

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2008-004

August 6, 2008

CAPITAL HEALTH

Case File Number H1338

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

Summary: The Applicant made an access request to Capital Health for a copy of a quality review that was completed by the Sturgeon Community Hospital. Capital Health decided to withhold the record pursuant to section 9 of the *Alberta Evidence Act* and the *Health Information Act*. The Applicant requested a review of Capital Health's decision and the matter was set down for a written inquiry.

During the inquiry, the Information and Privacy Commissioner requested a copy of the record at issue. Capital Health challenged the Information and Privacy Commissioner's authority to compel production of the record at issue. As a result, the issue of whether the Information and Privacy Commissioner had the authority to compel production of the record pursuant to section 88 of the *Health Information Act* was set down as a preliminary issue.

The Information and Privacy Commissioner held that he did not have the authority, pursuant to section 88 of the *Health Information Act* to compel the record at issue. As such, the Information and Privacy Commissioner did not address whether section 9 of the *Alberta Evidence Act* is paramount to section 88 of the *Health Information Act*.

Statutes Cited: AB: *Alberta Evidence Act* R.S.A. 2000, c. A-18, ss.9(1); *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(f)(viii), 4, 7(1), 11(2)(d), 73(1), 80, 88.

I. BACKGROUND

[para 1] On June 16, 2006, the Applicant made an access request to Capital Health. The Applicant requested the following:

“a copy of the quality review that was to have been completed by the Sturgeon Hospital (St. Albert) in December 2005 or January 2006. This review was in regards to an incident that occurred to me and thus my daughter at the Sturgeon Hospital on August 17, 2005”.

[para 2] On July 5, 2006, Capital Health responded to the access request. Capital Health stated that they had located a quality assurance record responsive to the request but were unable to provide the Applicant with a copy of that record pursuant to the *Health Information Act* (“HIA”) and the *Alberta Evidence Act* (“AEA”).

[para 3] On July 20, 2006, the Applicant requested a review of Capital Health’s decision. Mediation was authorized but did not resolve the issues. The matter was set down for a written inquiry.

[para 4] On November 2, 2007, my Office issued an inquiry notice to the parties. The issue identified in that notice read as follows: *“Does section 11(2) of the Act apply to the records/information? In particular, section 11(2)(d).”* The inquiry notice requested Capital Health supply a copy of the records at issue to this Office.

[para 5] Capital Health challenged my authority to compel production of the record at issue. As a result, on December 17, 2007, I issued a Notice to Produce to Capital Health and I subsequently set down an inquiry to deal with the preliminary issue of whether I have the authority to compel production of the record. I identified a number of organizations as Intervenors and gave those organizations the opportunity to provide a written submission to this Office. Those organizations included the Alberta Cancer Board, Alberta Health and Wellness, the Alberta Medical Association, the Alberta Mental Health Board, the Canadian Medical Protective Association, the College of Physicians and Surgeons of Alberta, the Health Boards of Alberta and the Alberta Mental Health Patient Advocate Office.

[para 6] Capital Health provided an initial and a rebuttal submission. Capital Health also provided a supplement to its initial submission. The Applicant, the Alberta Cancer Board, the Alberta Medical Association, the Canadian Medical Protective Association, the College of Physicians and Surgeons of Alberta, the Health Boards of Alberta and the Alberta Mental Health Patient Advocate Office each provided a submission to this Office.

II. ISSUE

[para 7] The issue identified in the inquiry notice is: Does the Commissioner have authority under section 88 of the HIA to compel the production of what is alleged to be a quality assurance record?

[para 8] I find that the following two sub-issues are relevant to this inquiry:

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

III. DISCUSSION: Does the Commissioner have authority under section 88 of the HIA to compel the production of what is alleged to be a quality assurance record?

A. Does section 88 of the HIA (authority to compel) apply to the records?

[para 9] Section 88 of the HIA outlines my authority to compel a record. Section 88 reads:

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

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

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

(4) If a custodian is required to produce a record under subsection (1) or (2) and it is not practical to make a copy of the record, the custodian may require the Commissioner to examine the original at its site.

(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.

[para 10] Of particular importance is section 88(2) which states that I may require any relevant record to be produced whether or not that record is subject to the provisions of the HIA. I note that it does not say that I may simply require any record to be

produced, the record must be “relevant”, or in other words relevant to the issue before me.

[para 11] After a review of the legislation and the arguments before me, I find that I do not have jurisdiction over the record at issue for the reasons outlined below.

[para 12] The HIA clearly states that the HIA applies to records in the custody or under the control of a custodian. Section 7(1) of the HIA states that an individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian:

7(1) An individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian.

[para 13] Section 73(1) of the HIA further states that 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:

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.

[para 14] Section 1(1)(f)(viii) of the HIA specifically excludes a quality assurance committee from the definition of a custodian:

1(1) In this Act,

(f) “custodian” means

...

(iv) a regional health authority established under the Regional Health Authorities Act;

...

(viii) a board, council, committee, commission, panel or agency that is created by a custodian referred to in subclauses (i) to (vii) , if all or a majority of its members are appointed by, or on behalf of, that custodian, but does not include a committee that has as its primary purpose the carrying out of quality assurance activities within the meaning of section 9 of the Alberta Evidence Act; (emphasis added)

[para 15] Section 9(1)(b) of the AEA defines a quality assurance committee as follows:

9(1) In this section,

...
(b) “quality assurance committee” means a committee, commission, council or other body that has as its primary purpose the carrying out of quality assurance activities and that is

(i) appointed by

- (A) a regional health authority,*
- (B) the Alberta Cancer Board,*
- (C) the Alberta Mental Health Board,*
- (D) the board of an approved hospital under the Hospitals Act, or*
- (E) the operator of a nursing home,*

(ii) established by or under another enactment of Alberta, or

(iii) designated by an order of the Minister of Health and Wellness as a quality assurance committee for the purposes of this section,

but does not include a committee whose purpose, under legislation governing a profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation;

[para 16] Section 9(1)(a) of the AEA further defines a quality assurance activity as follows:

9(1) In this section,

(a) “quality assurance activity” means a planned or systematic activity the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of

(i) the quality of health care or health services, or

(ii) the level of skill, knowledge and competence of health service providers;

[para 17] In this inquiry, I accept that the Sturgeon Community Hospital Executive Steering Team Quality Assurance Committee (the “Committee”) has custody of the record at issue. After a review of a copy of the “Quality Assurance Committee Request for Appointment” which confirms the designation by Capital Health of the Committee as

a quality assurance committee pursuant to section 9 of the AEA and, after a review of the attached terms of reference, I find that this Committee is a quality assurance committee under section 9 of the AEA. I therefore find that the Committee is not a custodian pursuant to section 1(1)(f)(viii) of the HIA. In this regard, I note that although the Committee is part of Capital Health, section 1(1)(f)(viii) clearly states that the Committee is not a custodian. Therefore, the HIA does not apply to this Committee. I also accept Capital Health's affidavit which indicates that the record was not distributed outside of this Committee.

[para 18] The Applicant questioned whether the Committee is in fact a quality assurance committee engaged in a quality assurance activity as defined in sections 9(1)(a) and 9(1)(b) of the AEA. The Applicant states that there was nothing systematic or planned in regard to the Committee's response to her concerns and that the Committee did not undertake a review for 5-6 months after the incident and did not follow-up for 1-2 months. Furthermore, the Applicant states that when she met with the Vice President and Chief Operating Officer as well as with the Regional Program Clinical Director of Women's Health Program in November 2006, neither of these individuals were aware of the findings, outcomes, recommendations and/or actions that resulted from the Applicant's letter of concern.

[para 19] The Applicant also questioned the underlying intent of the Committee. In support, the Applicant referred to a Quality Assurance Committees Information Package. The Applicant states that this information package states that the Committee's purposes are to protect information and to operate without concern of liability or concern of disclosing information in proceedings. The Applicant states that the requirement under section 9(1)(a) of the AEA to continually improve the quality of health care or health services and/or level of skill, knowledge and competence of health services providers was not mentioned. In addition, the Applicant states that this document does not mention methods or procedures that the Committee is to use to ensure that the causes of an adverse medical event are determined, how recommendations from investigations are to be implemented or how findings are to be communicated in the interest of prevention. The Applicant also referred to the Regional Terms of Reference template and states that the roles and responsibilities listed in that template have not been met for the incident in this inquiry.

[para 20] I have reviewed the Quality Assurance Committees Information Package referred to by the Applicant. This package consists of a number of documents including terms of reference and a set of guidelines. In these documents, reference is made to the purpose of a quality assurance committee as one of improvement of health care and/or health services and an increase in the level of skill knowledge and competence of health providers. Although the set of guidelines refer to the need to protect quality assurance information from disclosure, it also clearly states that such an activity must meet the definition of quality assurance and must be carried out by a committee that has quality assurance as its primary purpose. Furthermore, I find that the documents address the investigation and implementation of recommendations as part of the "Roles and Responsibilities" portion of the terms of reference. Although this document does not go

into further detail that the Applicant believes is warranted, I do not find that this, in and of itself, is sufficient to conclude that this Committee does not fulfill the requirements of a quality assurance committee as defined in section 9 of the AEA. Similarly, I do not find that the Applicant's arguments regarding the Committee's fulfillment or lack of fulfillment of its roles and responsibilities is sufficient to conclude that the Committee was not a quality assurance committee.

[para 21] The Applicant also states that there has been no unbiased determination that the record is a quality assurance document. I do not, however, agree that this is a relevant consideration under section 88 of the HIA. As previously mentioned, section 7(1) of the HIA states that an individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian, while, section 73(1) of the HIA further states that 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. I have found that the record is in the custody or under the control of the Committee. I have further found that the Committee is a quality assurance committee as defined in section 1(1)(f)(viii) of HIA and, therefore, although part of Capital Health, the Committee is not a custodian. Therefore, the HIA does not apply. Since the HIA does not apply, section 88 does not apply. Therefore, I do not have authority to compel the record at issue.

B. Does section 9 of the AEA prevail over the HIA under section 4 of the HIA (paramountcy)?

[para 22] As I have found that the HIA does not apply, I do not have to address this issue.

IV. ORDER

[para 23] I make the following order under section 80 of the HIA.

[para 24] I find that I do not have the authority to compel Capital Health to provide me with a copy of the record at issue pursuant to section 88 of the HIA.

Frank Work, Q.C.
Information and Privacy Commissioner