

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-016

April 18, 2001

CALGARY REGIONAL HEALTH AUTHORITY

Review Number 1880

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Summary: The Applicant applied to the Calgary Regional Health Authority for access to a record relating to terminations of pregnancy for congenital anomalies. The Calgary Regional Health Authority said it had no responsive records unless it created new records out of other existing records. The Assistant Commissioner found that the Calgary Regional Health Authority was not in breach of their duty to assist the Applicant pursuant to section 9(1) of the Act. Pursuant to section 9(2) of the Act, the Assistant Commissioner found that the Calgary Regional Health Authority does not have a duty under the Act to create records for the Applicant. The records could not be created from a record in electronic form using normal computer hardware and software and technical expertise and creating the record would unreasonably interfere with its operations. The Assistant Commissioner requested the Calgary Regional Health Authority to provide the Applicant with the statistical information it can create using its normal computer hardware and software systems and technical expertise. It was not necessary to consider whether other sections of the Act apply, as the Public Body does not have a duty to create a record.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 9(1)(2); *British Columbia Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 6; *Nova Scotia Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 11, s 8(3).

Authorities Cited: **AB:** Orders 2001-007, 2001-003, 2000-033, 2000-022, 99-021, 98-012, 97-006, 97-003; **BC:** Orders 00-16, 323-1999, 249-1998, 105-1996; **NS:** Reports FI-99-15, FI-99-09.

I. BACKGROUND

[Para 1.] In a letter dated September 7, 1999, the Applicant made a request to the Public Body (the "Calgary Regional Health Authority") under the *Freedom of Information and Protection of Privacy Act* (the "Act") relating to terminations of pregnancy for congenital anomaly, which were conducted from 1991 to 1998.

[Para 2.] The Applicant's final request was as follows:

1. What was the number of terminations of pregnancy for congenital anomalies for each year from 1996 to 1999?
2. What is the gestational age by week for those cases over 24 weeks for the years 1996 to 1999?
3. For each of the years from 1996 to 1999, what was the recorded prenatal diagnosis for all the weeks of gestation? These results will be grouped together by prenatal diagnosis.
4. For each year, 1996 to 1999, how many of these cases were born alive, how long did these cases live based upon a grouping of time, and what treatments did these cases receive on a grouping method?
5. For those same years, 1996-1999, what was the confirmed congenital anomaly?
6. For the years from 1996 to 1999, what percentage of terminations received autopsies?

[Para 3.] I issued Order 2000-033 in regard to the Applicant's request for a fee waiver. In that Order, I said that records, which exist, would relate to a matter of public interest. I waived the entire fee for such responsive records as exist.

[Para 4.] In Order 2000-033, I said that finding did not address whether or not the Public Body has a duty to create records that do not presently exist. The Public Body was not required to create any records for or to provide any records to the Applicant, pending the outcome of a further inquiry. The existence of a duty to create a record is one of the issues before this inquiry.

[Para 5.] The Public Body does not have a record that meets the request of the Applicant. This information would have to be compiled from various sources. The Public Body estimated that it would require four months of time and extensive involvement of medical specialists to review the estimated 475 patient charts required to gather the information requested by the Applicant.

[Para 6.] The Public Body says that conducting computer searches and manual chart reviews could generate some of the information in this request. The Public Body says that other parts of the information could be only be generated by hiring medical specialists such as geneticists and neonatologists to interpret patient charts and provide expert opinion, for example to determine the confirmed congenital anomaly.

[Para 7.] The Applicant and the Public Body have provided written submissions and written rebuttals for this inquiry. This Order proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORDS AT ISSUE

[Para 8.] The information requested by the Applicant does not yet exist as discrete records. The records containing information requested by the Applicant would need to be compiled from existing records.

III. ISSUES

[Para 9.] The issues before this inquiry are:

Issue A: Did the Public Body breach the duty to assist the Applicant pursuant to section 9(1) of the Act?

Issue B: Does the Public Body have the duty to create a responsive record for the Applicant pursuant to section 9(2) of the Act?

Issue C: If the Public Body has the duty to create the record requested by the Applicant, are there provisions in the Act that authorize the Public Body to withhold information?

IV. DISCUSSION OF THE ISSUES

1. General

[Para 10.] Section 9 of the Act says:

- (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.
- (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 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.

2. Did the Public Body breach the duty to assist the Applicant pursuant to section 9(1) of the Act?

[Para 11.] There are two issues under section 9(1) of the Act: the adequacy of the search and the general duty to assist.

a. Did the Public Body conduct an adequate search for records?

[Para 12.] In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1).

[Para 13.] Previous orders (E.g., Order 98-012, Order 2001-003 and Order 2001-007) say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

i. Did the Public Body make every reasonable effort to search for the actual record requested?

[Para 14.] The first component of an adequate search is that the Public Body must make every reasonable effort to search for the record requested. The Public Body says that it conducted a thorough and adequate search for responsive records. An affidavit was provided by the Manager of Corporate Data at the Calgary Regional Health Authority, as evidence of the steps taken when conducting the search.

[Para 15.] The Public Body says that it has conducted a thorough search that involves a search of paper and computer records and has ascertained that there are no responsive records. The Applicant says there must be responsive records.

[Para 16.] I have reviewed a sample of the typical charts involved. I understand how information of the kind at issue here is dispersed in patient charts and may not exist on the face of a record. I find that the Public Body made every reasonable effort to search for the actual record requested. Therefore, the Public Body has fulfilled the first component of conducting an adequate search.

ii. Did the Public Body inform the Applicant in a timely fashion about what was done?

[Para 17.] The second component of an adequate search is that the public body must inform the applicant in a timely manner about what has been searched. The Applicant says that the Public Body did not generally respond in a prompt or timely manner throughout the handling of this request.

[Para 18.] The Public Body says that it informed the Applicant early on in this process that the search for records included both patient charts and computer records. The December 1, 1999, letter that was sent to the Applicant shows that both paper records and computer records were searched.

[Para 19.] I find that the Public Body informed the Applicant in a timely manner about what had been searched. Therefore, the Public Body has fulfilled the second component of conducting an adequate search.

b. Did the Public Body fulfill the general duty to assist the Applicant?

[Para 20.] In order to fulfill the general duty to assist, a public body must make every reasonable effort to assist an applicant pursuant to section 9(1) of the Act. The Applicant says that the Public Body did not fulfill the duty to assist, as it did not meet the standards that are described in the FOIP Guidelines and Practices Manual.

[Para 21.] For example, the Applicant says that the Public Body did not attempt to develop a working relationship, define the nature and scope of the request, promptly acknowledge receipt of the request or the initial fee, telephone to resolve any problems quickly or advise about extensions of time until after the extensions were granted. The Applicant says there were long silences with little or no explanation about what was being done with the request.

[Para 22.] The Public Body says that it went 'above and beyond its duty' to the Applicant. As an example, the Public Body says it offered to provide the Applicant with statistical information about pregnancy terminations, which can be created using its existing computer software and hardware without cost, as a responsive record does not exist.

[Para 23.] The Public Body raises the question of whether a duty under section 9(1) is an issue that is subject to the Act when there are no records. In Order 2000-022, the Commissioner said that the duty to assist under section 9(1) is independent of whether or not records exist that are subject to the Act. I find that even if there are no responsive records, a public body must still fulfill its section 9(1) obligations to an applicant.

[Para 24.] I acknowledge that this was a complex request. For example, this request was much more complicated than the request made to the Vancouver General Hospital for the number of abortions performed for two calendar years in Order 323-1999. This request involves extremely sensitive information.

[Para 25.] In my previous order, I said that if this record existed, the record would relate to a matter of public interest. There is no doubt that the more this type of information is made publicly available in statistical form by public bodies, the less need there will be for these types of access requests.

[Para 26.] The parties have a long-standing and somewhat acrimonious relationship. However, regardless of the historical relationship between an applicant and a public body, the public body must fulfill its duty to assist under the Act. These circumstances should raise a red warning flag for public bodies, who should be especially vigilant to ensure that duties under the Act are satisfied.

[Para 27.] The Applicant admits that the Public Body spent a great deal of time and effort responding to this request. The Public Body admits that there was a 'break down of communication' between the Public Body and the Applicant and that there were 'misunderstandings'.

[Para 28.] The Public Body did not meet the best practice standards described in the Manual. However, it does not necessarily follow that the Public Body has breached its duty to assist pursuant to the Act. The issue before me is whether or not the Public Body has made every reasonable effort to assist the Applicant. Meeting the requirement under the Act does not require a standard of perfection, but does require every reasonable effort in the circumstances.

[Para 29.] In my view, complying with the practices described in the Manual is a prudent course of action for public bodies. Complying with that standard is beneficial to both the public body and the applicant. For example, a practice described in the Manual is that where a request involves a vast amount of information the public body should attempt to clarify and narrow the request while still meeting the information needs of the applicant.

[Para 30.] The FOIP Guidelines and Practices Manual describes the best practices for handling requests by public bodies under the Act. In some instances the practices have been developed from requirements set out in Orders. However, the standard in the Act is that a public body must make every reasonable effort. While I encourage public bodies to follow the ideal standard set out in the Manual, that standard is higher than the requirement to make every reasonable effort under the Act.

[Para 31.] The efforts made by the Public Body in this case were not exemplary, but the efforts were adequate. I find that the Public Body has provided sufficient evidence and has discharged its burden of proof to show that it fulfilled its general duty to assist the Applicant.

[Para 32.] In summary, I find that the Public Body conducted an adequate search for records and fulfilled its general duty to assist the Applicant pursuant to section 9(1). Therefore, the Public Body was not in breach of its duty to assist the Applicant.

2. Does the Public Body have the duty to create a responsive record for the Applicant pursuant to section 9(2) of the Act?

[Para 33.] Section 9(2) requires a public body to create a record when the two-part test set out in this provision is met. A public body must create a record when (1) the record can be created from a public body's record that is in electronic form using its' normal computer hardware and software and technical expertise; and (2) creating the record would not unreasonably interfere with the operations of the public body.

[Para 34.] As the public body is in the better position to address these issues, the public body has the burden of proving that it does not have a duty to create a record. The

public body must provide sufficient evidence to show that it does not have a duty to create a record under section 9(2) of the Act.

[Para 35.] In Order 2000-022, the Commissioner recently said that a record does not have to be created under section 9(2) if this cannot be done using existing hardware and software. In that case, the public body would have had to identify split mineral titles before it could locate the records requested. As the record requested could not be created from a record in electronic form, section 9(2) was not applicable and the public body was not required to create the record.

[Para 36.] A similar provision to section 9(2) in the Alberta legislation exists in section 6(2) of the British Columbia legislation, and has been considered in various orders. In Order 105-1996, the B.C. Commissioner found that the public body did not have a duty to prepare the list of records requested by the applicant, as the list did not exist in hard copy or as a machine-readable record.

[Para 37.] In Order 249-1998, the B.C. Commissioner found that the duty to create a record did not include the duty to gather or create information, when a search of machine-readable records for payments to law firms did not locate any of this information. Similarly, in Order 00-16, the B.C. Commissioner said this provision creates a limited duty for public bodies to assist applicants by electronically creating a record, but does not even require that a public body search for a record electronically.

[Para 38.] Section 8(3) of the Nova Scotia legislation is a similar provision to section 9(2) of the Alberta legislation, and has been considered in various orders. In Report FI-99-09, the Review Officer found that the Medical Examiner's Office was not required to create a record of the number of vehicle fatalities for persons wearing seatbelts under this provision. The office was not automated to correlate these facts or to electronically create this record.

[Para 39.] In Report FI-99-15, a Review Officer under the Nova Scotia legislation found that a public body did not have a duty to create a record of the calls placed within the geographic area of an ambulance route. This situation involved a delayed response to a 911 call. The Review Officer said that a duty to create this record did not arise, partly due to the extensive time and resources that would be required to create the record requested.

[Para 40.] In regards to the application of section 9(2)(a) of the Act, the Public Body says that the first requirement is not met, as the record requested cannot be created using normal computer hardware, software and technical expertise. In order to create the record, the Public Body says it would have to conduct extensive research and both clinical and information system staff would have to conduct detailed chart reviews.

[Para 41.] The Public Body says that some statistical information could be created using existing computer systems. An example of the information that could be created using existing computer systems was provided in the rebuttal provided by the Public Body.

The Public Body says the Applicant has been 'steadfast' in the view that the information that could be created using existing computer systems does not satisfy the request.

[Para 42.] The Applicant says that some of the information requested exists in patient charts for example the number of pregnancy terminations, gestational age, genetic anomalies, number of survivors and treatment provided. However, the issue is whether the record can be created from a record that is in electronic form. I find that it cannot. Therefore, I do not find it necessary to consider any jurisdictional issues involving patient charts under section 40(3) of the *Hospitals Act*.

[Para 43.] I find that the record requested cannot be created from a record that is in electronic form using normal computer hardware and software and technical expertise. Therefore, section 9(2)(a) of the Act does not apply to this request.

[Para 44.] In regards to the application of section 9(2)(b) of the Act, the Applicant says that creating the record would not unreasonably interfere with the operations of the Public Body. The Applicant says that staff other than direct care providers such as health administrators could collect most of the information needed and there would be minimal impact on clinical care.

[Para 45.] The Public Body says that the requirement in section 9(2)(b) is not met, as creating the record would unreasonably interfere with its operations for the following reasons:

- ◆ Creating the record would require an extensive amount of time. This would require a review of numerous patient charts. A full day is required just to review a few charts.
- ◆ A significant amount of staff resources from health records, information technology and clinical areas would be required for several weeks to create the record.
- ◆ Specialists such as perinatologists, obstetricians and gynecologists would be required to review and analyze patient charts and provide expert opinion in order to create the record, for example to ascertain the congenital anomaly.
- ◆ Most of these specialist physicians are not employees and the Public Body may not be able to persuade them to take time away from patient care activities.
- ◆ Clinical staff and particularly specialists are in high demand. Specialists would be removed from providing patient care due to the time required to review, analyze and interpret patient charts to create this record.
- ◆ This diversion of staff resources would interfere with operations and the ability of the Public Body to provide patient care.

[Para 46.] I find that creating the record requested would unreasonably interfere with the operations of the Public Body.

[Para 47.] Consequently, I find that neither of the requirements for the duty to create a record in section 9(2) of the Act is met in this situation. I find that the Public Body does not have a duty to create a record pursuant to section 9(2) of the Act.

[Para 48.] The Public Body says it can create some information using its existing computer systems. The Public Body says that it has previously offered to provide this statistical information to the Applicant. I request the Public Body to provide this information to the Applicant without charge.

3. If the Public Body has the duty to create the record requested by the Applicant, are there provisions in the Act that authorize the Public Body to withhold information?

[Para 49.] The parties were asked to provide argument in the event that I find that the Public Body has a duty to create the record, regarding whether other sections of the Act apply. As I have found that the Public Body does not have a duty to create a record, I do not find it necessary to consider whether other provisions of the Act apply.

V. ORDER

[Para 50.] I make the following order under section 68 of the Act:

1. I find that the Calgary Regional Health Authority was not in breach of the duty to assist the Applicant pursuant to section 9(1) of the Act.
2. I find that the Calgary Regional Health Authority does not have a duty to create a record for the Applicant pursuant to section 9(2) of the Act, as the record cannot be created from a record that is in electronic form using its normal computer hardware and software and technical expertise and creating the record would unreasonably interfere with its operations.
3. I request the Calgary Regional Health Authority to provide the Applicant with the statistical information the Public Body has described and that it can create using its normal computer hardware and software systems and technical expertise.
4. I do not find it necessary to consider whether other sections of the Act apply, as I have found that the Public Body does not have a duty to create a record under section 9(2) of the Act.

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