

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-030

December 20, 2000

CALGARY REGIONAL HEALTH AUTHORITY

Review Number 1792

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

Summary: The Applicant applied for access to records relating to the loss of hospital privileges in the early 1980s by a particular doctor. The Public Body responded that most of the records responsive to the Applicant's request were destroyed in 1995. The Inquiry Officer found that the Commissioner does not have jurisdiction over how a public body dealt with its records retention system prior to the extension of the *Freedom of Information and Protection of Privacy Act* (the "Act") over health care bodies on October 1, 1998. However, the Inquiry Officer ordered the Public Body to comply with its duty under section 9(1) of the Act to respond to the Applicant openly, accurately and completely with regard to the search conducted in response to the Applicant's request.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act, S.A. 1994, c.F-18.5, ss. 9(1), 86(1)(c.1), 86(1)(e), 86(2), 98(1)*

Authorities Considered: AB: Order 97-003, Order 97-006, Order 99-012, Order 99-021, Order 99-033, Order 99-039, Investigation Report 99-IR-004

I. BACKGROUND

[para 1.] On October 12, 1999, the Applicant applied to the Calgary Regional Health Authority (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Applicant requested access to records relating to the loss of hospital privileges in the early 1980s by a particular doctor (herein referred to as “Doctor X”), including:

- All the documentation that was kept by the various hospitals’ investigating and discipline committees;
- All correspondence between the Honourable Marvin Moore, Minister of Hospitals and Medicare, Doctor X and the hospitals;
- All information and dates relating to why Doctor X lost hospital privileges in Calgary hospitals and the names of all the parties involved in this decision.

[para 2.] On November 12, 1999, the Public Body advised the Applicant that “most of the records” responsive to the Applicant’s request would have been located in the records of the Medical Advisory Board of the Calgary District Hospital Group (the “CDHG”). The CDHG was one of the Public Body’s predecessor organizations that had ceased to exist on March 31, 1995.

[para 3.] In the letter to the Applicant, the Public Body advised that the CDHG Medical Advisory Board’s records for the time period relevant to the Applicant’s request were destroyed in 1995. The Public Body advised that only one responsive record was “still in existence”. The responsive record was the CDHG personnel file for Doctor X (the “Personnel File”), which consisted of approximately 305 pages. The Public Body advised the Applicant that it was withholding the Personnel File in its entirety under section 16 of the Act.

[para 4.] Subsequently, the Applicant authorized a representative to write to the Commissioner on December 28, 1999 requesting a review of the Public Body’s response to the Applicant’s request. (The Applicant and the Applicant’s representative will be jointly referred to in this Order as “the Applicant”.)

[para 5.] The Commissioner received the Applicant’s request for review on January 5, 2000 and authorized mediation pursuant to section 65 of the Act.

[para 6.] On March 8, 2000, the Public Body issued third party notification to Doctor X regarding the Personnel File that was denied to the Applicant. A copy of the Personnel File accompanied the notice to Doctor X. Doctor X was asked to make representation to the Public Body as to whether the Personnel File should or should not be disclosed.

[para 7.] However, Doctor X elected to forward the Personnel File, in its entirety, to the Applicant on, or about, March 16, 2000.

[para 8.] On April 20, 2000, the Public Body wrote to the Applicant to explain the third party notification process set out in the Act and to request that the Personnel File sent by Doctor X be returned to the Public Body. The Public Body also released a severed copy of the Personnel File to the Applicant as an exchange for the Personnel File disclosed by Doctor X. The Public Body severed information under section 16 (disclosure harmful to third party's personal privacy); section 18 (confidential evaluations); section 23 (advice from officials); and section 4(1)(b.1) (record excluded from the Act by virtue of section 9 of the *Alberta Evidence Act*).

[para 9.] On May 10, 2000, the Applicant requested access to:

“...all records concerning [Doctor X’s] refusal or loss of Hospital privileges in the General Hospital, Foothills Hospital and Rockyview Hospital in Calgary dating as far back as the 1960’s.”

[para 10.] The Public Body responded on May 19, 2000 and released three pages to the Applicant. The Public Body applied section 16(1) and section 23(1) of the Act to sever information on these three pages.

[para 11.] Subsequently, the Applicant wrote to the Public Body on June 4 and June 9, 2000 for further information. The Public Body responded on June 8 and July 14, 2000.

[para 12.] As the Public Body and the Applicant could not reach a mutually satisfactory resolution during mediation, the matter was set down for written inquiry. The Notice of Inquiry was issued to the parties on September 19, 2000.

[para 13.] Pursuant to section 59 of the Act, on September 19, 2000, the Commissioner delegated to me the authority to hear this inquiry and render a decision on all matters at issue.

[para 14.] The Applicant and the Public Body provided initial and rebuttal submissions to the inquiry. In accordance with the general practice of this Office, the submissions were exchanged among the parties.

[para 15.] The written inquiry began on November 22, 2000. I adjourned the inquiry to request the Public Body to provide me with the following:

- Copies of the Applicant’s initial request for information (dated October 12, 1999) and subsequent requests for information; and
- Copies of the Public Body’s responses to the Applicant’s requests.

[para 16.] The requested information was received on November 27, 2000.

II. PRELIMINARY MATTERS

[para 17.] The Notice of Inquiry issued to the parties on September 19, 2000 sets out two issues. The first issue is a jurisdictional issue and the second issue relates to section 9(1) of the Act (duty to assist applicants). However, I noted that the Applicant's submissions raised a number of other issues.

[para 18.] A Notice of Inquiry does not preclude the Commissioner from considering other issues that he considers relevant on a matter before him (Order 99-033 [para. 44]). However, in this case, I have decided to limit myself to the issues set out in the Notice of Inquiry. My reasons are as follows:

- The Applicant had the opportunity to raise these issues after the Notice of Inquiry was sent out and prior to the filing of the submissions, but did not do so. I am concerned that the Applicant is attempting to broaden the scope of this inquiry.
- A number of the issues raised in the Applicant's submissions are questions concerning the Public Body's record management practices and procedures. I view these questions as relating to the jurisdictional issue set out in the Notice of Inquiry.
- Some of the issues raised by the Applicant are outside the mandate of this Office, and are not relevant to the processing of the Applicant's access request in accordance with the provisions of the Act.
- The issue regarding the Public Body's application of section 16(1) and section 23(1)(f) of the Act to sever information was unclear. The Applicant did not specify to which records this issue relates to and provided no argument as to the Public Body's application of these sections of the Act. From the Applicant's submission, I noted that section 16(1) and section 23(1)(f) of the Act were referenced in relation to the three pages that were released by the Public Body on May 19, 2000. As the Public Body subsequently released these three pages in their entirety, severing is no longer an issue.

[para 19.] There is a further matter related to the Personnel File that the Applicant received from Doctor X. The Public Body stated the Personnel File contains patient records unrelated to the Applicant and has requested that the Applicant return the entire file to the Public Body. To date, the Applicant has not complied with the Public Body's request.

[para 20.] The Public Body requested that the Commissioner order the Applicant to:

1. Return the entire Personnel File to the Public Body;
2. Make an undertaking to destroy all copies of the Personnel File that may have been made, and

3. To further undertake, if any copies have been provided to others, to provide the Public Body with a list of all parties to which copies of the Personnel File have been made.

[para 21.] I appreciate the Public Body's concerns with regards to the Applicant's possession of the Personnel File. However, the Applicant is not subject to the Act and therefore, the Commissioner has no jurisdiction over the Applicant's actions. The Public Body will have to pursue any other statutory or common law remedies it may have against the Applicant.

III. RECORDS AT ISSUE

[para 22.] As severing is not an issue before me in this inquiry, the records themselves are not directly at issue.

IV. ISSUES

[para 23.] The Notice of Inquiry set out the following issues for the inquiry:

1. Does the Commissioner have jurisdiction over how the Public Body dealt with their records retention system prior to the *Freedom of Information and Protection of Privacy Act* (the "Act") coming into force in relation to Health Care Bodies?
2. Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by s. 9(1) of the Act?

V. DISCUSSION OF THE ISSUES

Issue A: Does the Commissioner have jurisdiction over how the Public Body dealt with their records retention system prior to the *Freedom of Information and Protection of Privacy Act* (the "Act") coming into force in relation to Health Care Bodies?

1. Applicant's Position

[para 24.] The Applicant alleges that the Public Body violated section 86(1)(c.1) and section 86(1)(e) of the Act when the CDHG Medical Advisory Board records were destroyed in 1995.

[para 25.] Section 86(1)(c.1) and 86(1)(e) of the Act read:

86(1) A person must not wilfully

(c.1) alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access to the record,

(e) destroy any records subject to this Act with the intent to evade a request for access to the records.

[para 26.] The Applicant referenced Investigation Report 99-IR-004 (page 3), which stated:

...section 86(1)(e) and (2) of the FOIP Act was proclaimed in force effective June 1, 1994.

[para 27.] I understand the Applicant's position to be:

- Section 86(1)(e) pre-dates the implementation of the Act.
- Therefore, section 86(1)(c.1) and section 86(1)(e) would grant the Commissioner jurisdiction over how the Public Body dealt with its record retention system prior to the Act coming into force in relation to health care bodies.

2. Public Body's Position

[para 28.] I will summarize the Public Body's submissions as follows:

- Health care bodies were not subject to the Act until October 1, 1998. The language of the Act does not give a retroactive construction. In other words, the Act cannot be applied retroactively. Therefore, the Commissioner does not have any jurisdiction over any record retention policies that were developed prior to the extension of the Act to health care bodies.
- The records destroyed in 1995 no longer exist and are not in the custody or control of the Public Body. Therefore, these records are not subject to the Act and thus are outside the jurisdiction of the Commissioner. The Public Body submits that consideration of any retention/destruction policy relating to records not subject to the Act is not within the jurisdiction of the Commissioner.
- Section 86(1)(e) of the Act, as it relates to section 98(1) is not applicable as requests under the Act were not in the Public Body's contemplation in 1995.

3. Analysis

[para 29.] Based on the Applicant's arguments, I will consider whether section 86(1)(c.1) and section 86(1)(e) of the Act grant the Commissioner jurisdiction over how the Public Body dealt with its records retention system prior to health care bodies being subject to the Act.

[para 30.] The Act received Royal Assent in 1994 and was proclaimed in force effective October 1, 1995 for provincial public bodies. Subsequently, the Act was extended to school jurisdictions on September 1, 1998; health care bodies on October 1, 1998; post-secondary educational institutions on September 1, 1999; and local government bodies on October 1, 1999.

[para 31.] Section 98(1) of the Act states:

98(1) This Act, except section 86(1)(e) and (2), comes into force on Proclamation.

[para 32.] Section 86(1)(e) and 86(2) were proclaimed in force effective June 1, 1994, which pre-dates the implementation of the Act to any of the public bodies. Therefore, regardless of the date to which a public body became subject to the Act, section 86(1)(e) and 86(2) applied to all public bodies as of June 1, 1994.

[para 33.] Section 86(1)(c.1) of the Act was introduced as a new provision as a result of the May 19, 1999 amendments to the Act. As section 86(1)(c.1) of the Act did not apply to the Public Body in 1995, I will not consider this section any further.

[para 34.] I find that section 86(1)(e) and section 86(2) do not impose any duty or requirement as to how a public body should structure or maintain its records retention system. Consequently, these sections convey no authority or power to the Commissioner over how a public body deals with its records retention system.

[para 35.] I conclude that section 86(1)(e) and section 86(2) do not grant the Commissioner jurisdiction over how a public body deals with its records retention system prior to the implementation of the Act. Therefore, as his delegate, I also do not have jurisdiction.

[para 36.] Section 86(1) lists a number of “offences” under the Act that could result in fines charged pursuant to section 86(2) of the Act. Section 86(1)(e) is the only offence that came into force prior to the proclamation of the Act.

[para 37.] The Commissioner has stated that section 68 of the Act, which sets out the Commissioner’s power to make an order, does not give him the power to levy a fine under section 86(2) and that this would be a matter for the courts (Order 99-012 [para. 48]). Therefore, any party, including but not limited to the Commissioner, who believes that an offence under section 86(1) of the Act has been committed, may pursue this matter with the Crown Prosecutor who would determine whether further proceedings are warranted.

Issue B: Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by s. 9(1) of the Act?

1. Applicant’s Position

[para 38.] The Applicant’s submissions state that the Public Body has not fulfilled its duty to prove that the requested records have been destroyed. The Applicant is not convinced that all responsive records were destroyed, and alleges that the Public Body is concealing responsive records.

2. Public Body’s Position

[para 39.] The Public Body’s submissions state:

- The Public Body responded to the Applicant’s requests for information in a timely manner.
- The Public Body did not process the Applicant’s subsequent requests for information as “new” requests under the Act and therefore did not delay the response to the Applicant.
- The Applicant has been provided with all the information requested which was in the custody of the Public Body. The Public Body cannot release records that it does not have and it cannot create non-existence records to fully satisfy the Applicant.

[para 40.] The Public Body’s position is that it has responded to the Applicant as openly, accurately and as completely as possible and therefore has met its obligations under section 9(1) of the Act.

3. Analysis

[para 41.] Section 9(1) of the Act reads:

9(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 42.] The issue under section 9(1) of the Act for both the Applicant and the Public Body is whether the Public Body fulfilled its duty to respond openly, accurately and completely.

a. For What Time Period do I review the Public Body’s response?

[para 43.] The Commissioner has stated that he would only review the actions taken by a public body prior to the date of an applicant’s request for review. A review of anything after that date would result in a review of what went on during mediation and the Commissioner has stated he will not do this (Order 99-039 [para. 92]).

[para 44.] The Commissioner has also stated that an applicant could not “unilaterally” modify the access request during mediation and have the Commissioner review the public body’s actions on that modified request (Order 99-039 [para. 91]). In the same Order, the Commissioner further states:

[para 93.] It was open to the Public Body, during mediation, to search for additional records that the Applicant wanted, but the Public Body was under no duty to do so.

[para 45.] The Applicant initially applied to the Public Body under the Act on October 12, 1999. The Public Body responded on November 12, 1999. The Applicant then asked the Commissioner to review the Public Body's response on December 28, 1999. In response to the Applicant's request for review, the Commissioner authorized mediation. Subsequently, the Applicant wrote to the Public Body on May 10, June 4, and June 9, 2000 to request further information. The Public Body responded on May 19, June 8, and July 14, 2000.

[para 46.] Both the Applicant and the Public Body referenced the correspondence exchanged between the two parties subsequent to the Applicant's request for review. The Applicant claims that the correspondence supports the Applicant's allegations that the Public Body has not fulfilled its duty to prove that the requested records have been destroyed and that the Public Body is concealing responsive records. However, the Public Body states the correspondence shows that it has fulfilled its duty as set out under section 9(1) of the Act.

[para 47.] I reviewed the correspondence exchanged between the two parties, that was provided for the inquiry. Neither the Public Body nor the Applicant provided me with a copy of the Public Body's May 19, 2000 response. However, page 6 of the Applicant's initial submission indicated that the Public Body applied section 16(1) and section 23(1)(f) of the Act to sever information from the records released. The Public Body's rebuttal submission does not dispute this fact.

[para 48.] Therefore, under section 9(1) of the Act, I intend to consider the Public Body's May 19, 2000 response. I find that, by its actions, the Public Body accepted the Applicant's access request of May 10, 2000, such that the Applicant did not unilaterally modify the access request.

[para 49.] However, I note that the Public Body's correspondence dated June 8 and July 14, 2000 make no reference to the Act. Therefore, I find that the Public Body's responses to the Applicant's requests for further information were outside the Act and I will not review these responses.

[para 50.] In conclusion, I will review the Public Body's actions up to its May 19, 2000 response to determine whether the Public Body fulfilled its duty as provided by section 9(1) of the Act.

b. Did the Public Body Properly Discharge Its Obligations under section 9(1)?

[para 51.] The Commissioner has stated that to properly discharge its obligations under section 9(1), a public body must provide the Commissioner with sufficient evidence to show that the public body has made a reasonable effort to identify and locate records responsive to the request (Order 97-003 [para. 26]).

[para 52.] In my view, the Commissioner's comment can be applied to this case. In other words, the Public Body must provide the inquiry with sufficient evidence to show that it has responded to the Applicant openly, accurately and completely. This is consistent with the

Commissioner's decisions in previous Orders that the burden is on the public body to prove that it has fulfilled its duty under section 9(1) of the Act (Order 97-003 [para. 25]; Order 97-006 [para. 7]).

[para 53.] The Public Body's initial submission outlined a chronology of the correspondence exchanged between the Applicant and the Public Body. However, copies of the correspondence were not included in either the Public Body's initial or rebuttal submissions. The Applicant's submissions provided copies of some of the correspondence.

[para 54.] Upon my request, the Public Body provided me with copies of the correspondence between the Applicant and the Public Body. However, the Public Body did not retain a copy of its May 19, 2000 letter to the Applicant and was therefore, unable to provide this letter to me. As a result, I relied on the information contained in the Applicant's submission regarding the contents of the Public Body's May 19, 2000 letter.

[para 55.] The only evidence presented by the Public Body is that it has responded to the Applicant in a timely manner. However, timeliness of response is a duty under section 10 of the Act and is not relevant to section 9(1) of the Act.

[para 56.] The Public Body claims it has provided the Applicant with all responsive records in its custody. However, the Public Body provides no evidence in its submissions to substantiate its claim.

[para 57.] The Public Body's submissions provided no evidence to refute the Applicant's allegations that responsive records still exist, other than providing general statements that it denies the Applicant's allegations and that it fulfilled its duty to respond openly, accurately and completely.

[para 58.] The Public Body's submissions presented no evidence as to the search conducted for responsive records. In addition, the Public Body provided no explanation as to how the Public Body came to its conclusion that there were no more responsive records in existence, other than the Personnel File of Doctor X.

[para 59.] In the absence of evidence from the Public Body, I find that the Public Body did not fulfill its burden to prove that it had properly discharged its obligation under section 9(1) of the Act. Therefore, I intend to order the Public Body to comply with its duty to respond to the Applicant openly, accurately and completely with regard to the search conducted in response to the Applicant's request. In Order 99-021, the Commissioner sets out what a public body must provide to an applicant when it can't find responsive records.

VI. ORDER

[para 60.] I make the following Order under section 68 of the Act:

Issue A: Does the Commissioner have jurisdiction over how the Public Body dealt with their records retention system prior to the Freedom of Information and Protection of Privacy Act (the “Act”) coming into force in relation to Health Care Bodies?

[para 61.] Section 86(1)(e) and section 86(2) of the Act does not grant the Commissioner jurisdiction over how the Public Body dealt with its records retention system prior to the Act coming into force in relation to health care bodies.

Issue B: Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by s. 9(1) of the Act?

[para 62.] I find that the Public Body’s case did not meet the burden of proof under section 9(1) of the Act in this inquiry.

[para 63.] Pursuant to section 68(3)(a) of the Act, I order the Public Body to report to me and to the Applicant as to the process it went through to locate responsive records. I also order the Public Body to explain how it came to its conclusion that no responsive records, other than the Personnel File of Doctor X, exists. If records existed but have been destroyed, I order the Public Body to say so, and to provide documentation substantiating the destruction. If no documentation is available, I order the Public Body to say so and to provide an explanation.

[para 64.] I further order that the Public Body notify me in writing within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Marylin Mun
Inquiry Officer