

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2004-004

June 29, 2004

DR. MORAG E. GOLDIE

Review Number H0308

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

Summary: The Applicant alleged that Dr. Goldie (“the Custodian”) improperly refused to correct or amend her physician office records in contravention of the *Health Information Act* (“the Act”). The Commissioner found there was no error or omission in the Applicant’s health information under section 13(1) of the Act. The Commissioner confirmed the Custodian’s decision not to correct or amend the health information under section 13(6)(a) of the Act as the entries were an accurate description of the Custodian’s professional opinion and observations.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i)(i), 1(1)(k), 1(1)(n), 13(1), 13(6)(a) and 14(1)(a), *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 36(1) and 36(2).

Orders Cited: AB: Orders 97-002, 97-020, 2000-007; ONT: Orders PO-2079 and MO-1518.

I. BACKGROUND

[para 1] The Applicant alleged that Dr. Morag E. Goldie (the “Custodian”) refused to correct or amend her physician office records in contravention of the *Health Information Act* (the “Act”). I authorized an investigation under the Act, but the Applicant was not satisfied with the outcome of the investigation. The Applicant made a request for review and the matter was set down for a written inquiry.

[para 2] The Applicant provided a written initial submission that was exchanged between the parties. The Custodian provided a written initial submission that I accepted on an 'in camera' basis. I requested the Custodian to provide a copy of the records/information at issue. The Custodian provided the records/information at issue along with a rebuttal submission that I accepted 'in camera'.

II. RECORDS AT ISSUE

[para 3] In her submission the Applicant states:

I want my records noted that [name of identifiable individual] influenced Dr. Goldie or other Doctors to state "Paranoid", "Unable to get along with people", Personality disorder".

The Applicant says these notations were made in error and that she was misdiagnosed. The Applicant says there is also an omission in the records because the Custodian did not note that the Applicant was abused by her husband.

III. ISSUES

[para 4] The issues before this inquiry are:

Did the Custodian properly refuse to correct or amend the Applicant's health information under section 13(1) of the Act?

Did the Custodian properly refuse to correct or amend a professional opinion or observation under section 13(6)(a) of the Act?

IV. DISCUSSION OF THE ISSUES

A. General

[para 5] Part 2 of the Act establishes the right of an applicant to make a request for correction or amendment of health information as well as the exceptions that allow a custodian to refuse the request. The Custodian has refused to correct or amend the information. Under section 14(1)(a) of the Act the Applicant has elected to ask the Commissioner to review the Custodian's decision.

[para 6] Sections 13(1) and 13(6)(a) of the Act say:

13(1) An individual who believes there is an error or omission in the individual's health information may in writing request the custodian that has the information in its custody or under its control to correct or amend the information.

.....

13(6) A custodian may refuse to make a correction or amendment that has been requested in respect of

- (a) a professional opinion or observation made by a health services provider about the applicant.

[para 7] The Applicant says the records/information contain errors and omissions and the Custodian has improperly refused to correct or amend the Applicant's health information under section 13(1) of the Act. The Custodian says the entries at issue accurately reflect her medical opinions and observations, and she has properly refused to correct or amend the information under section 13(6)(a) of the Act.

B. Application of Section 13(1) (Error or Omission)

[para 8] Section 13(1) of the Act gives an applicant the right to request health information to be corrected or amended when there is an error or omission in the records/information. For section 13(1) to apply, two requirements must be met: (1) there must be health information about the applicant, and (2) there must be an error or omission in the applicant's health information.

[para 9] The definition of "health information" in the Act (s. 1(1)(k)) includes "diagnostic, treatment and care information", which includes information about the physical and mental health of an individual (s. 1(1)(i)(i)). As the information at issue (i.e., "Paranoid", "Unable to get along with people", "Personality disorder".) falls within the definition of diagnostic, treatment and care information, this is health information. In particular, this is the Applicant's health information, so the first requirement is met.

[para 10] The words "error" and "omission" are not defined in the Act. However, the meaning of these words has been established in previous Orders under a similar provision in section 36(1) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act"). In Order 97-020, the former Commissioner said an "error" is a mistake, or something wrong or incorrect. The Commissioner also said that an "omission" means that something is missing, left out or overlooked.

[para 11] In Order 97-020, the Commissioner said that to "correct" means to set right, amend, or substitute the right thing for the wrong thing. In that Order, the Commissioner said information could be corrected where there is an error or omission of fact. He also said that information could not be corrected where there is a dispute about whether there is an error or omission of fact.

[para 12] The Act is silent regarding which party has the burden of proof under section 13(1) of the Act. In Order 97-020, the Commissioner said an applicant is in the best position to show where there has been an error or omission in that person's own information. I adopt that reasoning. Therefore, I find that an applicant has the burden of proof under section 13(1).

[para 13] In her submission, the Applicant says the records contain both errors and omissions. The Applicant disagrees with Dr. Goldie's diagnosis. In addition, the Applicant says that Dr. Goldie should have written in the record that another individual influenced her to make the notations at issue. The Custodian disagrees with this assertion of the Applicant. The Custodian denies that she was influenced by another individual to make the notations at issue. Consequently, the Custodian disagrees that she should have written a note to that effect in the record.

[para 14] The Applicant says the Custodian should have recorded that the Applicant was abused by her husband. The Custodian did make an entry noting the Applicant's complaint that her husband was abusive. In her submission, the Custodian said "I do not recall [name of identifiable individual] ever mentioning sexual abuse by her husband and I have not seen any evidence of physical abuse". The Custodian disagrees with the Applicant's view and says the entries are accurate and there are no errors or omissions in the records.

[para 15] The Applicant has not provided me with any evidence whatsoever in support of her allegations. I find the Applicant has failed to discharge her burden of proof to show that there was an error or omission of fact in the records/information. Also, because there is a dispute between the parties about whether or not there is an error or omission of fact, the information cannot be corrected.

C. Application of Section 13(6)(a) (Professional Opinion or Observation)

[para 16] There is not only a dispute about whether there is an error or omission of fact, but also a dispute under section 13(6)(a) of the Act. Section 13(6)(a) gives a custodian the discretion to refuse to correct or amend health information where that information involves a professional opinion or observation. The Applicant disagrees with the Custodian's diagnosis that the Applicant is paranoid, unable to get along with people and has a personality disorder. The Applicant says the entry about her diagnosis is an error.

[para 17] For section 13(6)(a) to apply, three requirements must be met; (1) there must be either a professional opinion or observation, (2) the professional opinion or observation must be that of a health services provider, and (3) the professional opinion or observation must be about the applicant.

[para 18] The term "professional opinion or observation" is not defined in the Act. However, the meaning of the word "opinion" has been established in previous Orders under the provision in section 36(2) of the FOIP Act that refers to a 'professional or expert opinion'. I note that under the FOIP Act a public body must not correct an opinion; however, under the Act a custodian has the discretion to refuse to correct or amend an opinion.

[para 19] In Order 97-002, the former Commissioner said that "opinion" means a belief or assessment based on grounds short of proof; a view held as probable. An opinion is subjective in nature and may or may not be based on fact. The Concise Oxford Dictionary, Tenth Edition, defines "professional" to mean of or relating to or belonging to a profession. The opinion of the Custodian in this case is a medical professional opinion. The Concise Oxford Dictionary defines "observation" to mean a comment based on something one has seen, heard, or noticed, and the action or process of closely observing or monitoring.

[para 20] In Order 2000-007, the former Commissioner said an opinion was not an error or omission if it accurately reflected the views of the author at the time it was recorded, whether or not the opinion is supported by fact. In Ontario Orders PO-2079 and MO-1518, the Adjudicators said that a record is not 'incorrect' or 'in error' if it is an accurate reflection of the views or observations of the individuals whose impressions are recorded. The truth or falsity of the views is not the issue. Furthermore, the Adjudicators said that where an opinion is involved a correction cannot be a substitution of opinion.

[para 21] The Act is silent regarding which party has the burden of proof under section 13(6) of the Act. In Order 97-020, the Commissioner said the party who refuses to correct an applicant's information is in the best position to speak to the reasons for refusing and therefore has the burden of proof. I adopt that reasoning. Therefore, I find that the Custodian has the burden of proof under section 13(6) of the Act.

[para 22] In her submission, the Custodian says the notations at issue in the records/information are her medical opinion and "...I remain reluctant to change the records as they represent my honest opinions based on what I have heard and seen in the office". The Custodian says the entries accurately reflected her view at the time they were made.

[para 23] The Custodian saw the Applicant a number of times between the dates of August 23, 1999 and August 26, 2002. The Custodian's notes show that she had listened to the Applicant and noted those things which, in her professional opinion, were relevant and worthy of note. Dr. Goldie concluded that the Applicant was "Paranoid" and had a "Personality disorder". Right or wrong, this is the physician's professional opinion.

[para 24] Section 13(6)(a) says the Custodian is entitled to her opinions and observations and has the discretion to refuse to change them. The notations "Paranoid" and "Personality disorder" were professional opinions. The notation, "Unable to get along with people", is a blend of professional opinion and observation. Therefore, I find that the first requirement under section 13(6)(a), that there must be a professional opinion or observation, is satisfied.

[para 25] I find that the second requirement under section 13(6)(a) is satisfied as the Custodian is a "health services provider" as defined in section 1(1)(n) of the Act.

[para 26] The third requirement in section 13(6)(a) is also met as the professional opinion or observation is about the Applicant.

[para 27] In my view, the Custodian has discharged her burden of proof and satisfied all the criteria in section 13(6)(a). The only remaining consideration is whether the Custodian has properly exercised her discretion.

[para 28] The information at issue was an accurate description of a professional opinion and observation. A correction or amendment in this case would be tantamount

to substituting the Applicant's opinion for the Custodian's opinion. Therefore, I find the Custodian has properly exercised her discretion in deciding not to correct or amend the records/information under section 13(6)(a) of the Act.

V. ORDER

[para 29] In summary, pursuant to my authority under section 80(3)(d) of the Act, I confirm the Custodian's decision not to correct or amend the health information.

Frank Work, Q. C.
Information and Privacy Commissioner