ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-006

February 21, 2001

ALBERTA HEALTH & WELLNESS

Review Number 1824

Office URL: http://www.oipc.ab.ca

Summary: A newspaper reporter requested information relating to cost effectiveness and impact on medical outcomes of surgery performed by private clinics on a contract basis for regional health authorities. The Assistant Commissioner found that Alberta Health & Wellness failed to fulfill its duty to assist pursuant to section 9(1) and required a further search for responsive records. The Assistant Commissioner found that section 20(1)(a)(i) did not apply and it was not necessary to consider whether section 23(1)(b) applied to the record. The Assistant Commissioner found that section 23(1)(a) did apply and upheld the decision of Alberta Health & Wellness to refuse to disclose the record pursuant to the *Freedom of Information and Protection of Privacy Act*.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, ss. 9(1), 20(1)(a)(i), 23(1)(a) and 23(1)(b).

Authorities Cited: AB: Order 96-006; Order 96-017; Order 97-020; Order 99-001; Order 99-002; Order 99-006; Order 99-036; Order 99-040 and Order 2000-021.

I. BACKGROUND

[Para 1.] Mark Lisac, a reporter for the Edmonton Journal, (the "Applicant") made a request for access to information dated December 10, 1999, to the Public Body ("Alberta Health & Wellness") under the *Freedom of Information and*

Protection of Privacy Act (the "Act"). The Applicant asked for information relating to cost-effectiveness and medical outcomes for surgery done in private clinics.

[Para 2.] The request from the Applicant was dated December 10, 1999, and read as follows:

> Any studies, correspondence, briefing materials or other information indicating the relative cost-effectiveness and-or relative effects on medical outcomes of surgeries performed by private clinics on a contract basis for regional health authorities.

[Para 3.] In a letter dated January 12, 2000 and postmarked January 17, 2000, the Public Body provided the Applicant with two responsive records. The first record provided was a seven-page document entitled 'Background on Private Provision of Medical and Hospital Services in Other Jurisdictions'. The second record was a four-page document entitled, 'Fact Sheet – Atlantic Institute for Market Studies Report'.

[Para 4.] Following this reply, the Applicant raised concerns with my office about the lack of responsiveness and timeliness of the Public Body. The first concern was that the normal operating practice of public bodies to discuss each request with applicants by telephone and to provide written acknowledgement of receipt of the request, but this practice did not occur.

[Para 5.] The second concern was that public bodies normally alert applicants before the due date if the response is expected to be a few days late, but this did not occur. The third concern was that it is expected that mail will be received within one or two business days, but the letter to the Applicant was not even postmarked until five days after the date of the letter. My office discussed these concerns with the Public Body.

[Para 6.] As a result, the Public Body sent a letter of apology dated January 28, 2000, to the Applicant. The Applicant accepted the letter of apology as addressing certain procedural issues raised by the Applicant. However, the issue of adequacy of the search remained outstanding.

[Para 7.] On February 9, 2000, the Applicant made a request for review of the Public Body's response to the access request. The request for review questioned the adequacy of the search. The Applicant said that a statement made by the Minister of Health & Wellness at a news conference as well as written information the Applicant obtained from other sources indicated that additional responsive records likely existed, but had not been provided.

[Para 8.] The Applicant provided a copy of a letter addressed from the Alberta Minister of Health to the federal Minister of Health, which was available on the government web site. Additionally, the Applicant provided part of an Alberta Health brochure entitled, "We Are Listening", which makes reference to costs in the public and private systems for eye surgery.

[Para 9.] On February 11, 2000, I authorized mediation to attempt to settle this matter. During the course of mediation, the Public Body provided my office with 14 additional pages of information. On January 12, 2001, the Public Body provided two of the additional 14 pages to the Applicant. I note that the Public Body provided the Applicant with a total of 13 pages in response to the request.

[Para 10.] The Public Body refused to provide the remaining 12 pages of information to the Applicant, saying this information was not responsive to the request. The parties were unable to reach a resolution. The matter was set down for a written inquiry. The Applicant and the Public Body submitted written submissions.

[Para 11.] The Public Body submitted its entire written submission in camera to my office on the deadline of January 19, 2001. In a letter dated January 19, 2001, I asked the Public Body to review this decision and to resubmit its submission, with a part to be provided to the Applicant and a part to be dealt with in camera if necessary. In this letter I also asked the Public Body to mark its records and to clearly indicate any section of the Act being used to withhold any portion of a record.

[Para 12.] The original submission of the Public Body does not form part of the written representations of the parties before me at this inquiry. In response to my letter, the Public Body provided two written submissions, with one submission to be provided to the Applicant and the other submission not to be provided to the Applicant. These submissions were provided on January 24, 2001, the new deadline. These two later submissions are the written representations of the Public Body that are before me at this inquiry.

II. RECORD AT ISSUE

[Para 13.] The record at issue in this inquiry consists of the 12 pages that were withheld in their entirety from the Applicant. The Public Body has numbered the record from page 1 to page 12. The record consists of an 8-page draft letter and 4 pages of internal e-mail communications.

[Para 14.] The 8-page draft letter is a letter from the Minister of Health & Wellness to the federal Minister of Health. The final draft of this letter was disclosed on the government web site along with a covering press release entitled, "Alberta Health and Wellness News Release", dated December 10, 1999.

[Para 15.] Three of the pages of e-mail communications relate to the draft letter. The other page of e-mail communications relates to the last two pages of information that has already been provided to the Applicant.

III. ISSUES

[Para 16.] The issues before this inquiry are:

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

Issue B: Is the information that has been withheld from the Applicant responsive to the Applicant's request?

Issue C: Did the Public Body properly apply section 20(1)(a)(i) (harm to Government relations)?

Issue D: Did the Public Body properly apply section 23(1)(a) (advice)?

Issue E: Did the Public Body properly apply section 23(1)(b) (consultations or deliberations)?

IV. DISCUSSION OF THE ISSUES

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

1. General

[Para 17.] Section 9(1) of the Act says:

> 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 18.] Order 2000-021 recently confirmed that an adequate search two elements - 1) every reasonable effort is made to search for the actual record requested, and 2) the applicant is informed in a timely fashion about what has been done. The standard established by the Act is not a standard of perfection, but a standard of reasonableness.

2. Application of Section 9(1)

[Para 19.] The Applicant says in his submission that the Public Body did not conduct an adequate search. The Applicant says that he provided three additional records obtained from other sources to the Public Body. The Applicant says that the Public Body only located further responsive records after the Applicant located the public documents.

[Para 20.] The Applicant says that the public documents he located indicate that further responsive documents exist. I note that an excerpt in the "We Are Listening" document says, "Each proposal would have to show a net benefit and give consideration to reduced waiting times or improved efficiency."

[Para 21.] Similarly the letter to the federal Minister of Health that was provided as an attachment to the Applicant's submission, states:

> 1. How will the proposal give Albertans faster access to surgical services? Each regional health authority would look at its own circumstances and determine if they felt the option of contracting out some surgical procedures would benefit people in their region. The contracts they then propose to Alberta Health and Wellness would not be approved unless they provided clear benefits – and those benefits would be faster access, shorter waiting times or increased efficiency.

[Para 22.] This letter goes on to state:

> 2. What evidence is there that this will cost less? There will be no contracts unless there is a net benefit to Albertans. One of those benefits will be cost effectiveness. Experience in Alberta with contracting out day surgeries indicates that focusing on a narrow range of less intensive surgery can allow private clinics to become very efficient and cost effective at what they do.

In his submission, the Applicant says that it appears the Public Body has more responsive records due to statements such as the above.

[Para 23.] The Public Body says in its submission that it conducted a thorough search for the records. The Public Body described the search methods it used to identify responsive information. The method used by the Public Body was a number of e-mail requests sent to certain individuals in the department.

[Para 24.] The Public Body provided copies of the e-mail requests sent to various individuals as evidence of the adequacy of its search. However, these requests did not result in the Public Body identifying the records located by the Applicant or subsequently located by the Public Body.

[Para 25.] By the Public Body's own admission in its letter of apology to the Applicant, it appears that even the Public Body recognizes a number of serious breaches of its duty to assist the Applicant. I do commend the Public Body for providing a forthright apology. However, this apology does not change the inadequacy of the search.

[Para 26.] I am not satisfied that the Public Body made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely under section 9(1). I find that the Public Body failed in its duty to assist the Applicant.

[Para 27.] Due to the outstanding issue of adequacy of the search, I am ordering the Public Body to conduct a further search for responsive records and to provide me and the Applicant with an explanation of the efforts made to locate further responsive records.

B. Issue B: Is the information that has been withheld from the Applicant responsive to the Applicant's request?

[Para 28.] The determination of whether a record is responsive is a judgment based upon the specific facts of an individual request. Order 97-020 says 'responsiveness' means anything that is reasonably related to an applicant's request for access. Factors such as whether or not the information is otherwise available to the public are not relevant to a determination of responsiveness.

[Para 29.] The Public Body maintains that none of the 12 pages in the record are responsive to this access request. On the one hand, this access request is broadly framed in regards to information about cost-effectiveness and medical outcomes for surgery done in private clinics. On the other hand, this request is narrowly framed in that it is limited to surgeries done on a contract basis for regional health authorities. However, I do not interpret this request to be restricted to a request for financial information that appears in figures and tables.

[Para 30.] I have considered all of the evidence before me including the record and the submissions of the parties. I find that the e-mail communications (pages 1 to 3 and page 12) are responsive to this request, as this information deals with

the general subject matter of the access request. I find that the draft letter (pages 4 to 11) is responsive to this request for the same reason.

[Para 31.] As I have found that all of the pages in the record are responsive, all of the record remains to be considered under the exceptions claimed by the Public Body.

C. Issue C: Did the Public Body properly apply section 20(1)(a)(i) (harm to Government relations)?

1. General

[Para 32.] The Public Body says that section 20(1)(a)(i) applies to the entire record, that is, that is to all of pages 1 to 12. Therefore, I will be considering the entire record under this provision.

[Para 33.] Section 20(1)(a)(i) of the Act says:

> 20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> > (a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:
> >
> > > (i) the Government of Canada or a province or territory of Canada,

2. Application of section 20(1)(a)(i)

[Para 34.] In its submission, the Public Body says that the record falls within section 20(1)(a)(i) because the information involves an exchange between the provincial Minister of Health and the federal Minster of Health. I have also considered the arguments raised by the Public Body in its 'in camera' submission. I note that the first time the Public Body raised this argument was in its submission.

[Para 35.] I concede that the e-mail advice involves sensitive information. The content of the draft letter also involves sensitive information. However, the matter before me is whether the disclosure of this information could reasonably be expected to harm relations between the Government of Alberta and the Government of Canada.

[Para 36.] The Public Body has the burden of proof on this issue. However, the Public Body has not provided any evidence or argument to convince me that

disclosing this information would harm relations between the Government of Alberta and the Government of Canada.

[Para 37.] I have considered all the evidence before me including the record and the submissions of the parties including the in camera submission of the Public Body. I find that section 20(1)(a)(i) does not apply to any parts of the record.

D. Issue D: Did the Public Body properly apply section 23(1)(a) (advice)?

1. General

[Para 38.] The Public Body says that section 23(1)(a) applies to the entire record. Section 23(1)(a) of the Act says:

> 23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> > (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

2. Application of section 23(1)(a)

[Para 39.] Order 96-006 set out the criteria for "advice", which includes advice, proposals, recommendations, analyses or policy options under section 23(1)(a). That advice should:

(a) be sought or expected, or be part of the responsibility of a person by virtue of that person's position;
(b) be directed toward taking an action; and
(c) be made to someone who can take or implement the action.

[Para 40.] In order to fall within this section, the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. Order 99-040 confirmed that the record must contain more than a bare recitation of facts or summaries of information. Order 99-001 said that factual information sufficiently interwoven with other advice, proposals, recommendations or policy options may also be withheld.

[Para 41.] Pages 1 to 3 and page 12 of the record all involve advice provided by e-mail communications. Pages 1 to 3 relate to the draft letter. Page 12 relates to two pages of information that have been released by the Public Body to the Applicant. These e-mail communications clearly involve advice, proposals, recommendations and analyses provided by staff.

[Para 42.] This advice is an expected part of the responsibilities of ministerial staff to provide advice to and for the Minister of Alberta Health & Wellness. This advice is directed towards taking an action and is made to individuals who can implement the action, as evident in the subsequent revisions made to the draft letter. This exception enables employees to provide candid advice and recommendations to their superiors without fear of outside scrutiny.

[Para 43.] After carefully reviewing the records, I find that the Public Body properly withheld pages 1 to 3 and page 12 of the record under section 23(1)(a). This information has not been publicly disclosed and disclosure of these pages would reveal advice, proposals and recommendations.

[Para 44.] It is more difficult to determine whether disclosing the draft letter (pages 4 to 11) would reveal advice, proposals or recommendations. I note that much of the information in the draft letter was made public in the final letter that was released on the government web site. The final letter was dated December 10, 1999. I find that the Public Body properly withheld pages 4 to 11 of the record under section 23(1)(a) for the following reason.

[Para 45.] This is a situation of civil servants trying to come up with appropriate wording to convey the desired message in a complex situation. I am inclined to think this is exactly the kind of thing the section was designed to allow to be withheld. If the earlier draft contained any data of the kind being sought, I might be inclined to view it differently.

[Para 46.] Section 23(1) is a discretionary ("may") exception. Consequently, even if this section applies to the information in the records, a public body may nevertheless decide to disclose the information. Order 96-017 said that a public body exercises its discretion properly when (1) it considers the objects and purposes of the legislation in question, and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[Para 47.] After reviewing the submissions, it is my opinion that the Public Body properly exercised its discretion according to the objects and purposes of the Act and did not exercise its discretion for an improper or irrelevant purpose.

E. Issue E: Did the Public Body properly apply section 23(1)(b) (consultations or deliberations)?

[Para 48.] The Public Body says that section 23(1)(b) applies to pages 1 to 3 and page 12 of the record. As I have already found that the Public Body properly applied section 23(1)(a) to this information, I do not find it necessary to decide whether section 23(1)(b) also applies to the same information.

V. ORDER

[Para 49.] Under section 68 of the Act, I make the following order:

1. I am not satisfied that the Public Body made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely under section 9(1). I am ordering the Public Body to conduct a further search for responsive records and to provide me and the Applicant with an explanation of the efforts made to locate further responsive records.

2. I find that all of the record is responsive to the general subject matter of the request, and therefore all of the record remains to be considered under the exceptions claimed by the Public Body.

3. I find that section 20(1)(a)(i) does not apply to the record, and therefore all of the record remains to be considered under the additional exceptions claimed by the Public Body.

4. I find that the Public Body properly applied section 23(1)(a) to all of the record and properly exercised its discretion not to disclose the record. I find that the Public Body is not required to disclose the record to the Applicant pursuant to section 23(1)(a).

5. As I have already found that the Public Body properly applied section 23(1)(a), I do not find it necessary to decide whether section 23(1)(b) also applies to the same information.

6. I order the Public Body to notify me in writing within 50 days of being given a copy of this Order, that it has complied with this Order.

Frank Work, Q.C.
Assistant Information and Privacy Commissioner