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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2008-001

September 10, 2008

CALGARY HEALTH REGION

Case File Number H1471

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Summary: In 2006, the Applicant made a request under the *Health Information Act* (the "Act") to the Calgary Health Region (the "Custodian") for two specific records, and for any information relating to three hospitalizations that had not been released to her following access requests in 2003 and 2005. The Custodian gave the Applicant a fee estimate to produce the two specific records. It further advised her that it had already provided her with all information in its possession regarding her three hospitalizations, and that there were no new responsive records. The Applicant asked this Office to review the fee estimate, as well as the Custodian's response to her request for assurances that it had previously accounted for all existing information.

The Adjudicator found that the Custodian presented insufficient evidence to show that it made every reasonable effort to locate records responsive to the Applicant's request for information not previously released to her. He therefore concluded that the Custodian did not fulfill its duty to 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. The Adjudicator ordered the Custodian to conduct an adequate search and to communicate to the Applicant the steps taken in doing so.

The Adjudicator found that the Custodian did not properly estimate its fees for services under section 67(3) of the Act. He concluded that the fees set out in the Schedule to the *Health Information Regulation* do not apply for producing 20 pages of records or less, as the basic fee of $25 paid by an applicant on an access request is intended to sufficiently

cover the costs associated with producing that limited number of pages. As the Custodian's fee estimate was to produce only seven pages, the Adjudicator reduced the additional fees that the Custodian may charge the Applicant to zero.

Finally, the Adjudicator concluded that he had no jurisdiction to decide issues in relation to the Custodian's responses to the Applicant's 2003 and 2005 access requests. These issues included whether the Custodian met its duty to assist the Applicant, and properly severed records that were provided to her at those times. The Adjudicator had no jurisdiction because the Applicant had not made a request for review of the 2003 and 2005 matters within the timeframe set out under section 74(2) of the Act.

Statutes and Regulations Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i)(i), 1(1)(i)(ii), 1(1)(k)(i), 8(1), 10(a), 11, 12(1), 12(2), 12(2)(a), 12(2)(c)(i), 15, 67(1), 67(2), 67(3), 73, 73(1), 74, 74(2), 74(2)(a), 74(2)(b), 80, 80(3)(a), 80(3)(c), 80(4) and 89(1); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 12(1)(c)(i) and 57(1); *Health Information Regulation*, Alta. Reg. 70/2001, ss. 10, 10(1), 10(1)(a) to (h), 10(1)(h), 10(3), 12, 12(1) and clauses 2, 2(a), 2(b) to (m), 2(o)(i), 2(o)(ii), 2(p), 2(q)(i) and 2(q)(ii) of the Schedule; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/1995.

Authorities Cited: AB: Orders 2001-032, F2004-026, H2005-002, H2005-003, H2005-004 and H2006-003.

I. BACKGROUND

[para 1] Under the *Health Information Act* (the "Act"), the Applicant made requests to the Calgary Health Region (the "Custodian") for her health information in 2003 and 2005, and the Custodian responded. In a letter dated October 13, 2006, the Applicant made a third request for the same information, being copies of her health records in relation to three periods of hospitalization spanning from March 30, 1999 to September 15, 2000. She indicated that she was making the request because she believed that the Custodian had inappropriately withheld information in the past, and had neglected to acknowledge that certain information exists.

[para 2] By letter dated November 2, 2006, the Custodian provided the Applicant with an estimate of the fees payable to process her request. By letter dated November 9, 2006, the Applicant narrowed her request. She restricted it to a copy of nursing notes dated August 6, 2000, a copy of an ethics consultation dated August 11, 2000, and copies of any information not previously released to her in respect of her three periods of hospitalization.

[para 3] By letter dated November 20, 2006, the Custodian revised the fee estimate to process the request for only the nursing notes and ethics consultation. It advised the Applicant that it had previously given her, in 2003 and 2005, all of the information in respect of her three periods of hospitalization, and that there were no new responsive records.

[para 4] By letter dated December 4, 2006, the Applicant asked this Office to review the Custodian's fee estimate, and its response to her request for assurances that it had not withheld information, without her knowledge, at the time of her access requests in 2003 and 2005. Mediation was authorized but was not successful. The Applicant requested an inquiry, by letter to this Office dated February 26, 2007, and a written inquiry was set down.

II. RECORDS AT ISSUE

[para 5] As this inquiry involves the Custodian's duty to assist the Applicant and its fee estimate, there are no records directly at issue. For context, however, the Applicant has requested nursing notes, an ethics consultation, and any information regarding three hospitalizations that was not released to her at the time of access requests in 2003 and 2005.

III. ISSUES

[para 6] The Notice of Inquiry, dated February 22, 2008, set out two issues:

> 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?
>
> Did the Custodian properly estimate the fees for service pursuant to section 67(3) of the Act?

[para 7] On review of the Applicant's request for review dated December 4, 2006, and the initial and rebuttal submissions of the parties, I identified a third issue in this inquiry:

> Did the Custodian meet the requirements of section 12(2) of the Act?

[para 8] I wrote to the Custodian to obtain additional submissions regarding the above issue, as well as regarding its duty to assist the Applicant, under section 10(a) of the Act, at the time of her access requests in 2003 and 2005. I did not request or obtain further submissions from the Applicant, as she had already addressed these matters in her initial and rebuttal submissions.

[para 9] The Applicant has raised numerous other issues in her submissions. I will address some of them indirectly, to the extent that they are relevant to the issues set out above. However, I will not address issues or arguments that the Applicant did not raise in her request for review by this Office (such as whether it is appropriate for information to be severed by a health records technician or whether there are "systemic" problems regarding the Custodian's compliance with the Act), or matters that do not fall within the purview of the Act (such as the policies and procedures that govern ethics consultations and mental health review panel hearings).

IV. DISCUSSION OF ISSUES

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?

[para 10] Section 10(a) of the Act reads as follows:

> *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,*

[para 11] The Applicant believes that the Custodian has not met its duty to assist her because it neglected, at the time of her access request in 2003, to advise her of the existence of the ethics consultation dated August 11, 2000, which was a record prepared during her third period of hospitalization. She indicates that, after providing clarification that she wanted this record, she received what appeared to be a severed copy. The Applicant further states that, at the time of her access request in 2005, the Custodian again failed to note the existence of the ethics consultation, or indicate that it had been removed from her hospital chart.

[para 12] The Applicant also believes that the Custodian has failed to account for records following her latest access request for any information regarding her three hospitalizations that it has not already provided to her. In particular, she refers to notes made by a physician who met with her prior to the meeting of the ethics committee that carried out the ethics consultation, and who told her that he would place his thoughts on her chart. As stated in her request for review, she wishes "to have more substantive assurances that undisclosed information does not exist".

[para 13] The Applicant's specific concerns raise the question of whether the Custodian has conducted an adequate search for responsive records. A custodian must conduct an adequate search for responsive records in order to meet its duty to assist an applicant under section 10(a) of the Act (Order H2006-003 at para. 79). In order to conduct an adequate search, a 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 (Order H2006-003 at para. 90).

[para 14] Because the question of an adequate search is the particular one raised here, it is the only question that I will address in the context of the Custodian's duty under section 10(a) of the Act. Although the Applicant has also questioned the appropriateness of the Custodian's decisions to sever certain information in records previously provided to her, I will not discuss this. First, section 10(a) does not encompass other, more specific duties set out in the Act, such as those in relation to severing (Order H2006-003 at para. 57). Second, I do not have jurisdiction to address

matters in relation to severing that occurred in the context of the 2003 and 2005 access requests. I discuss this lack of jurisdiction, in more detail, later in this Order. Insofar as the Custodian may sever information in records responsive to the Applicant's access request of November 9, 2006, the Custodian must first actually provide the records before those severing decisions, if any, may be reviewed by this Office.

[para 15] With respect to a search for responsive records, an applicant's mere speculation that records exist, but have not been provided by a custodian, is an insufficient basis on which to conclude that there was an inadequate search (Order H2005-004 at para. 61). In this inquiry, however, the fact that the ethics consultation was overlooked twice before – and was a record that clearly fell within the scope of the Applicant's previous requests – demonstrates to me that the Custodian has not searched for records in all reasonably possible locations in the past, and that it may again not have done so in response to the Applicant's request of November 9, 2006. The Commissioner has stated:

> … [W]here an applicant clearly requests all health information, an adequate search requires the custodian to look in all places where there might be such records. In my view, in determining the scope of a search for 'all health information' (or some equivalent), a custodian must have regard to its own practices about where such health information might be found – whether and with what degree of regularity it is placed in some central location or locations. If it is possible there are health records that are not in defined locations, the search must extend to those other locations. (Order H2005-004 at para. 65.)

[para 16] Here, I also find the Applicant's belief that a specific set of physician's notes is missing, in the context of her latest access request, to be more than speculative. In contrast to a situation where an individual believes that records were created simply on the basis that he or she interacted with employees of the custodian (as in Order H2005-004), the Applicant in this case was specifically told by the physician that he would add notes to her chart.

[para 17] The Custodian argues that it is premature to address the Applicant's suggestion that information is missing from her chart, as she only raised it during this inquiry and the Custodian has not yet provided records in response to the Applicant's 2006 access request. It submits that it has not had an opportunity to make additional inquiries to address the suggestion that the Applicant's hospital record is incomplete.

[para 18] In her letter of November 9, 2006, the Applicant asked the Custodian to provide her with any information relating to three hospitalizations that had not been released to her previously. An affidavit sworn on behalf of the Custodian indicates that a search was conducted, and attached to the affidavit is a copy of an e-mail, dated October 25, 2006, to a specific individual asked to conduct the search for responsive records. In its response of November 20, 2006, the Custodian advised the Applicant that

it had already provided all information in its possession regarding the three previous hospitalizations, and that there were no new responsive records.

[para 19] In short, the Custodian has already conducted a search for information not previously released to the Applicant, and has already indicated that no further records exist. As a result, I do not find it premature to review the adequacy of the Custodian's search for responsive records.

[para 20] It is irrelevant that the Applicant also requested copies of the nursing notes and ethics consultation in her November 9, 2006 letter, but has not yet obtained them. The request for previously unreleased information was a separate and distinct part of the request, and the Custodian has already indicated that it intends to provide nothing in response. I also find it irrelevant that the Custodian's November 20, 2006 response was in the context of a fee estimate, as its response that there were no new responsive records was unequivocal and had no bearing on the fee estimate. The Custodian did not say that it believed that there were no new responsive records, but that it would later clarify and revise the fee estimate if new records were located. There was no implication to that effect either.

[para 21] Even if the Applicant has only now alleged, during this inquiry, that certain records are missing, this does not preclude the matter from being now addressed. While applicants should be encouraged to bring concerns about the adequacy of a search to the attention of a custodian after they receive initial responses to their access requests, nothing under the Act requires them to do so. Conducting an adequate search is part of a custodian's duty to assist under section 10(a) of the Act, and a custodian should not have to be asked or reminded by an applicant to carry one out. In this inquiry, the Applicant's access requests were clear in that she wanted records associated with specific hospitalizations, and specific dates were provided. The Custodian should not have required further clarification regarding the scope of the search.

[para 22] Moreover, I note that the Applicant previously brought her concerns about possibly missing records to the attention of the Custodian. She raised the allegedly missing physician's notes in an October 12, 2006 letter attached to her October 13, 2006 request to the Custodian. Finally, even if the Custodian only became fully aware of the Applicant's specific concerns about the adequacy of its search for records during this inquiry, it had an opportunity to respond in its rebuttal and/or additional submissions.

[para 23] As a custodian is in the best position to show whether it fulfilled its duty to assist an applicant, and whether it conducted an adequate search for records, it has the burden of proof to show that it fulfilled its duties under section 10(a) of the Act (Order H2006-003 at para. 11). A decision about the 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, a custodian must provide sufficient evidence to show that it has made a reasonable effort to locate responsive records (Order H2005-003 at para. 19, adopting the same principles that have been developed regarding a public body's duty to

conduct an adequate search under section 10(1) of the *Freedom of Information and Protection of Privacy Act*).

[para 24] In this inquiry, the Custodian has provided insufficient evidence regarding the adequacy of its search for responsive records following the Applicant's 2006 access request. Although an affidavit sworn on behalf of the Custodian indicates that a particular individual was contacted to search for and provide copies of responsive records, the Custodian does not elaborate on how that search was conducted. It simply submits that "in the absence of information to the contrary, [the Custodian] must rely on the presumption that hospital records are complete". I fail to see how the Custodian is entitled to rely on such a presumption, as the presumption suggests that whatever the Custodian happens to locate and obtain for the Applicant is sufficient. It is incumbent upon a custodian to take every reasonable step to ensure that the responsive records are actually – not presumptively – complete.

[para 25] To fulfill the evidentiary burden of proving that it has conducted an adequate search, a custodian should not only indicate who conducted the search, but should also consider including the following information in its submissions or affidavit: the specific steps taken to identify and locate records responsive to the applicant's access request; the scope of the search conducted (e.g., physical sites, program areas, specific databases, individuals contacted); the steps taken to identify all possible repositories of records relevant to the access request; why the custodian believes that no more responsive records exist than what has been found or produced; and any other relevant information. A custodian must also show that it informed the applicant of what it has done in order to search for the requested information, as this is part of conducting an adequate search (Order H2006-003 at para. 90).

[para 26] As it has not provided sufficient evidence, I find that the Custodian has failed to discharge its burden of proof by showing that it made every reasonable effort to locate records responsive to the Applicant's request for any information relating to her three previous hospitalizations that had not been released to her previously. I must therefore conclude that it did not fulfill its duty to 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. I intend to order the Custodian to fulfill its duty under section 10(a) by conducting an adequate search for responsive records, and telling the Applicant what has been done to locate the requested information.

B. Did the Custodian properly estimate the fees for service pursuant to section 67(3) of the Act?

[para 27] The Custodian has the burden of proving that it properly estimated the fees assessed to the Applicant in order to produce a copy of the information that she has requested (Order H2005-002 at para. 21). The relevant provisions of the Act that govern the Custodian's ability to charge fees are as follows:

67(1) A custodian may charge the fees provided for in the regulations for services provided under Part 2.

(2) Subsection (1) does not permit a custodian to charge a fee in respect of a request for access to an applicant's own health information, except for the cost of producing the copy.

(3) A custodian must give an applicant an estimate of the total fee for its services before providing the services.
…

(6) The fees referred to in subsection (1) must not exceed the actual cost of the services.

[para 28] Section 67(1) of the Act allows a custodian to charge fees in accordance with the *Health Information Regulation* (the "Regulation"). The relevant provisions of the Regulation are as follows:

10(1) An applicant who makes a request for access to a record containing health information may be required to pay a basic fee of $25 for performing one or more of the following steps to produce a copy of the information:

(a) receiving and clarifying the request;

(b) obtaining consent if necessary;

(c) locating and retrieving the records;

(d) preparing the record for copying, including removing staples and paper clips;

(e) preparing a response letter;

(f) packaging copies for shipping or faxing, or both;

(g) postage and faxing costs;

(h) photocopying a record.

(2) Processing of a request will not commence until the basic fee has been paid, if applicable.

(3) In addition to the basic fee, additional fees in accordance with the Schedule may be charged for producing a copy of a record.
…

12(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on the receipt of an agreement to pay the fee, and on the receipt of at least 50% of any estimated fee.

(2) The balance of any fee owing is payable at the time the information is delivered to the applicant.

(3) Fees or any part of those fees will be refunded if the amount paid is higher than the actual cost of the service.

...

Schedule

1 The amount of the fees set out in this Schedule is the maximum amount that can be charged to applicants.

2 The following fees for producing a copy of a record may be charged if the cost of photocopying a record under section 10(1)(h) of this Regulation, calculated at $0.25 per page, exceeds $5, and then only the amount that exceeds $5 may be charged:

(a)	*photocopies, hard copy laser print and computer printouts*	*$0.25 per page*
...		
(o)	*severing time to determine whether a record requires severing, and to review and to identify the parts of the record to be severed:*	
(i)	*technician time*	*$6.75 per 1/4 hour to maximum of 3 hours*
(ii)	*health services provider time*	*$45 per 1/4 hour to maximum of 3 hours*
...		
(q)	*other direct costs:*	
(i)	*charges to retrieve records or to return records, or both, from another location*	*contracted fee or average past costs*
(ii)	*courier charges or delivery charges, or both, to send copies to applicant other than by mail or fax*	*actual cost*

[para 29] In its letter of November 20, 2006, the Custodian revised its fee estimate as a result of the Applicant's narrowed request of November 9, 2006. Because the Applicant narrowed her request, it is not necessary for me to consider the Custodian's original fee estimate in its letter of November 2, 2006 (although I will occasionally refer to it). Moreover, I will restrict my discussion to the concerns raised by the Applicant. Specifically, she is concerned with the amount of the fee estimate, and with the Custodian's request for her to pay a portion of the fees in advance.

1. The fee estimate of November 20, 2006

[para 30] The revised fee estimate in the Custodian's letter of November 20, 2006 was as follows:

Photocopying charges @ $0.25 per/copy	
– 7 pages x $0.25 = $1.75 less $5.00 =	*$ 0.00*
Severing time @ $6.75/ ¼ hour (max. 3 hours)	
– 2 min./page x 5 pages =	*$ 6.75*
Severing time of health services provider	
@ $45.00/ ¼ hour (max. 3 hours) =	*$45.00*
Charge to retrieve and return records from off-site storage =	*$17.25*
Courier charges =	*$ 8.00*
Sub-Total =	*$77.00*
less fee received Oct. 24, 2006 =	*$25.00*
Total =	*$52.00*

[para 31] The estimate shows that the Custodian deducted a basic fee of $25.00, which was paid by the Applicant in accordance with section 10(1) of the Regulation. Its letter then requested $26.00, or half of the remaining balance of $52.00, in order to proceed with the Applicant's request for the nursing notes and ethics consultation.

[para 32] Section 10(3) of the Regulation provides that, besides the basic fee of $25, an applicant may be charged additional fees for producing a copy of a record. However, the additional fees must be in accordance with the Schedule. The introductory words in clause 2 of the Schedule state that the fees set out below those words may be charged if the cost of photocopying a record under section 10(1)(h) of the Regulation, calculated at $0.25 per page, exceeds $5, and then only the amount that exceeds $5 may be charged. The Custodian has interpreted this to mean that it may not charge the Applicant photocopying fees in excess of $5, but that it may still charge the other fees in the Schedule.

[para 33] I do not believe that this is the proper interpretation. Clause 2 of the Schedule sets out a precondition before "the following fees" – which I take to mean any or all of them – may be charged. That precondition is that the cost of photocopying a record, calculated at $0.25 per page, exceeds $5. In other words, there must be more than 20 pages of records being produced for an applicant before the fees in the Schedule can apply (as 21 pages or more of records, copied at $0.25 per page, would be more than $5.)

[para 34] I believe that the intention behind the introductory words of clause 2 of the Schedule is as follows: When an applicant is only obtaining 20 pages of records or less, the $25 basic fee paid under section 10(1) of the Regulation is considered sufficient not only to cover the steps set out in paragraphs 10(1)(a) to (h) of the Regulation, but also to cover the custodian's costs associated with retrieving the records, reviewing them for possible severing, delivering them to the applicant, and other services set out in the Schedule. Because of the limited number of pages in question, it would be unreasonable to charge the fees in the Schedule in addition to the $25 amount already assessed. Only if more than 20 pages are being produced is there a sufficient amount of work on the part of the custodian, or sufficient out-of-pocket expenses, to justify charging something extra.

[para 35] The present inquiry demonstrates my point. The Custodian's fee estimate of November 20, 2006 is to produce only seven pages of records, yet the Applicant has been assessed $77 in total. That amounts to $11 per page, which is excessive in my view. Access to one's own health information should not be prohibitively expensive.

[para 36] Custodians might think it is unfair that they may not, for example, charge the cost associated with reviewing and severing a record when they have nonetheless spent time doing so in relation to 20 pages or less. However, my interpretation – according to which they must simply absorb the time and expense – is not inconsistent with the fact that the Schedule does not permit them to charge for more than three hours of severing, even if it takes them much longer. In other words, the Regulation places limits on the fees that may be charged in the context of an access request.

[para 37] The Commissioner has stated:

> … [T]he reason these fee limits exist is to avoid creating an inordinate cost impediment or barrier that becomes an obstacle for individuals seeking access to their own health information. Although custodians have custody and control over the physical records that contain health information, it is the individuals themselves who have the fundamental right to the information – it is their own health information. (Order H2005-002 at para. 23.)

I adopt the foregoing explanation in concluding that the Schedule does not give a custodian the ability to charge additional fees in respect of 20 pages of records or less.

[para 38] Despite the literal wording of clause 2 of the Schedule, I also believe that a custodian may not charge the fees set out in the Schedule if there are 20 pages or less of records produced in the form of hard copy laser print or computer printout. The Schedule's reference to "photocopying" at $0.25 per page includes, in my view, production of records in these two other formats. They fall within the same category as photocopies under clause 2(a) of the Schedule (all being $0.25 per page), and it would not make sense to treat them differently for the purpose of fees. The time and resources used to readily produce a hard copy laser print or computer printout is roughly the same as those used to make a photocopy.

[para 39] I add, however, that even where there are 20 pages or less of records to print out or photocopy, a custodian may still charge the fees set out in the Schedule for producing a copy of the other types of records set out in the Schedule – namely floppy disks, microfiche, photographs, video cassette, radiology film, and any other format of a record set out in clauses 2(b) to (m), as well as clause 2(p). I interpret the Schedule's reference to producing a copy of "a record" to mean that the fees set out in the Schedule are assessed on a record-by-record basis. Although a custodian may not charge the fees in the Schedule for copying or printing 20 pages or less, it may still charge the fees associated with the production of other materials or forms of media that are part of the same access request. For clarity, all paper records requested by an applicant that fall under clause 2(a) of the Schedule would, in my view, constitute one "record" for the purpose of determining whether the $5 threshold was met for the purpose of assessing fees. Once they collectively total more than 20 pages, a custodian may charge fees for the services set out in the Schedule.

[para 40] As the Custodian believed that it had already provided the Applicant with all information in its possession regarding her three hospitalizations, its fee estimate of November 20, 2006 contemplates producing the nursing notes and ethics consultation only. As already pointed out, they total seven pages and the associated photocopying costs are therefore less than $5. Given my conclusions above, the Custodian may not charge additional fees under the Schedule for the production of the nursing notes and ethics consultation. The basic fee of $25 paid by the Applicant sufficiently covers the cost of her narrowed access request. I therefore intend to reduce the additional fees that the Custodian may charge to zero.

2. The possibility of another revised fee estimate

[para 41] Because I also intend to order the Custodian to conduct a search for additional responsive records, it is possible that it will locate records totaling more than 20 pages, in which case it may charge the fees set out in the Schedule. I will therefore review the concerns of the Applicant, insofar as they relate to this possibility. In other words, my comments below, regarding other aspects of the Custodian's fee estimate of November 20, 2006, are intended to provide guidance in the event that the $5 threshold in respect of photocopying is met, such that fees for severing time, and for the retrieval, return and delivery of records, become possible.

[para 42] The Applicant does not dispute the estimated fee of $6.75 for the severing time spent by a technician, as set out under clause 2(o)(i) of the Schedule. She does, however, dispute the estimated fee of $45.00 for the severing time spent by a health services provider. She argues that it was not part of the Custodian's original fee estimate of November 2, 2006, being the estimate to provide *all* health records in relation to the Applicant's three hospitalizations.

[para 43] As severing by a health services provider was assigned to two pages in the November 20, 2006 estimate, and the ethics consultation is two pages, I assume that this is the record to which the $45 fee was applied. The Applicant further argues that this was

inappropriate, as she believes that the same record was severed by a health records technician at the time of her previous access request in 2003. She questions why a health services provider would be required to make severing decisions under the Act. In her view, the records that she has requested are not qualitatively different from one another, and severing decisions do not require clinical expertise, only expertise with regard to the wording and purposes of the Act.

[para 44] The reason that severing by a health services provider was not set out in the original fee estimate of November 2, 2006 is presumably because the Custodian had not realized that the Applicant's initial request of October 13, 2006 included the ethics consultation. The Custodian should have realized this, as the ethics consultation is dated August 11, 2000 and therefore fell within the timeframe of the Applicant's third hospitalization. However, a custodian is entitled to revise a fee estimate once it becomes aware that additional records have been requested.

[para 45] The Applicant raises the possibility that the ethics consultation contains personal information, but not health information. If that is the case, she argues that the record would be subject to the *Freedom of Information and Protection of Privacy Regulation*, which does not contemplate a fee of $45 per quarter hour in respect of reviewing and severing a record. However, I find that the ethics consultation is a record containing "health information" as defined under the *Health Information Act*. Specifically, it contains "diagnostic, treatment and care information" [section 1(1)(k)(i) of the Act], as it includes information about the mental health of the Applicant [section 1(1)(i)(i)] and information about health services provided to her [section 1(1)(i)(ii)]. The fees under the *Health Information Regulation* may therefore apply to reviewing and severing the ethics consultation, in the event that there become more than 20 pages of responsive records.

[para 46] Clause 2(o)(ii) of the Schedule to the Regulation allows a custodian to charge $45 per quarter hour for a health services provider's time spent severing a record. If severing by a health services provider is contemplated by the Schedule, there must be times that are envisioned when severing by a technician would not be appropriate, even though the latter may have general expertise in responding to access requests under the Act. These times may be when the record in question is unusual, the possible exceptions to disclosure are more difficult to apply or to know on the face of the record, or there would be serious consequences on improper disclosure. Section 11 of the Act sets out several exceptions to disclosure, some of which may require unique considerations in the circumstances of a given case.

[para 47] At the same time, custodians should be encouraged to use the services of a technician when severing records, if a technician is available and their services would be appropriate. The difference in the Schedule's fees for the services of a technician versus a health services provider is significant, and as stated earlier in this Order, access to one's own health information should not be prohibitively expensive.

[para 48] Given the foregoing, I do not question the Custodian's view that certain records requested by the Applicant may require severing decisions to be made by a health services provider. The Applicant has obtained records from the Custodian before and has questioned whether they were severed properly. The Custodian may reasonably believe that severing by a health services provider is now necessary to ensure that severing is done correctly. Therefore, should the fees set out in the Schedule become applicable as a result of a revised estimate to produce more than 20 pages of records, the severing fee of $45 may properly apply to the appropriate record or records.

[para 49] The Applicant disputes the estimated charge for retrieving and returning records from offsite storage, as she believes that the requested records are at the hospital itself. In support, she refers to an affidavit sworn by the Custodian's access and privacy coordinator in the context of Case File Number H1409 before this Office, which involves the same two parties as in this inquiry.

[para 50] I cannot consider the affidavit sworn in Case File Number H1409. Section 89(1) of the Act states: "A statement made or an answer given by a person during an investigation or inquiry by the Commissioner is inadmissible in evidence in court or in any other proceeding." (There are three exceptions, none of which apply here.) The present inquiry is "any other proceeding" within the meaning of section 89(1) (Order 2001-032 at para. 45, interpreting the virtually identical section 57(1) of *Freedom of Information and Protection of Privacy Act*). Accordingly, affidavits sworn in the context of one inquiry before this Office are not admissible in a different inquiry.

[para 51] The Applicant appears to believe that if some of her health information remains at the hospital, then all of it remains there. However, the nursing notes and ethics consultation date from 2000, and it is reasonable for records to be relocated offsite after a certain lapse of time. I therefore do not question the Custodian's assertion that it is required to retrieve records from another location. I will discuss the estimated amount in case more than 20 pages of records are located by the Custodian following its further search, and the fee for the retrieval/return of records therefore becomes applicable. I note that the same amount was assessed in the Custodian's November 2, 2006 fee estimate in respect of all of the information originally requested by the Applicant, so it appears that the $17.25 fee is the relevant amount, regardless of the quantity of records retrieved from the offsite location.

[para 52] Under clause 2(q)(i) of the Schedule, the Custodian may charge the contracted fee for retrieving records from another location and/or returning them. The Custodian submitted a copy of its "Offsite Storage Basic Services Price Schedule". Among other possible charges, "basic retrieval" is $1.20 per cubic foot, "research/labour" is $35.00 per hour, and "transportation" is $6.50 per order. The Custodian estimated the fee for retrieving and returning records to be $17.25, which it states is the actual cost. I am prepared to assume that $1.20 is a minimum charge for retrieval, and that the $6.50 transportation charge necessarily applies. The remaining $9.55 of the estimate would equate to approximately 15 minutes of labour, which I find reasonable. I therefore believe that the total estimate of $17.25 for obtaining records from offsite storage would

comply with the Regulation, in the event that 20 or more pages of records become the subject of a revised fee estimate.

[para 53] Under clause 2(q)(ii) of the Schedule, the Custodian may assess the Applicant courier charges to send copies of the requested information other than by mail or fax. The Applicant disputes the estimated courier charge, as she has previously received information from the Custodian by regular mail. She is apparently amenable to obtaining the requested information by regular mail, or by picking it up herself. Where an applicant expresses such a preference, I see no reason why the Custodian should engage the services of a courier. I therefore believe that the Custodian would improperly include the courier charges of $8.00 in any fee estimate prepared for the Applicant.

[para 54] The Applicant takes issue with the Custodian's request for her to pay 50% of the estimated balance in advance, as it has charged her *after* providing the requested information in the past. However, the Custodian has no obligation to follow its past practice. Section 12(1) of the Regulation contemplates advance payment of at least 50% of properly estimated fees, and the Custodian would therefore be entitled to obtain that amount before proceeding with a request for records totaling more than 20 pages.

[para 55] All of the foregoing is to say that if the Custodian locates additional responsive records further to my order to conduct an adequate search, and the total number of records responsive to the Applicant's November 9, 2006 request become more than 20 pages, then fees for severing time by a technician, severing time by a health services provider, and retrieving records from another location would be appropriate, but courier charges would not.

[para 56] I will address one further possibility: The Applicant states that if the Custodian did not sever information from the copy of the ethics consultation that it previously provided to her, she does not require another copy. In this respect, she raises the possibility of further narrowing her latest access request. Should the Custodian advise the Applicant that information was not severed previously, so that she decides not to obtain another copy of the ethics consultation, any fees in respect of copying or severing that particular record would not be payable.

C. Did the Custodian meet the requirements of section 12(2) of the Act?

[para 57] Section 12(2) of the Act reads as follows:

> *12(2) In a response under subsection (1) [being a response to a request to obtain access to a record], the custodian must tell the applicant*
>
> *(a) whether access to a record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*

(c) if access to the record or part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an affiliate of the custodian who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner.

[para 58] In her letters of October 13, 2006 and November 9, 2006 to the Custodian, the Applicant expressed her view that the Custodian has previously withheld information without alerting her to its existence. In her submissions, she indicates that she does not know whether information has been severed from the ethics consultation that she received following her 2003 access request. She also suggests that there may be full pages of records that have been withheld from her but that she has not been told about, such as physician's notes allegedly prepared prior to the ethics consultation.

[para 59] The foregoing concerns raise the question of whether the Custodian has complied with the requirements of section 12(2) of the Act. In particular, section 12(2)(a) requires a custodian to tell an applicant whether access to a record or part of it is granted or refused. If access to a record or part of it is refused, section 12(2)(c)(i) requires the custodian to tell the applicant the reasons for the refusal and the provision of the Act on which the refusal is based.

[para 60] On May 8, 2008, I wrote to the Custodian to obtain submissions on the additional issue of whether the Custodian met the requirements of section 12(2) of the Act when it responded to the Applicant in 2003 and 2005. Given the Applicant's concerns that she may not have received all requested information in the past, I also requested submissions from the Custodian regarding its duty to assist the Applicant and to conduct an adequate search for responsive records at the time of her access requests in 2003 and 2005.

[para 61] The Custodian has objected to a review by this Office of its duty to assist the Applicant in 2003 and 2005. It first questioned my request for additional submissions in a letter dated May 13, 2008. On June 2, 2008, this Office advised the Custodian that it took the view that the Applicant had requested – in her letter to this Office of December 4, 2006 – a review of a decision, act or failure to act of the Custodian that relates to her access requests in 2003 and 2005.

[para 62] Sections 73 and 74 of the Act read, in part, as follows:

73(1) An individual who makes a request to a custodian for access to or for correction or amendment of health information may ask the Commissioner to

review any decision, act or failure to act of the custodian that relates to the request.

…

74(1) To ask for a review under this Division, a written request must be delivered to the Commissioner.

(2) A request under section 73 for a review of a decision of a custodian must be delivered to the Commissioner within

(a) sixty days after the person asking for the review is notified of the decision, or

(b) any longer period allowed by the Commissioner.

…

[para 63] The Custodian submits that the Applicant made no request for review within 60 days of the Custodian's decision regarding her 2003 and 2005 access requests, as required by section 74(2)(a) of the Act. In its additional submissions responding to my letter of May 8, 2008, the Custodian therefore did not, for the most part, address its duty to assist the Applicant in 2003 and 2005. It did, however, address whether it had complied with section 12(2) of the Act in 2003 and 2005.

[para 64] Under section 73(1) of the Act, an individual who makes a request to a custodian for access to health information may ask the Commissioner to review "any decision, act or failure to act of the custodian that relates to the request." In its letter of November 20, 2006 to the Applicant, the Custodian advised her as follows:

Additionally, your November 9th letter requested that the Calgary Health Region provide you with any information related to your hospitalizations of March 30 – April 6, 1999, October 20 – November 19, 1999, and August 4 – September 15, 2000 that it has not previously released to you. The Region has already provided you with all information in its possession regarding these hospitalizations; once in 2003, and then again in 2005. There are no new records responsive to this request. […]

[para 65] Because the Applicant raised her previous access requests in her letter of November 9, 2006 to the Custodian, and the Custodian provided a response regarding them in its letter of November 20, 2006, I considered whether part of the Custodian's letter of November 20, 2006 to the Applicant was a "decision, act or failure to act" of the Custodian that "relates" to the access requests in 2003 and 2005, within the meaning of section 73(1) of the Act. The Applicant sought information or clarification regarding the earlier access requests and, in stating that there were no new responsive records, the Custodian possibly made a decision and/or acted in a manner that related to the earlier access requests.

[para 66] However, I conclude that the Custodian's November 20, 2006 response did not relate to the access requests in 2003 and 2005. It related only to her November 9, 2006 request, which, among other things, asked for any information not previously released to her. Although this aspect of her 2006 request and the Custodian's response made direct or indirect reference to the 2003 and 2005 requests, this is not sufficient for the Custodian's 2006 response to be a decision, act or failure to act that relates to the earlier access requests, within the meaning of section 73(1) of the Act.

[para 67] To conclude otherwise would be to effectively allow applicants to initiate a request for review in relation to a dated matter, simply by following up with the custodian on that dated matter and obtaining some sort of reply. The proper sequence of events contemplated under the Act is that an applicant makes an access request under section 8(1), the custodian responds within the applicable timeframes set out under sections 12(1) or 15, and the applicant then requests, if he or she wishes, a review within 60 days of being notified of the custodian's response, in accordance with section 74(2)(a).

[para 68] The Custodian submitted copies of its letters in response to the Applicant's 2003 and 2005 access requests. Those letters are dated January 14, 2004 and February 16, 2005. The Applicant was required, under section 74(2)(a), to make her request for review within 60 days of receiving them. This Office has no record of any request for review by the Applicant, in relation to her 2003 and 2005 access requests, other than the one dated December 4, 2006 in the context of this inquiry. That request was clearly outside the 60-day timeframe.

[para 69] Section 74(2)(b) of the Act sets out an exception to the 60-day deadline in that it allows a request for review to be delivered to the Commissioner "within any longer period allowed by the Commissioner". However, there is no indication that the Commissioner extended the time for the Applicant to deliver her request for review in relation to the 2003 and 2005 access requests. I do not have the jurisdiction to extend it now, given the limits of my delegated authority and the fact that this inquiry is already underway.

[para 70] I conclude that I have no jurisdiction to decide issues in relation to the Custodian's responses to the Applicant's 2003 and 2005 access requests. In addition to whether the Custodian met its duty to assist and conducted an adequate search, this includes whether the Custodian met the requirements of section 12(2) of the Act, as well as whether it properly severed records that were provided to the Applicant at those times.

[para 71] Earlier in this Order, I was able to review the adequacy of the Custodian's search for records responsive to the Applicant's 2006 request for information not released to her previously, given that the Custodian already conducted the search and indicated that there were no new records. However, I do not intend to address whether the Custodian has met the requirements of section 12(2) of the Act in the context of the 2006 request. My letter of May 8, 2008 to the Custodian raised section 12(2) of the Act as it related only to the 2003 and 2005 access requests, not the 2006 one.

[para 72] Moreover, the Custodian has not yet fully responded to the 2006 request. Although it has already responded to that part of the request for information not previously released, it has not yet provided the nursing notes or ethics consultation. Given my order below for the Custodian to conduct an adequate search, it may also locate additional responsive records. I therefore consider it appropriate to give the Custodian the opportunity to provide the nursing notes and ethics consultation, conduct an adequate search for information not previously released to the Applicant, and account for any other responsive records. After that response, if the Applicant still believes that she has not been told whether the ethics consultation has been severed and whether access to any other records has been refused (and, if so in either case, why), she may then ask this Office to review whether or not the Custodian has met the requirements of section 12(2) of the Act.

[para 73] To provide guidance to the Custodian in meeting the requirements of sections 12(2), I note that the Commissioner has made the following comments regarding the virtually identical section of the *Freedom of Information and Protection of Privacy Act*:

> [There is an implicit requirement] that in a response, responsive records that are being withheld be described or classified insofar as this is possible without revealing information that is to be or may be excepted, and that the reasons be tied to particular records so described or classified. At a minimum, it would, at least in most cases, be possible to set out the number of records being withheld under a particular subsection without disclosing the contents… [A response] should also… provide… the number of pages of which each withheld record consisted. (Order F2004-026 at para. 99, discussing section 12(1)(c)(i) of the *FOIP Act*.)

[para 74] I point out the foregoing because the Applicant wants to make sure that the Custodian does not withhold information without telling her. If the Custodian fully complies with section 12(2) of the Act after conducting an adequate search for records not previously released to the Applicant – that is, advises her of the number of pages (if any) that have been withheld in their entirety, describes them to the extent possible without disclosing the information excepted from disclosure, and provides reasons for any refusal to grant access – the Applicant's concern, regarding the possible existence of information of which she has not been made aware, will be addressed.

V. ORDER

[para 75] I make this Order under section 80 of the Act.

[para 76] I find that the Custodian failed to conduct an adequate search for records in response to the Applicant's November 9, 2006 request for information relating to her three periods of hospitalization that had not been released to her previously. I therefore find that the Custodian did not fulfill its duty to 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.

[para 77] Under section 80(3)(a) of the Act, I order the Custodian to comply with its duty under section 10(a), by conducting an adequate search for responsive records and communicating to the Applicant what has been done in this regard. Under section 80(4), I specify that the Custodian inform the Applicant of the specific steps taken to identify and locate responsive records, the scope of the search conducted (e.g., physical sites, program areas, specific databases, individuals contacted), the steps taken to identify all possible repositories and persons holding responsive records, and why the Custodian believes that no more responsive records exist than what has already been found or produced (should that be the case).

[para 78] I find that the Custodian did not properly estimate the fees for service pursuant to section 67(3) of the Act, as the fees set out in the Schedule to the Regulation do not apply for producing a copy of only seven pages of records. Under section 80(3)(c), I reduce the additional fees that the Custodian may charge the Applicant to zero. (The basic fee of $25 was properly charged, so there is no refund of that amount.)

[para 79] I further order the Custodian to notify me, in writing and within 50 days of receiving a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator