

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2022-07

June 16, 2022

DR. ELIZABETH KELLY

Case File Number 008578

Office URL: www.oipc.ab.ca

Summary: The Applicant requested his health information from Dr. Elizabeth Kelly (the Custodian). When he reviewed the information he received, he noted statements and opinions about him made by employees of the clinic at which the Custodian practices. The Applicant requested correction of the information under the *Health Information Act* (HIA).

The Custodian refused to correct the information and informed the Applicant that he had the right to seek review by the Commissioner or to submit a statement of disagreement, as required by section 14 of the HIA.

The Applicant requested review by the Commissioner of the Custodian's refusal to delete the records.

At the inquiry, the Custodian argued that the information that was the subject of the access request was not health information within the terms of the HIA. The Adjudicator agreed that the information was not health information and found that the HIA did not apply to it.

The Adjudicator recommended that the Custodian consider, in consultation with the clinic, whether the information at issue is the personal information of the Applicant or employees within the terms of PIPA, and to determine whether it is necessary to mitigate

the risk of inadvertent use or disclosure of the information under that Act, possibly by removing the information from the Applicant's health record.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 13, 14, 80; *Personal Information Protection Act*, S.A. 2003, c P-6.5

1. BACKGROUND

[para 1] The Applicant requested his health information from Dr. Elizabeth Kelly (the Custodian). When he reviewed the information he received, he noted statements and opinions about him made by employees of the clinic at which the Custodian practices. The Applicant requested correction of the information under the *Health Information Act* (HIA).

[para 2] The Custodian refused to correct the information, stating:

In your letter dated December 18, 2017, you requested that I correct or amend certain information from your health information record at my clinic (the "Request"). This letter is my reply to your request (the "Decision").

Section 13 of the *Health Information Act* provides that:

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.

Your Request concerns information entered by Ms. [...], Ms. [...], Dr. [...], and me. I refer to records created by me as the "Dr. Kelly Records" and the others as the "Residual Records".

I have decided to refuse to correct or amend the Dr. Kelly Records because they concern the clinic staff's observations or opinions about you.

I have decided to refuse to correct or amend the Residual Records because they were not originally entered by me. Further, and in the alternative, I have decided to refuse to correct or amend the Residual Records because they concern the clinic staff's observations or opinions about you.

[para 3] As required by section 14 of the HIA, The Custodian informed the Applicant that he had the right to seek review by the Commissioner or to submit a statement of disagreement.

[para 4] The Applicant requested review by the Commissioner of the Custodian's refusal to delete the records.

II. ISSUES

ISSUE A: Did the Custodian properly refuse to make the requested correction?

[para 5] Section 13 of the HIA authorizes an applicant to request that a Custodian correct the applicant's health information. It states:

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.

[para 6] Section 14 of the HIA establishes the process to be followed when a Custodian refuses to make the requested correction. It states:

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.

(2) An applicant who elects to submit a statement of disagreement must submit the statement to the custodian within 30 days after the written notice of refusal has been given to the applicant under section 13(5) or within any extended period under section 15(3).

(3) On receiving the statement of disagreement, the custodian must

(a) if reasonably practicable, attach the statement to the record that is the subject of the requested correction or amendment, and

(b) provide a copy of the statement of disagreement to any person to whom the custodian has disclosed the record in the year preceding the applicant's request for the correction or amendment.

[para 7] Section 13 of the HIA imposes a duty on a Custodian to respond to a correction request within 30 days of receiving it, but not a duty to correct health information, even if the Applicant establishes that the health information that is the subject of the request is incorrect. If the Custodian refuses to correct health information, the HIA requires it to give the Applicant a choice: to write a statement of disagreement no more than 500 words, which the Custodian will then attach to the record, or to request review by the Commissioner.

[para 8] The Custodian refused to correct the information the Applicant sought to have removed from his records and informed the Applicant of the rights to make a statement of disagreement or to request review. The Applicant elected to seek review by the Commissioner, rather than provide a statement of disagreement.

[para 9] The Custodian argues that the information at issue is the opinion of a health services provider that need not be corrected. The Custodian also argues in her submissions that the information that is the subject of the correction request is not health information. If that is so, then the information cannot be the subject of a correction request under the *Health Information Act*, as the correction provisions of the HIA apply only to health information. As the question of whether the information that is the subject of the Applicant's request is subject to the HIA is a jurisdictional question, I will address this issue first.

Is the information that is the subject of the correction request the Applicant's health information?

[para 10] In his request for review, the Applicant stated:

Dr Kelly's entry and the letter from [the employee] (Dr Kelly's affiliate) dated January 15, 2016 are the only requested modifications. [Another employee's] and prior [employee's] entries are provided for background and to establish inappropriate conduct on their behalf. [The employee] is the clinic LEAD MEDICAL OFFICE ASSISTANT and is responsible for contacting and dealing with the patients of dozens of doctors.

[para 11] The letter from the employee states:

He [the Applicant] was very rude and condescending and demanded that he would discuss this matter with Dr. Kelly and was coming in for this appointment [...]

I advised him that if he insisted on coming to this appointment then he could discuss this matter with the manager upon his arrival. I felt very intimidated and frightened by him by the way [he] spoke to me on the phone.

I have spoken with [the Applicant] on one other [occasion] before this and he was very rude to me during our conversations and I was frightened and intimidated by these previous conversations. This has been documented in his chart on Dec 8/15.

[para 12] The Applicant also took issue with a note written by the Custodian that documented a conversation with the employee who wrote the notes that are also the subject of the correction request. The Applicant highlighted a portion of a note written by the Custodian that he wanted corrected.

- Spoke with [the employee] regarding concerns over treatment from patient. Reviewed chart and prior documentation of staff members feeling intimidated and threatened by patient.

- Spoke with CPSA [...] who advised that patient be warned that additional behaviour that was considered threatening or intimidating to staff would be grounds for termination of relationship. Also advised that I may decline to accept care if I felt that there would not be a good therapeutic relationship.

- [...] When told that multiple staff members felt threatened and intimated during their conversations with him, [the Applicant] responded that "they should" because he felt that they were not doing their jobs correctly.

[...]

[The Applicant] was advised that any additional episodes of behavior that made staff feel intimidated or threatened would be grounds for termination from clinic.

The Applicant indicated in his correction request and in his submissions for the inquiry that the employees who informed the Custodian that they felt intimidated by his behavior were not being truthful. He noted in his correction request that he told the Custodian that he said that employees should feel threatened if it is pointed out that they are not doing their jobs.

[para 13] The Custodian argues:

The Information pertains to opinions and observations made by the Clinic's staff of the Applicant's behaviour, and their personal reactions to such behaviour. The Information does not fall within the definition of "diagnostic, treatment and care information". The Information does not fall within the definition of "registration information". Therefore, the Respondent submits that the Information does not fall within the definition of "health information". This reasoning is consistent with the OIPC's findings in the Review Decision.

Section 13(1) of the HIA provides that an "individual who believes there is an error or omission in the individual's health information [emphasis in original] may in writing request the custodian that has the information in its custody or under its control to correct or amend the information" [emphasis added]. As the Information is not health information, section 13(1) is not engaged, and cannot serve as a basis for the Deletion Request [...]

[para 14] The information the Applicant seeks to have removed from his file consists of opinions and reactions of employees of the clinic about phone conversations the employees had with the Applicant.

[para 15] Section 1(1)(k) of the HIA provides the following definition of "health information":

1(1) In this Act,

(k) "health information" means one or both of the following:

(i) diagnostic, treatment and care information

(ii) registration information [...]

"Diagnostic, treatment and care information" is defined by section 1(1)(i) as information about the physical and mental health of an individual, and various kinds of information associated with providing a health service to an individual:

1(1) In this Act,

(i) "diagnostic, treatment and care information" means any information about any of the following

- (i) *the physical and mental health of an individual;*
- (ii) *a health service provided to an individual, including the following information respecting a health services provider who provides a health service to that individual:*

 - (A) *name;*
 - (B) *business title;*
 - (C) *business mailing address and business electronic address;*
 - (D) *business telephone number and business facsimile number;*
 - (E) *type of health services provider;*
 - (F) *licence number or any other number assigned to the health services provider by a health professional body to identify that health services provider;*
 - (G) *profession;*
 - (H) *job classification;*
 - (I) *employer;*
 - (J) *municipality in which the health services provider's practice is located;*
 - (K) *provincial service provider identification number that is assigned to the health services provider by the Minister to identify the health services provider;*
 - (L) *any other information specified in the regulations;*
- (iii) *the donation by an individual of a body part or bodily substance, including information derived from the testing or examination of a body part or bodily substance;*
- (iv) *a drug as defined in the Pharmacy and Drug Act provided to an individual;*
- (v) *a health care aid, device, product, equipment or other item provided to an individual pursuant to a prescription or other authorization;*

(vi) the amount of any benefit paid or payable under the Alberta Health Care Insurance Act or any other amount paid or payable in respect of a health service provided to an individual,

and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record[...]

[para 16] The statements the Applicant seeks to have removed from his file are primarily about the feelings of employees of the clinic regarding telephone conversations with the Applicant. One can learn the Applicant's name from this information and his responses to the information communicated to him – that his “meet and greet” with the Custodian was cancelled. One can also learn about the employees' reactions to the conversation, and their personal views regarding his tone.

[para 17] While these statements were recorded and stored in the Applicant's health records, the statements themselves indicate that the employees voiced these concerns as a workplace issue. The statements are not about the Applicant's physical or mental health and were not made for the purpose of providing health services to the Applicant or in the course of providing health services.

[para 18] The Custodian provided the following background:

The Respondent is a physician working at the Foothills Primary Care Centre (the "Clinic"). The Applicant had a "meet-and-greet" appointment with the Respondent scheduled for January 15, 2016.

On that day, [...], who was at the time a Clinic employee, called the Applicant to inform him that his appointment with the Respondent was cancelled, and that another physician of the Clinic had agreed to take the Applicant on as a patient. The Applicant nevertheless stated that he intended to come to the Clinic to discuss matters with the Respondent.

[para 19] The employee who wrote about her conversations with the Applicant and her reaction to them is an employee of the Clinic at which the Custodian practices. The evidence before me indicates that the employee performed employment duties for the Clinic as well as for the Custodian.

[para 20] An employee of a clinic may act as the affiliate of a custodian when the employee assists the custodian to provide health services within the terms of the HIA. However, such an employee may also carry out duties on behalf of the clinic, as an organization, that do not involve, or relate to, the provision of health services as defined in the HIA. In addition, employees may also create records containing personal information about the employee as an identifiable individual, such as the circumstance when they communicate with the employer about the employment relationship.

[para 21] The statements of the employee and the Custodian do not impart any information about the Applicant's health, or about a health service he received. The

purpose of the employee's call was to provide information regarding an appointment. The purpose of the Custodian's note was to provide her reasons for not entering a doctor-patient relationship with the Applicant.

[para 22] In my view, none of the information that is the subject of the correction request constitutes the Applicant's health information within the terms of the HIA. I find that the information in the records is primarily about the employees who documented their reactions to the phone conversations they had with the Applicant. I find that the Custodian used this information both for the purpose of managing the employment relationship with the employees, and for the purpose of deciding whether to enter a doctor-patient relationship, but not to provide health services to the Applicant.

[para 23] The information that is the subject of the correction request is not about the Applicant's health or about treating his health. The Applicant is referred to as being "rude and condescending" after being informed that his appointment would be with a doctor other than the Custodian. One can also learn from the statements that the Applicant intended to come in to speak with the Custodian despite the cancellation of the "meet and greet" appointment; that the employee felt he was rude and condescending; that she had spoken with the Applicant more than once, and that she felt threatened. None of this information could be said to be the Applicant's health information, although, as discussed below, it is potentially the Applicant's personal information within the terms of the *Personal Information Protection Act*.

[para 24] Similarly, the information recorded by the Custodian conveys only the concerns of employees about the Applicant's manner and her conversation with the Applicant about those concerns. The Custodian did not take the Applicant on as a patient, and her decision not to enter the doctor-patient relationship was not made for purposes captured by section 1(1)(k) of the HIA.

[para 25] As I find that the information that is the subject of the Applicant's correction request is not the Applicant's health information, I find that the HIA does not apply to the information.

[para 26] While the foregoing finding concludes the inquiry, I believe it is appropriate to make a non-binding recommendation to the Custodian regarding the HIA and another potentially relevant statute, the *Personal Information Protection Act* (PIPA).

[para 27] The Custodian and the clinic are not one and the same in this case, and notice to one is not notice to the other. The correction request was made to the Custodian and this office opened the file solely in relation to the Custodian's response under the HIA. The clinic, which would be the organization in this case, was not identified as a respondent and the correction request was not made to it. For this reason I have not decided this case under PIPA, but considered the parties' arguments in relation to the HIA.

[para 28] The HIA does not contain provisions requiring a Custodian to remove information from health records. Nevertheless, in some cases, keeping information that is not a patient's health information with or in a patient's health records may increase the risk of the inadvertent disclosure of the information, and the potential contravention of other statutes, such as PIPA. (I infer that the information at issue in this inquiry is being kept in the Applicant's health records, as he appears to have received access to it in response to an access request under the HIA.)

[para 29] Information that is about an employee performing work duties in a representative capacity is not necessarily personal information. Information about a health services provider providing care to a patient will be the patient's health information under section 1(1)(k). However, where, as here, the information at issue is about the employee's personal views regarding workplace events, the information is potentially the personal information of the employee.

[para 30] When an individual's personal information is stored in health records, it may also be subject to inadvertent use or disclosure when the health record is viewed for the purposes of providing health services, which may not always be authorized under PIPA.

[para 31] If all the information that is the subject of the correction request remains part of the Applicant's health record, any information that is potentially personal information – whether the Applicant's or that of an employee – may be at risk of inadvertent use or disclosure whenever it is accessed or shared. This risk may be low, depending on the format in which the record is stored and how likely the record is to be accessed.

[para 32] I recommend to the Custodian that she consider, in consultation with the clinic, whether the information at issue is the personal information of the Applicant or employees within the terms of PIPA. If so, then the Custodian and the clinic should also consider whether it is necessary to mitigate the risk of inadvertent use or disclosure. If the fact that the information is located in the Applicant's health record gives rise to the possibility that the information could be used or disclosed in contravention of PIPA, then the Custodian and the clinic should consider removing the information from the Applicant's health record or even deleting it, if the information has no further use to the clinic and it is not contrary to its record retention policy to do so.

III. ORDER

[para 33] I make this Order under section 80 of the HIA.

[para 34] I confirm that the Custodian did not fail to meet duties to the Applicant under section 13 of the HIA when she refused to make the requested correction.

Teresa Cunningham
Adjudicator
/bah