

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2006-003

September 22, 2006

CALGARY HEALTH REGION

Review Number H0960

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Summary: The Applicant's husband made a request to the Calgary Health Region ("CHR") under the *Health Information Act* ("HIA"), for access to records for specific hospital admissions at the Peter Lougheed Centre. A short time later the Applicant made another request to CHR for access to the entire chart of her then-deceased husband, as the personal representative and the executrix of the estate.

CHR disclosed 992 pages in their entirety, except for two ambulance attendants' registration numbers that were withheld under section 11(2)(a) of HIA (health information about another individual). The Applicant asked for a review of CHR's decision. CHR subsequently disclosed all of the severed information. The Applicant said CHR breached its duty to assist and failed to conduct an adequate search under section 10(a) of HIA.

The Adjudicator found that CHR met its obligations to the Applicant under section 10(a) of HIA, in that (i) CHR discharged its general duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, and (ii) CHR discharged its specific duty to conduct an adequate search for responsive records.

The Adjudicator declined to exercise her discretion to decide a moot issue, as CHR had already disclosed all of the information initially withheld under section 11(2)(a) of HIA. The preliminary issues of further submissions, late raising of issues and burden of proof under section 10(a) of HIA were also addressed.

Statutes Cited: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 10(a), 7, 7(1), 7(2), 7(3), 8, 9, 11, 11(2), 11(2)(a), 61, 79, 80, 80(3)(a), 104(1)(d); *Health Information Regulation*, A.R. 70/2001, section 10(2); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7, 8, 10(1).

Authorities Cited: *Health Information Act: Guidelines and Practices Manual, Alberta's Health Information Act*, Alberta Health and Wellness, 2001.

Cases Cited: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (1989) 57 D.L.R. (4th) 231, 1989 CanLII 123 (S.C.C.); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, 2006 SCC 7 (CanLII) (S.C.C.); *R. v. Smith*, [2004] 1 S.C.R. 385, 2004 SCC 14 (CanLII) (S.C.C.); *Moyisa v. Alberta Labour Relations Board*, [1989] 1 S.C.R. 1572, 1989 CanLII 55 (S.C.C.), on appeal from the AB CA).

Orders Cited: AB: Orders: F2005-024, F2005-023, F2005-020, F2005-018, F2005-012; H2005-007, H2005-006, H2005-003, H2005-002, F2004-005 & H2004-001, H2004-004, F2003-001, F2002-015 & H2002-006, H2002-001, 2001-041, 2001-016, 2000-014, 99-038, 99-011, 99-005, 98-012, 98-003, 97-006, 96-022, 96-017, 96-014, 96-011.

I. BACKGROUND

[para 1] The Applicant's husband made a request to the Calgary Health Region ("CHR" or the "Custodian") under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA" or the "Act"), for access to records for specific hospital admissions at the Peter Lougheed Centre. A short time later the Applicant made another request for access to the entire chart of her then-deceased husband, pursuant to her authority to exercise rights as the personal representative and as executrix of the estate under section 104(1)(d) of HIA.

[para 2] For the most part, CHR and the Applicant treated the two requests as a single request as they were so intertwined. CHR disclosed 992 pages in their entirety, with the exception of two ambulance attendants' registration numbers that were withheld in response to the second request under section 11(2)(a) of HIA (health information about another individual). The Applicant asked for a review of CHR's decision. CHR subsequently disclosed all of the severed information.

[para 3] The Applicant nevertheless alleged that CHR breached its duty to assist and failed to conduct an adequate search under section 10(a) of HIA. The matter was set down for a written inquiry (the "Inquiry"). The Information and Privacy Commissioner, Frank Work, (the "Commissioner") delegated me to hear the Inquiry. The parties provided written initial submissions and written rebuttal submissions. CHR provided an Affidavit with each submission.

II. RECORD AT ISSUE

[para 4] As the Inquiry pertains to the manner in which CHR responded to an access request, there are no records directly at issue.

III. INQUIRY ISSUES

[para 5] The issues at the Inquiry are:

- A. Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(a) of the Act?
- B. 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] The issue of whether CHR made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely under section 10(a) is a separate issue from whether CHR conducted an adequate search for responsive records, also under section 10(a) of HIA. I will begin by considering whether CHR met its general duty to assist and then consider whether CHR met its specific duty to conduct an adequate search, as required by section 10(a) of HIA.

IV. PRELIMINARY ISSUES

Burden of Proof

[para 7] In its written initial submission, CHR raised the issue of burden of proof under section 10(a) of HIA, as follows:

The CHR submits that the Applicant has at least an initial burden to provide the CHR with enough detail to respond to the allegation that the CHR has failed to meet its duty to assist. The CHR would further submit that the Applicant should have the burden of proof to at least establish a *prima facie* case showing that the CHR failed to meet its duty to assist before the CHR is forced to demonstrate that it met its duty to assist.

[para 8] HIA is silent regarding which party has the burden of proof under section 10(a) of the Act. When HIA is silent, a case-by-case determination must be made about which party has the burden of proof. Orders issued under other provisions in HIA where the burden of proof is also silent say the party that is in the best position to address the matter at issue has the burden of proof (Orders: H2005-007, paras 53, 66-67; H2005-006, paras 45-46, 72-73; H2004-004, paras 12, 21). The Orders issued under section 10(a) of HIA have not explicitly addressed the burden of proof.

[para 9] The Orders issued under the parallel provision of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("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 10] The Orders issued under FOIP say that applicants have an initial duty when making an access request under section 7 of FOIP, which is the parallel to section 8 of HIA. The 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). There is no issue here about clarification of the request, as the records requested were clear.

[para 11] In regard to the burden of proof in this case, I find that CHR is in the best position to show whether it fulfilled its duty to assist the Applicant and whether it conducted an adequate search for records under section 10(a) of HIA. Therefore, I find that CHR has the burden of proof at the Inquiry to show that it fulfilled its duties under section 10(a) of HIA.

Moot Issue

[para 12] The Applicant urges me to decide the issue of whether section 11(2)(a) of HIA applies to the information initially withheld, saying this finding pertains to whether CHR met its duty to assist under section 10(a) of HIA. The Applicant says that CHR failed to make every reasonable effort to assist her under section 10(a) because it improperly applied the exception to withhold information under section 11(2)(a) of HIA.

[para 13] CHR disagrees with the Applicant and says the application of section 11(2)(a) of HIA is no longer at issue because all of the information has since been disclosed. In its written rebuttal submission, CHR states:

Furthermore, a complete and unsevered copy of the one-page document at issue has been released to the Applicant. It is respectfully submitted that whether or not the CHR's original severing of the one-page record was correct is not properly before the Commissioner. On April 25, 2005, the OIPC copied the CHR on a letter to the Applicant and indicated that the CHR's agreement to provide a complete and unsevered copy of the information requested "resolves the issue which you brought" to the OIPC. Therefore, the appropriateness of the severing is no longer at issue in this Inquiry.

[para 14] Previous HIA Orders have not considered the matter of the exercise of jurisdiction to decide moot issues. Order 99-005 under FOIP describes a "moot" issue, as follows:

An issue is "moot" when it presents no actual controversy or the issue has ceased to exist because the matter has already been resolved. According to *Black's Law Dictionary*, a matter is also said to be "moot" when a determination is sought on the matter which, when rendered, cannot have any practical effect on the existing controversy (para 27).

[para 15] I accept CHR's argument that the application of section 11(2)(a) of HIA to the information initially withheld is a moot issue. CHR has already disclosed to the Applicant the information that was previously at issue. The section 11(2)(a) issue no longer exists because that matter has been resolved. A finding under HIA would not have any practical effect as the Applicant has already received all of the information sought. Nevertheless, I will consider whether I should exercise my discretion to decide the moot issue under section 11(2)(a) of HIA.

[para 16] The criteria to consider when deciding whether to exercise the discretion to hear a moot issue have been set out in previous Orders issued from this Office under FOIP (Orders F2005-020, paras 7-12; 2001-041, paras 12-15; 99-005, paras 27-67; see also 96-014 and 96-011). The exercise of discretion is a matter of general policy or practice that is governed by the criteria that have been established by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (1989) 57 D.L.R. (4th) 231, 1989 CanLII 123 (S.C.C.).

[para 17] The criteria developed in *Borowski* are cited in recent decisions of the Supreme Court of Canada (for example, *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, 2006 SCC 7 (CanLII) (S.C.C.); *R. v. Smith*, [2004] 1 S.C.R. 385, 2004 SCC 14 (CanLII) (S.C.C.); *Moysa v. Alberta Labour Relations Board*), [1989] 1 S.C.R. 1572, 1989 CanLII 55 (S.C.C.), on appeal from the AB CA). The three criteria in *Borowski* are:

(i) *Adversarial Context*: The issue must exist within an adversarial context, the adversarial relationship must prevail even though the issue is moot and a party must suffer collateral consequences if the merits are left unresolved. In the case before me, there is no current live controversy between the parties about disclosing the information withheld under section 11(2)(a) of HIA, as CHR has disclosed all of the information sought. The information withheld was not relevant to assessing the circumstances of the Applicant's husband's death. There is no evidence before me of collateral consequences to a party if I decide to exercise my discretion not to decide the issue.

(ii) *Judicial Economy*: The special circumstances of the case must justify applying scarce resources to decide the issue. It must be considered whether the decision will have some practical effect on the rights of the parties, whether there is a recurring issue and whether there is a public interest such as the social cost of continued uncertainty in the law in leaving the matter undecided. In this case, there is no practical effect on the rights of the parties as the only remedy available under section 11(2)(a) of HIA is an Order for disclosure of the very information that the Applicant has already received. Section 11(2)(a) of HIA has already been interpreted in previous Orders issued from the Office (Orders F2002-015 & H2002-006 and H2002-001).

(iii) *Role of the Legislative Branch*: It must be considered whether exercising the discretion would intrude into the role of the legislative branch. The Applicant argues that the application of section 11(2)(a) pertains to the duties owed to applicants under section 10(a) of HIA. However, previous Orders say the duty to assist under section 10(1) of FOIP is a separate duty that is not linked with and does not encompass other

duties under FOIP (Orders F2005-023, para 40; F2005-012, para 26; 2000-014, paras 84-85). The creation of a link between the general duty to assist in section 10(a) and the duty to properly apply section 11(2)(a) of HIA is not my prerogative, but that of the Legislature.

[para 18] I will mention Order F2005-012, even though that case turned on a different set of facts including delay in disclosing records. In that Order, the Commissioner decided to exercise his discretion to decide a moot issue where he considered whether a public body's application of particular exceptions to access and compliance with other duties in FOIP pertained to the general duty to assist in the circumstances of that case (paras 25-28). However, the facts in the case before me are different and do not justify a deviation from the general principle.

[para 19] Having considered the criteria set out in *Borowski* and the particular circumstances of this case, I decline to exercise my discretion to decide the moot issue under section 11(2)(a) of HIA.

Late Raising

[para 20] In her written initial submission, the Applicant raised for the first time, a matter that falls outside of the duty to assist issue in section 10(a) of HIA, which is the subject of the Inquiry. The Applicant says that section 61 of HIA applies in this case in that it requires CHR to make every reasonable effort to ensure that health information is accurate and complete before disclosing the information. As I have said, the Applicant also says that section 11(2)(a) of HIA applies. In its written rebuttal submission, CHR objects to the Applicant raising new issues that are not before the Inquiry.

[para 21] My jurisdiction at the Inquiry and the scope of this Order are restricted to the duty to assist issue under section 10(a) of HIA that was previously raised by the Applicant. I do not have jurisdiction at the Inquiry to make decisions about other issues that the Applicant raises in her submissions that go beyond the duty to assist under section 10(a) of HIA. Section 80(3)(a) of HIA allows me to require that a duty imposed by the Act be performed. My authority in this case is restricted to reviewing whether CHR fulfilled its duty to assist under section 10(a) of HIA.

[para 22] This decision is consistent with the approach taken by the Commissioner in Orders issued under HIA (Orders: H2005-007, paras 7-8; H2005-006, paras 7-8; F2004-005 & H2004-001, paras 16-17). Furthermore, I have said that other duties in HIA are not linked to the duties under section 10(a) of HIA, unless those duties are expressly linked by the legislation.

Further Submission

[para 23] When the written rebuttal submissions were exchanged between the parties, the parties were advised that further submissions would not be accepted unless

further information was specifically requested by this Office. Nevertheless, the Applicant sent a further written submission after the exchange of rebuttal submissions. The Applicant's further written submission was returned unread with a letter explaining that the further submission would not be considered at the Inquiry.

[para 24] As further submissions will not be accepted after the parties have been informed of that decision, the Applicant's further submission has not been considered at the Inquiry. This decision is consistent with the approach taken by the Commissioner in earlier Orders issued under HIA (Order F2004-005 & H2004-001, para 13).

V. DISCUSSION OF ISSUES

ISSUE A: Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(a) of the Act?

A. General

[para 25] Section 10(a) of HIA reads:

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. Argument and Evidence

CHR's Argument and Evidence

[para 26] CHR 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(a) of HIA. CHR says that it "met and even exceeded" its duty to assist the Applicant under section 10(a) of HIA.

[para 27] *Response to First Request:* In support of its position that it met its general duty to assist under section 10(a) of HIA, CHR provided evidence in the form of two Affidavits from its Access and Privacy Analyst, who oversees the responses to requests made under HIA. CHR provided copies of the correspondence between the parties and the records that were disclosed, as attachments to the Affidavits.

[para 28] On January 12, 2004, the Applicant's husband made a request to CHR for access to records for specific admissions at the Peter Lougheed Centre (the "first request"), as follows:

Complete charts with respect to both the 4th of January 2004 admission and the 9th of January 2004 admission and specialty clinic visit from Dec 23rd with [name of doctor].

[para 29] CHR responded to the first request on January 12, 2004, as follows:

Attached are copies of the following documents requested on the above named person. All treatment notes from inpatient admissions & specialty clinics from January 5/2004 – January 12/2004. If you have any questions, contact our office at [telephone number].

[para 30] CHR provided a copy of the record that it says it disclosed in its entirety in response to the first request, as an attachment to its Affidavit. This record includes a January 4, 2004 admission to the Emergency Department, a January 5 to 7, 2004 inpatient admission and specialty clinic admissions to the Hematology/Oncology Clinic on December 23, 2003 at the Peter Lougheed Centre. This record consists of 95 pages.

[para 31] In its written initial submission, CHR describes its response to the first request, as follows:

On January 12, 2004, the same day as the request for health information was made, the CHR provided [name of individual] with a complete and unsevered copy of all records responsive to his request. As the CHR provided the information requested on the very day the request was made, and as a complete and unsevered copy of all responsive records was provided, the CHR submits that it clearly met its duty to assist as prescribed in HIA.

[para 32] *Response to Second Request:* On January 28, 2004, the Applicant made a request to CHR for access to “the entire chart” of her then-deceased husband (the “second request”). CHR provided the Applicant’s Request for Access to Health Information form in its Affidavit. The form contains handwritten notes made by CHR staff, which describe some of the attempts that were made to contact the Applicant, as follows:

04.02.03 [February 3, 2004]. As per [name of individual], this is a new request. Therefore \$25 will be charged. Called several times to let her know. No answer.

- Feb 23 – Called – No answer.
- Feb 24 – Called – No answer.
- Feb 25 – Called – No answer.
 - o Called son & he will contact mother - she is out of town.

[para 33] CHR responded to the second request on February 25, 2004, in the following manner:

A copy of the information you requested is attached as indicated below. A portion of the record you requested contains information that is exempt from disclosure under Section 11, Subsection 2(a) of the Health Information Act and has not been included. Information about a third party.

Entire treatment chart.
An invoice will be forwarded by the Department of Finance.

If you have any questions, contact our office at [telephone number].

[para 34] CHR's Affidavit describes its response to the second request, as follows:

I am advised by [name of individual], Health Records Technician at the CHR, that, following a thorough and comprehensive search, the CHR provided the Applicant with all records (subject to severing on one page) responsive to her request.

[para 35] CHR provided a copy of the record that it says it provided to the Applicant in response to the second request, as an attachment to its Affidavit. CHR provided this record in five volumes. This record includes laboratory reports and admission records of various emergency department, in-patient, intensive care and specialty clinics that encompass the time period of the records requested in the first request. This record covers the time period from at least January 7, 1992 to the end of the January 8-20, 2004 admission, when the Applicant's husband passed away.

[para 36] This record consists of 897 pages that were disclosed in their entirety, except for the small amount of information that CHR withheld on one page. This record shows that CHR prepared the record on February 25, 2004 and that the Applicant picked up the record on March 15, 2004. On March 15, 2004, CHR waived the above-mentioned \$25.00 basic fee for the second request. There is no indication that CHR charged any fees whatsoever for responding to the two requests and for disclosing the records, other than the \$25.00 basic fee that was paid for the first request.

[para 37] *Information Withheld:* The page that was severed is dated January 3, 1999. This page pertains to a response to the "FMC-ER" ("Foothills Medical Clinic - Emergency Department") that involved an ambulance transfer from FMC-ER to "PLC Unit #53". Multiple copies of this page were provided in the submissions of CHR as well as in the submissions of the Applicant.

[para 38] The five-volume record provided by CHR contains two copies of the page at issue. The first copy of this page is located near the beginning of the record. This copy of the page contains the notation, "Section 11(2)(a)", written above the segment that was severed. The segment blocked out is approximately one inch by two inches in size. This copy is identical to the copy that was provided by the Applicant in her submission, except that in the Applicant's copy the notation, "Section 11(2)(a)", is highlighted in yellow.

[para 39] However, there is a second or duplicate copy of the same page in the five-volume record. The second copy is located midway through Volume 3 of the record. The second copy of the page is different from all of the other copies in that it (i) additionally has the number 475 marked on the bottom right hand corner, and (ii) does not contain the notation "Section 11(2)(a)". There is no indication that the information at issue was severed from the second copy of the page.

[para 40] In its Affidavit, CHR describes the information that it severed from the record in its second response, as follows:

I am advised by [name of individual], Health Records Technician for the Calgary Health Region that, on February 25, 2004 the CHR responded to [sic] Applicant's January 28th request and indicated that a one-page record responsive to the Applicant's request had been severed pursuant to Section 11(2)(a) of HIA.

[para 41] CHR also provided a copy of this page in its Affidavit as an attachment to its April 19, 2005 letter to the Applicant, when it disclosed this page to the Applicant in unsevered form. In addition, the Applicant provided a copy of this page as she received it in its severed form in an attachment to her initial written submission. The Applicant's copy of this page contains the notation, "Section 11(2)(a)". The HIA section notation is written above a segment that is blocked out on the page and that is highlighted in yellow.

[para 42] CHR says it later disclosed all of the information initially withheld, in the following circumstances:

The Applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the CHR's decision to sever a portion of the health information requested by the Applicant. On March 11, 2005, the CHR was notified that [name of individual] was authorized to investigate and mediate the matter. ...During the mediation that took place, the sole issue was the appropriateness of the CHR's severing of the one-page record.

On April 19, 2005, as a result of the mediation provided by the OIPC, the CHR wrote to the Applicant and indicated that the information previously severed from the information provided to her was being provided in an unsevered form.

[para 43] In the letter dated April 19, 2005, CHR subsequently disclosed to the Applicant all of the information initially withheld as follows:

We are pleased to inform you that after meeting with [name of individual] of the Office of the Information and Privacy Commissioner, the information previously withheld is now being released to you in its entirety. A copy of the record is attached.

Total number of pages copied and released - 1.

Should you have any questions, regarding our response to your request, please contact us at [telephone number] and we will attempt to assist you in addressing those concerns.

[para 44] The information withheld from the page at issue consists of the registration numbers of two ambulance attendants. CHR says that the ambulance attendants are part of the inter-hospital ambulance transfer system.

[para 45] In total, CHR disclosed 992 pages in their entirety, except for the small amount of information that was initially severed. Both sets of records are generally organized in chronological order, although duplicate copies from older admissions are

sometimes included in later admissions. Both sets of records have multiple page-numbering systems, but are not numbered in the order in which they were provided at the Inquiry.

Applicant's Argument and Evidence

[para 46] The Applicant says that CHR breached its general duty to assist as it failed to make every reasonable effort to assist and to respond openly, accurately and completely under section 10(a) of HIA. In particular, the Applicant says CHR did not (i) properly apply the exception to access under section 11(2)(a) of HIA to the information initially withheld, (ii) specifically direct her to the information initially withheld, or (iii) number the pages in sequence in the records.

[para 47] The Applicant says that CHR improperly applied the exception to access in section 11(2)(a) of HIA, and thereby failed to fulfill its duty to assist under section 10(a) of HIA. The Applicant states:

The authority cited by the CHR with regard to the information originally withheld in C-1 turns out to be not only erroneous but also a source of considerable uncertainty for the Applicant who depended on the CHR for a complete and accurate copy of the record required for an informed decision regarding possible action on the circumstances of her late husband's death at the PLC.

[para 48] In her written initial submission, the Applicant conceded that the information withheld was not relevant to the assessment of her husband's death:

For an informed assessment of the circumstances leading to [name of Applicant's husband's] death at the PLC, the Applicant did not need the registration numbers identifying the ambulance attendants in the 1999 excerpt C-1 as part of her late husband's CHR health record.

[para 49] The Applicant says that CHR did not specifically direct her to the information withheld and thereby failed to fulfill its duty to assist under section 10(a) of HIA. In her written initial submission, the Applicant says:

Although the section number 11(2)(a) is indicated in C-1 [page that was severed], above the space provided for the severed information, it is not indicated in such a way that it would clearly stand out.

[para 50] The Applicant says that CHR did not number the pages in the records in sequence, and thereby failed to fulfill its duty to assist under section 10(a) of HIA. In her written initial submission, the Applicant says:

It is respectfully submitted that the custodian could reasonably have assisted the Applicant by simply numbering the pages disclosed, preferably with tabs separating sets of records chronologically, and marking with a highlighter the space reserved for the severed information in C-1 and the section number indicated above the same.

By numbering the pages of the record disclosed on 15 March 2004, it is respectfully submitted that the CHR would have assisted the Applicant by making it possible for her to compare records as disclosed to [name of Applicant's husband] on 12 January 2004, with the corresponding records disclosed to her on 15 March 2004, so as to verify that the records disclosed are both accurate and complete.

[para 51] In her written initial submission, the Applicant quoted passages from the *Health Information Act: Guidelines and Practices Manual, Alberta's Health Information Act, Alberta Health and Wellness, 2001* (the "HIA Manual") for the interpretation of section 10(a) of HIA. The HIA Manual reads:

Duty to Assist Applicants

Section 10(a) expresses the duty of a custodian to make every reasonable effort to assist an applicant and to respond to each applicant openly, accurately and completely. This means that if the applicant is not fully knowledgeable as to what records may exist or how they are organized, for example, the custodian has a duty to tell the applicant what they need to know in order for them to obtain as much of the information they are seeking as possible under the *Act* (p. 33).

Indication of Severing

A custodian must indicate the section number (and subsection, where applicable) of any exceptions used to sever information, either in the space left after the severing or in the margin closest to the severed information. ...Indicating the section numbers used to sever information from records helps an applicant understand why part of the information requested has been refused and permits an independent review of the decisions made by the custodian. The applicable sections of the *Act* could be included in the response to the applicant for greater certainty (pp. 52-53).

Copying Retrieved Records

Once the records have been located, either the program area in a larger custodian or the office of the Health Information Coordinator, as appropriate, prepares them for review and completes the request documentation. This may involve copying and numbering all records pertinent to the request (p. 44).

Copy and number retrieved records (to make a working copy) (p. 58).

[para 52] The HIA Manual says its purpose is:

This Manual is provided as information only and is intended to serve as a supplement to the *Health Information Act* and Regulations. The information contained in it is provided as guidelines, not as binding rules. All best practices and examples used are provided as illustrations and should not be used as authority for any decisions made under the *Act* (introduction).

C. Application

[para 53] Section 10(a) of HIA creates a general duty for custodians to assist and to respond to applicants. A custodian's duty to assist under section 10(a) of HIA and under the parallel provision 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 custodian responds to the applicant who is making a request. The issue in the case before me is the scope of a custodian's duty to assist an applicant under section 10(a) of HIA.

[para 54] The Commissioner recently stated the general principle in regard to the parallel provision in FOIP, "[i]t should also be noted that, although section 10(1) sets out a general duty of public bodies to assist applicants, it does not encompass other, more specific duties set out under the Act: Order 2000-014" (Order F2005-012, para 26; see also Orders F2005-023, para 40; 2000-014, paras 84-85).

[para 55] The general duty to assist under the parallel provision in FOIP was recently 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).

Application of Exception

[para 56] When responding to an access request, a custodian must determine whether an exception to access under section 11 of HIA applies. If a custodian determines that information falls under a mandatory exception under section 11(2), the custodian must apply the exception and is legally obligated to sever the information from the record where the information can reasonably be severed (HIA section 7(2)). An applicant's right of access extends only to the remainder of the record when an exception to access applies (HIA section 7(2)).

[para 57] I have already said that I have decided to exercise my discretion not to consider the moot issue of the application of section 11(2)(a) of HIA. However, even if I exercised my discretion to decide this issue and even if I found that section 11(2)(a) does not apply to the severed information (*which I have not*), it does not necessarily follow that CHR has failed to fulfill its duty to assist under section 10(a) by improperly applying an exception to access under HIA in the circumstances of this case. As I have said, the general duty of custodians to assist applicants does not encompass other, more specific duties set out under the Act.

[para 58] CHR gave the Applicant access to a large amount of information in an expeditious fashion. CHR withheld only a small amount of information when applying the exception. CHR promptly communicated with the Applicant regarding its decision to sever and the basis for severing under HIA. Additionally, the Applicant has had the information at issue all along. CHR inadvertently disclosed to the Applicant, in the

second or duplicate copy, the very information that it severed from the first copy of the page at issue.

[para 59] In my view, CHR's application of the exception to access in the circumstances of this case does not mean that it breached its duty to assist or that it did not make "every reasonable effort" to assist the Applicant or respond to the Applicant openly, accurately and completely, as required under section 10(a) of HIA.

Locating Information

[para 60] CHR indicated the severed segment by blocking out the information withheld and by writing a notation on the page to indicate the section under which the information was severed. CHR advised the Applicant of the exception being applied in its February 25, 2004 letter of response to the Applicant, which says the record "contains information that is exempt from disclosure under Section 11, Subsection 2(a) of the Health Information Act and has not been included."

[para 61] A custodian has no way of knowing an applicant's unique needs or specific wishes unless the applicant tells the custodian. In its letter of response, CHR gave the Applicant a number to call "[i]f you have any questions. The Applicant did not ask CHR for assistance to identify where the information was severed from the record.

[para 62] CHR provided the Applicant with a copy of the specific page as well as all of the information that was initially severed in a separate letter after the mediation, so the Applicant knew what information had been severed. However, steps taken during mediation are after the fact. This is not the relevant timeframe for considering whether a custodian has fulfilled its duty to assist an applicant when responding to an access request.

[para 63] CHR blocked out the severed information, made a notation of the section under which the information was severed, highlighted the severed information in yellow, provided a covering letter about the information severed and gave the telephone number at which it could be contacted if there were any questions.

[para 64] In my view, the fact that CHR did not take further steps to identify the location of the information that was severed from the record in the circumstances of this case, does not mean that it breached its duty to assist or that it did not make "every reasonable effort" to assist the Applicant or respond to the Applicant openly, accurately and completely, as required under section 10(a) of HIA.

Numbering Pages

[para 65] CHR provided the records with pages in a general chronological order to the Applicant. The Applicant did not request the pages to be numbered, although she

was given contact information and invited to telephone CHR with any questions. CHR says the Applicant did not raise this issue with CHR before the Inquiry.

[para 66] CHR provided the Applicant with a large amount of information in response to the two access requests. The records already have multiple page-numbering systems and are not numbered in the order in which the pages were provided at the Inquiry. On the one hand, I sympathize with the Applicant as this is a lot of information to sort through. On the other hand, the Applicant requested “the entire chart”.

[para 67] The Applicant says that custodians have a duty to number pages in accordance with the HIA Manual. However, the HIA Manual describes best practices, which are ideal standards and suggestions for custodians to consider when developing internal record management protocols. Best practices are higher standards than the requirement to make every reasonable effort under HIA. Although custodians are encouraged to strive towards ideal standards, this is not a legal requirement under HIA (Order 2001-016, para 30).

[para 68] I accept the Applicant’s argument that numbering the pages would have assisted her in reviewing and comparing the records. However, I do not accept that there is a legal requirement under HIA for custodians to number the pages in the records that are disclosed to applicants in response to an access request, in order to fulfill the duty to assist under section 10(a) of HIA.

[para 69] As I have said, a custodian cannot know what an applicant wants unless the applicant tells the custodian. CHR provided its telephone number and invited the Applicant to call with any questions. The Applicant did not contact CHR or request the pages to be numbered. A requirement to number all the pages in every record disclosed could cause further delay in responding to access requests and may not be of assistance to every applicant.

[para 70] Applicants may wish to arrange the pages in their own chosen order. In this case there were already multiple page-numbering systems in the records. In some circumstances, a custodian’s numbering system could create confusion rather than provide assistance to an applicant. In any event, the duplicate pages disclosed in the second request (897 pages) would have different page numbers than the same pages disclosed in the first request (95 pages), as the second request was a longer record.

[para 71] This is not to say that when an applicant specifically requests this type of assistance that a custodian should not make every reasonable effort to respond. However, the Applicant did not ask CHR to number the pages. CHR provided the pages in the records in chronological order.

[para 72] In my view, the fact that CHR did not number the pages in the order in which they were disclosed to the Applicant, in the circumstances of this case, does not mean that it breached its duty to assist or that it did not make “every reasonable effort” to assist the Applicant or respond to the Applicant openly, accurately and completely, as required under section 10(a) of HIA.

Every Reasonable Effort

[para 73] There are no specific criteria for what constitutes “every reasonable effort” to assist an applicant. Therefore, “every reasonable effort” must be determined based upon a consideration of the facts and the circumstances of every case.

[para 74] CHR disclosed a large amount of information in a timely fashion to the Applicant. CHR disclosed the first set of records in their entirety on the same day the request was made. CHR disclosed the second set of records on the same day it made contact with the Applicant through a family member. CHR made numerous attempts to contact the Applicant. CHR severed only a small amount of information.

[para 75] An applicant’s right to access and a custodian’s duty to process a request are subject to the payment of any fees being charged (HIA sections 7(3), 9). For a discussion of the fees that custodians can charge for processing and photocopying a record, see Order H2005-002, paras 7-8 and Appendix I). A custodian is not to start processing a request until the basic fee has been paid (*Health Information Regulation, A.R. 70/2001*, section 10(2)). Notwithstanding the difficulties in contacting the Applicant, CHR took the initiative to expeditiously prepare the records.

[para 76] Notwithstanding its authority to charge a basic fee for the second request and to await payment before starting to process the records, CHR prepared a copy of the record on the same day it made even indirect contact with the Applicant. CHR was entitled to charge other types of fees such as photocopying for both of these requests. The fees could have been costly with the number of pages involved. CHR subsequently waived payment of the basic fee for the second request and did not charge the Applicant any fees whatsoever beyond the \$25.00 basic fee for the first request. In my view, CHR’s decision to waive the payment of fees goes towards it making every reasonable effort to assist the Applicant.

[para 77] I accept CHR’s evidence in its Affidavits and CHR’s argument in its written submissions that it fulfilled its general duty to assist under section 10(a) of HIA. Based upon my review of the records, the evidence and the arguments provided by the parties, for all of the above reasons, I find that CHR discharged its burden of proof to show that it fulfilled its 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(a) of HIA.

ISSUE B: 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 78] The Notice of Inquiry states:

The Applicant says that the one-page record the Custodian provided to the Applicant during the review was not part of the record that the Applicant originally received from the Custodian. The Applicant is not satisfied that the one-page record is the record from which the Custodian says it initially withheld and subsequently disclosed information to the Applicant, and therefore believes that her late husband's "entire chart" from the Peter Lougheed Centre has not been disclosed to her as executor of his estate.

A. General

[para 79] A custodian must conduct an adequate search for responsive records to meet its duty to assist an applicant under section 10(a) of HIA.

B. Argument and Evidence

Applicant's Argument and Evidence

[para 80] The Applicant says that CHR failed to conduct an adequate search for responsive records under section 10(a) of HIA, as CHR may not have given her all of the records. The Applicant says that further hospital records could exist and that CHR could have withheld some of her husband's health information. The Applicant says this means that CHR has failed in its duty to conduct an adequate search for responsive records under section 10(a) of HIA.

[para 81] The Applicant initially took the position that the exception claimed for the one-page document that was severed shows that the document she received could not be the same document. The Applicant says this means that further information exists in the hospital record that has not been disclosed and therefore, CHR has failed to conduct an adequate search for responsive records under section 10(a) of HIA.

[para 82] In a letter dated October 11, 2005, the Applicant explains why she believes that she has not received all of the hospital records, as follows:

Moreover, the one page document that was released to me as an attachment to your 25 April letter was not, contrary to your assertion in the third paragraph of your 29 September 2005 letter, part of the record I initially received. This being so, I am not satisfied that this is the information that the Calgary Health Region authorities initially withheld from me and have reason to believe that my late husband's "entire chart" from the Peter Lougheed Centre has not been disclosed to me

[para 83] In her written initial submission, the Applicant says:

Considering that the section number indicated concerns health information, and that the information severed does not, [name of Applicant] could not have reasonably been expected to conclude that the information the PLC Health Record Services claim to have initially withheld under 11(2)(a) concerned ambulance attendants whose registration numbers are part of her late husband's health chart as originally compiled by another custodian (the FMC). (C-1)

[para 84] The Applicant initially took the position that CHR did not give her the page that was severed in the records. However, at Inquiry, the Applicant conceded that she was mistaken and the records CHR disclosed to her did include the severed page. In her written initial submission, the Applicant states:

At the time of her 11 October 2005 response (A-9) to the OIPC Health Information Officer's 29 September 2005 letter (A-7), the Applicant honestly believed that C-1 was not part of the original bundle of unnumbered documents received.

It was only in preparing the present submissions, that the Applicant found C-1 in the bundle of unnumbered documents originally picked up at the PLC Health Record Services counter on 15 March 2004.

[para 85] Additionally, the Applicant says that three pages were disclosed in the first request that were not disclosed in the second request. She says this shows that CHR did not conduct an adequate search for records. The Applicant states:

Through careful comparative reading of the two sets of records in preparing the present submissions, the Applicant has identified what is arguably an important discrepancy. A 3-page document titled "Personal Information", bearing the stamp "PATIENT NOT SEEN IN ADMITTING" and dated 04/01/04 (C-2) was only included in the records disclosed to [name of Applicant's husband] on 12 January 2004, to be omitted from the records disclosed to the Applicant on 15 March 2004. ...

Considering the CHR's failure to disclose to the Applicant C-2, as part of its disclosure of all the other corresponding records as previously disclosed to [name of Applicant's husband], the Applicant respectfully submits that this should be seen as an indication of the CHR's failure to meet its duty under section 10(a).

[para 86] Attachment C2 to the Applicant's initial written submission consists of three pages of blank forms that include the Applicant's husband's name in an addressograph plate stamp in the upper right hand corner. The first page is entitled, "Personal Information" and "Information for Family and Close Friends". The first page includes educational information for families and friends, as some hospital terms are explained such as "Patient Condition Reports". The balance of the three pages consists of various types of consent forms.

CHR's Argument and Evidence

[para 87] CHR says it conducted an adequate search as this was a "thorough and comprehensive" search for responsive records. CHR did not address the three pages of blank forms in its rebuttal submission, but says that it searched for all of the responsive records. CHR says the adequacy of the search is evident as it not only located but also expeditiously disclosed all of the pages of information in the records. CHR says it conducted an adequate search for responsive records and thereby met its duty to assist the Applicant, as required by section 10(a) of HIA.

C. Application

[para 88] Order H2005-003 said the basic test that must be met in order for a custodian to carry out an adequate search under HIA is that the custodian “must make every reasonable effort to search for the actual records that have been requested” (para 15; Order 96-022, para 14). The standard for the search is not perfection but rather what is “reasonable” in the circumstances.

[para 89] 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 facts of how a custodian conducted its search in the particular case (Orders H2005-003, para 17; 98-003, para 37).

[para 90] Orders issued from this Office have established two criteria for determining whether an adequate search has been conducted for responsive records, which is that the custodian 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).

Search for Records

[para 91] The first request was for information that included the hospital admission of January 9, 2004. I note that CHR’s response did not include any records for the January 9-12, 2004 admission. It is possible that CHR located this part of the record but was unable to take that part of the record out of circulation to make copies at the time of the request, due to the circumstances.

[para 92] The need to have the hospital record available on a 24-hour basis for the delivery of health services may have been a significant factor in CHR not providing the January 9, 2004 admission record in response to the first access request. The Applicant’s husband was an in-patient when he made his January 12, 2004 access request. He was an extremely sick man and passed away a few days after he made the request. The records for the January 9th admission were provided to the Applicant in the second response.

[para 93] In any event, the failure to include the records of the January 9, 2004 admission in response to the first access request is not part of the Applicant’s complaint. The Applicant did not raise this issue in either of her written submissions, so this is not the basis for the Applicant’s allegation that CHR failed to conduct an adequate search for records under section 10(a) of HIA.

[para 94] The Applicant says the failure to provide the three pages of blank forms in the second response shows that CHR did not locate all responsive records in its searches. However, these pages are merely blank forms. It is possible that these pages

were eventually not considered part of the permanent record, but were inadvertently disclosed or provided out of an abundance of caution in the first request. It is also possible that these pages were determined to be unresponsive at the time of the second request because they do not pertain to the provision of a health service.

[para 95] In any event, locating different records in different searches does not necessarily mean that a custodian has failed to conduct an adequate search (Orders H2005-003, paras 23-24; F2003-001). Previous Orders say that what must be considered when determining the adequacy of a search is the effort made by the custodian in the circumstances of the case including the thoroughness of the search.

[para 96] Contrary to the Applicant's initial position, she concedes that she did in fact receive the severed page in the response to the second request. The Applicant's initial belief that she had not received the severed page was the main basis for her allegation of inadequacy of the search. With the exception of the blank forms, the second search located the same records as the first search, which points towards the searches being adequate.

[para 97] CHR located and disclosed 95 pages of information the same day the first request was made. CHR located and disclosed 897 pages of information the same day the Applicant was first contacted via a telephone message that was left with a family member. CHR located and disclosed a total of 992 pages in an expeditious manner. There is no indication that there is any existing information that is missing from the records that were provided to the Applicant.

[para 98] Speculation on the part of an applicant that further information might exist is not a sufficient reason to find that a custodian has failed to conduct an adequate search for responsive records (Order 2005-003, paras 30-35). The Applicant does not provide any concrete reason to believe that further records exist. A custodian's search can only find the records that exist. There is no indication that there is any further information that should have been included in the record that has not been located and disclosed to the Applicant.

[para 99] CHR is required to search for the records requested in order to conduct an adequate search. There is no evidence before me to suggest that CHR failed to search for the records that were requested. For all of the above reasons, I accept CHR's argument that it conducted a thorough and comprehensive search for the records requested. In my view, CHR fulfilled the first criteria of conducting an adequate search, in that it made every reasonable effort to search for the records requested.

Inform the Applicant

[para 100] This is not a case where a custodian did not attempt to communicate with an applicant when processing an access request. To the contrary, the records show that CHR communicated in its first response to the Applicant on the same day the record was requested. In its second response, CHR made numerous attempts to contact the

Applicant in order to respond to the request. When CHR staff did reach someone at the Applicant's residence, they communicated with the Applicant by leaving a telephone message with a member of her family.

[para 101] English is not the Applicant's first language. The attachments to her initial written submission refer to the Applicant's reliance upon her daughter to assist her to review the records and to participate in the review process. The attachments to the Applicant's submission also say that the Applicant's daughter was visiting in Croatia for an extended period and living in Montreal, indicating that the daughter's assistance was not always readily available. These arrangements undoubtedly made it more difficult for the parties to communicate.

[para 102] The records show that CHR made a diligent effort to inform the Applicant and to communicate the progress being made on the search. Therefore, I find that CHR fulfilled the second criteria in conducting an adequate search, in that it informed the Applicant in a timely way of what it had done.

[para 103] Based upon my review of the records, the evidence and the arguments provided by the parties, for all of the above reasons, I find that CHR discharged its burden of proof to show that it fulfilled its duty to conduct an adequate search for responsive records and thereby met its duty to the Applicant, as required under section 10(a) of HIA.

[para 104] This is a case that turns on the facts. The standard under section 10(a) of HIA is not a standard of perfection, but rather what it is reasonable for a custodian to do in order to assist an applicant who is making an access request.

VI. ORDER

[para 105] I make the following Order under section 80 of HIA:

- I find that the Custodian 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(a) of the Act, and
- I find that the Custodian conducted an adequate search for responsive records, and thereby met its duty to the Applicant, as required by section 10(a) of the Act.

Noela Inions, Q. C.
Adjudicator