ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2010-002

July 30, 2010

DR. FINOLA FOGARTY

Case File Number H2408

Office URL: www.oipc.ab.ca

Summary: The Applicant asked the Custodian to correct or amend her health information under section 13(1) of the *Health Information Act* (the "Act"). An employee of the Custodian sent a letter saying that the Custodian would be consulting with her lawyer prior to responding to the Applicant's request. The Applicant received no further response.

The Adjudicator found that the Custodian failed to fulfill her duty to respond to the Applicant within 30 days, as required by section 13(2) of the Act, or within any extended period, as contemplated by section 15(1). Under section 13(7) of the Act, the Custodian's failure to respond to the Applicant was deemed to be a refusal to correct or amend her health information. During the inquiry, the Custodian also expressly indicated that she was refusing the Applicant's correction/amendment requests.

The Adjudicator found that the Custodian properly refused to make most of the corrections and amendments requested by the Applicant. Although the Applicant established that certain facts were true, the Adjudicator found that, except in one instance, there were no errors or omissions, in relation to those facts, in records in the custody or under the control of the Custodian. Rather, the proven facts were already contained in records of the Custodian, the Applicant wanted alleged errors to be corrected in records of third parties, she pointed to alleged errors expressed verbally by the Custodian (which cannot be corrected or amended as they are not recorded), or the particular correction/amendment request set out no alleged error or omission at all. The

Adjudicator accordingly confirmed the decision of the Custodian not to correct or amend the Applicant's health information in these respects.

However, the Adjudicator found that the Applicant established an error or omission in her health information in one record of the Custodian. As the Custodian did not show that she properly exercised her discretion to refuse to correct or amend the information, the Adjudicator ordered the Custodian to correct or amend it by adding a notation to the particular record.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(k)(i), 1(1)(i), 1(1)(i)(ii), 1(1)(m)(i), 2(e), 2(g), 3(a), 3(b), 10(a), 13, 13(1), 13(2), 13(5), 13(6)(a), 13(6)(b), 13(7), 14(1), 15, 15(1), 15(1)(a), 15(2), 73(1), 80, 80(3)(d) and 80(4); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 65(1) and 72(3)(d).

Authorities Cited: AB: Orders 97-002, 97-020, F2009-001, H2004-004, H2005-006 and H2005-007.

I. BACKGROUND

[para 1] In a letter dated December 8, 2008, the Applicant asked her former psychiatrist, Dr. Finola Fogarty (the "Custodian"), to correct or amend some of the Applicant's health information under the *Health Information Act* (the "Act" or "HIA").

[para 2] In a letter dated December 30, 2008, the Custodian's administrative assistant advised the Applicant that the Custodian would be consulting with her lawyer prior to responding to the Applicant's letter of December 8, 2008.

[para 3] By letter dated January 9, 2009, the Applicant asked the Commissioner to review the Custodian's refusal to either correct or amend her health information, or to extend the time for responding to her correction/amendment request.

[para 4] The Commissioner authorized a portfolio officer to investigate and attempt to settle the matter. This was not successful, and the Applicant requested an inquiry by letter dated March 4, 2009. A written inquiry was set down.

II. INFORMATION AT ISSUE

[para 5] The information at issue consists of the Applicant's health information that she wants to have corrected or amended in records that she has submitted in this inquiry. This information and the records in which it is found are described in this Order in the course of the discussion.

III. ISSUES

[para 6] The Notice of Inquiry, issued March 12, 2010, set out the following issue, which I have rephrased so that it also refers to the "amendment" of information, and uses the proper term "health information" (as opposed to "personal health information"):

> Did the Custodian respond to the Applicant's request for correction or amendment of her health information in accordance with sections 13, 14(1) and 15 of the Act?

[para 7] In this Order, I will first discuss whether the Custodian fulfilled her duty to respond to the Applicant's request for correction or amendment of her health information (her "correction/amendment request"), and then discuss whether the Custodian properly refused to make each of the specific corrections/amendments requested. I have framed the second part of the discussion as follows:

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

[para 8] In the course of the inquiry, I asked the Applicant to point to the specific locations of the alleged errors or omissions that she believed to exist in her health information. My letter and the Applicant's response of July 14, 2010 were both copied to the Custodian.

[para 9] In her response, the Applicant raised other alleged errors or omissions not initially set out in her letter of December 8, 2008 to the Custodian. As it is only the correction/amendment requests set out in the Applicant's letter of December 8, 2008 that are the subject of the review that has proceeded to this inquiry, I have jurisdiction to address only those particular requests. I will therefore not discuss any of the additional correction/amendment requests set out in the Applicant's submission of July 14, 2010, such as those relating to alleged errors regarding the Applicant's diagnoses, and those relating to alleged omissions as to what the Custodian told the Applicant during their counseling sessions. Finally, I have no jurisdiction to address various other matters raised by the Applicant in her submissions, as they are not related to the application of the *Health Information Act*.

IV. DISCUSSION OF ISSUES

A. Did the Custodian respond to the Applicant's request for correction or amendment of her health information in accordance with sections 13, 14(1) and 15 of the Act?

[para 10] The relevant parts of sections 13, 14(1) and 15 of the Act read as follows:

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

(2) Within 30 days after receiving a request under subsection (1) or within any extended period under section 15, the custodian must decide whether it will make or refuse to make the correction or amendment.

(3) If the custodian agrees to make the correction or amendment, the custodian must within the 30-day period or any extended period referred to in subsection (2)

> *(a) make the correction or amendment,*
>
> *(b) give written notice to the applicant that the correction or amendment has been made, and*
>
> *(c) notify any person to whom that information has been disclosed during the one-year period before the correction or amendment was requested that the correction or amendment has been made.*

(4) The custodian is not required to provide the notification referred to in subsection (3)(c) where

> *(a) the custodian agrees to make the correction or amendment but believes that the applicant will not be harmed if the notification under subsection (3)(c) is not provided, and*
>
> *(b) the applicant agrees.*

(5) If the custodian refuses to make the correction or amendment, the custodian must within the 30-day period or any extended period referred to in subsection (2) give written notice to the applicant that the custodian refuses to make the correction or amendment and of the reasons for the refusal.

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

> *(a) a professional opinion or observation made by a health services provider about the applicant, or*
>
> *(b) a record that was not originally created by that custodian.*

(7) The failure of the custodian to respond to a request in accordance with this section within the 30-day period or any extended period referred to in subsection (2) is to be treated as a decision to refuse to make the correction or amendment.

14(1) Where a custodian refuses to make a correction or amendment under section 13, the custodian must tell the applicant that the applicant may elect to do either of the following, but may not elect both:

(a) ask for a review of the custodian's decision by the Commissioner;

(b) submit a statement of disagreement setting out in 500 words or less the requested correction or amendment and the applicant's reasons for disagreeing with the decision of the custodian.

…

15(1) The custodian may extend the time for responding to a request under section 8(1) or 13(1) for an additional period of up to 30 days or, with the Commissioner's permission, for a longer period if

(a) the request does not give enough detail to enable the custodian to identify the record that is requested or to be corrected or amended,

(b) a large number of records are involved in the request and responding within the period set out in section 12(1) or 13(2), as the case may be, would unreasonably interfere with the operations of the custodian, or

(c) more time is needed to consult with another custodian before deciding whether to grant access to a record or to make the correction or amendment requested.

(2) If the time is extended under subsection (1), the custodian must tell the applicant

(a) the reason for the extension,

(b) when a response can be expected, and

(c) that the applicant may make a complaint to the Commissioner about the extension.

…

[para 11] In her letter of December 8, 2008, the Applicant asked the Custodian to correct or amend her health information under section 13(1) of the Act. In a letter dated December 30, 2008, an employee of the Custodian advised the Applicant that the Custodian would be consulting with her lawyer prior to responding to the Applicant's request. The Applicant received no further response.

[para 12] On receipt of a correction/amendment request, a custodian has a duty to respond within 30 days under section 13(2) of the Act, or to properly extend the time for responding under section 15(1). The letter written on behalf of the Custodian was not a decision of the Custodian, under section 13(2), to make or refuse to make the corrections and amendments requested by the Applicant. It was also not an extension of the time for responding to the request under section 15(1), as the Custodian did not tell the Applicant

when a response could be expected, or tell her any of the other things required under section 15(2).

[para 13] I accordingly find that the Custodian did not respond to the Applicant's request for correction or amendment of her health information in accordance with sections 13(2) or 15(1) of the Act.

[para 14] Because the Custodian failed to respond to the Applicant's request within 30 days or any extended period, her failure is to be treated, under section 13(7) of the Act, as a decision to refuse to make the corrections or amendments. Through her submissions in this inquiry, the Custodian has now also expressly indicated that she refuses to correct or amend the Applicant's health information. Because of this, it is pointless for me to order her to comply with her duty, under section 13(2), to decide whether to make or refuse to make the requested corrections or amendments.

[para 15] If a custodian refuses to make a requested correction or amendment, section 13(5) of the Act requires the custodian to give written notice to the applicant that the custodian refuses to make the correction or amendment and written notice of the reasons for the refusal. Once the Custodian decided not to make the requested corrections or amendments, as she has now done, she should have notified the Applicant of the decision and the reasons. I realize that she has done so indirectly, by way of her submissions in this inquiry, but she should have notified the Applicant *directly* (see Order F2009-001 at para. 25, discussing a public body's duty to provide certain information to an applicant directly, as part of the duty to assist under section 10(1) of the *Freedom of Information and Protection of Privacy Act*). I also note that section 13(5) contemplates written notice to applicants within 30 days or any extended period; however, custodians are not relieved of their duty under that section as a result of their own delay.

[para 16] I accordingly find that the Custodian did not respond to the Applicant's request for correction or amendment of her health information in accordance with section 13(5) of Act. However, it is not appropriate, in the circumstances of this case, for me to order her to comply with the section. This is because I decide below whether she properly refused to make the requested corrections/amendments. It would not make sense for me to order the Custodian to convey her decision and reasons to the Applicant directly, at the conclusion of this inquiry, when I have already reviewed the decision and reasons. For instance, to the extent that I conclude that the Custodian improperly refused to correct or amend the Applicant's health information, it would be nonsensical for her to convey, directly to the Applicant, her initial improper decision. (If, on the other hand, the Applicant had elected to submit a statement of disagreement to the Custodian, as I am about to discuss, I would not have gone on to review the Custodian's refusal to correct or amend the Applicant's health information, and the Custodian's refusal would accordingly have "stood". In such a case, I would have ordered the Custodian to convey her decision and reasons, in response to the correction/amendment request, directly to the Applicant.)

[para 17] Section 14(1) of the Act requires a custodian who has refused to make a requested correction or amendment to tell an applicant that he or she may elect to ask for

a review of the custodian's decision by the Commissioner, or submit a statement of disagreement to the custodian, but that he or she may not elect both. Because the Custodian failed to advise the Applicant of this option, I find that she failed to comply with section 14(1). The Custodian argues that no harm has come because the Applicant was already aware of her rights under the Act. However, custodians are required to meet their duties under the Act, regardless of a particular individual's knowledge of the Act. The point of the duty under section 14(1) is to *ensure* that all individuals are aware of their option following a custodian's refusal to correct or amend their health information. (Moreover, the Applicant's submission of July 14, 2010 tells me that she was, in fact, *not* aware of the foregoing.)

[para 18] I considered ordering the Custodian to comply with her duty under section 14(1), but found it more expedient to advise the Applicant of her option myself. This was to confirm, while the inquiry was already and still underway, that the Applicant wished to proceed with a review of the Custodian's refusal to correct or amend her health information, and not merely a review of the Custodian's failure to respond. In her submission of July 14, 2010, the Applicant wrote that she was "uncertain" of her two choices. However, she effectively indicated that she wanted a review, and she proceeded to make further submissions to me regarding the Custodian's refusal to correct or amend her health information.

[para 19] My decisions not to order the Custodian to comply with her duties under sections 13(2), 13(5) and 14(1) of the Act, for the various reasons stated, are not meant to diminish the seriousness of her failures to comply with her duties. Although custodians are not necessarily required to correct or amend an individual's health information, the purpose of the Act, as expressly set out in section 2(e), is "to provide individuals with a right to request correction or amendment of health information about themselves". The intent is to enable individuals to ask for their health information to be corrected or amended, and to obtain a response, accompanying reasons and information about further recourse in a timely fashion. In failing to comply with her duties, the Custodian completely disregarded the Applicant's rights as well as flouted the Act.

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

[para 20] Section 13 of the Act is reproduced above. It permits a custodian to refuse to correct or amend information that has been requested to be corrected or amended by an applicant. In Order H2005-006 (at paras. 41 and 42), the Commissioner set out the relevant principles, steps in the analysis and applicable burdens of proof as follows:

> I will use a two step process to address the issues in the case before me. First, I will consider whether any of the information at issue consists of a professional opinion or observation under section 13(6)(a) of HIA. If the information is a professional opinion or observation, that information is not subject to correction or amendment, as a custodian can refuse to make a correction or amendment under section 13(6)(a) of HIA regardless of

whether there is an error or omission. The burden of proof under section 13(6)(a) of HIA is to show that the information consists of a professional opinion or observation.

Second, with respect to the information that is not professional opinion or observation, I will consider whether there are errors or omissions under section 13(1) of HIA. If the information contains an error or omission of fact that information may be subject to correction or amendment. Therefore, a custodian must justify a decision to refuse to make a correction or amendment under section 13(1) of HIA. The burden of proof under section 13(1) of HIA is to show that the information contains an error or omission. A custodian must properly exercise discretion when refusing to correct or amend health information.

[para 21] It is the Custodian who has the burden of proving that the information at issue consists of a professional opinion or observation (Order H2004-004 at para. 21). If it does not consist of a professional opinion or observation, it is the Applicant who has the burden of proving that there is an error or omission in her health information (Order H2004-004 at para. 12). If there is an error or omission in the Applicant's health information, it is the Custodian who has the burden of proving that she properly exercised her discretion when refusing to correct or amend the information (Order H2005-006 at para. 42).

[para 22] In her letter of December 8, 2008, the Applicant made various requests to correct or amend her health information. I will review them in sequence.

1. Information about who ended the Applicant's counseling

[para 23] In her correction/amendment request of December 8, 2008, the Applicant wrote to the Custodian as follows:

You have stated verbally and in writing, that it is you who ended counselling with me. Under Alberta's Health Information Act, I would like this information to be corrected or amended to reflect my position.

The Applicant's position is that she is the one who ended the counseling relationship with the Custodian.

[para 24] A custodian cannot make a correction or amendment to information that has only been "stated verbally", as the information is not recorded. Above, however, the Applicant says that the information that she wants to have corrected is also "in writing".

(a) Is the information a professional opinion or observation?

[para 25] Under section 13(6)(a) of the Act, the Custodian may refuse to make a correction or amendment that has been requested by the Applicant in respect of a

professional opinion or observation made by the Custodian, as a health services provider, about the Applicant. This is because a record is not "incorrect" or "in error" if it is an accurate reflection of the views, opinions or observations of the individuals whose impressions are recorded (Order H2004-004 at para. 20). A professional opinion or observation does not go to the truth of its contents, but rather to the impressions, perceptions, views and understandings of the author (Order H2005-006 at para. 64).

[para 26] In Order H2005-006 (at paras. 47 and 48), the Commissioner explained a professional opinion or observation as follows:

> I have previously said that "professional" means of or relating to or belonging to a profession and "opinion" means a belief or assessment based on grounds short of proof, a view held as probable. "Observation" means a comment based on something one has seen, heard, or noticed, and the action or process of closely observing or monitoring (Order H2004-004, para 19). The opinion or observation is that of the author or the writer of the information at issue.
>
> Opinions and observations are subjective in nature. Opinions, even those based on the same set of facts, can differ. […]

[para 27] As to which of the parties ended the counseling, I find that this is not a professional opinion or observation of the Custodian. It has nothing to do with the Custodian's professional views or expertise, and it is not subjective in nature. Rather, it is information that can be determined objectively and is therefore a fact, or a "thing that is known to have occurred, to exist, or to be true; an item of verified information" (Order 97-002 at paras. 42 and 43; Order H2005-006 at para. 76).

[para 28] As section 13(6)(a) does not apply to the Applicant's particular correction/amendment request above, it is possible for the information to be subject to correction or amendment. In order for it to be, two requirements must be met in that (1) there must be health information about the Applicant, and (2) there must be an error or omission in the Applicant's health information (Order H2004-004 at para. 8).

(b) Is the information the Applicant's health information?

[para 29] Under section 1(1)(k)(i), "health information" means, among other things, "diagnostic, treatment and care information." Under sections 1(1)(i)(ii), "diagnostic, treatment and care information" means, among other things, information about a health service provided to an individual. Under section 1(1)(m)(i), "health service" means, among other things, a service funded or partially funded by Alberta Health and Wellness that is provided to an individual for the purpose of protecting, promoting or maintaining mental health, or diagnosing and treating illness.

[para 30] The counseling provided by the Custodian to the Applicant was for the purpose of protecting, promoting or maintaining the Applicant's mental health, and

diagnosing and treating her illness. Because the Custodian is a psychiatrist, I presume that the counseling was funded or partially funded by Alberta Health and Wellness (neither party suggests otherwise). The counseling was therefore a "health service". Finally, I find that the fact regarding which party ended the counseling is "about" that health service, and is therefore the Applicant's "health information".

(c) Is there an error or omission?

[para 31] As to whether there is an error or omission regarding who ended the counseling, the Applicant submits that she and the Custodian had an exchange at their last counseling session on March 1, 2006, during which the Custodian accused the Applicant of threatening her and the Applicant then said "I don't know if I'll be able to come back here again". The fact that the Applicant said something to that effect is confirmed on the last page of the Custodian's notes of March 1, 2006, where the Custodian wrote that the Applicant said "I'm done and not sure I'll come back". The Applicant later described the exchange that she had with the Custodian to a representative of the College of Physicians and Surgeons of Alberta (the "CPSA") in a letter complaining to the CPSA about the Custodian, dated March 21, 2006. Further, in a letter of March 15, 2006 to the Custodian, the Applicant wrote: "I have elected not to have further discussion with you about this matter, nor to ask for a referral." The Applicant characterizes this as her "letter of termination".

[para 32] The Applicant also provided a copy of a letter dated October 12, 2006 from the Custodian to a third party. In it, the Custodian wrote: "She [the Applicant] terminated care here when I advised a referral to [particular] therapy…". I take the Custodian's statement to be an indication that the Custodian considers the Applicant to have terminated the relationship. I therefore find, as a fact, that the Applicant ended the counseling.

[para 33] An error is "a mistake, or something wrong or incorrect"; an omission means that "something is missing, left out or overlooked" (Order H2004-004 at para. 10). Here, I find that there is no omission in the Applicant's health information, as the Applicant's letter of March 15, 2006 to the Custodian already reflects that the Applicant ended the counseling. Further, the Custodian's notes of March 1, 2006 reflect the fact that it was the Applicant, not the Custodian, who was considering terminating the counseling relationship. Finally, the Custodian's letter of October 12, 2006 reflects the fact that the Applicant is the one who terminated care.

[para 34] As to whether there is an error about who ended counseling elsewhere in the Applicant's file, the Applicant did not indicate, in her correction/amendment request of December 8, 2008, where such an error appears. Unless it is obvious or readily ascertainable, an applicant should usually indicate the location of an alleged error in his or her health information or, in the case of an omission, the location of where the missing information should be included. At the same time, where an applicant does not give enough detail to enable a custodian to identify the record that is be corrected or amended, the custodian should seek clarification as part of the duty

to make every reasonable effort to assist the applicant under section 10(a) of the Act. This is expressly contemplated under section 15(1)(a), insofar as an extension of the time limit for responding to a correction/amendment request is required in order to obtain that clarification.

[para 35] The Custodian did not initially respond at all to the Applicant's correction/amendment request, and so did not seek clarification as to where the alleged error appears regarding who ended counselling. I considered ordering the Custodian to seek that clarification, but did so myself in the course of the inquiry, for the sake of expedience. In her response of July 14, 2010, the Applicant wrote:

> *I am not aware of any notes in my patient file that contain incorrect statements about who ended counselling. But it is clear that the Custodian subsequently referred in her letter to my lawyer [name] (and perhaps to other sources as well), that I terminated care with her because she advised [a particular referral].*
>
> *Furthermore, CPSA advised me during their investigation of her that the Custodian told them she wished to end counselling with me. CPSA subsequently advised me of this and the fact that they had grave concerns with the method she seemed to have chosen to do so – by accusing me of threatening her.*

[para 36] The Applicant submitted a copy of the above-mentioned letter from the Custodian to the Applicant's lawyer. However, as noted by the Applicant, it states that it was the Applicant who terminated care, so I find that there is no error to be corrected. To the extent that the Applicant is disputing the reason that she terminated the counseling relationship, this is not what she asked to have corrected or amended in her request of December 8, 2008 to the Custodian. I therefore find that the Custodian is not required to correct or amend her statement in that regard.

[para 37] As for what the Custodian "told" the CPSA, I take this to be a reference to a verbal statement, which cannot be corrected or amended under the Act. If it is a reference to a written statement, I found no statement of the Custodian to the CPSA about who ended counseling among the records submitted by the parties.

[para 38] I do note, under Tab 6 of the Custodian's initial submission (erroneously cited as Tab 5 in the text of the submission), a letter dated July 20, 2006, in which a third party says that he "became aware that Dr. Fogarty did not wish to be her [the Applicant's] counsellor". To the extent that the Applicant wants this statement to be corrected or amended, the Custodian is not required to correct or amend it. The letter is addressed to another third party, and was not copied to the Custodian, so I presume that the letter is not in the Applicant's file held by the Custodian. Under section 13(1) of the Act, the Applicant may ask the Custodian to correct or amend information only where the information is in the custody or under the control of the Custodian. I find that the

Custodian does not have custody or control of the July 20, 2006 letter and therefore has no obligation to consider correcting or amending it.

(d) Conclusion

[para 39] I conclude that the Custodian properly refused to correct or amend the Applicant's health information with respect to who ended counseling. The Applicant has established that she is the one who ended the counseling, but that fact is already reflected in the health information that is in the custody or under the control of the Custodian. There is no error or omission to be corrected or amended.

2. Incidents involving the Applicant and her ex-partner

[para 40] In her correction/amendment request of December 8, 2008, the Applicant wrote to the Custodian as follows:

> *In your patient notes of our sessions you stated that I assaulted my ex-partner and that these actions precipitated his assaults on me. I wish these statements to be corrected or amended to reflect what I actually told you.*
>
> *I told you that I defended myself from this man's physical assaults. I told you that after his first physical attack on me – just two weeks after we met – I tried to end my relationship with him. I told you that he persuaded me to believe he was not a violent man. I told you that after I agreed to continue our relationship, he became very violent and eventually inflicted lifetime physical, emotional, and psychological injuries. I told you that he was criminally convicted for Assault Causing Bodily Harm. I told you I subsequently learned that he had a history of physical violence toward his intimate partners.*
>
> *Any statements written in your patient notes contradicting the above, I ask to be corrected or amended. Any statements made by you, or written by you, that contradict the above, I wish to be corrected or amended. I wish this to be carried out with extreme care and attention.*

[para 41] I will review the above correction/amendment request according to the principles, steps and burdens of proof set out in the preceding part of this Order.

(a) Is the information a professional opinion or observation?

[para 42] As to whether the Applicant assaulted her ex-partner and her actions precipitated the assaults on her, or, by contrast, she defended herself from her ex-partner's assaults, I find that this is not a professional opinion or observation of the Custodian. It has nothing to do with the Custodian's professional views or expertise, and it is not subjective in nature. Rather, it is information that can – where evidence is

available – be determined objectively and is therefore a fact. For instance, either the Applicant assaulted her ex-partner, or she did not. Either the Applicant's ex-partner assaulted her, or he did not.

(b) Is the information the Applicant's health information?

[para 43] Under section 1(1)(k)(i), "health information" means, among other things, "diagnostic, treatment and care information." Under sections 1(1)(i), "diagnostic, treatment and care information" includes "any other information about an individual that is collected when a health service is provided to the individual". In the copy of the Custodian's notes submitted by the Applicant, I see various references to assaults, violence and events involving the Applicant and her ex-partner. Because the information held by the Custodian about incidents involving the Applicant and her ex-partner was collected when the Applicant obtained a health service, it is the Applicant's health information.

(c) Is there an error or omission?

[para 44] In the Applicant's correction/amendment request reproduced above, she wants the Custodian's records to reflect what she actually "told" her about the assaults and other interactions with her ex-partner. In her submissions, she further states:

> *I am requesting that the patient records written by Dr. Fogarty be reviewed by the Commissioner. If the records diverge from the statements I know I made (or from statements that I know I did not make to her as I have described them here), since I am aware of her capacity to shape them to her own singular intentions (for whatever reasons I cannot fully comprehend), then I merely wish them to be amended to reflect what I know I said.*

[para 45] I am not in a position to determine whether the Applicant's health information reflects what she knows herself to have said to the Custodian. As in Order H2005-007 (at para. 56), there is no way for me to factually ascertain precisely what the Applicant told the Custodian during her counseling sessions, or to determine whether most of the events described by the Applicant occurred or did not occur.

[para 46] However, I find that I am in a position to determine whether certain of the information set out in the Applicant's correction/amendment request above is true or not true. Here, I am making a distinction between statements about what the Applicant said at her counseling sessions and statements of the Custodian about what occurred in the past (i.e., where the statement is not attributed to the Applicant but is instead a "bare" statement of what occurred). I am referring specifically to information about whether the Applicant assaulted her ex-partner, and whether her ex-partner assaulted her. Having said this, I am limited – given the evidence before me – to determining whether the Applicant or her ex-partner was *convicted* of assaulting the other. I have no way of

determining whether either of them assaulted the other in circumstances that did not lead to any charges or trial.

[para 47] The Custodian submitted a copy of a decision of the Law Enforcement Review Board, in which it is stated that police responded to two incidents involving the Applicant and her ex-partner. The first occurred in May 1999 and resulted in no charges being laid against the Applicant or her ex-partner. The second occurred in October 2000 and resulted in charges of assault being laid against both the Applicant and her ex-partner. The decision states that the Applicant's ex-partner was convicted, but that the charges against the Applicant were dismissed.

[para 48] The Applicant submitted a copy of a decision of the Criminal Injuries Review Board, in which the incident of October 2000 is also described. The decision states that the Applicant's ex-partner was charged and convicted.

[para 49] I see that records of the Custodian refer to other incidents involving the Applicant, her ex-partner and police at different times, but I take the October 2000 incident to be the only one where a charge of assault was laid against the Applicant. This is the incident that she describes in her submissions, and neither she nor the Custodian suggests that there was another incident where she was charged with assaulting her ex-partner, or anyone else. Because the decision of the Law Enforcement Review Board states that the charge of assault against the Applicant was dismissed, I find, as a fact in this inquiry, that the Applicant was not convicted of assaulting her ex-partner. On the basis of the decision of the Law Enforcement Review Board, as well as the decision of the Criminal Injuries Review Board, I also find, as a fact in this inquiry, that the Applicant's ex-partner was convicted of assaulting her.

[para 50] I note that, in Order H2005-006, the Commissioner found that certain information in a custodian's records was a professional opinion or observation that the custodian could refuse to correct or amend. He found so because the "the information … consist[ed] of [the custodian's] recording of what he saw, heard or noticed during the [a]pplicant's visits to his office and consist[ed] of views or assessments based on grounds short of proof" and because "[t]he information that [the custodian] derived from the sessions with the [a]pplicant is not verifiable information" (at para. 60). In this inquiry, my findings regarding which of the Applicant and her ex-partner was convicted of assaulting the other differ from the Commissioner's conclusions in Order H2005-006 because the information here is not a professional opinion or observation; rather, it consists of facts that are verifiable, not based on grounds short of proof. My findings likewise differ from those in Order H2005-007 (at para. 56), where the Commissioner found that information was "not capable of concrete proof". Here, the Applicant has met the burden of proving that she was not convicted of assaulting her ex-partner, and that her ex-partner was convicted of assaulting her.

[para 51] At the same time, the fact that the Applicant was not convicted of assaulting her ex-partner and the fact that her ex-partner was convicted of assaulting her are the only facts that I can verify in this inquiry. As I cannot verify any of the other

events involving the Applicant and her ex-partner that she describes in her correction/amendment request, I am limited to reviewing possible errors or omissions in the Applicant's health information regarding whether the Applicant was convicted of assaulting her ex-partner, and whether the Applicant's ex-partner was convicted of assaulting her.

[para 52] In her correction/amendment request of December 8, 2008, the Applicant did not specify the records that she wanted to have corrected or amended regarding who assaulted whom. I therefore asked her in the course of the inquiry. In her response of July 14, 2010, the Applicant pointed to a memorandum from her lawyer to her lawyer's assistant, as well as notes of another one of her counselors. These documents record verbal statements apparently made by the Custodian to the lawyer's assistant and to the Applicant's other counselor.

[para 53] Under section 13(1) of the Act, an individual may ask a custodian to correct or amend information only where the information is in the custody or under the control of the custodian. As the memorandum and notes just described are records created and held by third parties, and were not copied to the Custodian so as to suggest that she has the same records in her possession, I find that the Custodian does not have custody or control of the Applicant's health information in them. She is therefore not required to correct or amend any information in those records (even assuming that they contain errors or omissions about who was convicted of assaulting whom).

[para 54] With her submission of July 14, 2010, the Applicant did submit certain records of the Custodian. I find that one accurately reflects who was convicted of assaulting whom, but that one does not. Specifically, a letter of June 22, 2005 from the Custodian to a third party refers to the Applicant's "abusive ex-partner and his conviction for Assault Causing Bodily Harm to her". The Custodian is not required to correct or amend this letter, as there is no error or omission.

[para 55] However, in a letter of October 12, 2006 from the Custodian to a third party – which is "Schedule 1" to the Applicant's July 14, 2010 submission – the Custodian states that "a history of assault and illegal acts were revealed in her [the Applicant's] past records". Because the Applicant was once charged with assaulting her ex-partner, I find that this statement improperly suggests that she was convicted of assaulting him, which is not true. The statement contains an error or omission, in that there is "something wrong or incorrect" or "something is missing, left out or overlooked" (Order H2004-004 at para. 10). Accordingly, the statement about "a history of assault" is open to correction or amendment under section 13 of the Act. For clarity, I point out that, although the letter of October 12, 2006 was written after the relationship between the Applicant and Custodian was terminated, the statement remains the Applicant's health information, as found by me above. The information about a "history of assault" is in the context of the Custodian describing her diagnosis, treatment and care of the Applicant.

[para 56] To summarize, the Applicant requested that the Custodian correct or amend any statements written by the Custodian that contradict the Applicant's assertions

that she did not assault her ex-partner and that her ex-partner is the one who assaulted her. Insofar as the assaults are concerned, the Applicant has established that she was not convicted of assaulting her ex-partner, and she has met the burden of proving that there is an error or omission in her health information contained in the Custodian's October 12, 2006 letter, for the reasons just set out.

[para 57] As for other errors or omissions in records of the Custodian, regarding who assaulted whom, the Applicant did not specifically point to any. She indicates that she is unable to do so because she cannot decipher the vast majority of the Custodian's notes. I likewise find the Custodian's handwriting to be difficult to read in many instances. I therefore considered asking the Custodian to indicate all locations in her records pertaining to the Applicant where there exists information about or in relation to assaults, physical attacks or violence involving the Applicant and her ex-partner, and to provide a transcription of the information. However, I decided that this was not necessary, as I was able to read most of the Custodian's handwriting.

[para 58] On my review of the Custodian's notes submitted by the Applicant, I find no error or omission regarding the fact that the Applicant's ex-partner was convicted of assaulting her. That fact and details of the violence inflicted on the Applicant by her ex-partner are mentioned several times, as in the Custodian's "new patient information", and her notes of May 2, 2005, September 7, 2005, October 19, 2005 and January 17, 2006.

[para 59] I also find no error or omission in the Custodian's handwritten notes suggesting that the Applicant was convicted of assaulting her ex-partner. Where I see the word "assault" or a description of events involving the Applicant and her ex-partner, the information, although some words are illegible, does not suggest that the Applicant was convicted of assaulting her ex-partner. In fact, I see no information that even suggests that she was violent toward her ex-partner, or assaulted him in a manner short of charges, short of conviction, or otherwise.

[para 60] Given the foregoing, the only error or omission in the Applicant's health information that is in the custody or under the control of the Custodian and that is subject to possible correction or amendment under section 13 of the Act is the statement regarding the Applicant's "history of assault" in the Custodian's letter of October 12, 2006.

(d) Did the Custodian properly exercise her discretion not to correct or amend the Applicant's health information?

[para 61] Section 13(6)(b) of the Act contemplates that a custodian may refuse to make a correction or amendment that has been requested in respect of a record that was not originally created by that custodian. The letter of October 12, 2006 was created by the Custodian herself. To the extent that it incorporates information found in records of third parties, the Custodian does not submit that she relied on section 13(6)(b) to refuse to correct or amend the Applicant's health information. I therefore conclude that the section does not apply. As explained earlier, the Custodian has the burden, under section 13(2),

of justifying her decision to refuse to correct or amend the error or omission established by the Applicant and showing that she properly exercised her discretion when refusing to do so (Order H2005-006 at para. 42).

[para 62] The Custodian first submits that she was justified in refusing to correct or amend the Applicant's health information under section 13(6)(a) of the Act, on the basis that the requested corrections or amendments are in respect of a professional opinion or observation made by a health services provider about the Applicant. However, I found above that the information regarding who was convicted of assaulting whom is not a professional opinion or observation of the Custodian. For the same reasons set out earlier, I also find that the information is not the professional opinion or observation of other health service providers. Again, it is a verifiable fact.

[para 63] The Custodian also submits that she properly refused to correct or amend the Applicant's health information because "[m]edical records are evidence and must be preserved, not changed on request". For instance, she writes the following:

> *[I]n accordance with the CPSA Standards of Practice, the Custodian must ensure that patient records, including the Applicant's, are preserved and accessible for at least ten years and protected against unauthorized modification. The reason for this is simple: medical records are evidence.*
>
> *Clearly, this fact has not escaped notice by the Applicant. What she seeks, in essence, is for the Commissioner to direct that certain evidence created and maintained by the Custodian be altered so as to benefit the Applicant in her legal battles [with her ex-partner]. Such is neither the purpose of the Health Information Act or other privacy legislation, nor the duty or proper function of the Commissioner.*
>
> *Moreover, it would be wrong for the Custodian to be influenced, whether by a complaint to the CPSA or the Commissioner, or otherwise, to alter the accurate recording of her opinions and observations of the Applicant, as former patient. As the Canadian Bar Association has noted, "once medical information is recorded, it is not supposed to be destroyed or changed based on a patient's request."*

[para 64] To the extent that above arguments are meant to apply only to professional opinions and observations under section 13(6)(a), or to information that does not have an error or omission under section 13(1) – as opposed to an individual's health information more generally – I can accept them as a possible basis for exercising discretion not to correct or amend an applicant's health information in a particular case. In Order H2005-007, the Commissioner stated that the fact that a record pertains to quasi-judicial or judicial proceedings may be a factor weighing in favour of maintaining the historical integrity of the record (at para. 79). However, in that Order, the Commissioner had found that the health information that the applicant wanted to have corrected or amended was either a professional opinion or observation (at para. 62), or did not contain an error or

omission (at para. 75). Here, I have found that the information about who was convicted of assaulting whom is not a professional opinion or observation, including of other health professionals who treated the Applicant. I have also found that the statement that the Applicant has a history of assault contains an error or omission.

[para 65] If the Custodian is instead arguing that medical records can essentially never be corrected or amended because the information may be needed in the future, or is currently being used, as evidence in a proceeding, the Custodian's arguments attempt to render section 13 of the Act virtually meaningless. "Medical records" are precisely those that contain health information, the correction or amendment of which is expressly contemplated by section 13. Correction or amendment of health information under the *Health Information Act* is, to use the Custodian's words, an "authorized modification", and health information may be corrected or amended under the Act "based on a patient's request". I also note that the document of the Canadian Bar Association, submitted by the Custodian, is a document of that Association's branch in British Columbia, and that British Columbia does not have an equivalent to Alberta's *Health Information Act*. (I make no comment on whether an individual's health information may be corrected or amended in that jurisdiction under a different Act, and therefore whether the information in the document of the Canadian Bar Association, submitted by the Custodian, is accurate or not with respect to the law of British Columbia.)

[para 66] For her part, the Applicant says that she is not asking to have evidence altered to benefit her in her legal battles with her ex-partner. Rather, she says that she wants information corrected or amended in the context of her position vis-à-vis the Custodian, in order to have what she told the Custodian reflected in the records. At the same time, the Applicant admits that the Custodian's counseling notes have been requested by her ex-partner's lawyer for use in her ex-partner's defence of a legal action that she has commenced against him.

[para 67] Regardless, in my view, the fact that health information is being used in a legal or other proceeding does not necessarily militate toward exercising discretion not to correct or amend it. Under section 3(a), the Act "does not limit the information otherwise available by law to a party to legal proceedings", and under section 3(b), the Act "does not affect the power of any court or tribunal in Canada … to compel the production of documents". Therefore, even where an individual's health information has been corrected or amended by a custodian, this does not necessarily mean that the original information, if still on the record that was corrected or amended or existing elsewhere, cannot be used in a legal proceeding. A judicial or quasi-judicial body could have access to both the original and corrected/amended information in order to decide the relevance of each. Where the original information no longer exists, such as where it is ordered by the Commissioner or his delegate to be redacted, the judicial or quasi-judicial body may nonetheless be made aware of the fact and nature of the correction/amendment request. Indeed, the correction/amendment request will likely have been retained on the custodian's file.

[para 68] Further, and more importantly in my opinion, a legitimate purpose of section 13 of the Act is to grant an individual the possibility of having his or her health information corrected or amended before that information, if it indeed warrants a correction or amendment, is used in a legal proceeding to his or her potential detriment. I therefore reject the Custodian's argument that "[c]ompelling legal reasons exist to refuse the request to alter the medical records".

[para 69] The Custodian further argues that the CPSA conducted an investigation and found no basis for altering any records. I fail to see how this is relevant to this inquiry. It is the role of the Commissioner or his delegate to conduct an independent review of the Custodian's decision not to correct or amend the Applicant's health information. The CPSA was addressing matters in a different context, not reviewing the application of the *Health Information Act*.

[para 70] Finally, the Custodian submits that the relief requested by the Applicant should not be granted because the Custodian's records in relation to her "have already been, or in some cases may yet be, augmented to include the written materials prepared as part of this Inquiry and the Applicant's December 8, 2008 letter preceding it". The Custodian appears to be suggesting that no correction or amendment of health information is required because the requested corrections or amendments are already reflected in the Applicant's initial correction/amendment request and in her submissions in this inquiry. If that argument were relevant, no correction or amendment would ever have to be ordered under section 80(3)(d) of the Act, given that an order flows from what was requested in an initial correction/amendment request and what was argued during an inquiry. In short, the Custodian misunderstands the scheme for the correction or amendment of health information set out in the Act. Where an applicant, as here, requests a review of a custodian's decision not to make a correction or amendment, the possibility that the initial request and/or inquiry submissions may make their way onto the Custodian's file has no bearing whatsoever. The applicant remains entitled to an order requiring the correction or amendment of health information in a particular record, if it is warranted.

(e) Conclusion

[para 71] I conclude that the Custodian did not properly exercise her discretion when she refused to correct or amend the statement regarding the Applicant's "history of assault" in the Custodian's letter of October 12, 2006. The Custodian's arguments regarding professional observations or opinions, and regarding the preservation of medical records, do not hold in this case. Her arguments regarding the findings of the CPSA, and the possibility that the Applicant's correction/amendment request or inquiry submissions might be placed in the Custodian's file, are irrelevant.

[para 72] I point out that I am not required to return the matter back to the Custodian for consideration. Sections 2(g) and 73(1) of the Act contemplate an independent review of a decision of a custodian following an applicant's request for a correction or amendment of health information, and section 80(3)(d) grants me the authority to specify

how health information is to be corrected or amended. Under the comparable provisions of the *Freedom of Information and Protection of Privacy Act*, I may substitute my own decision when I find that a public body has improperly exercised its discretion following a correction/amendment request (Order 97-020 at paras. 112 to 114, discussing what are now sections 65(1) and 72(3)(d) of the *FOIP Act*).

[para 73] I am aware that the Applicant did not specifically identify the Custodian's letter of October 12, 2006 in her correction/amendment request of December 8, 2008. However, as explained earlier, it was the Custodian's duty to seek clarification of which specific records the Applicant wanted to have corrected or amended, which the Custodian failed to do. Now that I am aware of the October 12, 2006 letter, I may order the Applicant's health information contained in it to be corrected or amended.

[para 74] At the same time, in specifying how health information is to be corrected or amended under section 80(3)(d) of the Act, I am limited to rectifying the error or omission that I have found to be established by the Applicant. While the Applicant has alleged several errors or omissions regarding incidents between her and her ex-partner, the specific error or omission that she has shown in this inquiry is the one about who was convicted of assaulting whom. Specifically, the Applicant's ex-partner was convicted of assaulting her, and the Applicant was not convicted of assaulting her ex-partner. This is therefore the extent of the correction that I order below.

3. Statements from the Custodian to others

[para 75] In her correction/amendment request of December 8, 2008, the Applicant wrote to the Custodian as follows:

> *On [a particular date], after I filed my complaint with the College, you wrote to and telephoned my lawyer [name]. You made statements to him in writing that I ask to be corrected or amended. You spoke with [the lawyer's] assistant the same day and made statements that I wish to be corrected or amended in writing to him.*
>
> *On [a particular date], you also telephoned my counsellor [name]. You made statements about me to him that I wish to be corrected or amended in writing to him.*

[para 76] I find that the above requests are not sufficiently clear so as to require the Custodian to make any corrections or amendments. The Applicant does not set out the errors or omissions that she believes to exist in her health information. Moreover, a custodian cannot make a correction or amendment to information that is not recorded, and the Applicant refers above to statements made during telephone conversations that were not necessarily recorded.

[para 77] In the course of the inquiry, the Applicant provided some indication regarding what information she wanted to have corrected or amended in the request just

reproduced. It would appear that some of the information is the same as information that she wanted to have corrected or amended elsewhere in her request of December 8, 2008, and I may therefore have indirectly addressed part of what the Applicant intended in the above request. However, it was incumbent on the Applicant, at the time of making her correction/amendment request just reproduced, to set out the errors or omissions that she believed to exist in her health information. Where an applicant does not do so, it is not a proper request under section 13(1) of the Act.

V. ORDER

[para 78] I make this Order under section 80 of the Act.

[para 79] I find that the Custodian did not decide whether she would make or refuse to make the corrections and amendments requested by the Applicant within 30 days after receiving the Applicant's request, or within any extended period under section 15. The Custodian therefore did not comply with section 13(2) of the Act. It is unnecessary for me to order her to comply with her duty under section 13(2), as her failure to fulfill the duty has been treated under section 13(7) as a refusal to make the corrections or amendments, and the Custodian has also expressly indicated, in the course of this inquiry, that she refuses to make the requested corrections or amendments.

[para 80] I find that the Custodian did not give written notice to the Applicant that she was refusing to make the requested corrections or amendments and written notice of the reasons for the refusal. The Custodian therefore did not comply with section 13(5) of the Act. It is not appropriate for me to order her to comply with her duty under section 13(5), as the Applicant has elected a review of the Custodian's decision, which I have now done.

[para 81] I find that the Custodian, on refusing to make the requested corrections or amendments, did not tell the Applicant that she may elect to ask for a review by the Commissioner or submit a statement of disagreement to the Custodian. The Custodian therefore did not comply with section 14(1) of the Act. However, it is unnecessary for me to order her to comply with her duty under section 14(1), as I advised the Applicant of her option myself, and the Applicant elected a review.

[para 82] With the exception noted in the next paragraph of this Order, I find that the Custodian properly refused to correct or amend the Applicant's health information. Under section 80(3)(d) of the Act, I confirm the decision of the Custodian not to correct or amend the Applicant's health information, except as noted in the next paragraph.

[para 83] I find that the Custodian did not properly refuse to correct or amend a statement regarding a "history of assault" on the part of the Applicant, which health information of the Applicant is contained in the Custodian's letter of October 12, 2006 to a third party (the letter is "Schedule 1" to the Applicant's July 14, 2010 submission in this inquiry). Under section 80(3)(d), I specify that the Custodian correct or amend the Applicant's health information by placing an asterisk next to the phrase "history of

assault" on page 1 of the October 12, 2006 letter and then repeating the asterisk at the bottom of the page with the following notation, in the Custodian's handwriting or else typewritten and initialled by her:

> Note that [*insert name of Applicant here*] was not convicted of assaulting her ex-partner; rather her ex-partner was convicted of assaulting her.

[para 84] Under section 80(4) of the Act, I specify, as a term of this Order, that the Custodian provide the Applicant with a copy of the corrected/amended version of the letter of October 12, 2006.

[para 85] I further order the Custodian to notify me in writing, within 50 days of being given a copy of this Order, that she has complied with the Order.

Wade Riordan Raaflaub
Adjudicator