to voluntary. The Complainant's hearing before the *Mental Health Act* Review Board to overturn his involuntary admission was successful, and he was later discharged home. The Complainant submits that this, and the fact that a second psychiatrist assessed the Complainant at a later date, and opined that he was not a risk to himself or others, is proof that the first psychiatrist erred in their assessment of whether the Complainant was a threat to another person.

[31] Although the Complainant had presented himself at the Emergency Department of the Queen Elizabeth Hospital on his own accord and voluntarily admitted himself, I cannot overlook the fact that, upon examination, the psychiatrist changed the Complainant's status from "voluntary" to "involuntary". It is reasonable to conclude that the psychiatrist believed, based on their observations and interactions with the Complainant at the time, that threats were made, and that the threats were serious enough to disclose to a police services agency.

[32] The Public Body submits,

> Medicine is not an exact science and at times will result in differing opinions by health care providers. In this case, [the second psychiatrist] was not present on June 9, 2011 when the Complainant presented at the ED of QEH. He came into contact with the Complainant after he was on Unit 9 for a period of time and his situation had improved. A progress note in the Complainant's medical record dated June 16, 2011 written by [the second psychiatrist] appears to be the first time that [the second psychiatrist] saw the Complainant. In the note [the second psychiatrist] writes "...Requested a 2nd opinion from another psychiatrist. Stated he has not felt in any danger of acting on previous thoughts of harming others or himself...I told him that I did not have enough information to give a second opinion regarding his involuntary admission but would pass on the request...". Also on the same date [the second psychiatrist] ordered '"unaccompanied punctual". . . .

[33] The evidence indicates that two opposing opinions were held by medical professionals familiar with the Complainant. This is not uncommon, as opinions are, by their nature, subjective, even in the professional context. Neither of these professionals can predict the future with precision. Part of their responsibility is to assess risk of the patient to themselves and to others. Because this is a matter of professional judgment, sometimes opinions will differ. It is not for me to replace my opinion for that of a professional in their field of expertise. In these circumstances, the psychiatrist's opinion is based on professional experience and interaction with the patient. These factors, combined with the goal of public safety, weigh in favour of deferring to the psychiatrist's opinion in circumstances such as those arising in this investigation.

[34] The Complainant also submits that he posed no threat to anyone at the time that his personal information was disclosed to the Workers Compensation Board and the police service, because he had already been involuntarily admitted to hospital. The Public Body argues that involuntary admission to a hospital does not guarantee security. In its submissions in support of its argument under clause 37(1)(cc) of the *FOIPP Act*, the Public Body states:

> A hospital is not a secure facility like a correctional centre or prison and there is always a risk that a patient may go missing. There is a risk that some time could pass before a missing patient was noticed. We acknowledge that this risk is reduced in the case of an involuntarily admitted patient however there is still a risk. As a result of this risk, the intended victim in this case and the police were informed of the threats.
> . . .

[35] According to a Queen Elizabeth Hospital policy, "Patient Observation Levels", the nursing staff requirements for a patient at high risk of harming self or others, which was the clinical judgment made by the psychiatrist, includes the requirement that the patient must be directly visible at all times, that assigned staff must remain in close proximity to the patient even when visitors are present or the patient is in the

bathroom, and assigned staff are not to spend time with other patients and are to discourage loitering by other patients. As indicated by the position paper of the Canadian Psychiatric Association, involuntary admission is one tool that may be used to reduce risk in circumstances such as these, but there exists discretion to use other tools, as well.

[36] Under the circumstances, I find that the Public Body reasonably exercised its discretion to disclose the Complainant's personal information to the Charlottetown Police pursuant to subclause 37(1)(o)(i) of the *FOIPP Act*. The personal information was disclosed to a law enforcement agency in Canada to assist in an investigation undertaken with a view to a law enforcement proceeding. Further, in accordance with subsection 37(2) of the *FOIPP Act*, based on the police record and all of the evidence, only information that was necessary to describe the threat was disclosed. I will proceed to analyze the disclosure by the Public Body of the Complainant's personal information to the two employees of the Workers Compensation Board.

Disclosure to Employees of the Workers Compensation Board

[37] A decision of the Alberta Information and Privacy Commissioner provides an analysis of Alberta's equivalent to clause 37(1)(o) of the *FOIPP* Act, as it was in 1996. In Order 96-007, 1996 CanLII 11528 (AB OIPC), at page 10, the Commissioner states:

> The letter written by the Complainant to Alberta Justice, referred to in the first complaint, contains personal information of the Complainant. Disclosure of the letter by Alberta Justice to the Edmonton Police Service, would be justified under section 38(1)(o) as submitted by Alberta Justice. However, the question arises as to how that letter came into the possession of the Complainant's former spouse's lawyer. One possibility was that the Edmonton Police Service released it; another possibility was that the RCMP released it. At this time, I do not have jurisdiction over either of these so I did not attempt to extend my investigation to either one. I hope that it will be of some assistance to these police forces if I tell them that I do not think that section 38(1)(o) would allow the disclosure of personal information to a private citizen. Section 31 might apply, but

> section 31 would only be exercised by the head of the public body or designate and the other conditions of section 31 would have to be adhered to. The Protocol referred to above should be applied in such a case. The head of the public body should consider whether to release the actual record or a warning based on the contents of the record. [*underline emphasis added*]

[38] In the complaint before me, the disclosure of the Complainant's personal information was made by the Public Body to two employees of the Workers Compensation Board. The evidence the Public Body provided does not indicate the date of disclosure by the Public Body to the two employees of the Workers' Compensation Board. However, notes and records provided during the investigation imply that a concurrent disclosure was made to the Charlottetown City Police. The disclosure to the Workers Compensation Board employees was not made to assist in an investigation undertaken with a view to a law enforcement proceeding, or from which a law enforcement proceeding was likely to result. Rather, the stated reason for the disclosure was to warn potential victim(s) of an alleged threat. Therefore, I find that the disclosure by the Public Body to the two employees of the Workers Compensation Board is not authorized by clause 37(1)(o) of the *FOIPP Act.* Indeed, once the psychiatrist disclosed the perceived threat to the Charlottetown Police, it was within the police authority's power to warn the alleged victim of the threat, based on its own assessment.

[39] This investigation reveals that the psychiatrist employed by the Public Body disclosed the Complainant's personal information to two employees of the Workers Compensation Board. While one of these employees was an alleged victim of the Complainant's alleged threat, the reason for disclosure to the second employee is unclear, as will be discussed more fully below. In either case, I can find no authority under the *FOIPP Act* for these disclosures. The Public Body made a brief submission relating to these disclosures, as follows:

> Health PEI's disclosure to WCB (a public body) was directly related to a service provided by that public body to the individual to whom the personal information belongs.

This argument is not supported by any provision of the *FOIPP Act*, nor does it pertain to clause 37(1)(o) of the *FOIPP Act*.

[40] I wish to make it clear that, by finding that the Public Body was not authorized to disclose the Complainant's personal information to employees of the Workers Compensation Board, I am not questioning the professional judgment of the psychiatrist who made the disclosure. Indeed, this is not my role. I am simply concluding that, based on the combination of the particular facts of this investigation and the regulatory framework as it currently stands in Prince Edward Island, there was no authority to do so.

[41] The Public Body did not direct me to any hospital protocols that guide health professionals in the event that they are faced with circumstances such as those circumstances facing the psychiatrist in this instance. I imagine that similar circumstances are not uncommon in emergency rooms, and a hospital protocol would be helpful to this office in future investigations. If the Public Body were to choose to develop such a protocol, it should be guided by the applicable privacy protection legislation, which, at present, is the *FOIPP Act*. I do note that, under the *Health Information Act*, SPEI 2014, c 31, which has not yet been proclaimed into force in Prince Edward Island, clause 24(1)(a) states, as follows:

> 24. (1) A custodian may disclose personal health information without the consent of the individual to whom it relates if the custodian reasonably believes that disclosure is required
>
> (a) to prevent or reduce a risk of serious harm to the health or safety of the individual to whom it relates or another individual;

This subsection of the *Health Information Act*, once proclaimed, may yield different

results should similar circumstances to this complaint arise with public bodies in the future.

Related Issue: The Public Body's Internal Investigation

[42] As is the normal practice in investigations of privacy complaints, former Commissioner Maria MacDonald requested, at the outset of this complaint, that the head of the Public Body conduct his own internal investigation into the complaint. The head of the Public Body complied and reported the results of the investigation. For the reasons set out below, I find the internal investigation to be incomplete.

[43] In the complaint before me, the Complainant questions the accuracy of the personal information that was collected from him and then disclosed to others. Accuracy of information is always important, but particularly so in complaints such as these. I have identified an inconsistency in the information that has been provided during this investigation. In addition, I have identified a record that should have been provided to this office at the outset, but was not provided until the final stage of the investigation. Further, I have identified a lack of necessary detail in the Public Body's internal investigation.

[44] In its written decision responding to the Complainant's request to change his admission status to "voluntary" from "involuntary", the *Mental Health Act* Review Board includes the Board's evaluation of the circumstances of the Complainant's admission, and raises a concern for the Complainant's privacy. Starting a paragraph 11 of its decision, the board states:

> 11. In [the Complainant's] application to the Board, and at the hearing, he indicated that he went voluntarily to the hospital, and allowed himself to be taken to Unit 9 to meet with [the psychiatrist]. He relates that when asked by her why he was there, he explained his history and chronic pain, and that he "wanted justice against WCB and I would like to do it myself." He relates

that at [the psychiatrist's] request, he gave her his case worker's name. She then informed him that she would need to involve the police. [The Complainant] relates that he was not able to explain that his words were not meant as a threat; [the Complainant] said that she explained to him the "she was just doing her job."

12. It appears that [the psychiatrist] (according to her Psychiatric Note) then took steps to involve the police, notified the case worker, and notified another WCB official who she believed was a "target" (this was the word used by [the psychiatrist] at the hearing in explaining why she took this latter step).

13. The Panel had some concerns about these steps taken by [the psychiatrist]. Those concerns relate to [the Complainant's] privacy interests and her assessment of the "threat" itself. However, those concerns do not fall within the mandate of the Board on this application, which is concerned solely with whether [the Complainant] meets the statutory criteria for involuntary admission. Nor, it must be noted, were any independent witnesses present at the time of the discussion between [the Complainant] and [the psychiatrist]. [*underline emphasis added*]

[45] While the privacy concerns noted by the *Mental Health Act* Review Board have been addressed in this Investigation Report, I also have concerns regarding the accuracy of information provided by the Public Body to explain the psychiatrist's decision to disclose the Complainant's personal information to two employees of the Workers Compensation Board. Public bodies should be mindful of their obligation to make reasonable efforts to ensure the accuracy and completeness of facts used to make decisions that directly affect an individual, in accordance with section 33(a) of the *FOIPP Act*. In contrast to the initial submissions of the Public Body and the statement of the *Mental Health Act* Review Board, the physician consultations record, dated June 15, 2011, and authored by the psychiatrist who disclosed the Complainant's personal information, indicates that the disclosure to the second employee of the Workers Compensation Board was made at the request of the first employee, the alleged victim of the threat. If the second employee was a "target" of the threat, this fact was not disclosed by the health care records prepared by the psychiatrist who assessed the

threat. Although I have found that neither of these disclosures to employees of the Workers Compensation Board was authorized by the *FOIPP Act*, I wish to point out that internal investigations of alleged privacy breaches by public bodies should optimally be clear, consistent and complete. These characteristics are essential to informed findings by the Information and Privacy Commissioner.

[46] As noted earlier in this report, the Public Body amended its position regarding the disclosure of the Complainant's personal information to rely on clause 37(1)(o) of the *FOIPP Act* as opposed to clause 37(1)(cc). It was only at that time that the Public Body provided a copy of the Law Enforcement Disclosure form to support its position. The late provision of this form is concerning, given that the disclosure of the Complainant's personal information to Charlottetown Police was an issue identified early in this investigation, and neither the Complainant nor this office was aware of the existence of this document. I would ask that, as part of its own internal investigations in future, the head of the Public Body be mindful to provide all records that may be relevant to the issues.

[47] As indicated earlier in this Investigation Report, I am also concerned about the lack of detailed evidence regarding precisely what personal information of the Complainant was disclosed to the 3 parties identified. While the records and the Public Body's submissions, indicate that the 3 parties were informed of the alleged threat, I note that the Public Body has an obligation, pursuant to subsection 37(2) of the *FOIPP Act*, to limit the disclosure. Detailed notations of the personal information which was disclosed is therefore necessary to ensure that subsection 37(2) is adhered to. I expect such detail in future.

V. FINDINGS

[48] I find that, in disclosing the Complainant's personal information to the Charlottetown Police, the Public Body did not violate Part II of the *FOIPP Act.* This disclosure was authorized by subclause 37(1)(o)(i) of the *FOIPP Act*.

[49] I find that, in disclosing the Complainant's personal information to two employees of the Workers Compensation Board, the Public Body violated Part II of the *FOIPP Act.* This disclosure was not authorized by clause 37(1)(o) of the *FOIPP Act*.

VI. RECOMMENDATIONS

[50] In order to comply with subsection 37(2) of the *FOIPP Act,* I RECOMMEND that the head of Health PEI create a detailed record of any personal information of clients or patients which Health PEI discloses to third parties.

[51] In accordance with subsection 33(a) of the *FOIPP Act,* I RECOMMEND that the head of Health PEI be mindful of a public body's obligation to make reasonable efforts to ensure the accuracy and completeness of facts used to make decisions that directly affect an individual. Accuracy includes keeping a record of the reasons for disclosure of an individual's personal information, and completeness includes creating a detailed record of any personal information of clients or patients which Health PEI discloses to third parties.

[52] I thank the Complainant for bringing his privacy complaint to the attention of this office. By doing so, he has allowed further analysis of the privacy protections available to all individuals in Prince Edward Island via the *Freedom of Information and Protection of Privacy Act*.

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Karen A. Rose
Information and Privacy Commissioner