

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-018

May 10, 2001

Alberta Cancer Board

Review Number 1601

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicants applied to the Alberta Cancer Board (the “Public Body”) for access to health records relating to their son. Before this inquiry, the Alberta Cancer Board (the “ACB”) had provided the Applicants with a total of 878 pages, and had withheld only two pages of records. The Commissioner found that the ACB was not in breach of its duty to assist the Applicants pursuant to section 9(1) of the Act. The Commissioner found that he did not have jurisdiction to order the ACB to create records for the Applicants pursuant to section 9(2) of the Act. It was not necessary to consider whether section 15 of the Act applied to the clinical research trial protocols and bulletins of the Pediatric Oncology Group (the “Third Party”), as these records were provided to the Applicants recently when the objection to disclosure was withdrawn. The Commissioner found that the ACB did not properly apply section 26(1) of the Act to the two remaining pages of records, and ordered these pages disclosed to the Applicants with names and initials of certain third parties severed. The Commissioner found that section 34(a) does not apply to the facts in this case, so it was not necessary to determine whether the ACB made every reasonable effort to ensure that the information was accurate and complete. The Applicants received every page of the 880 pages of records held by the ACB, pursuant to the Act.

Statutes Cited: AB: *Cancer Programs Act*, R.S.A. 1980, c. C-1, s. 20; *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 5(2), 6(1), 6(2), 9(1), 9(2), 26(1) and 34(a); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, ss. 15(2)(d)(j); *Health Information Act*, S.A. 1999, c. H-4.8 (proclaimed in force on April 25, 2001); *Hospitals Act*, R.S.A. 1980, c. H-11, s. 40.

Authorities Cited: AB: Orders 99-034, 98-002 and 97-009.

I. BACKGROUND

[Para 1.] In a letter delivered on January 29, 1999, the Applicants applied to the Alberta Cancer Board (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”). The Applicants requested information relating to the medical treatment of their son.

[Para 2.] The request involved an extensive number of records, which were located across the province in various locations and programs, including the Cross Cancer Institute, Tom Baker Centre, Foothills Hospital, Alberta Children’s Hospital, Cancer Registry, Alberta Cancer Board and the Bone Marrow Transplant Program.

[Para 3.] Records in the custody of the Alberta Cancer Board (the “ACB”) included records from federal programs such as the Canadian Childhood Cancer Surveillance Program and out-of-country records such as records from the University of Minnesota. The request involved records located with three other public bodies as well as with third parties such as the Pediatric Oncology Group (the “Third Party”).

[Para 4.] Mediation was attempted but was unsuccessful. The matter was set down for inquiry. An initial oral inquiry involving the Applicants and the ACB addressed the issues of jurisdiction and custody and control of the records: see Order 99-034. This inquiry, which is written, addresses other issues. The Applicants and the ACB have provided written submissions for this inquiry.

[Para 5.] This Order proceeds on the basis of the FOIP Act as it existed before the amendments to the FOIP Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[Para 6.] A large number of records have already been released to the Applicants. The ACB has already provided the Applicants with 878 pages and has only withheld two pages of records.

[Para 7.] Two pages of records are at issue in this inquiry. The Public Body has numbered these records as pages 3 and 4 of the Cross Cancer Institute records.

III. ISSUES

[Para 8.] The issues before this inquiry are:

Issue A: Did the Public Body conduct a thorough search for the records and generally respond to the Applicants openly, accurately and completely as required by section 9(1) of the Act?

Issue B: Did the Public Body properly apply section 9(2) of the Act in withholding the Axon II screen prints?

Issue C: Did the Public Body properly apply section 26(1) of the Act to the records withheld?

Issue D: Did the Public Body make every reasonable effort to ensure that the information is accurate and complete, as required by section 34(a) of the Act?

IV. DISCUSSION OF THE ISSUES

Preliminary matter

[Para 9.] The records withheld by the ACB involved clinical trial protocols and bulletins of a research organization known as the Pediatric Oncology Group (the "POG"). The Notice of Inquiry included the issue of whether the ACB properly applied section 15 of the Act to the POG records.

[Para 10.] The POG initially objected to the release of its records pursuant to section 15 of the Act, but later withdrew the objection. Subsequently, in a letter dated April 9, 2001, the ACB provided the Applicants with the 115 pages of POG records. For this reason, I do not find it necessary to consider whether or not the ACB properly applied section 15 of the Act to the POG records.

ISSUE A: Did the Public Body conduct a thorough search for the records and generally respond to the Applicants openly, accurately and completely as required by section 9(1) of the Act?

1. General

[Para 11.] Section 9(1) of the Act says:

9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

There are two issues under section 9(1) of the Act: the adequacy of the search and the general duty to assist.

a. Did the Public Body conduct an adequate search for records?

[Para 12.] The ACB has the burden of proving that it has fulfilled its duty under section 9(1). An adequate search has two components: (1) every reasonable effort must be made to search for the actual records requested and (2) the applicant must be informed in a timely fashion about what has been done.

i. Did the Public Body make every reasonable effort to search for the actual records requested?

[Para 13.] The ACB says that it conducted a thorough and adequate search, which involved approximately 22 departments. The ACB has provided a detailed description of the efforts it made to search for responsive records.

[Para 14.] In my view, the ACB conducted an extremely complex search and made every reasonable effort to search for the actual records requested. I find that the ACB fulfilled the first component of conducting an adequate search.

ii. Did the Public Body inform the Applicant in a timely fashion about what was done?

[Para 15.] The ACB provided a detailed description of the steps taken to inform the Applicants about what had been searched. In my view, the ACB informed the Applicants in a timely manner about what had been searched. I find that the ACB fulfilled the second component of conducting an adequate search.

b. Did the Public Body fulfill the general duty to assist the Applicant?

[Para 16.] The ACB provided a detailed description of the efforts made to assist the Applicants with the request. The ACB made every reasonable effort to assist the Applicants and responded openly, accurately and completely to this request. I find that the ACB fulfilled its general duty to assist pursuant to section 9(1). In fact, I commend the ACB on its handling of this difficult request.

ISSUE B: Did the Public Body properly apply section 9(2) of the Act in withholding the Axon II screen prints?

[Para 17.] The Applicants have requested the ACB to create AXON II screen prints. AXON II screen prints can be created electronically from diagnostic and treatment information that is recorded in the ACB records. These screen prints can display a variety of different types of health information relating to an individual patient, such as the types of health services that were provided.

1. Application of section 5(2) of the FOIP Act

[Para 18.] I must first consider whether section 5(2) of the FOIP Act applies to the information from which the Applicants want the ACB to create records. If section 5(2) applies, I do not have jurisdiction over the ACB to determine whether the ACB has a duty to create the records requested by the Applicants.

[Para 19.] Section 5(2) of the FOIP Act says:

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

- (a) another Act, or
- (b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[Para 20.] Section 5(2) enables another 'enactment' or a provision of the enactment, to prevail despite the FOIP Act. Section 5(2) is jurisdictional because, if another enactment or a provision of it prevails despite the FOIP Act, I do not have jurisdiction to apply the FOIP Act.

[Para 21.] The matter of my jurisdiction is always an issue for me to decide. Section 5(2) requires that I first decide whether the information falls within another enactment or a provision of it that expressly provides that the enactment or provision of it prevails despite the FOIP Act.

[Para 22.] If so, I must then decide whether there is an inconsistency or conflict between a provision of the FOIP Act and the other enactment or a provision of another enactment. If there is an inconsistency or conflict, the other enactment or provision prevails despite the FOIP Act.

2. Does the information fall within another enactment or provision that expressly provides that it prevails despite the FOIP Act?

[Para 23.] I must first consider whether the records the Applicants want created involve information that falls within section 20 of the *Cancer Programs Act* and section 40(3) of the *Hospitals Act*. These enactments prevail despite the FOIP Act, as provided by section 5(2) of the FOIP Act and section 15(2)(d) and section 15(2)(j) of the FOIP Regulation. The relevant parts of section 15(2) of the FOIP Regulation say:

15(2) The following Acts and the regulations made under them prevail despite the *Freedom of Information and Protection of Privacy Act*:

.....

(d) *Cancer Programs Act*;

.....

(j) *Hospitals Act*

[Para 24.] Section 20 of the *Cancer Programs Act* says that Part 2 (which includes section 40) of the *Hospitals Act* applies to a provincial cancer hospital and an outpatient clinic, and that section 40 of the *Hospitals Act* applies to programs of the ACB. Section 40(3) of the *Hospitals Act* says:

40(3) Information obtained from hospital records or from persons having access thereto shall be treated as private and confidential information in respect of any individual patient and shall be used solely for the purposes described in subsection (2) and the information shall not be published, released or disclosed in any manner that would be detrimental to the personal interests, reputation or privacy of a patient or the patient's

attending physician or any other person providing diagnostic or treatment services to a patient.

[Para 25.] In Order 99-034, I said that a public body's use and disclosure of information obtained from records maintained by a provincial cancer hospital or a program of the ACB, which is a diagnostic and treatment centre or from persons having access to the records, was outside of my jurisdiction. However, Order 99-034 did not address diagnostic and treatment records of the ACB, as that issue was not before me in that inquiry. That order did address information under section 40(3) of the *Hospitals Act*.

[Para 26.] I find that the information contained in the AXON II screen-prints would fall within section 40(3) of the *Hospitals Act*. Having made this finding I must now consider whether the information requested by the Applicants would fall within an exception to section 40(3) of the *Hospitals Act*. Section 40(5)(a) of the *Hospitals Act* says:

40(5) Notwithstanding subsection (3) or any other law, a board or employee of a board, the Minister or a person authorized by the Minister, or a physician may
(a) divulge any diagnosis, record or information to the patient to whom the diagnosis, record or information relates or to his legal representative,

I find that the information contained in the health records of the ACB falls within the section 40(5)(a) exception to section 40(3) of the *Hospitals Act*.

[Para 27.] Section 15(2) of the *FOIP Regulation* specifically provides that the *Cancer Programs Act* and the *Hospitals Act* prevail despite the FOIP Act. Therefore, I must now decide whether there is an inconsistency or conflict between the FOIP Act and section 40(5)(a) of the *Hospitals Act*.

3. Is there an inconsistency or conflict between the FOIP Act and section 40(5)(a) of the Hospitals Act?

[Para 28.] In Order 99-034, I said that the terms 'inconsistent' or 'in conflict with' means a situation where two legislative enactments cannot stand together. This means that compliance with one law involves breach of the other law.

[Para 29.] Section 6(1) of the FOIP Act gives an applicant a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant. Section 6(2) of the FOIP Act says that the right of access does not extend to information excepted from disclosure under the FOIP Act. Therefore, the access provisions of the FOIP Act allow a right of access, subject to limited exceptions.

[Para 30.] Section 40(5)(a) is a discretionary provision that allows the listed persons to provide access to a diagnosis, record or information. The only limitation is that a decision must be a proper exercise of discretion. Consequently, the right of access established in section 6(1) of the FOIP Act (which is subject to limited exceptions under the FOIP Act, as in section 6(2)) is inconsistent or in conflict with the discretionary decision set out in section 40(5)(a) of the *Hospitals Act*.

[Para 31.] There are other inconsistencies and conflicts between these two provisions. For example, if access is refused under the FOIP Act, an applicant may ask the Commissioner to review the decision. The Commissioner may order access. The FOIP process is in conflict with section 40(11) and section 40(12) of the *Hospitals Act*, as the recourse for refusal of access under the *Hospitals Act* is a court application for an order directing access.

[Para 32.] Therefore, I find that the access provisions of the FOIP Act are inconsistent or in conflict with the access provisions in section 40(5)(a) of the *Hospitals Act*.

4. Conclusion under section 5(2) of the FOIP Act

[Para 33.] Section 5(2) of the FOIP Act applies to the information contained in the AXON II screen prints requested by the Applicants, pursuant to section 40(5)(a) of the *Hospitals Act*. Consequently, the FOIP Act does not apply to those records, and I have no jurisdiction to determine whether the ACB has a duty under section 9(2) to create records for the Applicants that involve diagnostic and treatment information.

[Para 34.] Therefore, I do not find it necessary to consider whether section 9(2) applies. The Applicants cannot get access to those records under the FOIP Act.

[Para 35.] As indicated in Order 99-034, I said that the situation might be different once the *Health Information Act* comes into force. The *Health Information Act* was recently proclaimed and came into force on April 25, 2001. However, this Order deals with the situation that existed before the *Health Information Act* came into force.

ISSUE C: Did the Public Body properly apply section 26(1) of the Act to the records withheld?

1. General

[Para 36.] Section 26(1) of the Act says:

- 26(1) The head of a public body may refuse to disclose to an applicant
- (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,
 - (b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services, or
 - (c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.

2. Application of section 26(1)(a)

[Para 37.] The ACB says that section 26(1)(a) (litigation privilege) applies to the two pages of records that have been withheld from the Applicants. In Order 97-009, I said that to correctly apply section 26(1)(a) with respect to litigation privilege, a public body must meet the following three-part test:

- a. there is a third party communication, which may include
 - (i) communications between the client or the client's agents and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;
 - (ii) communications between the solicitor or the solicitor's agents and third parties to assist with the giving of legal advice; or
 - (iii) communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.
- b. the maker of the document or the person under whose authority the document was made intended the document to be confidential; and
- c. the 'dominant purpose' for which the documents were prepared was to submit them to a legal advisor for advice and use in the litigation, whether existing or contemplated.

[Para 38.] The ACB says that the first part of the test is satisfied as these pages were prepared by third parties and provided to the ACB to enable the ACB to obtain legal advice. The ACB says that the makers of these documents intended them to be confidential, so the second part of the test is met.

[Para 39.] The ACB says that third parties produced these pages as a result of existing litigation and solely as a result of the filing of a Statement of Claim by the Applicants against the ACB, which was named as a defendant. The ACB says the three-part test for litigation privilege is satisfied.

[Para 40.] Page 4 is a letter to the ACB from its insurer. This letter says that the attached Statement of Claim was found as a result of a courthouse search, and that the Statement of Claim has been filed but has not yet been served on the ACB. The insurer says that there is no immediate need to assign legal counsel.

[Para 41.] Page 3 is an internal memorandum sent from a Director at the Cross Cancer Institute to three physicians who are named as defendants in the Statement of Claim. The Director says that there is no need for any action or response until the Statement of Claim is served. The Director advises that there is the possibility of a claim so they may wish to consider which insuring body they want to represent them in the event that the Statement of Claim is served in future.

[Para 42.] I find that neither of these pages involves or contemplates correspondence with a solicitor or shows any intention to obtain legal advice in the circumstances. These communications indicate that there is merely the possibility of a claim and there is no

need to obtain legal advice unless circumstances change. Therefore, the first and third parts of the test for litigation privilege are not met.

[Para 43.] I find that the ACB has not correctly applied section 26(1)(a) (litigation privilege) and has not discharged its burden of proof.

[Para 44.] The ACB says that common interest privilege also applies to these pages. In Order 97-009, I said that common interest privilege exists when documents are provided amongst parties where several parties have a common interest in anticipated litigation. Common interest privilege exists when one party consults with a lawyer on an issue of common interest, and shares or exchanges the legal opinion with other parties with the same interest. However, I find that neither of these pages involves the exchange of legal advice between the parties.

[Para 45.] As these two pages do not fall within section 26(1)(a) (litigation or common interest privilege), it is necessary to consider whether these pages fall within section 26(1)(b) or section 26(1)(c).

3. Application of section 26(1)(b) and section 26(1)(c)

[Para 46.] Section 26(1)(b) of the Act includes information prepared by or for a lawyer of a public body and section 26(1)(c) includes information in correspondence between a lawyer of a public body and any other person in relation to providing advice by the lawyer.

[Para 47.] These pages do not involve information prepared by or for a lawyer or information in correspondence involving a lawyer. I find that these pages do not fall under section 26(1)(b) or section 26(1)(c) of the Act.

[Para 48.] In summary, I find that the ACB did not properly apply section 26(1). Section 26(1)(a), section 26(1)(b) and section 26(1)(c) do not apply to these pages. Having made this finding, I do not find it necessary to consider whether the ACB exercised its discretion properly under section 26(1).

[Para 49.] I will be ordering the Public Body to disclose these pages to the Applicants. As I find that the disclosure of the names or initials of certain third parties contained in these pages would be an unreasonable invasion of personal privacy, this information must be severed from the information disclosed to the Applicants.

[Para 50.] I note that the Applicants will now have obtained all 880 pages of the responsive records held by the ACB, pursuant to the Act.

ISSUE D: Did the Public Body make every reasonable effort to ensure that the information is accurate and complete, as required by section 34(a) of the Act?

[Para 51.] Section 34(a) of the Act says:

34 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must
(a) make every reasonable effort to ensure that the information is accurate and complete

[Para 52.] Order 98-002 says that two conditions must be met for section 34(a) to apply to public bodies. The first condition is that the public body must have the individual's personal information. The second condition is that the public body must intend to use that information to make a decision. When these two conditions exist, the public body must reasonably ensure that the information is accurate and complete.

[Para 53.] The Applicants make allegations at length about inaccuracies in records. For example, the Applicants say the ACB did not ensure that the information in the patient record was accurate or complete. The Applicants say that the ACB did 'dry-charting', which means that a false document was prepared, which appears on the surface to be flawless. The Applicants maintain that the notes that were made regarding a September 30, 1996, meeting were not made until about two years later, and that 1998 information was contained in the 1996 notation.

[Para 54.] However, the Applicants do not say what personal information was inaccurate or incomplete or what decisions the ACB made using inaccurate and incomplete personal information. Consequently, there is no evidence on which I can find that section 34(a) applies.

[Para 55.] Since I find that section 34(a) of the Act does not apply to the facts in this case, I do not find it necessary to determine whether the ACB has made every reasonable effort to ensure that the information is accurate and complete.

V. ORDER

[Para 56.] I make the following order under section 68 of the Act:

1. I find that the ACB conducted a thorough search for the records and responded to the Applicants openly, accurately and completely as required by section 9(1) of the Act.
2. I find that I do not have jurisdiction to order the ACB to create records pursuant to section 9(2) of the Act.
3. I find that the ACB did not properly apply section 26(1) of the Act. I order the ACB to disclose pages 3 and 4 of the Cross Cancer Institute records to the Applicants with the names and initials of certain third parties severed. I will provide the ACB with a highlighted copy of the information that is to be withheld from the Applicants.

4. I find section 34(a) of the Act does not apply to the facts in this case, so I do not find it necessary to determine whether the ACB has made every reasonable effort to ensure that the information is accurate and complete.
5. I order the ACB to notify me in writing within 50 days of being given a copy of this Order, that it has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner