

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2023-10/H2023-02**

March 15, 2023

**ALBERTA HEALTH SERVICES**

Case File Numbers 022152 and 027978

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual (the Applicant) made an access request to Alberta Health Services (AHS) for a 911 call and all video-audio and handwritten records from the initial 911 call to patient hand over at the Misericordia hospital, for a specified date.

AHS responded and provided the Applicant with a recording of the 911 call and records it located. It informed the Applicant that although ambulances are equipped with cameras in the patient compartment, there was no functionality to record audio or video.

The Applicant replied, questioning AHS' response regarding the camera functionality, and asking for a written statement from the ambulance driver as to what the driver observed in the patient compartment. AHS replied that it had received all records that responded to her access request and if the Applicant was not satisfied, she could ask this Office for a review.

The Applicant requested a review and subsequently an inquiry into AHS' response.

The Adjudicator found that AHS had conducted an adequate search for the 911 call and for any video-audio from the ambulance patient compartment, but had failed to conduct an adequate search for any handwritten records. The Adjudicator ordered AHS to conduct a further search for any responsive handwritten records.

The Adjudicator found there was no obligation for AHS to create the record requested by the Applicant.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 6, 10 and 72; *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 7, 8, 10, 12 and 80; *Health Information Regulation*, AR 70/200, ss. 1 and 3.1.

**Authorities Cited: AB:** Orders F2007-029, F2008-006, F2012-25/H2012-12, F2012-26, F2015-36, F2018-09, F2019-09, H2004-002, H2005-003, H2015-01/F2015-24, and H2015-03.

**Other Sources:** Merriam-Webster dictionary online ([www.merriam-webster.com](http://www.merriam-webster.com)).

## I. BACKGROUND

[para 1] On March 10, 2021, an individual (the Applicant) made an access request to Alberta Health Services (AHS), on AHS' "Request to Access Information *Freedom of Information and Protection of Privacy Act*" form (the FOIP Access Request Form), for the following information:

911 Call – [number] – occ –Jan 15/2021 [address]. Requesting a copy of all video-audio & handwritten records from initial call to patient hand over @Misericordia [sic] Hospital.

[para 2] On March 24, 2021<sup>1</sup>, AHS responded to the Applicant under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act) and stated:

We are pleased to provide access to the records you requested; a copy of the records are enclosed. However, please be advised that although ambulances are equipped with cameras in the patient compartment there is no functionality to record audio or video. The cameral [sic] is there so the driver can view the rear patient compartment on video (not recorded) to ensure practitioner and patient safety.

[para 3] AHS advised the Applicant that it was providing her with 26 pages of records and a recording of the 911 call.

[para 4] AHS informed the Applicant that under section 65 of the FOIP Act, she could ask the Information and Privacy Commissioner to review any decision made on her request.

[para 5] On March 29, 2021, the Applicant replied to AHS via email and stated, in part:

In the opening letter for Final Package Ref # 2021-P-048 it is stated that, my original request for all audio and video recordings of my ambulance transfer to Misericordia Hospital, Edmonton Ab. could not be fulfilled because the camera in patient compartment is for driver observation and there is no functionality for recording video or audio.

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<sup>1</sup> AHS mistakenly dated the letter March 24, 2020 instead of March 24, 2021. This error has no effect on my decision. In its response, AHS also misinterpreted the Applicant's handwriting of "occ" (subsequently confirmed by the Applicant during this inquiry to be an abbreviation of the word "occurrence") in her access request, to be "Dec". Based on this, AHS applied a date range of Dec. 1, 2020 to January 15, 2021 to the Applicant's access request, and conducted a search for responsive records based on this date range, when the Applicant was only seeking responsive records for Jan. 15, 2021. This error does not affect my decision in any way since the search AHS conducted included the date (January 15, 2021) specified by the Applicant in her access request.

This is in direct conflict with paramedic [Name]s written statements “cameras and audio on”, “advised patient that incidents are being recorded”

Could I please have clarification, if incidents in patient compartment were not being recorded, then does that imply that paramedic [Name]’s written statements are untrue.

...

If there was in fact no recording functionality to the camera in patient compartment, then could I please have a written statement of events from the driver who was able to observe patient compartment incidents?

[para 6] On March 29, 2021, AHS responded to the Applicant as follows:

Thank you for your email. The FOIP Office received all records that responded to your request for processing. If you feel that a thorough and accurate search was not conducted you are able to seek a review from the Office of the Information and Privacy Commissioner as detailed on your final letter.

If you have concerns with the care you were provided, the Patient Relations website details how to submit your concerns: Patient Concerns & Feedback Alberta Health Services.

[para 7] The Applicant requested a review of AHS’ response.

[para 8] The Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

[para 9] In her Request for Inquiry, the Applicant stated, in part:<sup>2</sup>

... I would still like a detailed written statement, by the driver, from arrival on scene to arrival at Misercordia [sic] ER.

[para 10] The Commissioner agreed to conduct an inquiry and delegated her authority to me.

## II. ISSUES

[para 11] The issues for this inquiry are as follows:

1. **Did Alberta Health Services (AHS) meet its duty to assist the Applicant as provided by Section 10(1) of the FOIP Act or section 10(a) of the HIA, as applicable?**

*In this case, the Commissioner will consider whether AHS conducted an adequate search for responsive records under the applicable Act.*

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<sup>2</sup> The Applicant uses the terms “driver” to refer to the person who was driving the ambulance and “paramedic” to refer to the person who was in the ambulance patient compartment. I appreciate the driver may also be a paramedic; however, for clarity, I will refer to this individual as the “driver” as the Applicant has done.

**2. Does section 10(2) of the FOIP Act or section 10(b) of the HIA, as applicable, require AHS to create a record for the Applicant?**

*This issue will consider whether section 10(2) of the FOIP Act, or section 10(b) of the HIA, as applicable, requires AHS to have the ambulance driver create a detailed written statement of what the ambulance driver observed in the patient compartment on January 15, 2021, and provide the statement to the Applicant.*

### **III. DISCUSSION OF ISSUES**

**1. Did Alberta Health Services (AHS) meet its duty to assist the Applicant as provided by Section 10(1) of the FOIP Act or section 10(a) of the HIA, as applicable?**

*In this case, the Commissioner will consider whether AHS conducted an adequate search for responsive records under the applicable Act.*

*Which Act, the FOIP Act or the HIA applies to the information requested by the Applicant?*

[para 12] AHS is both a public body under the FOIP Act, and a custodian under the *Health Information Act*, R.S.A. 2000, c. H-5 (the HIA).<sup>3</sup> Depending on the circumstances and information requested, AHS may be responding to an access request as a public body under the FOIP Act, or as a custodian under the HIA.

[para 13] The Applicant used AHS' FOIP Access Request Form to make her access request for the following information:

- 1) a copy of the 911 call made on January 15, 2021;
- 2) all video-audio records from initial call to patient hand over at the Misericordia Hospital; and
- 3) all handwritten records from initial call to patient hand over at the Misericordia Hospital.

[para 14] The fact that the Applicant used AHS' FOIP Access Request Form to make her access request does not mean that all of the information she requested was in fact information that was subject to the FOIP Act, and not the HIA.

[para 15] Applicants do not necessarily know which Act applies to the information they have requested, and therefore which AHS form they should use to make their request. When it receives an access request, it is AHS' responsibility to determine which Act applies to the information requested regardless of the form an applicant uses.

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<sup>3</sup> See Order F2012-25/H2012-12 at para. 10. See sections 1(g)(v), (j) and (p) of the FOIP Act and section 1(1)(f)(iv) of the HIA.

[para 16] In its initial submission, made by its internal legal counsel, AHS advised that upon receipt of the Applicant’s access request, the Associate Advisor, Information Access Services, Legal & Privacy for AHS (the Associate Advisor, IAS), issued a separate Call for Records to each of the two repositories where records relating to this episode of care would be maintained: the 911 repository and the Emergency Medical Services (EMS) Electronic Patient Care Record (the ePCR) repository.<sup>4</sup>

[para 17] The Call for Records form the Associate Advisor, IAS sent to the Executive Director, EMS Dispatch Communications & Deployment contained the following language, in part:

AHS received a request under the *Freedom of Information and Protection of Privacy (FOIP) Act* for a 911 call for:

<b>Patient Name:</b>	[Applicant’s name]
<b>Date of Birth or PNH:</b>	
<b>Details of 911 Call or Incident</b>	
<b>Date of 911 Call/Incident:</b>	December 1, 2020 – January 15, 2021
<b>Approximate Time:</b>	Unknown
<b>Approximate Location:</b>	[Address]
<b>Patient’s Request (as directly quoted from the access request form):</b>	<i>911 Call – [number] – Dec - Jan 15/2021. [address]. Requesting a copy of all video-audio &amp; handwritten records from initial call to patient hand over @Misericordia Hospital.</i>  <i>Time Period Dec. 1, 2020 to Jan. 15, 2021</i>

You have received this notice as records related to this request may exist within your area of responsibility. FOIP requests should remain confidential.

[para 18] The Call for Records form the Associate Advisor, IAS sent to the EMS ePCR repository on the other hand, contained the following language, in part:

AHS received a request under the *Health Information Act (HIA)* for a Patient Care Report for:

<b>Patient Name:</b>	[Applicant’s name]
<b>Date of Birth or PNH:</b>	Unknown
<b>Date of Incident:</b>	December 1, 2020 – January 15, 2021
<b>Time of Incident:</b>	Unknown
<b>Location of Incident:</b>	[Address]
<b>Patient’s Request (as directly quoted from the access request form):</b>	<i>911 Call – [number] – Dec - Jan 15/2021. [address]. Requesting a copy of all video-audio &amp; handwritten records from initial call to patient hand over @Misericordia Hospital.</i>  <i>Time Period Dec. 1, 2020 to Jan. 15, 2021</i>

<sup>4</sup> AHS’ initial submission dated September 22, 2022.

You have received this notice as records related to this request may exist within your area of responsibility. HIA requests should remain confidential.

[para 19] In other words, based on the two different Call for Records forms used by the Associate Advisor, IAS, it appears that the Associate Advisor, IAS performed an analysis and determined that even though the Applicant used the FOIP Access Request Form to make her request, the request for the 911 call was, in the Associate Advisor, IAS' view, subject to the FOIP Act, and the request for the video-audio and handwritten records was subject to the HIA.

[para 20] The Associate Advisor, IAS received a copy of the 911 call from the 911 repository, and records from the EMS ePCR repository.

[para 21] However, even though the Associate Advisor, IAS had sent out a Call for Records under the FOIP Act and a Call for Records under the HIA, and received records from both the 911 repository in response to the Call for Records under the FOIP Act, and records from the EMS ePCR repository in response to the Call for Records under the HIA, the response that AHS sent to the Applicant only stated that AHS was responding under the FOIP Act.

[para 22] In particular it stated, in part:<sup>5</sup>

RE: *Freedom of Information and Protection of Privacy (FOIP) Act*  
Final Response to Request for Information

I am writing in response to your request for access to information under the *Freedom of Information and Protection of Privacy (FOIP) Act*.

Specifically, your request reads as follows:

*911 Call – [number] – Dec –Jan 15/2021 [address]. Requesting a copy of all video-audio & handwritten records from initial call to patient hand over @Misericordia Hospital.*

*Time Period Dec. 1, 2020 to Jan. 15, 2021*

...

We are pleased to provide access to the records you requested; a copy of the records are enclosed. However, please be advised that although ambulances are equipped with cameras in the patient compartment there is no functionality to record audio or video. The cameral [sic] is there so the driver can view the rear patient compartment on video (not recorded) to ensure practitioner and patient safety.

...

Please note that under section 65 of the *FOIP Act*, you may ask the Information and Privacy Commissioner of Alberta to review any decision made on your request . . .

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<sup>5</sup> AHS' response to Applicant dated March 24, 2020 (which should have been dated March 24, 2021).

...

Enclosures: Record package – 911 recording, 26 pages

[para 23] In AHS’ initial submission, AHS’ internal legal counsel stated, in part:

EMS personnel are required to manage patient care records in accordance with the requirements of the *Health Information Act*, RSA 2000 c H-10 [sic] (“HIA”) and AHS’ Managing Patient Care Records, ITM-EMS-1, which is publicly available at:

[https://extranet.ahsnet.ca/teams/policydocuments/1/cl\[=prov-ems-pt-care-records-itm-ems-1.pdf](https://extranet.ahsnet.ca/teams/policydocuments/1/cl[=prov-ems-pt-care-records-itm-ems-1.pdf).

In accordance with the Policy, EMS events are recorded in the ePCR, and all related documents are attached to them to create a single record of care for that event.

[para 24] AHS’ Managing Patient Care Records Policy (the Policy), a hard copy of which AHS provided to me and to the Applicant at my request, contains the following provisions that are relevant to this inquiry (emphasis in original):

**SCOPE**

Provincial: Emergency Medical Services

...

**OBJECTIVES**

- To outline the expectations of **Emergency Medical Services (EMS) staff** when documenting, collecting, and protecting **patient information** so that **patient confidentiality** is maintained.

**PRINCIPLES**

- Clinical documentation is integral to the provision of high quality and safe health service(s) for patients. EMS staff working within the health system have legal, ethical, organizational, and professional obligations regarding the completion and accuracy of clinical documentation.

**APPLICABILITY**

Compliance with this document is required by all Alberta Health Services employees, members of the medical and midwifery staffs, students, volunteers, and other persons acting on behalf of Alberta Health Services (including contracted service providers as necessary).

**ELEMENTS**

1. **Collection and Documentation of Information**

- 1.1 Collection and disclosure of patient information shall be in accordance with the AHS *Privacy Protection and Information Access Policy*, accreditation standards, professional responsibilities, the *Health Information Act (Alberta)* and *Freedom of Information and Protection of Privacy Act (Alberta)*, and all applicable legislation.

...

## 2. Responsibilities for the Management Patient Care Records

- 2.1 EMS staff shall:
  - a) ensure recorded patient information is accurate, and complete as outlined in training modules;
  - b) complete all required (mandatory) fields. In some cases leaving a field blank may be necessary but should be justified within the ePCR by documenting a rationale;
  - c) complete an ePCR for each patient and each call, prior to leaving the patient, unless directed to by an EMS manager or system demand requires an immediate response as determined by an AHS EMS Communications Centre;
  - d) link supplementary documents (i.e., Patient Information Booklet for patients remaining on scene, ECG hardcopy, etc.), to the pertinent ePCR by writing the event number onto the document as a cross reference;
  - e) manually transcribe any handwritten documentation related to patient care information (e.g., consolidated patient vital sign updates) into the ePCR record prior to leaving the healthcare facility;
  - f) complete and finalize all ePCR documentation in the ePCR. Finalized ePCRs are automatically cleared from the author's **tablet PC** once logged out.
    - (i) If left incomplete the ePCR will reappear on the tablet PC at the author's next login until the entry is completed and finalized.
  - g) make **clinical amendments** to information on the ePCRs within 14 days of a request from EMS managers or **ePCR Records staff** and return to ePCR Records staff;
  - h) confirm legal signature has been appropriately applied to all PCRs in designated places and all treatments/procedures are attributed to the EMS staff member(s) performing the treatment procedure;
  - i) document and co-sign all controlled substances usage and wastage; and



- j) ensure a hard copy version of the ePCR is made available including electrocardiograms (ECGs) and or other pertinent documentation (e.g., first responder notes) to appropriate **health care providers** at hospitals and other health care facilities, until an electronic version is available via Connect Care.
  - (i) a hard copy is required for **long-term care facility** or **publicly funded supportive living facility**.

2.2 ePCR Records staff shall:

...

- d) be responsible for the release of ePCRs in compliance with the AHS *Privacy Protection and Information Access Policy*, *Health Information Act* (Alberta), and *Freedom of Information and Protection of Privacy [Act]* (Alberta). Requests from agencies internal to AHS or external to AHS can be made directly to ePCR Records.

...

#### 4. Storage and Retrieval of PCR's

4.1 Administrative support staff shall comply with the *Health Information Act* (Alberta) and AHS Records and Information Management policies and forms.

#### 5. Request, Disclosure and Disposal of ePCRs

5.1 All EMS staff shall:

- a) refer all requests for specific PCRs and ePCRs to ePCR Records staff; and
  - ...
- b) disclose ePCRs as outlined in the *Health Information Act* (Alberta).

5.2 ePCR Record staff shall ensure documents are retained and disposed in accordance with the AHS *Records Management Policy* and *Official Records Destruction Procedure*, and as outlined in the AHS *Records Retention Schedule 1133-01*.

[para 25] Given that:

- the Associate Advisor, IAS had issued a Call for Records under the FOIP Act and a separate Call for Records under the HIA; and
- AHS' internal counsel had advised in AHS' initial submission that EMS personnel were required to manage patient care records in accordance with the requirements of the HIA and AHS' Managing Patient Care Records Policy; and
- there were multiple references in AHS' Policy which indicated that patient care records were subject to the HIA,

but AHS' response to the Applicant only stated that its response was being made under the FOIP Act, I asked AHS to provide me with a submission addressing which Act applied to the Applicant's request for: 1) the 911 call, 2) the audio-video recordings by the cameras in the ambulance patient compartment; and 3) the handwritten records from initial call to patient hand over at the Misericordia Hospital.

[para 26] It is important to determine which Act governs the information requested since I must determine whether AHS conducted an adequate search under the applicable Act, and make an Order under the correct legislation.

[para 27] AHS engaged external legal counsel to provide its submission. AHS' external legal counsel submitted that the FOIP Act applied to *all* of the information (referred to by AHS' external legal counsel as the "Records") requested by the Applicant (footnotes omitted):<sup>6</sup>

The FOIP Act applies to the entirety of the Records requested by the Applicant to the exclusion of the HIA. AHS' position is based on the statutory language found in both the FOIP Act and the HIA, and the broad exclusion of "emergency response dispatch services" from the definition of health services pursuant to s. 3.1(f) of the *Health Information Regulation* (the "HIR").

The FOIP Act provides individuals with a right of access to records containing their personal information that are under the custody or control of a public body, subject to certain definitions and exceptions. A record is defined in the FOIP Act as "a record of information in any form . . . and any other information that is written, photographed, recorded or stored in any manner . . ." and personal information is defined as "recorded information about an identifiable individual."

Based on the broad definitions summarized above and the scope of application of the FOIP Act, AHS submits that the FOIP Act applies to the entirety of the Records requested by the Applicant. Such Records fall within the definition of "records" under the FOIP Act and contain personal information of the Applicant.

While s. 4(1)(u) of the FOIP Act provides that the FOIP Act does not apply to health information that is under the custody or control of a custodian pursuant to the HIA, the Records are excluded from the definition of health information under the HIA pursuant to the "emergency response dispatch services" exemption, further described below.

Among other things, the HIA provides individuals with a right of access to records containing their health information that are under the custody or control of a custodian, subject to certain definitions and exceptions. Health information is defined by the HIA as one or both of: (i) diagnostic, treatment and care information; or (ii) registration information.

Diagnostic, treatment and care information is further defined as information about any of the following: (i) the physical and mental health of an individual; (ii) a health service provided to an individual (including certain information respecting the health services provider); or (ii) ". . . any other information about an individual that is collected when a health service is

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<sup>6</sup> AHS' submission dated December 16, 2022.

provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record.”

The Records are primarily related to health services provided to the Applicant or information about the Applicant that was collected when a health service was provided to the Applicant. However, the definition of a health service under the HIA specifically excludes certain services set out by the regulations. Section 3.1(f) of the HIA provides that “emergency response dispatch services” are excluded from the definition of a health service under the HIA. There has been no prior commentary of the definition of “emergency response dispatch services” by the OIPC. As such, the exception may be read in its grammatical and ordinary sense harmoniously and in the context of the HIA in its entirety.

All services provided to the Applicant in connection with the records requested by the Applicant, from the 911 call up to patient handover at the Misericordia Community Hospital, were primarily emergency response dispatch services within the meaning of the HIR. For example, the AHS EMS Event Details Report contains dispatch timestamps, location, timestamps, and a detailed chronology of the actions completed by the dispatch unit. While the EMS PCR Report contains treatment information involving the Applicant including the initial assessment of the Applicant prior to handover to the receiving hospital, the form is populated with the information from the original dispatch of the EMS unit and continues to fall within the purview of “emergency response dispatch services”. As such, the Records do not contain health information within the meaning of the HIA.

AHS submits that the broad application of the FOIP Act in conjunction with the foregoing exclusion brings the records requested by the Applicant within the application of the FOIP Act, to the exclusion of the HIA.

[para 28] For the reasons set forth below, I find that the FOIP Act applies to the Applicant’s request for a copy of the 911 recording, and the HIA applies to the Applicant’s request for the video-audio recordings by the cameras in the ambulance patient compartment and the handwritten records from initial call to patient hand over at the Misericordia Hospital.

### *The Legal Framework*

[para 29] Section 6(1) of the FOIP Act states:

*6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[para 30] Section 4(1)(u) of the FOIP Act states:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

...

*(u) health information as defined in the Health Information Act that is in the custody or under the control of a public body that is a custodian as defined in the Health Information Act.*

[para 31] The result of section 4(1)(u) of the FOIP Act is that if information requested by an applicant is “health information”, as defined in the HIA, which is in the custody or under the control of a public body that is a custodian as defined in the HIA, then the HIA and not the FOIP Act applies to that information.

[para 32] Section 7(1) of the HIA states:

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

[para 33] Section 8(1) of the HIA states that “to obtain access to a record, an individual must make a request to the custodian that the individual believes has custody or control of the record”.

[para 34] As noted above, AHS is a custodian pursuant to section 1(1)(f)(iv) of the HIA.

[para 35] “Health information” is defined in section 1(1)(k) of the HIA as follows:

*(k) “health information” means one or both of the following:*

*(i) diagnostic, treatment and care information;*

*(ii) registration information;*

[para 36] “Diagnostic, treatment and care information” is defined in section 1(1)(i) of the HIA as follows, in part:

*(i) “diagnostic, treatment and care information” means 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:*

*...*

*...*

*(iv) a drug as defined in the Pharmacy and Drug Act 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 37] It is important to note that the definition of “diagnostic, treatment and care information” is not limited to a “health service”. A “health service” is only one of the things listed that can constitute “diagnostic, treatment and care information” and therefore constitute “health information” under the HIA.

[para 38] “Health service” is defined in section 1(1)(m) of the HIA as follows:

*(m) “health service” means a service that is provided to an individual for any of the following purposes:*

- (i) protecting, promoting or maintaining physical and mental health;*
- (ii) preventing illness;*
- (iii) diagnosing and treating illness;*
- (iv) rehabilitation;*
- (v) caring for the health needs of the ill, disabled, injured or dying,*

*but does not include a service excluded by the regulations;*

[para 39] Section 3.1 of *Health Information Regulation AR 70/2001* (the HIR) sets out the services that are excluded from the definition of “health service” under section 1(1)(m) of the HIA. The relevant subsection for the purpose of this inquiry is section 3.1(f) of the HIR which states:

*3.1 For the purposes of section 1(1)(m) of the Act, the following services are excluded from the definition of health service:*

*...*

*(f) emergency response dispatch services.*

[para 40] “Emergency response dispatch services” are defined in section 1(b) of the HIR as follows:

*1 In this Regulation,*

*...*

*(b) “emergency response dispatch services” means the following dispatch services provided by an emergency response services dispatcher:*

- (i) receiving requests for emergency response services;*

- (ii) *in response to a request,*
  - (A) *gathering information,*
  - (B) *evaluating the request,*
  - (C) *providing assistance, and*
  - (D) *dispatching and supporting emergency response services;*

[para 41] “Emergency response dispatch services” are therefore restricted by the definition in section 1(b) of the HIR above to dispatch services provided by an emergency response services dispatcher.

[para 42] An “emergency response services dispatcher” is defined in section 1(d) of the HIR as follows:

- (d) *“emergency response services dispatcher” means a person who provides emergency response dispatch services and includes 911 operators.*

[para 43] The term “emergency response services” is defined in section 1(c) of the HIR as follows:

- (c) *“emergency response services” means services dispatched by an emergency response services dispatcher in response to an emergency and includes ground ambulance services, air ambulance services, fire services and police services;*

[para 44] Reading these provisions in their grammatical and ordinary sense, it is the *dispatch services* provided by an *emergency response services dispatcher* (the person who receives the request or call for emergency response services) that are excluded from the definition of a “health service” under section 1(1)(m) of the HIA.

[para 45] These services include “*dispatching and supporting* emergency response services”. The emergency response services provided by the entity or person *that is dispatched* by the emergency response services dispatcher, are not “emergency response dispatch services”, and are therefore not excluded from the definition of a “health service”.

[para 46] In other words, section 3.1(f) of the HIR does not say that “emergency response services” are excluded from the definition of a “health services” under section 1(1)(m) of the HIA; it only says that emergency response dispatch services are excluded from the definition of a “health service” under section 1(1)(m) of the HIA. “Emergency response services” and “emergency response dispatch services” are not the same and should not be conflated.

[para 47] In this case, as some of the information requested by the Applicant related to the information collected about the Applicant and services that were provided to the Applicant by

the employees of the ambulance company, I asked AHS to explain the relationship between AHS and the ambulance company.

[para 48] AHS' external legal counsel provided the following information about the relationship between AHS and the ambulance company that provided the services in this case:<sup>7</sup>

As discussed in AHS' initial written submissions and evidenced in Appendix "A" of the submissions, the Records were located from AHS repositories including EMS Dispatch Communications & Deployment, and EMS ePCR Records. While [the ambulance company] is an independent contractor of AHS and is not a public body itself as defined under the FOIP Act, AHS maintains custody and control of all records while [the ambulance company] is providing a service pursuant to its agreement with AHS.

[para 49] An "affiliate" of a custodian is defined in section 1(1)(a) of the HIA. In particular, section 1(1)(a)(ii) states:

*1(1) In this Act,*

*(a) "affiliate", in relation to a custodian, means*

*...*

*(ii) a person who performs a service for the custodian as an appointee, volunteer or student or under a contract or agency relationship with the custodian.*

*...*

[para 50] Given the submissions of AHS, I find that the ambulance company was acting as an affiliate of AHS in this case. I find that AHS maintains custody or control of all records while the ambulance company is providing a services pursuant to its agreement with AHS.

*Application of analysis to the information requested by the Applicant*

*The 911 Call*

[para 51] Section 1(d) of the HIR specifically states that the definition of an "emergency response services dispatcher" includes 911 operators. Accordingly, I find that the dispatch services provided by a 911 operator are excluded from the application of the HIA pursuant to section 3.1(f) of the HIR, and are subject to the FOIP Act.

[para 52] This analysis and conclusion is consistent with previous Orders of this Office, which have determined that access requests to AHS for copies of 911 calls are subject to the FOIP Act.<sup>8</sup>

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<sup>7</sup> AHS' submission dated December 16, 2022.

<sup>8</sup> See, for example, Order F2018-09.

[para 53] I agree with AHS' submissions that the search for the recording of the 911 call was governed by the FOIP Act. The Associate Advisor, IAS was correct to use the Call for Records which cited the FOIP Act with respect to the Applicant's request for the 911 call.

### *The Video-Audio Records*

[para 54] In this case, the Applicant asked for the video-audio from the cameras in the patient compartment of the ambulance.

[para 55] As will be discussed further below when I consider whether AHS conducted an adequate search for any video or audio from the cameras in the ambulance patient compartment, AHS has advised that there was no audio or video recording from the cameras since the cameras only provided a live view to the ambulance driver of what was occurring in the patient compartment, and were not capable of making a video or audio recording.

[para 56] Nonetheless, this was not known at the time AHS received the Applicant's access request for this information, and AHS had to decide which Act, the FOIP Act, or the HIA, governed the Applicant's request for this information. In other words, AHS had to determine which statute governed its search for video or audio records.

[para 57] As previously mentioned, the Associate Advisor, IAS, sent out one Call for Records for the 911 call, to the 911 repository under the FOIP Act, and a second Call for Records for the "video-audio & handwritten records from initial call to patient hand over @Misercordia Hospital" to the EMS ePCR repository under the HIA. However, despite the fact the Associate Advisor, IAS sent out a Call for Records under the FOIP Act and a Call for Records under the HIA, when AHS provided its response to the Applicant, it only said it was responding under the FOIP Act.

[para 58] AHS' external legal counsel has stated that "The Records are primarily related to health services provided to the Applicant or information about the Applicant that was collected when a health service was provided to the Applicant".<sup>9</sup>

[para 59] With her initial submission, the Applicant provided a copy of the records she received from AHS in response to her access request.<sup>10</sup>

[para 60] The ePCR records provided by AHS to the Applicant contain, among other information, the paramedic's observations about the Applicant, and the treatment that was provided to the Applicant by the paramedic. Having reviewed the information in these records, I find that they contain health information about the Applicant as defined in section 1(1)(k) of the HIA.

[para 61] I find that the services provided by the paramedic to the Applicant in the patient compartment of the ambulance fall within the definition of a "health service" in section 1(1)(m)

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<sup>9</sup> AHS' submission dated December 16, 2022.

<sup>10</sup> Applicant's initial submission dated October 3, 2022.



of the HIA and are not “emergency response dispatch services” under sections 1(b) and 3.1(f) of the HIR. I find that the HIA applies to the health services provided by the paramedic.

[para 62] In my view, if the cameras in the patient compartment of the ambulance had recorded the health services provided to the patient by the paramedic, the recording would fall within the definition of a “record” under section 1(1)(t) of the HIA, which states:

*1(1) In this Act,*

*...*

*(t) “record” means a record of health information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers, papers and any other information that is written, photographed, recorded or stored in any manner but does not include software or any mechanism that produces records;*

[para 63] Accordingly, I find that if the cameras in the ambulance patient compartment had been capable of recording, they would have been recording the treatment and/or care provided to the Applicant by the paramedic (who is not an emergency response services dispatcher as that term is defined in the HIR) and the HIA, and not the FOIP Act, would apply to the recording.

[para 64] As a result, when conducting a search for the existence of an audio and/or visual recording from the ambulance patient compartment in this case, in my view the Associate Advisor, IAS, was correct to send out a call for such a record to the EMS ePCR repository under the HIA.

[para 65] I will address the adequacy of AHS’ search under the HIA for audio and/or visual recordings from the cameras in the patient compartment later in this Order.

*The Handwritten Records From Initial Call To Patient Hand Over At The Misericordia Hospital*

[para 66] As noted above, taking into account the submissions of AHS and my review of the records AHS provided to the Applicant in response to her access request, I find that the information which was entered by the paramedic into the ePCR, is health information about the Applicant which was collected while the paramedic was providing health services to the Applicant, and is subject to the HIA and not the FOIP Act.

[para 67] Sections 2.1(c) and (e) of AHS’ Policy state that EMS staff shall:

*...*

- c) complete an ePCR for each patient and each call, prior to leaving the patient, unless directed to by an EMS manager or system demand requires an immediate response as determined by an AHS EMS Communications Centre;

*...*

- e) manually transcribe any handwritten documentation related to patient care information (e.g., consolidated patient vital sign updates) into the ePCR record prior to leaving the healthcare facility;

...

[para 68] The ePCR is AHS' electronic database that EMS staff (including contractors) enter health information into.

[para 69] I find that in the event that the paramedic and/or the ambulance driver made handwritten notes that contain diagnostic, treatment and care information, these handwritten notes would also be subject to the HIA.

[para 70] I will address the adequacy of AHS' search under the HIA for the handwritten notes later in this Order.

*Duty to Conduct an Adequate Search under the FOIP Act and the HIA*

[para 71] Section 10(1) of the FOIP Act states:

*10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 72] Section 10(a) of the HIA 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 73] As noted by the Adjudicator in Order H2015-01/F2015-24 at paragraphs 8 and 9:<sup>11</sup>

[para 8] The duty to assist under both Acts requires a custodian or public body to perform an adequate search for records. The search does not have to be perfect but the custodian or public body must make every reasonable effort to search for all records that are responsive to an applicant's request.

[para 9] In general, evidence of an adequate search should include:

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<sup>11</sup> See too Order H2005-003 at paragraphs 14 – 20, and in particular paragraph 20 where former Commissioner Work stated:

[para 20] In its written and oral submissions, the Custodian argued that the FOIP approach to interpretation should be applied to the parallel provision in HIA. I accept this argument. I hereby adopt the above described FOIP criteria and approach for deciding whether the adequacy of the search and therefore the duty to assist under section 10(a) has been satisfied by a custodian.

- 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 74] A public body has the onus to establish that it has made every reasonable effort to assist the applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1) of the FOIP Act.<sup>12</sup>

[para 75] Likewise, a custodian has the onus to establish that it has made every reasonable effort to assist the applicant under section 10(a) of the HIA.

[para 76] In its initial submission made by its internal legal counsel, AHS provided the following information about the search it conducted for responsive records:<sup>13</sup>

EMS personnel are required to manage patient care records in accordance with the requirements of the *Health Information Act*, RSA 2000 c H-10 (“HIA”) and AHS’s Managing Patient Care Records, ITM-EMS-1, which is publicly available at:

<https://extranet.ahsnet.ca/teams/policydocuments/1/clp-prov-ems-pt-care-records-itm-ems-1.pdf>.

In accordance with the Policy, EMS events are recorded in the ePCR, and all related documents are attached to them to create a single record of care for that event. In accordance with AHS policies, EMS personnel with delegated responsibility to conduct searches of those records performed the searches for records. Details of the activities undertaken to perform a comprehensive search are set out in Appendix “A” and “B” to this Submission. [Name of Associate Advisor, Information Access Services (IAS)] issued the standard form Call for Records to the EMS personnel responsible for conducting the searches. The Call for Records required EMS personnel to search for all audio and visual recordings of the identified episode of care. The search was conducted in the EMS ePCR and the 911 repository which are the official repositories for emergency dispatch and service records. EMS provided the 911 audio recording and the ePCR document in response to the Call for Records.

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<sup>12</sup> See Order F2007-029 at paragraph 46.

<sup>13</sup> AHS’ references to Appendix “B” below should have been to Appendix “C”, as Appendix “C” contains the Associate Advisor, IAS’s summary of the search that was conducted.

As the ePCR record states that the patient was advised that she was being recorded, [Associate Advisor, IAS] made further inquiries about the existence of any additional recordings. Her summary, including the responses received, is attached as Appendix “B” to this Submission. EMS management discussed this with the [ambulance company] provider and confirmed that the onboard camera is a view only device with no recording capability. EMS also further confirmed that no other records were made on any other device during that event.

[para 77] AHS provided the following information in response to each of the criteria in paragraph 66 of Order F2007-029 regarding the search it conducted for responsive records:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant’s access request  
Answer: AHS provided the Call for Records document and a summary of the efforts undertaken to determine whether any additional records existed
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.  
Answer: [Associate Advisor, IAS] followed the normal AHS procedures to issue a Call for Records. Searches were performed in the two EMS repositories where responsive records relating to that episode of care are maintained.
- 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.  
Answer: In accordance with AHS Policy, the ePCR and the 911 repository are the only repositories to be searched for ambulance dispatch and event records.
- Who did the search  
Answer: the EMS personnel normally tasked with responding to Call for Records, as identified on Appendix “B” to this Submission.
- Why the Public Body believes no more responsive records exist than what has been found or produced  
Answer: The only records maintained of such events are the 911 call recordings and the ePCR. All related documents are required to be attached to the ePCR as per AHS Policy. [Associate Advisor, IAS] noted that the ePCR states that the patient was advised she was being recorded, so she pursued this issue with EMS management personnel. EMS management confirmed that ambulance cameras are not capable of creating audio or video recordings and none were made on any other device.

[para 78] In its subsequent submission, made by its external legal counsel, AHS provided the following additional information about its search:

As an independent organization, [the ambulance company] may have custody and control of its own corporate records. However, it would not be the usual practice for [the ambulance company] to maintain its own repository of records relating to EMS dispatch. In accordance with the duty to assist, AHS had previously confirmed with [the ambulance company] that they did not have possession of any further recordings that were responsive to the Applicant’s access request (detailed in Appendix “C” of AHS’ initial written submissions).

*Adequacy of AHS' search for the 911 call*

[para 79] As AHS located and provided the Applicant with a copy of the 911 call, I find AHS conducted an adequate search and met its duty to assist the Applicant under section 10(1) of the FOIP Act with respect to the 911 call.

*Adequacy of AHS' search for the video-audio from the ambulance patient compartment*

[para 80] In Appendix "C" attached to AHS' initial submission, the Associate Advisor, IAS advised that she received an email from the Executive Director for the ambulance company which provided the EMS service, confirming that no recording was done, and containing the following explanation with respect to the paramedic's comment in the ePCR that he "Advised [patient] that incidents are being recorded":

It was confirmed with the crew involved that no recording was done. The crew made the statement in hopes of getting the patient to respond better before going down the medication root [sic]. The [sic] now realize how they documented it would raise a lot of questions now.

[para 81] In her initial submission, the Applicant argues that she believes a video recording exists. She states, in part:

The problem with this FOIP process, is that what is being legally discussed is "someone's" personal interpretation of the act as to whether the information has to be given to me or not. I believe the video exists, and the technology exists to produce the "recording", it is 2022 the age of Technocracy. My old school understanding of a "video" through the use of a camera, is to produce a "recording"[.]

[para 82] In her initial submission, the Applicant discusses the issues she has with the care she received from the paramedic. As I understand the Applicant's submissions, she believes that the paramedic was telling the truth when he informed her that "incidents are being recorded" and that AHS has denied that the "video" or the "recording" exists, or could be created, in order to protect the paramedic. She states, in part:

The reason this is significant is because if I was in fact [personal medical information] and had caused injury or harm to [the paramedic], then you've got to know AHS corporation would be able to produce the "recording" to use as evidence to convict me for that crime. The crime however has been committed against me, and therefore the proof of the crime will be withheld.

You and I both had to pay this man to treat me in this manner. Covering for him isn't doing anyone in Alberta any good.

[para 83] The Applicant also disputes AHS' explanation that the camera does not record audio and video and is there so that the driver can view the rear patient compartment on video, to ensure practitioner and patient safety. She states, in part:

. . . anyone who is driving down the highway "watching" a "video", is not practicing safe driving, or protecting the life that is in their care. Distracted Driving is against the Law. I

am still interested in reading the statements of the woman who was watching a video while driving “professionally”. . .

[para 84] The issue that I am determining in this inquiry is whether AHS conducted an adequate search for responsive records. Whether it is safe or unsafe for an ambulance driver to be able to observe what is happening in the patient compartment while driving, or whether the cameras *should* record audio and video are issues that are beyond the scope of my jurisdiction to decide and the scope of this inquiry.

[para 85] The online Merriam-Webster dictionary provides the following definition of “record” as a transitive verb:

. . . to cause (sound, visual images, data, etc.) to be registered on something (such as a disc or magnetic tape) in reproducible form

[para 86] As I understand AHS’ submissions, when on, the cameras in the patient compartment of the ambulance transmit a live picture (video) and audio feed of what is occurring in the patient compartment, to the ambulance driver. I understand the cameras do not record the live transmission because they are not capable of recording. As a result, there is no “video,” as in a video tape of the live transmission, or “recording” of what occurs in the patient compartment, nor can one be retroactively created.

[para 87] In other words, the events in the ambulance patient compartment are not registered by the cameras on something (such as a disc or magnetic tape) in reproducible form. I understand the Applicant was told by the paramedic that incidents were being recorded, when in fact they were not, in the hope that this would influence her behavior in a positive way.

[para 88] AHS has confirmed the cameras in the ambulance do not and can not record audio or video. It has provided a reasonable explanation for why the paramedic made the statement recorded in the ePCR that he advised the Applicant that incidents are being recorded. The ambulance company providing the EMS service also confirmed to AHS that no other audio or video recordings (i.e. cell phone video) were made by the ambulance driver or the paramedic of the event.

[para 89] I accept the AHS’ submissions that the camera in the ambulance did not record audio or video, and that no other audio or video recordings of the event were made. I find that with respect to the Applicant’s request for video-audio from the ambulance patient compartment, AHS has conducted an adequate search for responsive records and has met its duty to the Applicant under section 10(a) of the HIA.

[para 90] I note that in the event I had determined that the FOIP Act governed AHS’ search for audio or video from the ambulance patient compartment, I would have applied the same reasoning and found that AHS had conducted an adequate search for responsive records and had met its duty to assist the Applicant under section 10(1) of the FOIP Act.

[para 91] I will next consider AHS’ search for handwritten records responsive to the Applicant’s access request.

*Adequacy of AHS' search for handwritten records from initial call to patient hand over at the Misericordia Hospital*

[para 92] AHS advised that the Policy requires all EMS events to be recorded in the EMS ePCR, and all related documents are attached to them to create a single record of care for that event. I understand AHS to be saying that all records responsive to the Applicant's access request would be located in the EMS ePCR, and since it has searched the EMS ePCR, it has conducted an adequate search for responsive records.

[para 93] As noted above, at section 2.1(e), the Policy states:

2. Responsibilities for the Management Patient Care Records

2.1 EMS staff shall:

...

- e) manually transcribe any handwritten documentation related to patient care information (e.g., consolidated patient vital sign updated) into the ePCR record prior to leaving the healthcare facility;

[para 94] The Policy further states:

Compliance with this document is required by all Alberta Health Services employees, members of the medical and midwifery staffs, students, volunteers, and other persons acting on behalf of Alberta Health Services (including contracted service providers as necessary).

[para 95] AHS located and provided the Applicant with records from the initial call to patient hand over at the Misericordia Hospital that were entered into its ePCR; however, the Applicant asked for *handwritten* records.

[para 96] The Policy contemplates that EMS staff (and contracted service providers) may have created handwritten documentation. AHS did not indicate in its submissions that its search included asking the ambulance company whether the paramedic and the ambulance driver had created handwritten documentation.

[para 97] I cannot rule out the possibility that the paramedic and/or the ambulance driver created handwritten documentation.<sup>14</sup> Even if they created and then transcribed the handwritten documentation into the ePCR as required by the Policy, the Applicant has still asked for a copy of the *handwritten* documentation. It is not clear from the Policy what is to be done with handwritten documentation after it has been transcribed into the ePCR.

[para 98] Therefore, I find that AHS did not conduct an adequate search for any handwritten records responsive to the Applicant's access request, and consequently did not meet its duty to assist the Applicant with respect to these records, as required by section 10(a) of the HIA.

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<sup>14</sup> While it is unlikely that the ambulance driver would have made handwritten notes while responding to this call, the question must still be asked.

[para 99] I note that in the event I had determined that the FOIP Act governed AHS' search for handwritten documentation, I would have applied the same reasoning and found that AHS did not meet its duty to assist the Applicant under section 10(1) of the FOIP Act as it did not conduct an adequate search for any handwritten responsive records.

[para 100] Accordingly, assuming the paramedic and the ambulance driver are still employed by the ambulance company that provided the EMS service, I will order AHS to ask the ambulance company whether the paramedic and the driver created any handwritten records that would be responsive to the Applicant's access request, and if so, whether these handwritten records still exist. I will order AHS to inform the Applicant in writing of the response AHS receives from the ambulance company.

[para 101] If either the paramedic or the ambulance driver created handwritten records, and the handwritten records still exist, I will order AHS to provide a response to the Applicant as to whether it will provide the Applicant with access to these records. The response is to include the information set out under section 12(2) of the HIA.

[para 102] If either the paramedic or the driver are no longer employed by the ambulance company, I will order AHS to ask the ambulance company to search for any handwritten records that may have been created by the person no longer employed by the ambulance company, that are responsive to the Applicant's access request, and to provide AHS with the details of the search it conducted. I will order AHS to inform the Applicant in writing of the response AHS receives. If responsive records are located, I will order AHS to provide a response to the Applicant as to whether it will provide the Applicant with access to these records. The response is to include the information set out under section 12(2) of the HIA.

[para 103] There exists the possibility that the ambulance driver created a handwritten document containing her account of the health services that were provided to the Applicant in the ambulance compartment, which may satisfy the Applicant's request for a detailed written statement by the driver. However, there is also a possibility that the ambulance driver did not make any handwritten records, or made handwritten records which do not satisfy the Applicant's request for a detailed written statement from the ambulance driver.

[para 104] In light of this, I will consider the question of whether AHS is required under either the FOIP Act or the HIA, as applicable, to have the ambulance driver create a detailed written statement of what she observed and heard in the ambulance patient compartment as requested by the Applicant.

**2. Does section 10(2) of the FOIP Act or section 10(b) of the HIA, as applicable, require AHS to create a record for the Applicant?**

*This issue will consider whether section 10(2) of the FOIP Act, or section 10(b) of the HIA, as applicable, requires AHS to have the ambulance driver create a detailed written statement of what the ambulance driver observed in the patient compartment on January 15, 2021, and provide the statement to the Applicant.*



[para 105] With her initial submission, the Applicant provided the six page electronic EMS report (the EMS Report) she received from AHS in response to her access request, detailing the EMS account of the events of the call.

[para 106] The first page of the EMS Report contains the paramedic's comments about the call, which include his observations about and interactions with the Applicant, and the health services he provided to the Applicant. The EMS Report also contains detailed health information about the Applicant and the health services provided to the Applicant by the paramedic.

[para 107] The EMS Report provided by the Applicant is electronically signed by both the paramedic and the ambulance driver.

[para 108] As I understand it, the EMS Report is the information entered by the paramedic into AHS' ePCR, detailing what occurred in the ambulance patient compartment for this particular call. I interpret the ambulance driver's electronic signature on the EMS Report to mean that she confirms the paramedic's statement of events.

[para 109] In the cover email to which the Applicant attached her submission, the Applicant stated:

As for the written statement from the driver, she did sign her signature to [the paramedic]'s account of events.

[para 110] As I understand the Applicant's submissions, she is not satisfied with this and wants a *separate* written statement of events from the ambulance driver detailing the ambulance driver's account of events.

[para 111] I interpret the Applicant's request to be a request for an independent statement by the ambulance driver of the treatment and care the ambulance driver observed or heard being provided to the Applicant by the paramedic in the ambulance patient compartment.

[para 112] In my view, the request for such a statement is subject to the HIA. Accordingly, I will determine whether section 10(b) of the HIA requires AHS to have the ambulance driver create such a record where one does not exist in the first place.

[para 113] Section 7(1) of the HIA states:

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

[para 114] Section 10 of the HIA 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,*
- (b) *must create a record for an applicant if*
  - (i) *the record can be created from information that is in electronic form and is in the custody or under the control of the custodian, using its normal computer hardware and software and technical expertise, and*
  - (ii) *creating the record would not unreasonably interfere with the operations of the custodian*

*and*

- (c) *must provide, at the request of an applicant and if reasonably practicable, an explanation of any term, code or abbreviation used in the record.*

[para 115] In Order H2015-03, the adjudicator considered whether a custodian was required to create a record for an applicant under the HIA. At paragraphs 18 – 19, the adjudicator stated:

[para 18] In her request for an inquiry, the Applicant also stated that she was requesting affidavits of staff members:

I am STILL requesting affidavits from these “Supposed” staff members that I “supposedly” asked for money. As I can guarantee the statement from [the therapist] is an absolute lie, and I am calling her on this . . . I expect proof of such false statements towards me. Prove these blatant lies.

[para 19] Section 7 of the HIA gives applicants the right to request their health information in the custody or control of custodians. It does not create a right in an applicant to demand that employees of custodians swear affidavits regarding questions the Applicant has.

[para 116] The FOIP Act contains similar provisions to section 7 and section 10(b) of the HIA.

[para 117] Section 6(1) of the FOIP Act states:

*6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about an applicant.*

[para 118] Section 10(2) of the FOIP Act states:

*10(2) The head of a public body must create a record for an applicant if*

- (a) *the record can be created from a record that is in the electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*

(b) *creating the record would not unreasonably interfere with the operations of the public body.*

[para 119] Given the similarity between sections 6(1) and 10(2) of the FOIP Act and sections 7(1) and 10(b) of the HIA, and, I find the decisions in Orders F2012-26 and F2019-09 regarding a public body's duty to create a record for an applicant under the FOIP Act, to be relevant to the determination of whether a custodian has an obligation to create a record under section 10(b) of the HIA.

[para 120] In Order F2012-26, the adjudicator stated in paragraphs 37 – 39:

[para 37] As I have found that the Public Body conducted an adequate search for the records responsive to items 1 and 2 of the Applicant's access request – and, moreover, has located the responsive records - - I conclude that it met its duty to assist the Applicant, in this regard, under section 10(1) of the Act.

[para 38] At this point, I note that the Public Body says that the Applicant is effectively requesting, within the terms of section 10(2) of the Act, that it create a record responding to the two questions posed in her letter of April 7, 2009. Under section 10(2), a public body must create a record for an applicant if the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and creating the record would not unreasonably interfere with the operations of the public body. In response to the Public Body's reference to section 10(2), the Applicant asks me to determine whether the Public Body is required to create a record responding to her two questions, as well as a record setting out its decision and reasons following the investigation of her complaint.

[para 39] Section 10(2) does not require the Public Body to create any records for the Applicant. The provision applies when there is a record in a currently "inaccessible" electronic form, which might possibly be converted into a record that can then be made accessible to an applicant. In this inquiry, there is no reasonable possibility that the Public Body has the answers to the questions posed in the Applicant's letter of April 7, or a decision and reasons following its investigation of her complaint against her former supervisor, existing in an inaccessible electronic form somewhere in its computer systems. The records responsive to the Applicant's access request would be in the form of an e-mail or document, and I have found that the Public Body conducted an adequate search for such records in these forms. (my emphasis)

[para 121] In Order F2019-09, the adjudicator stated in paragraph 72:

[para 72] In my view, the above-cited orders come to a very similar conclusion. Where a public body can create a record from information currently existing in electronic form by essentially manipulating the data, it has an obligation to do so in response to an access request, as long as it can be done using the public body's normal hardware, software and technical expertise and where creating the record would not interfere with the public body's operations. Some incidental manual input may be required in order to do this, but such incidental input does not necessarily negate the duty. (my emphasis)

[para 122] In other words, a record must *first exist in electronic form* before a public body may (depending on whether the rest of the conditions contained in the section are met) have a duty to create a record, from the electronic record, for an applicant under the FOIP Act. I find the same to be true with regard to the duty of a custodian to create a record for an applicant under the HIA.

[para 123] Neither section 6 of the FOIP Act, nor section 7 of the HIA create a right in an applicant to request that an employee of the public body, or of the custodian, provide a written statement of their recollection of a particular event.<sup>15</sup>

[para 124] In this case there is no evidence before me that the driver of the ambulance created a separate statement detailing what she observed and heard in the patient compartment during the call involving the Applicant. There is no “information that is in electronic form” that might possibly be converted into the record the Applicant seeks. As a result, section 10(b) of the HIA does not require AHS to create or cause to be created the new record requested by the Applicant.

[para 125] I further note that if I had determined that the FOIP Act applied to the Applicant’s request, I would have applied the same reasoning and reached the conclusion that section 10(2) of the FOIP Act does not require AHS to create or cause to be created the new record requested by the Applicant.

[para 126] Although decided under the FOIP Act, I find the following comments of the adjudicator in Order F2008-006 at paragraph 66 to also be relevant in this case:

[para 66] The Public Body's FOIP Coordinator states that supporting documentation is not always kept. Under the Act, the Public Body is required to provide only the records that it has in its custody and control. As the Adjudicator put it in Order F2007-006 involving these same parties, "The Public Body can only provide the records it has in its possession and as they exist" (Order F2007-006 at paragraph 17). Whether anything ought to have been done regarding permit approvals and retention of records in this matter that was not done is something over which the Act gives me no powers. (my emphasis)

[para 127] Further, in Order H2004-002, former Commissioner Work stated at paragraph 15:

[para 15] I agree with PHR that HIA is not the governing legislation to address the patient care issues the Applicant raises throughout her submissions. My jurisdiction at the Inquiry and the scope of the Order are restricted to the access requests made by the Applicant to PHR under section 8(1) of HIA. I do not have jurisdiction at the Inquiry to make decisions about other matters raised by the Applicant that go beyond the access issues before me under section 7, section 11(1)(a) and section 11(2)(a) of the HIA.

[para 128] I concur with the comments of the adjudicator in Order F2008-006 and the former Commissioner in Order H2004-002. I have no authority under either the FOIP Act or the HIA to address the Applicant’s concerns with regard to the care she received from AHS, or to

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<sup>15</sup> See as well Order F2015-36 (which was upheld on judicial review) at paragraph 20 where the adjudicator stated at paragraph 20: “[para 20] As discussed above, applicants may make access requests for recorded information in the custody or control of a public body; however, there is no ability to make an access request for information that is not recorded in some form.”

determine whether AHS *ought to have* required the ambulance driver to create a separate written statement of what the ambulance driver observed in the ambulance patient compartment.

#### **IV. ORDER**

[para 129] I make this Order under section 72 of the FOIP Act and section 80 of the HIA.

[para 130] I find that AHS conducted an adequate search for the 911 call and met its duty to assist the Applicant under section 10(1) of the FOIP Act.

[para 131] I find that with respect to the Applicant's request for video-audio from the ambulance patient compartment, AHS has conducted an adequate search for responsive records and met its duty to the Applicant under section 10(a) of the HIA.

[para 132] As AHS did not indicate that its search included asking the ambulance company whether the paramedic and the ambulance driver created handwritten records, I find that AHS did not conduct an adequate search for handwritten records responsive to the Applicant's access request and did not meet its duty to assist the Applicant with respect to this item of her access request as required under section 10(a) of the HIA.

[para 133] Accordingly, assuming the paramedic and the ambulance driver are still employed by the ambulance company that provided the EMS service, I order AHS to ask (or to have the ambulance company ask) the paramedic and the ambulance driver whether they created any handwritten records that would be responsive to the Applicant's access request, and if so, whether the handwritten records still exist. I order AHS to inform the Applicant in writing of the response AHS receives.

[para 134] If either the paramedic or the ambulance driver created handwritten records responsive to the Applicant's access request, and the handwritten records still exist, I order AHS to provide a response to the Applicant as to whether it will provide the Applicant with access to these records. The response is to include the information set out under section 12(2) of the HIA.

[para 135] If either the paramedic or the ambulance driver are no longer employed by the ambulance company, I order AHS to ask the ambulance company to search for any handwritten records that may have been created by the person no longer employed by the ambulance company, that are responsive to the Applicant's access request, and to provide AHS with the details of the search it conducted. I order AHS to inform the Applicant in writing of the response AHS receives from the ambulance company. If responsive records are located, I order AHS to provide a response to the Applicant as to whether it will provide the Applicant with access to these records. The response is to include the information set out under section 12(2) of the HIA.

[para 136] I find that section 10(b) of the HIA does not require AHS to create or cause to be created the record requested by the Applicant.

[para 137] I order AHS to confirm to me and to the Applicant in writing within 50 days of receiving this Order that it has complied with this Order.

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Carmen Mann  
Adjudicator  
/ah