

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2004-003

August 4, 2006

PALLISER HEALTH REGION

Review Number H0208

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Summary: The Applicant made a request to Palliser Health Region (“the Custodian”) under the *Health Information Act* (“HIA”), for access to her health information at the Medicine Hat Regional Hospital. The Custodian disclosed the information except for two Incident Reports, saying section 11(2)(d) of HIA (another enactment) applies as the disclosure is prohibited under section 9 of the *Evidence Act*. At Inquiry, the Custodian said it was also allowed to refuse access to the Applicant under section 11(1)(b) of HIA (identification of another person), under section 11(1)(d) of HIA (advice or recommendations) and under the Wigmore criteria (common law privilege).

During the Inquiry, the Custodian raised the issue of whether section 9 of the *Evidence Act* prevails over HIA, which is an issue that goes to jurisdiction. The Commissioner found that HIA prevails over section 9 of the *Evidence Act* under the “paramountcy” clause in section 4 of HIA. Therefore, he had jurisdiction to decide the issues at the Inquiry. Also during the Inquiry, the Custodian initially refused to produce the Incident Reports. The Custodian subsequently produced the Incident Reports in response to the Commissioner’s exercise of his authority to compel relevant records under section 88 of HIA and the *Public Inquiries Act*.

The Commissioner found that section 11(2)(b) of HIA (investigation or practice review) applied to the health information in the Incident Reports. He upheld the Custodian’s decision to refuse access to the health information and ordered the Custodian to refuse to disclose all of the information in the Incident Reports under section 11(2)(b) of HIA. Given that decision, the Commissioner did not find it necessary to also consider whether the Custodian was entitled to refuse access under section 11(2)(d) of HIA, section 11(1)(b) of HIA, section 11(1)(d) of HIA and under the Wigmore criteria (common law privilege).

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i), 1(1)(k), 1(1)(m), 1(1)(o), 1(1)(u), 2(d), 2(g), 4, 11, 11(1)(b), 11(1)(d), 11(2)(b), 11(2)(d), 35(1)(g), 35(1)(l), 35(2), 35(3), 36(a), 37(1)(b), 77, 77(1), 79, 80, 88, 88(1), 88(2), 88(3), 92, 105; *Health Information Regulation*, A.R. 70/2001, s. 3; *Public Inquiries Act*, R.S.A. 2000, c. P-39, s. 4; *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 9; *Bill 17: The Quality Assurance Activity Statutes Amendment Act*.

Cases Cited: *Canada (Attorney General) v. Canada (Information Commissioner)*, (2005) 253 D.L.R. (4th) 590, 2005 FCA 199 (CanLII) (Fed CA), Application for Leave to Appeal dismissed on November 17, 2005 in *Canada (Attorney General) v. Canada (Information Commissioner)*, 2005 CanLII 44365 (SCC).

Authorities Cited: Ellen Picard and Gerald Robertson, "Incident Reports" in *Legal Liability of Doctors and Hospitals in Canada* (3rd ed.), Carswell, 1996, pp. 414-416.

Orders Cited: AB: Orders F2002-015 and H2002-006; H2002-002.

I. BACKGROUND

[para 1] The Applicant made a request to Palliser Health Region ("the Custodian") under the *Health Information Act*, R.S.A. 2000, c. H-5 ("the Act" or "HIA"), for access to her health information at the Medicine Hat Regional Hospital, which the Custodian provided including the notes from two teleconference meetings. However, the Custodian refused to disclose two Incident Reports, saying section 11(2)(d) of HIA (another enactment) applies because the disclosure is prohibited under section 9 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18 ("*Evidence Act*").

[para 2] The Applicant asked me to review the Custodian's response to the access request, but the Applicant was not satisfied with the mediation that I authorized. The matter was set down for a written inquiry ("Inquiry"). At the Inquiry, the Custodian provided a written initial submission that was provided to the Applicant. In its initial submission, the Custodian said it was also allowed to refuse access under section 11(1)(b) of HIA (identification of another person), under section 11(1)(d) of HIA (advice or analysis) and under the Wigmore criteria (common law privilege).

[para 3] During the Inquiry, the Custodian said that section 9 of the *Evidence Act* prevails over the Act under section 4 of HIA, which is an issue that goes to jurisdiction. Also during the Inquiry, the Custodian initially refused to produce the Records at Issue. Therefore, I continued the Inquiry to compel production of the Incident Reports. The Custodian subsequently produced the Incident Reports in response to my exercise of authority to compel under section 88 of HIA and the *Public Inquiries Act*, R.S.A. 2000, c. P-39 ("*Public Inquiries Act*").

[para 4] Also during the Inquiry, I sought further written argument from the parties on section 9 of the *Evidence Act* as it pertains to section 11(2)(d) of HIA, on any additional mandatory exceptions to access under HIA, on the discretionary exceptions to access that the Custodian raised under section 11(1)(b) of HIA and section 11(1)(d) of

HIA and on the Wigmore criteria under the common law. The Custodian's further written submission was provided to the Applicant.

II. RECORDS AT ISSUE

[para 5] In its written initial submission, the Custodian says the Records at Issue consist of two single-page records that pertain to "slip-and-fall accidents". The Custodian says the Records at Issue consist of two incident reports that are dated October 23, 2002 and November 2, 2002 ("Records at Issue" or "Incident Reports"). The Incident Reports are entitled:

Palliser Health Region
Unusual Occurrence QI Report
PATIENT/RESIDENT/CLIENT

[para 6] The Custodian says the Applicant requested two incident reports dated October 24, 2002 and November 2, 2002. However, the Custodian says the Incident Reports are dated October 23, 2002 and November 2, 2002. There is no evidence before me to suggest that there is any incident report that is dated October 24, 2002. I am satisfied that the first record in the Records at Issue is an incident report dated October 23, 2002.

III. INQUIRY ISSUES

[para 7] During the Inquiry, the Custodian raised the issue of whether section 9 of the *Evidence Act* prevails over HIA and consequently whether I have jurisdiction to decide the issues before me at the Inquiry. The Custodian also raised the issue of whether I have authority under section 88 of HIA and the *Public Inquiries Act* to compel production of the Incident Reports. As both of these matters go to my authority to exercise fundamental powers under HIA, I added these matters to the Inquiry issues.

[para 8] Also during the Inquiry, the Custodian said it was also allowed to refuse access under the discretionary exceptions in section 11(1)(b) of HIA (identification of another person) and section 11(1)(d) of HIA (advice or recommendations) as well as under the Wigmore criteria (common law privilege), so I also added these matters to the Inquiry issues. As section 11(2)(b) of HIA (investigation or practice review) is a mandatory provision, I further added this matter to the Inquiry issues.

[para 9] The issues before me at the Inquiry are:

- A. Does section 9 of the *Evidence Act* prevail over the Act under section 4 of HIA (paramountcy)?
- B. Does section 88 of HIA (authority to compel) apply to the records?

- C. Does section 11(2)(b) of HIA (investigation or practice review) apply to the information in the records?
- D. Does section 11(2)(d) of HIA (another enactment) apply to the records?
- E. Did the Custodian properly apply section 11(1)(b) of HIA (identification of another person) to the records?
- F. Did the Custodian properly apply section 11(1)(d) of HIA (advice or recommendations) to the records?
- G. Did the Custodian properly apply the Wigmore criteria (common law privilege) to the records?

IV. DISCUSSION OF INQUIRY ISSUES

[para 10] I will address the Inquiry issues in the above order, beginning with the matters that go to the fundamental questions of my jurisdiction to apply the Act under section 4 of HIA and of my authority to compel relevant records under section 88 of HIA. I will then address the mandatory refusal of access provisions in section 11(2)(b) of HIA and section 11(2)(d) of HIA. Next I will address the discretionary refusal of access provisions in section 11(1)(b) of HIA and section 11(1)(d) of HIA. Lastly, I will address the application of the Wigmore criteria under the common law.

ISSUE A: DOES SECTION 9 OF THE EVIDENCE ACT PREVAIL OVER THE ACT UNDER SECTION 4 OF HIA (PARAMOUNTCY)?

A. General

[para 11] Section 4 of HIA says:

4 If a provision of this Act is inconsistent or in conflict with a provision of another Act or of a regulation, 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.

B. Argument and Evidence

[para 12] In its initial written submission, the Custodian said that I do not have jurisdiction under the Act to apply HIA to the information in the records and to decide the issues before me at the Inquiry, as section 9 of the *Evidence Act* prevails over HIA.

C. Application

[para 13] Section 4 of HIA is a jurisdictional provision that is commonly referred to as a “paramountcy” clause. This section provides a mechanism to determine whether HIA prevails, or alternatively, whether another enactment prevails over or trumps HIA. The general rule in section 4 of HIA is that HIA prevails. The exception to the general rule in section 4 of HIA is that another enactment prevails over HIA.

[para 14] Section 4 of the Act has two criteria that must both be met in order for another enactment to prevail over HIA: 1. Another Act (for example, the *Evidence Act*) or a regulation under HIA must expressly say that the other enactment or a provision of it prevails despite HIA, and, 2. A provision of HIA must be inconsistent or in conflict with a provision in the other enactment.

[para 15] If both of the criteria in section 4 of the Act are met, the other enactment or the provision in the other enactment prevails over HIA and I do not have jurisdiction to apply HIA. However, where both of the criteria in section 4 of the Act are not met, then HIA prevails and I have jurisdiction to apply the Act.

[para 16] In order for a provision in another enactment such as section 9 of the *Evidence Act* to prevail over HIA, either the other Act or a regulation under HIA must expressly say that the other provision prevails despite HIA. There is no such provision in the *Evidence Act* or in a regulation under HIA. As at least one of the two criteria in section 4 of HIA is not met, section 9 of the *Evidence Act* does not prevail over the Act. This means that HIA prevails over section 9 of the *Evidence Act*.

[para 17] If the Legislature intended section 9 of the *Evidence Act* to prevail over the Act, it would have enacted a paramountcy provision in accordance with section 4 of HIA, either in a regulation under HIA or in the *Evidence Act*. However, the Legislature did not take such a step. This is telling, as the Legislature was well aware of the interface between HIA and section 9 of the *Evidence Act* (See, for example, sections 35(1)(g), 35(2) and 35(3) of HIA and the April 1999 amendments to section 9 of the *Evidence Act* through *Bill 17: The Quality Assurance Activity Statutes Amendment Act*).

D. Conclusion

[para 18] Section 9 of the *Evidence Act* does not prevail over the Act as at least one of the two criteria that must be met under section 4 of HIA in order for a provision in

another enactment to prevail over HIA, is not satisfied. This means that HIA prevails over section 9 of the *Evidence Act*. Consequently, I find that I have jurisdiction to apply HIA to the information in the records and to decide the issues before me at the Inquiry.

ISSUE B: DOES SECTION 88 OF HIA (AUTHORITY TO COMPEL) APPLY TO THE RECORDS?

[para 19] During the Inquiry, the Custodian initially refused to produce the Records at Issue, so I exercised my authority under section 88 of HIA and the *Public Inquiries Act* to compel the Custodian to produce the relevant records. The Custodian responded by subsequently producing the Records at Issue. As the matter arose during the Inquiry, I will address the issue in this Order.

A. General

[para 20] Sections 88(1) to 88(3) of HIA say:

88(1) In conducting an inquiry under section 77 or an investigation under section 84(a) or in giving advice and recommendations under section 86, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.

88(2) The Commissioner may require any relevant record to be produced to the Commissioner and may examine any information in the record, whether or not the record is subject to the provisions of this Act.

88(3) Despite any other enactment or any privilege of the law of evidence, a custodian must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

[para 21] Section 4 of the *Public Inquiries Act* states:

4 The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.

B. Argument and Evidence

[para 22] In its initial written submission, the Custodian says that section 9 of the *Evidence Act* prohibits it from disclosing the Incident Reports to anyone including to me at the Inquiry. It says that section 9 of the *Evidence Act* is a “complete bar to disclosure” and means that I do not have the authority to compel the Incident Reports at the Inquiry.

[para 23] Also in its initial written submission, the Custodian says that even if I do have jurisdiction to decide the issues before me at the Inquiry, I must decide the issues based on the “circumstances of the creation of the documents” without examining the contents of the Incident Reports. The Custodian says that also for this reason, I do not have the authority to compel the Incident Reports.

C. Application

[para 24] Section 88(1) of HIA provides me with the powers and privileges of a commissioner under the *Public Inquiries Act*. Section 4 of the *Public Inquiries Act* gives me the authority to require “any persons” to produce “any documents” that I “consider to be required for the full investigation of the matters” into which I am appointed to inquire. Section 88(2) of HIA gives me the authority to “require any relevant record to be produced to the Commissioner” and to examine any information in the record, whether or not the record is subject to the provisions of HIA.

[para 25] Section 77 of HIA requires me to conduct an inquiry when an applicant makes a request for review of a custodian’s decision to refuse access that has not been settled by mediation. In order to conduct a “full investigation” of the matters before me and to fulfill my statutory duty under HIA, I must have access to the relevant records. The Incident Reports are relevant at the Inquiry as they are the records that are the subject of the Applicant’s access request. The Incident Reports are the sole Records at Issue at the Inquiry.

[para 26] The exceptions to access in HIA do not apply to a specific type of record such as incident reports, *per se*. Rather the HIA exceptions to access apply to prescribed types of health information (section 11). For example, HIA requires a custodian to refuse to disclose health information to an applicant if the health information contains the results of an investigation, practice review or inspection (section 11(2)(b)) or if disclosure of the health information is prohibited by another enactment of Alberta (section 11(2)(d)).

[para 27] Similarly, section 9 of the *Evidence Act* does not apply to incident reports, *per se*. Rather, section 9 of the *Evidence Act* applies to a “quality assurance record” and to a “witness” in an “action”. A “quality assurance record” is defined as including particular types of records of information and must be created or received by or for a “quality assurance committee” in the course of or for the purpose of carrying out “quality assurance activities”.

[para 28] In order to decide the issues before me and to decide whether any of the exceptions to access that are claimed by the Custodian apply to the Incident Reports, it is essential for me to examine the information in the specific records at issue. I must not only conduct a record-by-record analysis, but a line-by-line analysis of the information in the records.

[para 29] The proper approach for deciding whether hospital incident reports fall under some form of statutory or common law protection from disclosure has been described by legal authorities, as follows:

Determination of whether this privilege applies in any given case must be done on a document-by-document basis, and not on the basis of the quality assurance committee's entire file generated by an incident. (Ellen Picard (Justice of the Court of Appeal of Alberta) and Gerald Robertson, *Legal Liability of Doctors and Hospitals in Canada* (3rd ed.), Carswell, 1996, p. 418)

[para 30] I must examine the information in the Incident Reports in order to decide whether the records consist of health information under HIA. I must examine the information in the Incident Reports in order to decide whether any of the HIA exceptions to access apply. I must examine the Incident Reports in order to decide the ultimate question of access as well as to decide all of the questions of fact and law that arose during the course of the Inquiry (HIA section 77(1)).

[para 31] Section 88(3) of HIA gives me the authority to compel a custodian to produce "any record" to "the Commissioner" that I require under section 88(1) or section 88(2) of HIA. Section 88(3) says that a "custodian must produce" any record to me. Section 88(3) of HIA applies "[d]espite any other enactment or any privilege of the law of evidence". It is occasionally necessary for me to exercise my authority to compel relevant records in order to perform my statutory duties under HIA.

[para 32] Section 88(3) of HIA does not exclude the records that are protected from disclosure by another enactment or by a privilege of law from my authority to compel. Rather, section 88(3) of HIA expressly includes these types of records under the Act. HIA does not exclude the health information in records pertaining to investigations, practice reviews or inspections. HIA also does not exclude the quality assurance records that fall under section 9 of the *Evidence Act* from the Act.

[para 33] The Applicant cannot have access to the Incident Reports during the Inquiry as they are the records at issue. I cannot review the Custodian's decision to refuse access to the Applicant under HIA without examining the specific records that are at issue. Without the ability to compel the records at issue, my powers of review under HIA would be thwarted. The statutory right of applicants to an independent review of a custodian's decisions about access to their own health information would be lost.

[para 34] If I did not have the authority to compel the records at issue, I would not be able to fulfill my legislative obligation to review a custodian's decision about access. I would no longer be able to perform this function. As a result, an applicant would be left with only the custodian's view of the application of the exceptions to access. However, the Custodian has not been constituted as the Commissioner under HIA to review the Custodian's own decision.

[para 35] Furthermore, section 9 of the *Evidence Act* does not create a "complete bar to disclosure" as section 9(4) of the *Evidence Act* says a witness is not excused from

producing any document that the witness is otherwise bound to produce. In addition, section 9(5)(b) of the *Evidence Act* explicitly protects persons from liability who disclose information pertaining to quality assurance activities. HIA provides immunity to persons acting in good faith in the performance of duties under HIA (sections 92, 105).

[para 36] The interpretation that the authority to compel in section 88 of HIA applies to the Incident Reports is consistent with the general scheme and purposes of the Act that include the right of individuals to access their own health information, subject only to the limited and specific exceptions in HIA (section 2(d)). The purposes of the Act include the right of individuals to independent review of the decisions that are made by custodians under HIA (section 2(g)).

[para 37] This interpretation of section 88 of HIA is consistent with other HIA provisions that allow custodians to disclose diagnostic, treatment and care information (section 35(1)(l)), registration information (section 36(a)) and health services provider information (section 37(1)(b)) for purposes of inquiries. In particular, HIA allows custodians to disclose health information to an officer of the Legislature where the information is necessary for performing the officer's duties (section 35(1)(l)), such as to the Commissioner during an inquiry.

[para 38] I have already determined that HIA prevails over section 9 of the *Evidence Act*. Therefore, for the same reasons, section 88 of HIA prevails over section 9 of the *Evidence Act*. In my view, the situation before me is precisely the kind of situation that was contemplated under the express authority that exists to compel relevant records despite any other enactment or any privilege of the law of evidence, as set out in section 88(3) of HIA.

D. Conclusion

[para 39] In my view, section 88 of HIA provides me with the authority to compel the relevant records, which consist of the Incident Reports, from the Custodian in order to decide the questions of law and fact and to conduct a full investigation of the matters before me at the Inquiry. For all of the above reasons, I find that I have the authority to compel the Custodian to produce the Incident Reports under section 88 of HIA.

[para 40] This interpretation is consistent with the view that has been taken by the courts. For example, the principle that the federal Information Commissioner under the *Access to Information Act*, R.S.C. 1985, c. A-1, has the authority to compel the production of relevant records and records that are the subject of an access request has since been reiterated by the Federal Court of Appeal.

[para 41] In *Canada (Attorney General) v. Canada (Information Commissioner)*, (2005), 253 D.L.R. (4th) 590, 2005 FCA 199 (CanLII) (Fed CA) (para 26), application for Leave to Appeal dismissed November 17, 2005 in *Canada (Attorney General) v. Canada (Information Commissioner)*, 2005 CanLII 44365 (S.C.C.), (although other issues were also addressed),

Malone, J.A. stated, "the Commissioner has the authority to compel the disclosure of the records requested under the Act and other relevant records" (para 26).

ISSUE C: DOES SECTION 11(2)(b) OF HIA (INVESTIGATION OR PRACTICE REVIEW) APPLY TO THE RECORDS?

[para 42] An individual has a right of access to any record containing their own health information, but the right of access does not extend to information to which a custodian is authorized or required to refuse access under section 11 of HIA (section 7). Section 11(2) of HIA is a mandatory or "must" provision that requires a custodian to refuse an applicant access to health information; section 11(2) prohibits a custodian from disclosing information that falls under that provision to an applicant.

[para 43] When a custodian refuses to provide an applicant with access to a health record under HIA, the custodian has the burden of proof to show that the applicant has no right of access to the record or part of the record (section 79). In other words, a custodian has the onus to show why the information in a record should not be released. As the Custodian has refused access in this case, the Custodian has the burden of proof to show why the Applicant should not have access to the Incident Reports.

A. General

[para 44] Section 11(2)(b) of HIA reads:

11(2) A custodian must refuse to disclose health information to an applicant

...

(b) if the health information sets out procedures or contains results of an investigation, a discipline proceeding, a practice review or an inspection relating to a health services provider.

B. Argument and Evidence

[para 45] In its written submissions, the Custodian says that all of the information in the Incident Reports pertains to an investigation or a practice review or an inspection under section 11(2)(b) of HIA. Section 11(2)(b) of HIA requires a custodian to refuse to disclose health information to an applicant if the information sets out procedures or contains the results of an investigation, a practice review or an inspection relating to a health services provider.

[para 46] In its initial written submission, the Custodian defines an "Unusual Incident" and describes the purpose of its "Unusual Incident Reporting System" in an excerpt from its General Policy Manual, as follows:

Definition of Unusual Incident: any situation, activity or event which is not consistent with the routine care and/or service of the facility, that results in or has the potential to result in harm or loss to the patient, a visitor, an employee, or the facility.

Purpose of the Unusual Incident Reporting System

- To assist in the ongoing monitoring of the quality and safety of the Hospital environment for patients, staff, and visitors.
- To assist in the identification, investigation, and elimination of activities or situations that have caused harm or have the potential to cause harm to an individual.
- To assist in determining the legal significance of these activities or situations that have [sic] caused harm or have the potential to cause harm.
- To assist in the data collection for the Medicine Hat Regional Hospital Quality Assurance and Risk Management Program.
- To assist in identifying and monitoring trends related to harmful or potentially harmful activities or situations.

[para 47] The Custodian provided copies of its “Documentation of An Unusual Incident Involving a Patient” and “Reporting of a Patient Related – Unusual Incident”, which outline the procedures to be followed by health services providers when responding to incidents and the information that is to be provided on the incident report form. Some of these procedures are incorporated into the incident report form itself.

[para 48] The information to be provided and the steps to be followed for incident reporting that pertain to patient related incidents include: “Assesses the patient’s condition/situation”, “Assigns the appropriate Severity Score”, “Notifies Senior Administration and Department Head, if appropriate”, “Notifies the physician and the patient’s family, if required”, “Analyses the patient incident” and “Completes the “Comments/Recommendations (Physician)”.

[para 49] In its initial written submission, the Custodian says that incident reports are an “essential source of data” for its Unusual Incident Reporting System. In its further written submission, the Custodian provides a detailed description of the procedures that are to be followed in its Unusual Incident Reporting System, which it says are the same procedures that were followed for the Incident Reports.

[para 50] In its further written submission, the Custodian provides a detailed description of the procedures that are followed in its Unusual Incident Reporting System. For example:

Nevertheless, when incident reports are prepared by hospital staff, the reports are stored, and then made available to a quality assurance committee, when and if, the committee seeks the reports. This is how incident reports are “created for” a quality assurance committee – Incident reports are used when they are required. There is no other use for the reports except for quality assurance, except possibly instructing legal counsel.

[para 51] In its written submissions, the Custodian describes the importance of protecting incident reports from disclosure. In its initial written submission, the

Custodian says, “[F]urther, the community at large, as users of the hospital, must rely on the full disclosure, and uninhibited opinions of hospital staff in their internal professional appraisals of the quality of care provided within the health region.” The Custodian states:

Palliser’s main concern in denying access to the incident reports relates to the context in which these reports are prepared as well as the purpose of the reports. Incident reports are a key source of data for institutional quality assurance. Many of Palliser’s quality assurance activities will originate from incident reports, and these reports are essential for the detection and eventual resolution of problems within the hospital environment. For this reason incident reports in general have as their main purpose the improvement of patient care.

[para 52] In its further written submission, the Custodian says the reason that the information in incident reports should be protected from disclosure is to encourage the “candid and forthright reporting of incidents to continually improve patient care”. The Custodian states:

Similarly, hospital staff understand [sic] that incident reports are created for quality assurance purposes and the guarantee of confidentiality that the Health Region gives to staff completing the reports is extremely important. Earlier, by letter dated April 1, 2004, the commissioner was sent declarations of the nurses involved in completing the incident reports in question. These declarations stressed that the individual employees understood that the reports were to be used for quality assurance purposes, and that, the reports were to be kept strictly confidential. The declarations further underscored the importance of the guarantee of confidentiality for the employee to be fully frank and candid when completing the report.

[para 53] The Statutory Declaration of an employee who completed one of the incident reports at issue, states:

The above referred to report was completed by me with the understanding that it would be used for quality assurance activities undertaken by Palliser Health Region to improve the quality of health care and the level of skill, knowledge and competence of health service [sic] providers.

I have been assured that all of the report’s contents would be kept strictly confidential and would not be disclosed by any person or used in any process except internal quality assurance matters.

This guarantee of confidentiality was important for me to be fully frank and candid when completing this report, especially due to the fact that the form requires that I provide “recommendations for care” (which may be critical of the actions of co-workers and others at the hospital).

Completion of this report is a mandatory requirement of my job.

C. Application

[para 54] I have interpreted section 11(2)(b) of HIA in previous Orders issued under HIA, so there is no need to repeat those discussions here. In Order H2002-002, I found that a letter that was prepared by a physician in an internal review to address a complaint about medical treatment, was practice review information under section 11(2)(b) of HIA (paras 7-22).

[para 55] In Order H2002-002, I described the meaning of “practice review” under section 11(2)(b) of HIA, as follows:

Health information of an individual usually provides the basis for a practice review, which is a critique of the care provided by a particular health services provider to a particular individual. In a practice review, health information relating to the individual may be intertwined with statements, comments, observations, evaluations and opinions about the quality of care provided by the health services provider (para 12).

[para 56] Also in Order H2002-002, I said that HIA does not prescribe formal criteria that must be met for information to fall within the purview of a practice review (para 18). I further said that the activities which fall within section 11(2)(b) of HIA cover the “fairly broad spectrum” (para 19) of investigations, disciplinary proceedings, practice reviews or inspections relating to health services providers.

[para 57] In Order F2002-015 and H2002-006, I found that many of the records that were created by a subcommittee in a regional health authority to address a series of complaints about a physician, consisted of practice review information under section 11(2)(b) of HIA (paras 38-39).

[para 58] For section 11(2)(b) of HIA to apply to the information in the Incident Reports, the Custodian must show that the following two requirements are met:

- There must be health information, and
- The health information must set out the procedures or contain the results of an investigation or a practice review or an inspection relating to a health services provider.

Health Information

[para 59] “Health information” under HIA includes “diagnostic, treatment and care information”, “health services provider information” and “registration information” (section 1(1)(k)).

[para 60] “Diagnostic, treatment and care information” is information about the physical and mental health of an individual, a health service provided to an individual and any other information about an individual that is collected when a health service is provided to the individual (HIA section 1(1)(i)). A “health service” is a service that is paid for by the Department and provided to an individual for purposes that include

protecting or promoting or maintaining physical and mental health, preventing illness, diagnosing and treating illness, rehabilitation and caring for the health needs of the ill, disabled or injured (HIA section 1(1)(m)).

[para 61] The headings on the Incident Reports include the date and time of the occurrence, patient status, patient diagnosis, patient condition, description of event and the health service provider's assessment and interventions, recommendations and physician findings. The Incident Reports include information about the physical health of an individual, a health service that was provided to the individual and information that was collected when a health service was provided to the individual. Therefore, I find that this information in the Incident Reports is "diagnostic, treatment and care information" under section 1(1)(i) of HIA.

[para 62] "Health services provider information" includes the name of a health services provider, type of health services provider, education and competencies, profession, job classification and employment status (HIA section 1(1)(o)). The Incident Reports include the names and types of health services providers, professional designations, position titles and employment status. Therefore, I find that this information in the Incident Reports is "health services provider information" as defined in section 1(1)(o) of HIA.

[para 63] "Registration information" includes an individual's demographic information such as the individual's name, personal health number and unique identification number, gender and an individual's location, residency and telecommunications information (HIA section 1(1)(u)); *Health Information Regulation*, A.R. 70/2001 section 3). Although portions of the Incident Reports are difficult to read, I am satisfied that they include the individual's name, gender, personal health number, unique identification number and address. Therefore, I find that this information in the Incident Reports is "registration information" under section 1(1)(u) of HIA.

[para 64] It is clear from my review of the Incident Reports that they contain all three types of "health information" in the Act. It is not in dispute that the Incident Reports consist of health information under HIA. The Custodian treated this as health information as the Custodian responded to the Applicant's request for the Incident Reports under HIA. For all of the above reasons, I find that all of the information in the Incident Reports falls within "health information" under section 1(1)(k) of HIA.

Investigation or Practice Review

[para 65] The Custodian describes its Unusual Incident Reporting System as an ongoing process that is undertaken for the purpose of identifying, investigating and eliminating unusual incidents. This is a mandatory reporting system as employees are required to complete incident reports for all unusual incidents. The Custodian describes the completion of incident reports as an "essential source of data" for its Unusual Incident Reporting System.

[para 66] The Custodian describes unusual incidents as including any situation, activity or event that is not consistent with routine patient care or service. Whenever an incident even has the potential to cause harm, the incident reporting forms must be completed. The forms must be completed regardless of whether the incident is serious and has caused harm or whether the incident is not serious with merely the potential of harm. The forms must be completed even for innocuous incidents.

[para 67] The purpose of the Incident Reports is to assist in the identification, investigation, and elimination of activities or situations that have caused harm or have the potential to cause harm. The Incident Reports are an essential part of the Unusual Incident Reporting System that entails a region-wide investigation of incidents, review of facility practices and inspection of the patient care and services provided to individuals by health services providers.

[para 68] The Incident Reports describe the procedures and steps that were taken by the health services providers who were involved in the specific situations when these two particular unusual incidents occurred. It is significant that the Incident Reports are entitled, “Unusual Occurrence QI Report” (emphasis added). In order to prepare the report, health services providers must make assessments, recommendations and findings and thereby describe the results of each particular investigation or practice review or inspection relating to an unusual incident.

[para 69] The Incident Reports contain the assessments, recommendations and findings made by the health services providers about these particular unusual incidents. In my view, the form as well as the substance of the health information in the Incident Reports sets out the procedures and additionally contains the results of an investigation or a practice review or an inspection relating to a health services provider under section 11(2)(b) of HIA.

D. Conclusion

[para 70] Based upon the evidence, the records and the argument provided at the Inquiry, I find that the Custodian has discharged its burden of proof to show that all of the information in the Incident Reports consists of health information and that the health information sets out the procedures and contains the results of an investigation or a practice review or an inspection relating to a health services provider under section 11(2)(b) of HIA. This means that the Custodian is required to refuse access and must refuse to disclose to the Applicant all of the information in the Incident Reports.

ISSUE D: DOES SECTION 11(2)(d) OF HIA (ANOTHER ENACTMENT) APPLY TO THE RECORDS?

[para 71] As a result of the above determination that the Custodian must refuse to disclose the Incident Reports to the Applicant under section 11(2)(b) of the Act, I do not find it necessary to also consider whether the Custodian is required to refuse access to

the health information under the mandatory exception to access in section 11(2)(d) of HIA (another enactment) under section 9 of the *Evidence Act*.

ISSUE E: DID THE CUSTODIAN PROPERLY APPLY SECTION 11(1)(b) OF HIA (IDENTIFICATION OF ANOTHER PERSON) TO THE RECORDS?

[para 72] As a result of the above determination that the Custodian must refuse to disclose the Incident Reports to the Applicant under section 11(2)(b) of the Act, I do not find it necessary to also consider whether the Custodian is allowed to refuse access to the health information under the discretionary exception to access in section 11(1)(b) of HIA.

ISSUE F: DID THE CUSTODIAN PROPERLY APPLY SECTION 11(1)(d) OF HIA (ADVICE OR RECOMMENDATIONS) TO THE RECORDS?

[para 73] As a result of the above determination that the Custodian must refuse to disclose the Incident Reports to the Applicant under section 11(2)(b) of the Act, I do not find it necessary to also consider whether the Custodian is allowed to refuse access to the health information under the discretionary exception to access in section 11(1)(d) of HIA.

ISSUE G: DID THE CUSTODIAN PROPERLY APPLY THE WIGMORE CRITERIA (COMMON LAW PRIVILEGE) TO THE RECORDS?

[para 74] As a result of the above determination that the Custodian must refuse to disclose the Incident Reports to the Applicant under section 11(2)(b) of the Act, I do not find it necessary to also consider whether the Custodian is allowed to refuse access to the health information under the Wigmore criteria (common law privilege).

V. ORDER

[para 75] I make the following Order under section 80 of HIA:

- I find that section 9 of the *Evidence Act* does not prevail over the Act under section 4 of HIA (paramountcy), as the criteria that must be met in section 4 of HIA for the provision in another enactment to prevail over the Act are not satisfied. Therefore, HIA prevails and I have jurisdiction to apply HIA to the information in the records and to decide the Inquiry issues;
- I find that I have the authority under section 88 of HIA and the *Public Inquiries Act* to compel the Custodian to produce the Incident Reports to me at the Inquiry;

- I find that section 11(2)(b) of HIA (investigation or practice review) applies to the health information in the Incident Reports and requires the Custodian to refuse to disclose the health information to the Applicant. Therefore, I uphold the Custodian's decision to refuse access to the health information and I order the Custodian to refuse to disclose all of the information in the Incident Reports to the Applicant;
- Given my decision under section 11(2)(b) of HIA that the Custodian must refuse to disclose all of the information in the Incident Reports to the Applicant, I do not find it necessary to also consider whether the Custodian is entitled to refuse access to the health information pursuant to:
 - Section 11(2)(d) of HIA (another enactment) and section 9 of the *Evidence Act*;
 - Section 11(1)(b) of HIA (identification of another person);
 - Section 11(1)(d) of HIA (advice or recommendations); and
 - The Wigmore criteria (common law privilege).

Frank Work, Q. C.
Information and Privacy Commissioner