

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2005-003

May 24, 2005

CAPITAL HEALTH AUTHORITY

Review Number H0362

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

Summary: The Applicant complained that the Capital Health Authority (“the Custodian”) had failed to conduct an adequate search for hospital records and breached its duty to assist under section 10(a) of the *Health Information Act* (“the Act”). The Commissioner found that the Custodian had conducted an adequate search and thereby discharged its duty to assist the Applicant in accordance with the Act, which establishes a standard of what is “reasonable” in the circumstances.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(k), 1(1)(f)(iv), 10(a), 79, 80; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 10(1).

Orders Cited: AB: Orders 96-022, 97-003, 98-003, 98-012, 2000-020, 2000-021, 2001-003, 2001-006, 2001-007, 2001-016, 2001-018, 2001-024, 2001-041, F2002-014, F2003-012, F2004-004, F2004-007, F2004-020, H2005-002.

I. BACKGROUND

[para 1] The Applicant complained that the Capital Health Authority (the “Custodian”) breached its duty to assist under the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA” or the “Act”) under section 10 of HIA. In particular, the Applicant alleged the Custodian had breached its duty to conduct an adequate search under section 10(a) of the Act.

[para 2] Mediation was authorized but the parties were unable to reach a resolution. The matter was set down for a written inquiry. The Applicant later requested an oral inquiry, which was granted. Both parties provided written initial submissions, which were exchanged between the parties. At the oral inquiry, the parties provided oral argument. The Custodian provided two witnesses who were directly involved in handling the access request at issue and who provided evidence under oath.

II. RECORDS AT ISSUE

[para 3] As this is a request for review of the Custodian's handling of the access request, there are no records at issue in the usual sense.

III. ISSUE

[para 4] The sole issue before this inquiry is: Did the Custodian conduct an adequate search for responsive records and thereby meet its duty to the Applicant, as required by section 10(a) of the Act?

IV. DISCUSSION OF THE ISSUE

A. General

[para 5] Section 10(a) of the Act says:

10 A custodian that has received a request for access to a record under section 8(1) (a) must make every reasonable effort to assist the applicant and to respond to each applicant openly, accurately and completely.

B. Inquiry Issue: Did the Custodian conduct an adequate search for responsive records and thereby meet its duty to the Applicant, as required by section 10(a) of the Act?

[para 6] In her written and oral submissions, the Applicant said her Alberta Health Care Statement lists billings for physician services for which the Custodian says they have no hospital records. The Applicant says the failure to provide the records requested means the Custodian's search was inadequate and therefore the Custodian's duty to assist was breached under the Act.

[para 7] In contrast, in its written submission, the Custodian says it has made a reasonable effort to assist the Applicant as it conducted a total of five searches for responsive records. In its oral submission, the Custodian says it also conducted two further searches making a total of seven searches, and that no further responsive records were located. The Custodian provided detailed written documentary evidence and oral evidence of the efforts made to locate the records, possible reasons the information could not be located and details of communications with the Applicant.

[para 8] The underlying facts are not in dispute. On July 22, 2002, the Applicant made an access request under the Act for all of her health records at the Royal Alexandra Hospital, Charles Camsell Hospital and Edmonton General Hospital (the "First Request"). The hospital records requested date back to 1974. The Custodian

conducted a search for the records and in a letter dated October 7, 2002, the Custodian responded to the First Request of the Applicant.

[para 9] On August 17, 2003, the Applicant made a second request for access to specific hospital records she said were missing from the information previously provided (the "Second Request"). On August 29, 2003, the Applicant provided further clarification of the Second Request. The Custodian conducted a second search for records and in a letter dated October 28, 2003, the Custodian provided further records in response to the Second Request of the Applicant.

[para 10] On November 10, 2003, the Applicant made a third request for access to specific types of records (the "Third Request") she said were missing from the information previously provided. The Custodian conducted a third search for those specific hospital records. In a letter dated November 28, 2003, the Custodian provided further records and an explanation for all records requested but not provided in response to the Third Request.

[para 11] On January 6, 2004, the Applicant requested a review of the Custodian's response to her Third Request. In response to the request for review the Custodian conducted a fourth search for responsive records. The Custodian conducted a fifth search for records relating to an October 22, 1995 visit to the Royal Alexandra Hospital Emergency Department. At the Inquiry, the Custodian provided oral evidence that two additional searches have been done meaning that a total of seven searches have been conducted without being able to locate any further responsive records.

[para 12] Specifically, the Third Request was for records in regard to a:

- Visit to the Royal Alexandra Hospital Emergency Department on October 22, 1995;
- Consultation with a named doctor on September 28, 1993; and
- Number of group therapy sessions including audio-visual records.

[para 13] There is no dispute that the Capital Health Authority is a custodian as defined in section 1(1)(f)(iv) (a regional health authority established under the *Regional Health Authorities Act*) of the Act. The Custodian acknowledges that the Royal Alexandra Hospital, the Charles Camsell Hospital and the Edmonton General Hospital fall under the Capital Health Authority. There is no question that the records requested fall within the definition of "health information" as defined in section 1(1)(k) of the Act.

[para 14] The sole issue before me is whether the Custodian conducted an adequate search for responsive records and thereby met its duty to the Applicant under section 10(a) of the Act. Section 10(a) of HIA has not yet been considered in an Order under the Act. However, section 10(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP") has an almost identical provision that says:

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.

The parallel FOIP provision to HIA has been previously considered in a number of Orders, ranging from Order 96-022 to Order F2004-020.

[para 15] Order 96-022 is the cardinal decision that establishes the basic test that must be met in order for a public body to carry out an adequate search under FOIP. In that Order, the former Commissioner said, “[a] public body must make every reasonable effort to search for the actual records that have been requested.” (Order 96-022, para 14)

[para 16] Also in that Order, the former Commissioner described the two criteria that must be satisfied in order to conduct an adequate search under section 10(1) of FOIP, as follows:

[a] public body will meet its duty to assist an applicant where it makes every reasonable effort to search for the records requested and it informs the applicant in a timely way what it has done. (Order 96-022, para 14).

[para 17] Additionally, in Order 98-003 the former Commissioner said, “[A] decision concerning an adequate search must be based on the facts relating to how a public body conducted its search in the particular case.” (Order 98-003, para 37)

[para 18] The above approach for determining adequacy of the search has been subsequently adopted and applied in numerous FOIP orders that I do not need to repeat here (See Orders 97-003 (para 24), 98-012 (para 13), 2000-020 (para 17), 2000-021 (para 68), 2001-003 (para 17), 2001-006 (para 18), 2001-007 (para 10), 2001-016 (para 13), 2001-018 (para 12), 2001-024 (para 19), 2001-041 (para 22), F2002-014 (para 15), F2003-012 (para 38), F2004-004, F2004-007 (para 10) and F2004-020).

[para 19] These FOIP Orders have not established a specific test for adequacy of the search; this is a question of fact to be determined in every case. The standard for the search is not perfection but rather what is “reasonable” in the circumstances. The decision about adequacy of a search is based upon the facts of how the search was conducted in the particular circumstances. In order to discharge its burden of proof under FOIP, a public body must provide sufficient evidence to show that it has made a reasonable effort to locate responsive records.

[para 20] In its written and oral submissions, the Custodian argued that the FOIP approach to interpretation should be applied to the parallel provision in HIA. I accept this argument. I hereby adopt the above described FOIP criteria and approach for deciding whether the adequacy of the search and therefore the duty to assist under section 10(a) of HIA has been satisfied by a custodian.

[para 21] To address the Applicant’s concerns, I must review the thoroughness of the Custodian’s search. In its written and oral submissions, the Custodian provided detailed descriptions of the steps that were taken, the communications that occurred, the documentation utilized and the efforts that were made to attempt to locate the information requested.

[para 22] As an example of the efforts made by the Custodian to assist, the Custodian requested and received clarification of the information requested by the Applicant. It confirmed its understanding of the Second Request with the 21 then outstanding portions of that request, in a four-page letter dated September 3, 2003. In oral evidence provided at the Inquiry, the Applicant said the Custodian's staff had been "great" and they had been "awesome in their attempts to locate the records. It was just that they cannot locate the records."

[para 23] What is the significance of a custodian locating further records during later searches? In particular, could a custodian discharge its duty to conduct an adequate search under section 10(a) of the Act when later searches yield records that were not found in the initial search? In this situation, the Custodian located further responsive records during the second and third searches that were not found during the initial search.

[para 24] In Order F2003-001, I determined that a public body had discharged its duty to conduct an adequate search although additional records were overlooked during the initial search and located during the second search. In my view, the fact that the Custodian located additional records during a subsequent search does not necessarily mean the Custodian failed to conduct an adequate search. The details of all the efforts made including the thoroughness of the searches must be considered.

[para 25] The Custodian provided the Applicant with numerous pages of hospital records in response to the three access requests made. However, in response to the Third Request, the Custodian advised the Applicant that there were records requested that it did not have and therefore could not provide. The Custodian provided detailed oral, affidavit and documentary evidence of the efforts made to locate and search for the records requested.

[para 26] In regard to the request for records of the Royal Alexandra Hospital Emergency Department for the visit of October 22, 1995, the Custodian says that it has conducted a total of seven searches but could not locate any responsive records. The Custodian said as a general rule, the original record stays with the hospital and a copy is provided to the doctor's office. In addition to searching its own records, the Custodian requested copies of responsive records from the relevant physicians' offices, but was advised that they did not have a copy of a record for any such visit.

[para 27] In its written and oral submissions, the Custodian said that the fact a record is missing could be due to any number of reasons. The Custodian provided some possible explanations for the absence of responsive records. The Custodian says it is possible that if the records ever existed, they could have been misfiled, destroyed, taken from the department and not returned or taken without the department's authorization. In oral evidence, the Custodian described the detailed steps it has taken multiple times to check for the possibility that the Applicant's records were misfiled.

[para 28] In its written submission that was confirmed again in oral evidence the Custodian said, "I checked the Emergency log and she only was in for 2 hours, which

leads me to believe that she may have left without any documentation". In oral evidence, the Custodian said that once an Emergency Department record is provided to health records, the original record never leaves the Department. If a record is created, a copy of that record is sent to the physician's office. If an emergency department record is needed for further treatment or care, the doctor comes down to the health records area and views the record or a copy of the record is provided to the doctor.

[para 29] What is the effect of a custodian providing an applicant with incorrect information? On one occasion the Custodian advised the Applicant that some of her records had been "inadvertently destroyed", but later advised the Applicant the earlier information was incorrect and confusion had arisen due to the numbering system for records. As I have stated earlier, the standard for adequacy of the search is a "reasonable" standard - not a standard of perfection. Human errors do occur. Shortly after the error was discovered, the Custodian advised the Applicant.

[para 30] What is the significance of records the Applicant believes should exist but where there is no evidence that the records ever existed? In particular, what is the significance of an Alberta Health Care Statement that lists physician billings where a corresponding record cannot be found? Does the failure to locate a corresponding record mean that a custodian has failed to conduct an adequate search for records under section 10(a) of the Act?

[para 31] In her written submission, the Applicant says that some of the specific records requested in the Third Request must exist because her Alberta Health Care Statement has billings for services provided on particular dates by particular physicians. In its written submission, the Custodian says it has repeatedly searched for responsive hospital records and that copies of the records were not located in the physicians' offices.

[para 32] In regard to the request for records of a consultation with a named doctor on September 28, 1993, the Custodian says it has conducted four searches for those records but could not locate any responsive records. The Applicant says there is a billing for the doctor in her Alberta Health Care Statement. In its written submission, the Custodian says it has no record of any such consultation ever occurring.

[para 33] A similar issue was considered in Order F2003-012, where the applicant argued that the public body had withheld the medical reports that corresponded with billings to the Workers' Compensation Board. In that case, the public body had conducted two searches of its records and confirmed with the named physician that they also had no such medical reports. In that Order, the Adjudicator said that records of payments made to physicians do not mean that corresponding medical records exist.

[para 34] In Order F2003-012, the Adjudicator said:

Whether medical reports should have been created is not an issue for this inquiry. The issue is whether the Public Body conducted an adequate search. Considering the Public Body's evidence that it conducted two searches and consulted with the named physician,

I find that the Public Body met its duty to the Applicant by conducting an adequate search for responsive records, as provided by section 10(1) of the Act. (para 38)

[para 35] Similarly, the issue before me at this inquiry is not whether records should have been created, but the adequacy of the search. The Applicant says that the October 22, 1995 and September 28, 1993 visits occurred in the hospital and therefore hospital records must exist. The Custodian says it is a matter of professional judgment whether or not a physician creates a record. I do not accept that the absence of corresponding hospital records for physician billings is evidence that a custodian has failed to conduct an adequate search for responsive records.

[para 36] In regard to the request for records including audio-visual recordings of the group therapy sessions, the Custodian says it has conducted three searches for these records but could not locate any such records. In its written submission, the Custodian says these are informal sessions and written notations are not made. The practice is that the numbers of individuals in attendance at the sessions is noted, but no individually identifiable information is documented.

[para 37] The Custodian says that VHS tape recordings were made during the group therapy sessions, but these recordings are routinely erased after each session. The Custodian says these recordings are used solely for education and supervision within the department as described on the consent form. I accept the Custodian's evidence on this point and find that there are no existing records for the group therapy sessions.

[para 38] The Custodian says that in each of the above instances, it has made every reasonable effort to search for the actual records requested by the Applicant. It is not in dispute that the Custodian kept the Applicant well informed of the results of the searches. It is also not in dispute that the Custodian made a diligent effort and conducted numerous and thorough searches for the actual records. In its written and oral evidence, the Custodian provided details of each of the searches conducted, many of which involved two or three staff members double and triple checking for responsive records.

[para 39] In oral evidence, the Applicant conceded this point and commended the Custodian's staff for the diligent efforts they had made. The Applicant stated, "I honestly believe the girls have done everything in their power to find the records." In my view, the Custodian did conduct an adequate search for the records requested by the Applicant in the Third Request and promptly communicated the results to the Applicant. Therefore, I find that the Custodian met its duty under section 10(a) of the Act.

[para 40] What is the rationale for the obligation that is placed on custodians to conduct an adequate search to assist applicants under the Act? In my view this duty logically flows from the fiduciary relationship between custodians and individuals. Although custodians have custody and control over the physical records that contain an individual's health information, the ability of an individual to exercise their right of

access depends upon custodians making every reasonable effort to locate responsive records. (See Order H2005-002, para 23)

C. Conclusion

[para 41] The Custodian provided written and oral argument and written and oral evidence that included two witnesses and detailed evidence of the steps taken in the searches. I note the extent of the searches that were conducted by the witnesses and their assistants. I found the Custodian's witnesses to be dedicated and knowledgeable. I got the sense they were genuinely frustrated with being unable to find responsive records.

[para 42] After considering all of the arguments and the evidence before me, I find that the Custodian has discharged its burden of proof by providing sufficient evidence of the adequacy of the search for the records requested in the Third Request by the Applicant. I find that the Custodian has conducted an adequate search for responsive records and has thereby met its duty to the Applicant as required by section 10(a) of the Act.

V. ORDER

[para 43] Pursuant to my authority under section 80 of the Act, I make the following Order:

- The Custodian conducted an adequate search for responsive records and thereby met its duty to make every reasonable effort to assist the Applicant, as required by section 10(a) of the Act.

Frank Work, Q. C.
Information and Privacy Commissioner