

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2021-12

November 10, 2021

Dr. Colin Lywood

Case File Number 006358

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to Insight Medical Imaging (Insight) for his own health information under the *Health Information Act*, RSA 2000 c H-5 (the HIA). The Applicant sought a set of x-rays taken at one of Insight's clinics.

Insight Medical Imaging is a partnership, currently consisting of 24 Radiologists, all of whom are custodians under the HIA. The Adjudicator determined that the appropriate Custodian to name as Respondent in this case was Dr. Colin Lywood (the Custodian).

The Applicant received five x-rays in response to his access request. The Applicant, who has endeavored to obtain accurate medical information about his condition for decades, believes that there are two or three more. The Applicant alleges that the Custodian, or others at Insight, withheld x-rays, cropped ones that it provided, and forged an x-ray requisition form in order to conceal the true extent of his injuries.

The Adjudicator noted that knowingly altering, falsifying, or concealing records in response to an access request are offenses under section 107(1)(a) of the HIA, which the Adjudicator did not have authority to consider at inquiry. The Adjudicator considered whether the Custodian met its duty to properly respond to the access request under section 10(a) of the HIA.

The Adjudicator confirmed that the Custodian met the duty under section 10(a).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, RSA 2000 c. F-25; *Health Information Act*, RSA 2000 c H-5, ss. 1(i)(i), 1(k)(i), 10(a), 80, 107(1)(a); *Personal Information Protection Act*, SA 2003, c P-6, ss. 1(1)(i)(iv), 4(3)(f).

Authorities Cited: AB: Order H2015-01

I. BACKGROUND

[para 1] On or around May 2, 2013, the Applicant attended Insight Medical Imaging (Insight) to obtain several x-rays. He was x-rayed by a technician, and the x-rays were subsequently reviewed and reported upon by Dr. Colin Lywood.

[para 2] On April 21, 2017, the Applicant made a request under section 8(1) of the *Health Information Act*, RSA 2000 c H-5 (the HIA) to Insight for his own health information. The request was as follows:

I am requesting copies of all lower back and pelvic x-rays taken on or about May 02, 2013.

[para 3] The Applicant made his request in writing using a form designed to request health information, and presented it to Insight in person. He was immediately provided electronic copies of five x-rays.

[para 4] The Applicant contends that he did not receive all records responsive to his access request. The Applicant recalls that at the time of the x-rays, the x-ray technician took several x-rays of his pelvis, while his hips were aligned in a particular position. The Applicant states that these images are missing from the records. Additionally, he states that none of the x-rays he received relates to the reason why he underwent the x-rays sought in his access request. He states that upon his request, his physician (the Physician) referred him for x-rays specifically to determine the location of a transverse process on his L5 vertebra¹, whereas the x-rays he received indicate that the purpose of the x-rays was in relation to his lumbar spine.

[para 5] The Applicant also alleges that several of the x-rays that were provided to him were cropped in order to conceal the location of his transverse process, which, he states, is no longer attached to his spine.

[para 6] On July 31, 2017, the Applicant filed a request for review of the response to his access request, with this office. Investigation and mediation were authorized to resolve the issues between the parties, but did not do so. The matter proceeded to inquiry.

¹ A transverse process is a boney projection off each side of a vertebra, to which various back muscles attach. <https://www.spine-health.com/glossary/transverse-process>

II. ISSUES

Issue A: Did the Respondent meet its obligations required by section 10(a) of the HIA (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

III. DISCUSSION OF ISSUES

Preliminary Matter – Access request under the HIA or the Personal Information Protection Act

[para 7] The Applicant made his request using a “Request to Access Health Information Form” that is specific to making requests for information under the HIA. However, rather than identifying a particular custodian as that term is defined in section 1(1)(f) of the HIA and section 2 of the *Health Information Regulation*, Alberta Regulation 70/2001 (the Regulations), he made the request to “Insight Medical Imaging.” Insight is a partnership of 24 Radiologists.

[para 8] As a partnership, Insight is an organization under section 1(1)(i)(iv) of the *Personal Information Protection Act*, SA 2003, c P-6 (PIPA):

(i) “organization” includes

(iv) a partnership as defined in the *Partnership Act*, and

[para 9] However, Insight’s partners, as Radiologists who are regulated members of the College of Physicians and Surgeons of Alberta, are each a custodian in their own right under section 1(1)(f)(ix) of the HIA and section 2(2)(i) of the Regulations. Those sections state:

(f) “custodian” means

(ix) a health services provider who is designated in the regulations as a custodian, or who is within a class of health services providers that is designated in the regulations for the purpose of this subclause;

* * *

(2) For the purposes of section 1(1)(f)(ix) of the Act, the following are designated as custodians:

(i) regulated members of the *College of Physicians and Surgeons of Alberta*;

[para 10] Under the circumstances, it appears that the access may be considered under PIPA, as a request for personal information made to an organization, or an access request made to a custodian, or a group of them, under the HIA. For the following reasons, I determined that the matter falls under the HIA, rather than PIPA.

[para 11] The form used by the Applicant makes it clear that he is exercising his access rights under the HIA. It is also clear that the information he is seeking is information about his physical health, which is “health information” as defined in section 1(k)(i) of the HIA in the form of “diagnostic, treatment and care information” as defined in section 1(i)(i) of the HIA. Since Insight is a partnership of custodians, the Applicant’s health information is in the custody or under the control of a custodian, and/or several of them. As such, the HIA applies to the information.

[para 12] Under section 4(3)(f) of PIPA, where the HIA applies to health information, PIPA does not:

(3) *This Act does not apply to the following:*

(f) *health information as defined in the Health Information Act to which that Act applies;*

[para 13] Since the HIA applies to the health information at the heart of this case, and the Applicant’s access request for the same, for the purposes of this Inquiry, the proper respondent custodian needs to be identified. Under the HIA and the Regulations it does not appear that the definition of “custodian” includes a partnership of custodians. While the partners of Insight are all members of a class of health services providers under section 2(2)(i) of the Regulations, they are only health services providers, and consequently custodians, as individuals. The definition of health services provider in section 1(1)(n) of the HIA, which is used in section 1(1)(f)(ix) to define custodians, states that health services providers are individuals:

(n) *“health services provider” means an individual who provides health services;*

[para 14] Since the individual custodian involved with the services provided to the Applicant which resulted in the creation of the x-rays at the heart of the access request is Dr. Lywood, I have determined that he is properly named as the respondent custodian in this inquiry.

[para 15] The response to the Applicant’s request for review, and the Custodian’s/Insight’s submissions in this Inquiry, were prepared by Insight’s VP Operations, who acts as its “custodian of health information.” For ease of reference, throughout this Order, I refer to the submissions made by Insight’s VP Operations and steps taken to respond to the Applicant’s request for health information as the Custodian’s Submissions, and steps that the Custodian took.

Preliminary Matter – FOIP does not apply

[para 16] I note that at some points in his submissions the Applicant refers to making a request under the *Freedom of Information and Protection of Privacy Act*, RSA 2000 c F-25 (FOIP). However, as discussed above, this matter falls under the HIA; accordingly, FOIP does not apply.

Issue A: Did the Respondent meet its obligations required by section 10(a) of the HIA (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

[para 17] Section 10(a) states:

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 18] In Order H2015-01, the Adjudicator described what factors a custodian's evidence should address in order to establish the adequacy of its search. She stated, at para. 9:

In general, evidence of an adequate search should include:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

Order F2007-029 at para 66

[para 19] The Custodian's submissions did not individually address the five points that evidence of an adequate search should generally cover, listed above. Often, failure to address each point will result in a finding that a search for responsive records is inadequate. However, the issues in this Inquiry revolve around whether further x-rays exist, and the veracity of those that were provided. For the reasons below, I find that the information provided in the Custodian's submissions establishes on the balance of probabilities that the Applicant was provided all responsive records and that the records are accurate.

[para 20] The Applicant's belief that there are further x-rays stems from a long history of attempts to discern irregularities in his L5 vertebra, which he says have been thwarted at every turn.² The Applicant describes the events of his ordeal, as follows.

[para 21] In 1985, the Applicant suffered catastrophic injuries due to a 70-foot fall while working. The Applicant asserts that in an effort to minimize the impact on its safety record, the Applicant's then employer asserted that the fall was only 30 to 40 feet, which was the understanding adopted by the Workers Compensation Board (WCB). He says that understanding subsequently played a role in determining the Applicant's workers' compensation benefits.

[para 22] The Applicant describes having first learned of damage to his transverse process upon reviewing an earlier x-ray with his physician in 2002. He asserts that his physician would not acknowledge the Applicant's concerns that his transverse process, and the muscles it anchored, were now bunched up on his right side. In pursuit of better treatment, the Applicant changed physicians.

[para 23] At some point, the Applicant also provided the earlier x-ray to a pain specialist and left it with her for review. He says that the earlier x-ray vanished from the pain specialist's office, and the Applicant's efforts to locate it or retrieve another copy from the original source, failed.

[para 24] Thereafter, the Applicant's pursuit of medical information about his condition was put on hold until he resumed his efforts in spring, 2013. In spring, 2013, he had the Physician refer him to the Custodian for x-rays, which he says was done specifically for the purpose of determining the location of his right side, L5, transverse process. Those x-rays are the subject of the access request.

[para 25] When the Applicant received the 2013 x-rays and the interpretation of them he discovered that everything *except* his L5 vertebra was reported upon. He states that his Physician, despite being aware of the Applicant's reason for wanting the x-rays, was "completely unfazed" by the absence of any mention of the vertebra.

[para 26] The Applicant's condition worsened again in 2018 and 2019 and he sought new x-rays from a different physician. He describes the same difficulties as with the 2013 x-rays: that physicians would not comment on his transverse process. He states that e-mails documenting these difficulties (from physicians other than the Custodian) have mysteriously vanished from his inbox, and other physicians were reluctant to treat his condition. The Applicant states that a physician at another clinic received a "chewing" for referring him for a CT scan in 2018, which resulted in evidence that his L5 vertebra and transverse process were damaged. The Applicant did not specify who delivered the "chewing."

² The precise number of x-rays that the Applicant believes were taken is uncertain. The Applicant states that he believes that Insight's x-ray technician took eight x-rays (three more than were provided) but also states that he knows beyond a doubt that there are two more x-rays.

[para 27] The Applicant says he has undergone numerous other x-rays, MRIs, and bone scans over the many years since the accident, but none of them has ever mentioned an anomaly to his L5 vertebra. The Applicant is certain that the consistent refusal to provide such information is deliberate, designed to disguise the severity of the accident, his resulting injuries, and medical malpractice. He contends that the absence of some of the 2013 x-rays from the response to the access request are part of the efforts to ensure that information confirming his injuries remains concealed.

[para 28] The Applicant also asserts that several of the x-rays that were provided were cropped, also in order to prevent information confirming his injuries from coming to light.

[para 29] With respect to the Applicant's allegations that the records provided are altered, and others were concealed, in response to the access request, strictly speaking, those allegations are not the subject of this Inquiry. Allegations of that type concern whether or not a custodian or an affiliate of a custodian has committed an offence under section 107(1)(a) of the HIA:

107(1) No custodian or affiliate of a custodian shall knowingly

(a) alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access to the record, or

[para 30] My power to dispose of issues raised in an inquiry are set out in section 80 of the HIA, and do not include authority to rule on whether an offence has been committed.

[para 31] The above is not to suggest that a custodian could meet its duty under section 10(a) of the HIA if it did alter or conceal records in response to an access request. Doing so would be a failure to make every effort to respond openly, accurately, and completely.

[para 32] Regarding the allegations that some of the x-rays provided to the Applicant were cropped, the Custodian's submissions explain that cropping is a standard practice, which involves focussing the x-ray on the part of the body under examination. Doing so minimizes radiation exposure to the patient, and the breadth of the resulting x-ray image. In the absence of any evidence from the Applicant supporting his assertion that the x-rays were cropped, I find that the explanation for why the x-rays are cropped establishes, on the balance of probabilities, that the images provided to the Applicant are accurate copies of the x-rays to which he sought access.

[para 33] The Custodian's description of how it determined that no further x-rays exist comes from a series of e-mails included in its submission.

[para 34] The Custodian reviewed its patient record and found that the Applicant attended only one of its clinics, and only one time, on May 2, 2013. The location of that clinic appears to be the same one at which the Applicant made his access request in

person as indicated by the address specified on his request to access health information form.

[para 35] In order to determine whether or not any further x-rays exist, the Custodian reviewed the requisition form completed by the Applicant's Physician when he referred the Applicant to the Custodian for the x-rays (the Requisition Form).

[para 36] The Requisition Form requests examination of the "LS Spine". An e-mail written by Insight's Diagnostic Imaging Manager, states that the purpose of the x-rays was to examine the Applicant's "L-Spine." The Custodian's submissions clarify that those terms both refer to the lumbar spine or lumbosacral spine, and are used interchangeably.

[para 37] Insight's Diagnostic Imaging Manager states that five images is the standard number of images taken for examination of the L-Spine, and notes that the technician who completed the x-rays marked on the Requisition Form that five x-rays were taken.³ A review of the Applicant's records at Insight and on Netcare, indicate that the Applicant has never had a pelvic x-ray, contrary to what the Applicant recalls.

[para 38] The Applicant states that the Requisition Form provided in the Custodian's submissions is a forgery, designed to conceal the extent of his injuries, and as such does not truthfully indicate how many x-rays were taken. The Applicant bases this conclusion on three points:

1. The "real" Requisition Form was for the express purpose of determining the location of his transverse process.
2. His Physician's signature is missing from the Requisition Form.
3. The original appointment date-stamp on the Requisition Form is overwritten by another date-stamp.

[para 39] The Applicant is correct that the Requisition Form is not signed by his Physician, and the appointment date-stamp is overwritten by a second stamp. The stamp on top is clear, and indicates the date of the appointment is May 2, 2013. A partial stamp is visible beneath it. While I cannot make out the month indicated by the partial stamp, it appears to indicate an appointment booking for the 24th day of some month in the year 2013.

[para 40] The Custodian's submission states that the reason why the date-stamp is overwritten, is unknown. It suggests that the initial date-stamp may have been incorrect, and was corrected by placing a second stamp over it.

³ The notation on the Requisition Form is illegible. At my request, the Custodian provided an explanation of the notation from the technician who made it. It consists of three characters. The first two are the technician's initials. The last one is the number "5", reflecting how many images were taken.

[para 41] The Custodian's submissions do not comment on the absence of a signature from the Applicant's Physician. The Custodian's submissions do highlight areas of the Requisition that were completed by the Physician, which includes the specification of what x-rays were ordered.

[para 42] In the course of the inquiry, I requested that the Applicant provide a statement from his Physician describing what x-rays he ordered on the Requisition Form. The Applicant refused to provide such a statement, explaining that he has no reason to believe that his Physician will aid him with acquiring the x-rays. Accordingly, I am left with the Applicant's mere assertion that the Requisition Form provided in the Custodian's submissions does not reflect the "true" purpose why the x-rays were ordered. I note that, as stated in the Custodian's submissions, the x-rays that were provided appear to show the area where the spine meets the pelvis and includes the L5 vertebra. As such, it seems to me that the x-rays would reveal, to someone trained to interpret them, any damage to those areas.

[para 43] I also asked the Applicant to provide a statement from his Physician indicating how many, if any, x-rays he received when he referred the Applicant for the x-rays at the heart of this case. The Applicant did not provide such a statement.

[para 44] While the Applicant has indicated several places where it can fairly be said that the Requisition Form could have been filled out in a more complete manner, I do not find that the evidence establishes on balance of probabilities that it is a forgery, or altered. There is no evidence that his Physician ever signed the form, or that the x-rays that were ordered do not reflect the purpose for which they were ordered. The fact the appointment date-stamp is overwritten does not lend itself to a finding that the Requisition Form is a forgery. It could just as easily have happened at the time when the Requisition Form was first stamped.

[para 45] Taking all of the above into account, I find that the evidence establishes that the determination that no further records exist, was properly arrived at. The access request was specific to a particular set of x-rays, which the staff at Insight had no trouble locating. Insight's own records, as well as the Requisition Form, and its standard practice of taking 5 x-rays when the L-Spine is examined, all consistently point to the conclusion that 5 x-rays is all it had when it responded to the access request. The conclusion that no further records exist is reasonable in light of that evidence. In the absence of the information that I requested from his Physician, the Applicant's recollection that there are more x-rays does not provide a sufficient evidentiary foundation to conclude there were more in fact.

IV. ORDER

[para 46] I make this Order under section 80 of the HIA.

[para 47] I confirm that the Custodian fulfilled the duty under section 10(a) of the HIA.

John Gabriele
Adjudicator
/an