

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-008

March 6, 2007

PALLISER HEALTH REGION

Case File Number 2677

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

Summary: The Applicant made multiple requests for access to information to Palliser Health Region ("PHR" or the "Public Body"). PHR responded to the nine access requests remaining at issue under the *Freedom of Information and Protection of Privacy Act* ("FOIP") as well as under the *Health Information Act* ("HIA").

PHR responded to the Applicant under FOIP by disclosing a total of 158 pages in their entirety of policy and training materials pertaining to takedowns at PHR. In responding to the access requests that pertained to both FOIP and HIA, PHR disclosed to the Applicant a further 1,150 pages of the Applicant's mental health records for a total of 1,308 pages. The Applicant was not satisfied with PHR's response and questioned whether she received all of PHR's policy and training materials pertaining to takedowns. The Applicant alleged that PHR breached its duty to assist under section 10(1) of FOIP.

The Commissioner found that PHR met its duty to assist the Applicant under section 10(1) of FOIP, in that PHR discharged its general duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely as well as its specific duty to conduct an adequate search for responsive records. The Inquiry was held in conjunction with the inquiry for Case File Number H0062, which involves PHR and the same Applicant in Order H2004-002.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7(1), 10(1), 72, 72(3)(a); *Health Information Act*, R.S.A. 2000, c. H-5.

Orders Cited: AB: Orders: FOIP - F2005-024, F2005-020, F2005-018, 99-038, 99-011, 98-012, 98-003, 97-006, 96-022, 96-017, 96-014; HIA - Order H2005-003.

I. BACKGROUND

[para 1] The Applicant made multiple requests for access to information to Palliser Health Region (“PHR” or the “Public Body”). PHR responded to the nine requests remaining at issue under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“FOIP”) as well as under the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”).

[para 2] PHR responded to the Applicant under FOIP by disclosing a total of 158 pages in their entirety of policy and training materials pertaining to takedowns at PHR. In responding to the Applicant’s access requests that pertained to HIA, PHR disclosed a further 1,150 pages of health records that included 289 severed pages that is not at issue at the Inquiry. PHR disclosed a total of 1,308 pages in response to the Applicant’s nine access requests that remain at issue. PHR says it has disclosed all responsive information to the Applicant.

[para 3] The Applicant was not satisfied with PHR’s response and questioned whether she received all of PHR’s policy and training materials pertaining to takedowns. The Applicant alleged that PHR breached its duty to assist under section 10(1) of FOIP. The Applicant asked for a review of PHR’s response under FOIP, but the Applicant was not satisfied with the outcome of the mediation that I authorized. The matter was set down for a written inquiry (the “Inquiry”). The parties provided written initial submissions that included *in camera* submissions.

[para 4] PHR included an *in camera* submission from the Affected Parties in its *in camera* submission. The Applicant provided written and videotape *in camera* submissions. In its initial written submission, PHR provided a binder of legal authorities, two binders containing copies of the Applicant’s nine requests for access remaining at issue and its responses pertaining to the information remaining at issue. PHR also provided a third binder of the “Documents at Issue”. PHR provided Affidavit evidence from its Vice President Corporate and from its Regional Manager of Health Records and HIA/FOIP Coordinator. Both parties provided written rebuttal submissions.

[para 5] The Inquiry was held in conjunction with the inquiry for Case File Number H0062 and Order H2004-002, involving PHR and the same Applicant. The Applicant and PHR provided the same submissions for both inquiries.

II. RECORD AT ISSUE

[para 6] As the Inquiry pertains to the manner in which PHR responded to a series of access requests, there are no records directly at issue.

III. INQUIRY ISSUE

[para 7] The issue at the Inquiry is:

- Did the Public Body meet its duty to assist the Applicant as provided by section 10(1) of FOIP?

[para 8] FOIP is silent regarding which party has the burden of proof under section 10(1) of the Act. When FOIP is silent, a case-by-case determination must be made to decide which party has the burden of proof. Previous Orders issued under FOIP say that the party who is in the best position to show whether the duties to assist an applicant and to conduct an adequate search for records have been met, has the burden of proof. For that reason, a public body usually has the burden of proof under section 10(1) of FOIP (Orders F2005-024, para 8; F2005-020, para 14; F2005-018, para 7; 98-012, para 11; 99-038, para 10; 97-006, para 7).

[para 9] The Orders issued under FOIP say that applicants have an initial duty when making an access request under section 7 of FOIP. The Applicant's initial duty is to provide sufficient clarification of the request for access to enable the public body to respond appropriately to the request and to fulfill the duty to assist under section 10(1) of FOIP (Orders 99-038, para 10; 98-012, para 11; 97-006, para 7; 96-017, para 13).

[para 10] In its written initial submission, PHR said the burden of proof for adequacy of the search rests with the public body. The public body must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. I agree with PHR and find that in this case, PHR has the burden of proof not only to show whether it conducted an adequate search for records but also whether it fulfilled its general duty to assist the Applicant under section 10(1) of FOIP.

IV. PRELIMINARY ISSUE

[para 11] In her submissions, the Applicant raises issues that fall outside of the matter that is the subject of the Inquiry, such as whether takedowns in the mental health setting are an abuse of power or compromise patient safety or quality of care. In its written submissions, PHR said that FOIP is not the governing legislation to address the patient care issues the Applicant raises throughout her submissions. I have discussed this issue in more detail in Order H2004-002, which I do not need to repeat here.

[para 12] My jurisdiction at the Inquiry and the scope of this Order are restricted to the duty to assist issue raised by the Applicant under section 10(1) of FOIP. I do not have jurisdiction at the Inquiry to make decisions about the other matters raised by the Applicant that go beyond the matter that is before me under section 10(1) of FOIP. Section 72 of FOIP requires me to issue an Order and section 72(3)(a) of FOIP allows me to require that a duty imposed by FOIP be performed. My authority at the Inquiry

pertains to whether PHR discharged its duty to assist under section 10(1) of FOIP when responding to the Applicant's access requests.

V. DISCUSSION OF ISSUE

ISSUE: Did the Public Body meet its duty to assist the Applicant as provided by section 10(1) of FOIP?

A. General

[para 13] Section 10(1) of FOIP reads:

10(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.

B. Argument and Evidence

PHR's Argument and Evidence

[para 14] PHR says that it fulfilled its general duty to assist and argues that it made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP. PHR says it conducted an adequate search for responsive records and thereby met its duty to assist the Applicant as required by section 10(1) of FOIP.

[para 15] In its initial written submission, PHR provided a detailed description of its overall response to the requests under both HIA and FOIP, as many of the requests involved information under both statutes. PHR provided copies of the nine requests remaining at issue as well as its responses to those requests.

[para 16] ***Binder 1: FOIP*** - The first two access requests remaining at issue pertain primarily to FOIP. PHR provided copies of the Applicant's first two requests and its response to those requests in one binder labeled as "Binder 1". Binder 1 is divided and tabbed with blue cover pages indicating "FOIP Request 1" and "FOIP Request 2". The Applicant's access request provided in FOIP Request 1 is dated January 28, 2002 and FOIP Request 2 is dated March 18, 2002. The notation on Binder 1 says it contains pages 1 to 158, which means that PHR disclosed a total of 158 pages in their entirety to the Applicant under FOIP.

[para 17] ***Binders 2, 3 and 4: HIA*** - The remaining seven access requests pertain primarily to HIA. PHR provided copies of the Applicant's further seven requests and its response to those requests in two binders labeled as "Binder 2" and "Binder 3". PHR indicates that Binder 2 contains pages 159 to 660, which it divided and tabbed with blue

cover pages indicating the first three HIA requests that it labeled as "HIA Request 3", "HIA Request 4" and "HIA Request 5". The Applicant's access request provided in HIA Request 3 is dated January 28, 2002; HIA Request 4 is dated May 14, 2002 and HIA Request 5 is dated July 16, 2002.

[para 18] PHR indicates that Binder 3 contains pages 661 to 1,019, which it tabbed with blue cover pages indicating the last four HIA requests that it labeled as "HIA Request 6", "HIA Request 7", "HIA Request 8" and "HIA Request 9". The Applicant's access request provided in HIA Request 6 is dated October 21, 2002; HIA Request 7 is dated October 24, 2002; HIA Request 8 is dated December 23, 2002 and HIA Request 9 is dated February 15, 2003. According to the notations on Binders 2 and 3 (Requests 3 to 9), PHR disclosed a total of 861 pages in their entirety to the Applicant under HIA.

[para 19] PHR provided a further binder that it labeled as "Binder 4", which it labeled as the "Documents at Issue". PHR says that Binder 4 also pertains to Request 3 and HIA and contains the severed pages. The notation on the face of Binder 4 says it contains pages 1,020 to 1,309 for a total of 289 pages. According to the notation on Binder 4, PHR disclosed a further 289 pages with minimal severing to the Applicant under HIA. According to PHR's figures, PHR disclosed a total 1,150 pages to the Applicant under HIA.

[para 20] According to the notations on the face of the binders, PHR disclosed a total of 1,308 pages of information to the Applicant in response to the nine access requests that remain at issue. None of the information that was disclosed to the Applicant in the 1,308 pages is at issue at the Inquiry, except in the sense that the Applicant does not believe she received all of PHR's information pertaining to policies and training materials for takedowns at PHR.

[para 21] PHR's Affidavit of its Regional Manager of Health Records and HIA/FOIP Coordinator says that individual took over responsibility for the Applicant's file in March of 2002. The Regional Manager of Health Records and HIA/FOIP Coordinator provided a detailed description setting out 26 steps that she took in an effort to respond openly, accurately and completely to the Applicant and to conduct an adequate search for responsive records.

[para 22] Some of the steps taken to search for the Incident Reports that were requested in the January 28, 2002 request, were described in the Affidavit, as follows:

That the search was complicated by the fact that there had been changes in the manner in which incidents were recorded and reported. Palliser had developed a new process for handling Incident Reports that went into effect in November 2000, subsequent to the time the Applicant was in Medicine Hat Regional Hospital. Documents related to incidents in use in the month of September 2000 when the Applicant was involved in certain incidents in the hospital involving security and medical personnel, were filed in a [sic] different locations. When the staff of Palliser were asked to search for Security Incident Report forms, they could not recall the location of documents prior to the introduction of the change to the process. ...

That the delay in finding Security Incident Reports can be attributed to several factors. Part of the difficulty arose from the changes to the process for handling Security Incident Reports during the material times. Once the Applicant had received the Unusual Incident Reports sent in May 2002, she clarified that the reports she was seeking were not the Unusual Incident Reports but rather the Security Incident Reports. I started looking for these responsive files in June 2002. ...

That I made inquiries throughout the Palliser administration to determine the location of the files prior to October 2000. The secretary to one of the Senior Administrators indicated that some Quality Improvement files were located in dead storage. I visited the dead storage area with that secretary and located binders related to that period. Those binders were pulled and reviewed in detail.

That located in one binder were three security incident reports that were thought to be relevant, one referenced the Applicant's name and the other two were consistent with the date, time and location. ...

That I personally interviewed six different Palliser staff members involved with this case including the security guards who initiated the Security Incident Reports and all were most anxious that their names and dates of birth not be released to the Applicant due to the physical and emotional harm they believed would come to them. ...

That I met with the Applicant for one and one-half hours in March 2002 to assist her in the review of her health record.

[para 23] The Affidavit provided by the Vice President Corporate of PHR sets out 60 points describing steps taken to respond to the Applicant's access requests. Copies of some of the correspondence exchanged between the parties and the records disclosed were provided as exhibits to this Affidavit. The cover sheet for the Applicant's January 28, 2002 access request was provided as Exhibit B to the Affidavit, which says:

All information on file, including but not limited to, admission certificates, doctors notes, nurses notes, certification papers, police reports, security incident form, or forms (personal information) from 5th North anything and everything on file for [name of Applicant] during her stay at the hospital unit 5th North. All information for the year 2000. Jan 01 2000 - Dec 31 2000.

[para 24] A letter written by the Vice President Corporate to the Applicant that is dated November 7, 2002 (Exhibit EE to Affidavit), says PHR "has responded to over thirty inquiries that you initiated directly and has handled in excess of forty additional forms of communication related to your case which you initiated through various investigations et cetera." A second letter to the Applicant attached to the Affidavit and also dated November 7, 2002 says PHR "provided a total of 95 policies to you on six different occasions". These letters indicate that the Applicant had not paid PHR any fees for responding to the requests.

[para 25] PHR's initial written submission says that "special circumstances" or "unique elements" should be considered when deciding whether a public body has fulfilled its duty to assist under section 10(1) of FOIP, as follows:

- a) It is significant that we are not dealing with a single request for access. The Applicant has made at least 13 different requests for access. Many of those 13 individual requests for access involved many different kinds of records. Some of the requests for access have been on a printed request form, others have come verbally in telephone conversations and meeting with the Applicant and others have come from correspondence from the Applicant. This inquiry appears to be dealing with all of her access requests aggregated and modified by information already provided to leave an alleged deficiency of records. It is submitted therefore that the entire context of dealing with this Applicant is relevant.
- b) The Applicant has used three different names in her dealings with Palliser. In a number of decisions, the Alberta Commissioner has held that the Applicant must provide sufficient detail of her request for access before the obligations of the public body under section 10(1) are fully engaged. It is submitted that the obligation on the Applicant to provide sufficient detail in her access requests should be viewed as necessarily including an obligation not to deliberately deceive the public body.
- c) A further complication was that the Applicant initiated multiple investigations through different agencies and offices which were concurrent at one point or another with her multiple access requests to Palliser. The persons in Palliser responsible for dealing with her multiple FOIP access requests, namely [name of individuals], were also the same persons responsible for dealing with investigations by the College of Physicians and Surgeons, the Department of the Solicitor General, the Department of Community Development, the Mental Health Patient Advocate and the Alberta Human Rights and Citizenship Commission. The efforts of [name of individuals] to respond to the Applicant's multiple access requests were complicated and impeded by the need to also address all of these other concurrent investigations.
- d) The Commissioner would be justified in finding that the Applicant is a "sophisticated user" of the FOIP Act. [AB Order 96-014]. Her use of pseudonyms, the many requests, her extensive use of collateral complaint fora and processes, and statements made in her correspondence with Palliser evidence a much higher level of sophistication than might be expected of a typical access applicant. If the Commissioner finds that the Applicant is a sophisticated user of the FOIP Act, and it is asserted there is a basis to make such a finding, then the duty on Palliser to assist is less onerous.

[para 26] Also in its initial written submission, PHR said that although the amount of time spent in conducting the search for records is not determinative, a "great deal of time" was spent in "significant efforts" to find responsive records. PHR also said, "the Applicant presented Palliser with its first formal access request". PHR stated that it has "since improved its HIA compliance and now tracks the processing of access requests in a more thorough and comprehensive fashion".

Applicant's Argument and Evidence

[para 27] The copy of the Applicant's severed request for review that was sent to the parties in the Notice of Inquiry to describe the issue under FOIP, says:

In keeping with #1, I still require the course information regarding takedown techniques used by Palliser.

[para 28] A handwritten notation of the Applicant attached to her March 16, 2002, access request to PHR is as follows:

I do not believe that all information that I requested was released. Refer to letter from Palliser. ...

3) Sent 2 booklets called response to aggressive people. Nothing I received was called "non-violent crisis intervention program"

- no guidelines
- no detailed information

4) I requested written documentation that verifies that the takedown team was told that a patient was violent and that they were called to the unit for this purpose. (Security Incident Form) or notes of Paramedics

5) Detailed acct of violent behavior (Security Incident form should provide this) Hospital records give only statements ex:

- Patient violent towards co-pts
- Patient aggressive toward staff
- Patient verbally abusive
- Patient assaulted a police officer

There is no record of any assault to a police officer – checked with Police
These statements are so vague, they give no account of any specific incidents that justify the takedown team being called – once again – What does the security incident form say? Was one filled out that night? Does one exist? Was one filled out recently?

[para 29] Exhibit C of the Affidavit of the Vice President Corporate of PHR includes a copy of the Applicant's three-page handwritten request for more information, wherein the Applicant says:

To make it perfectly clear, we are under no legal or moral obligation to sit down with any of you in order to obtain these records that we are requesting. [Name of individual] was given the opportunity to provide the policy we are requesting. ...

We do not grant interviews. We are respectfully requesting that you fully comply with our requests for information, records, policies, etc. We will give you an opportunity to do this. If you refuse, please advise us on how to appeal to a higher authority.

[para 30] In her written rebuttal submission, the Applicant says:

I have read the submission by the Public Body and I am not disputing the fact that I did receive hundreds of pages of documents requested. [Name of individual] did provide attentive response and did an excellent job in helping me to understand the records and responded to me in a very professional manner in spite of the fact that she had to deal with a "sophisticated user" of the FOIP system with a name problem. However, I do not appreciate being portrayed as deceptive because of an identity disorder.

[para 31] An attachment provided by PHR in its initial written submission that includes Request 3 in Binder 2, contains a note handwritten by the Applicant that says:

Thank-you [name of individual] for making our visit comfortable, safe, and without incident. I respect your professionalism considering the nature of your task of having to oblige an unwanted person in an unwanted situation. Most have a difficult time hiding their resentment. I am very appreciative of anyone who gives any assistance to me regardless of the circumstances. Thank you.

C. Application

[para 32] The two parts of the duty to assist under section 10(1) of FOIP are:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?
- Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?

[para 33] The issue of whether PHR made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely under section 10(1) is a separate issue from whether PHR conducted an adequate search for responsive records, also under section 10(1) of FOIP. I will begin by considering whether PHR met its general duty to assist and then consider whether PHR met its specific duty to conduct an adequate search, as required by section 10(1) of FOIP.

Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?

[para 34] Section 10(1) of FOIP creates a general duty for public bodies to assist and to respond to applicants. A public body's duty to assist under section 10(1) of FOIP is triggered by an access request (Order 99-011). The duty to assist pertains to the manner in which the public body responds to the applicant who is making a request. The issue in the case before me is the scope of a public body's duty to assist an applicant under section 10(1) of FOIP.

[para 35] The general duty to assist under FOIP was described in Order F2005-020, as follows:

Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is "reasonable". In Order 98-002, Commissioner Clark adopted the

definition of “reasonable” found in *Black’s Law Dictionary* (St. Paul, Minnesota, West Corp., 1999) as “fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view” (para 16).

Every Reasonable Effort

[para 36] There are no specific criteria for what constitutes “every reasonable effort” to assist an applicant, which must be determined based upon a consideration of the facts and the circumstances of every case.

[para 37] PHR disclosed to the Applicant an extensive amount of information (1,308 pages) with minimal severing. In the circumstances, PHR made a diligent effort to communicate with the Applicant, keeping in mind the Applicant’s apparent reluctance to meet in person and the multiple requests and investigations underway. PHR promptly provided the information located to the Applicant.

[para 38] There is an issue here about clarification of the request. The Applicant requested different information in the various requests and used at least three different names, which created confusion for PHR when responding to the requests. This was a complex series of requests that pertained to both FOIP and HIA and the interface between these statutes. These requests were made relatively soon after HIA came into force and were PHR’s first formal responses to access requests under HIA.

[para 39] Based upon my review of the records, the evidence and the arguments provided by the parties and for all of the above reasons, I find that PHR discharged its burden of proof to show that it fulfilled its general duty to make “every reasonable effort” to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required under section 10(1) of FOIP.

Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to assist the Applicant, as required by section 10(1) of FOIP?

[para 40] Previous Orders from my Office have said the basic test that must be met to carry out an adequate search is that a public body “must make every reasonable effort to search for the actual records that have been requested” (Order H2005-003, para 15; Order 96-022, para 14). The standard for the search is not perfection but rather what is “reasonable” in the circumstances.

[para 41] There is no specific test for adequacy of the search, as this is a question of fact to be determined in every case that is based upon how the search was conducted in the particular circumstances. The decision concerning the adequacy of the search must be based on the specific facts of how a public body conducted its search in the particular case (Orders H2005-003, para 17; 98-003, para 37).

[para 42] Orders issued from this Office have established two requirements for determining whether an adequate search has been conducted for responsive records, which is that the public body must (i) make every reasonable effort to search for the records requested, and (ii) inform the applicant in a timely way of what it has done (Orders H2005-003, para 16; 96-022, para 14).

Every Reasonable Effort to Search for Records Requested

[para 43] In my view PHR made a diligent effort that amounted to every reasonable effort to search for the actual records requested. For example, PHR persisted in its efforts to locate records and conducted many searches until the incident reports were found.

Inform the Applicant in a Timely Way

[para 44] In my view, PHR informed the Applicant in a timely way regarding the response. PHR made a concerted effort to contact and did meet with the Applicant in person, even when the Applicant was reluctant to meet with PHR. PHR communicated frequently and promptly with the Applicant. The standard under section 10(1) of FOIP is not a standard of perfection, but rather what it is reasonable for a public body to do in order to assist an applicant who is making an access request.

[para 45] For all of the above reasons, I find that PHR met its obligation to the Applicant under section 10(1) of FOIP, in that it discharged its general duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely as well as its specific duty to conduct an adequate search for responsive records.

VI. ORDER

[para 46] I make the following Order under section 72 of FOIP:

- I find that the Public Body met its duty to assist the Applicant as provided by section 10(1) of FOIP, and more particularly:
 - I find that the Public Body made every reasonable effort to fulfill its duty to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP, and

- I find that the Public Body conducted an adequate search for responsive records, and thereby met its duty to assist the Applicant, as required by section 10(1) of FOIP.

Frank Work, Q. C.
Information and Privacy Commissioner