

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2006-021 & H2006-001

August 18, 2006

### CAPITAL HEALTH

Review Number 3074 & H0849

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

**Summary:** The Applicant made a request to Capital Health ("CH") under the *Health Information Act* ("HIA"), for access to information related to a prescription at the University of Alberta Hospital. CH disclosed most of the information under HIA but withheld an Incident Report.

CH withheld the Incident Report under the *Freedom of Information and Protection of Privacy Act* ("FOIP"), saying that section 17(1) of FOIP (unreasonable invasion of third party's personal privacy), section 24(1)(a) of FOIP (advice or recommendations) and section 24(1)(b)(i) of FOIP (consultations or deliberations) apply. CH also withheld the information under HIA, saying that section 11(2)(b) of HIA (investigation or practice review) and section 11(2)(d) of HIA (another enactment) and section 9 of the *Evidence Act* apply.

During the Inquiry, CH initially refused to produce the Incident Report to the Commissioner. The Incident Report was the only record at issue, so the Inquiry was held in abeyance pending resolution of this matter. The Commissioner exercised his authority to compel relevant records under section 88 of HIA, section 56 of FOIP and the *Public Inquiries Act*. CH subsequently produced the Incident Report to the Commissioner. Thereafter, the Inquiry was reconvened.

At the Inquiry, CH said that section 4(1)(c) of FOIP (quality assurance record) does not apply but that section 27(1)(a) of FOIP (legal privilege) applies. Also at the Inquiry, CH said that section 11(2)(d) of HIA (another enactment) does not apply but that section 11(2)(b) of HIA (investigation or practice review), section 11(1)(b) of HIA (identification of another person) and section 11(1)(d) of HIA (advice or recommendations) apply. CH also said that legal privilege (common law) applies to the information in the Incident Report.

The Commissioner found that the Incident Report was health information as defined in HIA and was excluded from FOIP pursuant to section 4(1)(u) of FOIP. The Commissioner found that the mandatory refusal provision in section 11(2)(b) of HIA applied to the Incident Report. He upheld CH's decision to refuse access and ordered CH to refuse to disclose the Incident Report to the Applicant under section 11(2)(b) of HIA.

Given that decision, the Commissioner did not find it necessary to also consider whether CH was required to refuse access under the mandatory provision in section 11(2)(d) of HIA or was also allowed to refuse access under the discretionary provisions in section 11(1)(b) of HIA and section 11(1)(d) of HIA. The Commissioner did consider legal privilege (common law), but decided that it did not apply to the Incident Report.

**Statutes Cited:** **AB:** *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i), 1(1)(k), 1(1)(m), 1(1)(n), 1(1)(o), 1(1)(u), 7(1), 7(2), 11, 11(1)(b), 11(1)(d), 11(2), 11(2)(b), 11(2)(d), 79, 80, 88, 88(1), 88(2), 88(3); *Health Information Regulation*, A.R. 70/2001, s. 3; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 4(1)(c), 4(1)(u), 17(1), 24(1)(a), 24(1)(b)(i), 27(1)(a), 56, 56(1), 56(2), 56(3), 72; *Public Inquiries Act*, R.S.A. 2000, c. P-39, s. 4; *Alberta Evidence Act*, R.S.A. 2000, c. A-18, ss. 9, 9(1)(c), 9(2)(b); *Bill 17: Quality Assurance Activity Statutes Amendment Act*, 1999, Royal Assent, April 29, 1999; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10.

**Authorities Cited:** *Sullivan and Driedger on the Construction of Statutes* (4<sup>th</sup> ed. 2002), p. 1; Katherine Barber, Ed., *Canadian Oxford Dictionary* (2<sup>nd</sup> ed.), 2004; *Alberta Hansard*, Legislative Assembly of Alberta, Second Reading of *Bill 17: Quality Assurance Activity Statutes Amendment Act*, 1999, March 22, 1999, afternoon (1:30 pm) session, pp. 668-671.

**Cases Cited:** (*Goad (Guardian ad litem of) v. Cavanagh*, [1992] A.J. No. 1268, (1992) 3 Alta. L. R. (3d) 18, (1992) 5 C.P.C. (3d) 105, Action No. 9003-18347, Oral Judgement, April 8, 1992 (AB QB); (*Yellowbird v. Lytviak*, [1998] A.J. No. 372, 1998 ABQB 272 (CanLII), (1998) 218 A.R. 393, (1998) 78 A.C.W.S. (3d) 887, Action No. 9103 07522, Reasons for Decision, April 2, 1998 (AB QB).

**Orders Cited:** **AB:** Orders F2005-017 & H2005-001, H2004-005, F2004-005 & H2004-001, H2004-003, F2002-015 & H2002-006, H2002-002.

## I. BACKGROUND

[para 1] The Applicant made a request to Capital Health ("CH", the "Custodian" or the "Public Body") under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA"), for access to information pertaining to a prescription at the University of Alberta Hospital. CH provided most of the information to the Applicant under HIA.

[para 2] However, CH refused to disclose the Incident Report to the Applicant, saying that section 17(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP") (unreasonable invasion of third party's personal privacy), section 24(1)(a) of FOIP (advice or recommendations) and section 24(1)(b)(i) of FOIP (consultations or deliberations) apply. CH further refused to disclose the Incident Report under HIA, saying that section 11(2)(b) of HIA (investigation or practice review) and section 11(2)(d) of HIA (another enactment) together with section 9 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18 ("*Evidence Act*") apply and prohibit the disclosure.

[para 3] The Applicant asked me to review CH's response to the access request, but the Applicant was not satisfied with the mediation that I authorized. The matter was set down for a written inquiry ("Inquiry"). During the Inquiry, CH initially refused to produce to me the sole record at issue, which is the Incident Report. The Inquiry was held in abeyance pending resolution of this matter. CH subsequently produced the Incident Report in response to my exercise of authority to compel under section 88 of HIA, section 56 of FOIP and the *Public Inquiries Act*, R.S.A. 2000, c. P-39 ("*Public Inquiries Act*").

[para 4] Thereafter, the Inquiry was reconvened. At the Inquiry, CH provided a written initial submission that was provided to the Applicant. The Applicant did not provide a written submission. In its written initial submission, CH said that section 27(1)(a) of FOIP (legal privilege), section 11(1)(b) of HIA (identification of another person) and section 11(1)(d) of HIA (advice or recommendations) as well as legal privilege (common law) also apply.

## II. RECORD AT ISSUE

[para 5] In its initial written submission, CH said the sole record at issue is a hospital incident report. In this Order, I will refer to the record at issue as the "Incident Report". The Incident Report consists of a two-page record that pertains to a medication incident relating to the Applicant's prescription. The first page of the Incident Report is entitled "Incident Reporting". The second page of the Incident Report is dated May 25, 2004 and is entitled, "Incident Reporting Follow-Up".

## III. INQUIRY ISSUES

[para 6] I have included the matters set out in the Notice of Inquiry as well as the further matters CH raised during the Inquiry, in the following issues that are before me at the Inquiry:

- A. Does the record contain "personal information" as defined by section 1(n) of FOIP?
- B. Does the record contain "health information" as defined by section 1(1)(k) of HIA?
- C. Is the record excluded from the application of FOIP by section 4(1)(u) of FOIP (health information)?
- D. Is the record a "quality assurance record" as defined by section 9 of the *Evidence Act*?
- E. Is the record excluded from the application of FOIP by section 4(1)(c) of FOIP (quality assurance record)?
- F. Does section 17(1) of FOIP (unreasonable invasion of third party's personal privacy) apply to the record?

- G. Did CH properly apply section 24(1)(a) of FOIP (advice or recommendations) to the record?
- H. Did CH properly apply section 24(1)(b)(i) of FOIP (consultations or deliberations) to the record?
- I. Did CH properly apply section 27(1)(a) of FOIP (legal privilege) to the record?
- J. Does section 11(2)(b) of HIA (investigation or practice review) apply to the record?
- K. Does section 11(2)(d) of HIA (another enactment) apply to the record?
- L. Did CH properly apply section 11(1)(b) of HIA (identification of another person) to the record?
- M. Did CH properly apply section 11(1)(d) of HIA (advice or recommendations) to the record?
- N. Did CH properly apply legal privilege (common law) to the record?

#### **IV. PRELIMINARY ISSUE**

[para 7] During the Inquiry, CH raised the issue of whether I have the authority to compel production of the Incident Report at the Inquiry. I have canvassed the issue of my authority to compel relevant records at an inquiry under section 88 of HIA and the *Public Inquiries Act* (Order H2004-003 (paras 19-41)). Section 56 of FOIP is a parallel provision to section 88 of HIA. Similar reasoning applies to the authority to compel relevant records in this case under section 88 of HIA and section 56 of FOIP as in Order H2004-003, so there is no need to repeat that full discussion here.

[para 8] In summary, section 88(1) of HIA and section 56(1) of FOIP both provide me with the powers of a commissioner under the *Public Inquiries Act*. The *Public Inquiries Act* provides me with the power to require “any persons” to produce “any documents” that I consider to be required for the full investigation of the matters into which I am appointed to inquire (section 4).

[para 9] Section 88(2) of HIA and section 56(2) of FOIP both give me the authority to “require any relevant record to be produced to the Commissioner” and to “examine any information in the record”, whether or not the record is subject to the provisions of HIA or FOIP. Section 88(3) of HIA and section 56(3) of FOIP respectively, require a custodian and a public body to “produce to the Commissioner” “any record”, “[d]espite any other enactment or any privilege of the law of evidence”.

[para 10] For the above reasons, I find that I have the authority under section 88 of HIA, section 56 of FOIP and the *Public Inquiries Act* to compel CH to produce the relevant record, which is the Incident Report, at the Inquiry.

## V. DISCUSSION OF INQUIRY ISSUES

[para 11] I will address the Inquiry issues in the above order, beginning with whether the information is “personal information” under FOIP or “health information” under HIA and a “quality assurance record” under section 9 of the *Evidence Act*. I will next address the exclusions and the mandatory and discretionary refusal provisions under FOIP, followed by the mandatory and then the discretionary refusal provisions under HIA. Lastly, I will address the application of legal privilege under common law.

### ISSUE A: DOES THE RECORD CONTAIN “PERSONAL INFORMATION” AS DEFINED BY SECTION 1(n) OF FOIP?

[para 12] In its written initial submission, CH says the Incident Report contains “personal information” under section 1(n) of FOIP. “Personal information” under FOIP means information about an identifiable individual including the individual’s name, home address, age, sex, information about the individual’s health and health care history and anyone else’s opinions about the individual (section 1(n)). The information requested in the Incident Report forms is as follows.

[para 13] The Incident Reporting form (first page of the Incident Report) includes the following headings: “Person/Subject Involved”, “Room #”, “Phone”, “Address”, “Health Record #”, “Attending Physician”, “Most Responsible Diagnosis”, “Narrative Description: (Facts Only) Specify drug, strength and route for medication variances”, “Witness (Name, Address, Telephone#”, Reporter’s Name & title”, “Supervisor Reported To”, “Date and Time of Incident”, “Sex”, “Age”, “Status”, “General Location”, “Specific Location”, “Type of Incident: A. Falls, B. Medication Variance or Intravenous Variance or Treatment/Test/Procedure” and “Contributing Factors for A” and “Contributing Factors for B”.

[para 14] The Incident Reporting Follow-Up form (second page of the Incident Report) includes the following headings: “Site”, “Pt ID”, “Case No”, “Unit”, “Type of Incident”. Part B of the Incident Reporting Follow-Up form includes the following headings: “Complete this Section for Medication Incident Only”, “Print Drug Name”, “Dosage”, “Units (mg, G, mcg etc.)”, “Route”, “Drug”, “Dose”, “Administration of Drug”, “MAR Errors”, “Possible Cause of Med Incident”, “specify miscommunications” and “Further Assessment/Follow-Up Required”. Part C of the Incident Reporting Follow-Up form includes the following headings: “Comments by Person Making Report”, which is to include a “Detailed Description of Incident with Contributing Factors” and “Manager’s/Designate’s Actions or Recommendations to Prevent Recurrence”.

[para 15] After a review of the Incident Report and the argument provided by CH, I find that the information in the Incident Report contains “personal information” as defined in section 1(n) of FOIP.

**ISSUE B: DOES THE RECORD CONTAIN “HEALTH INFORMATION” AS DEFINED BY SECTION 1(1)(k) OF HIA?**

[para 16] In its written submission, CH says the Incident Report contains “health information” as defined under section 1(1)(k) of HIA. CH also inferred that the Incident Report contains health information, as it refused access to the Applicant under various HIA exceptions to access. “Health information” under HIA includes “diagnostic, treatment and care information”, “health services provider information” and “registration information” (section 1(1)(k)). The Applicant requested a:

Copy of the prescription dated May 24 from the University of Alberta Pharmacy and all correspondence associated with this prescription.

[para 17] In its submission, CH says the Incident Report was created in the following circumstances:

On May 24, 2004, the Applicant filled a prescription at the University of Alberta Pharmacy for an antibiotic for his continuous home IV therapy. In error, the Applicant was provided with another patient’s prescription for the same medication. He only received eight (8) grams instead of the prescribed twelve (12) grams. There were no adverse health consequences associated with this error. This error was acknowledged by Capital Health. On June 16, 2004, the Pharmacy manager and a representative of the Information and Privacy Office of Capital Health met to discuss the matter with the Applicant. At this meeting the incident was reviewed and Capital Health discussed with the Applicant the measures it would take to prevent such an error from recurring.

[para 18] “Diagnostic, treatment and care information” is information about the physical and mental health of an individual, a health service provided to an individual, a drug as defined in the *Pharmaceutical Profession Act* provided to an individual and any other information about an individual that is collected when a health service is provided to the individual (HIA section 1(1)(i)). A “health service” is a service that is paid for by the Department and provided to an individual for purposes that include protecting or promoting or maintaining physical and mental health, preventing illness, diagnosing and treating illness, rehabilitation and caring for the health needs of the ill, disabled or injured (HIA section 1(1)(m)).

[para 19] The headings in the Incident Report include the date and time of the occurrence, patient status, patient diagnosis, description of event and health services providers’ assessments including the possible cause of the incident, contributing factors and recommendations to prevent recurrence of the incident. The Incident Report includes information about the physical health of an individual, a health service that was provided to the individual, a drug as defined in the *Pharmaceutical Profession Act* that was provided to an individual and information that was collected when a health service was provided to the individual. Therefore, I find that this information is “diagnostic, treatment and care information” under section 1(1)(i) of HIA.

[para 20] “Health services provider information” includes information relating to a health services provider including their name, gender, type, education, competencies,

profession, job classification and employment status (HIA section 1(1)(o)). A “health services provider” means an individual who provides health services (HIA section 1(1)(n)). The Incident Report indicates the name, gender and type of health services provider, professional designation, position title and employment status. Therefore, I find that this information is “health services provider information” as defined in section 1(1)(o) of HIA.

[para 21] “Registration information” includes an individual’s demographic information such as the individual’s name and gender and an individual’s location and telecommunications information (HIA section 1(1)(u); *Health Information Regulation*, A.R. 70/2001 section 3). The Incident Report indicates the individual’s name, gender, address and geographic location in hospital. Therefore, I find that this information is “registration information” under section 1(1)(u) of HIA.

[para 22] After a review of the record at issue and CH’s argument, I accept CH’s argument and find that the Incident Report contains all three types of “health information” under section 1(1)(k) of HIA including “diagnostic, treatment and care information”, “health services provider information” and “registration information”. Therefore, I find that all of the information in the Incident Report falls within the definition of “health information” in section 1(1)(k) of HIA.

### **ISSUE C: IS THE RECORD EXCLUDED FROM THE APPLICATION OF FOIP BY SECTION 4(1)(u) OF FOIP (HEALTH INFORMATION)?**

[para 23] Section 4(1)(u) of FOIP says:

4(1) This Act applies to all records in the custody and 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 24] FOIP does not apply to health information as defined in HIA that is in the custody or under the control of a public body that is a custodian under HIA, as that information is excluded from FOIP. I have previously addressed the interface of FOIP and HIA and the HIA “carve out” from FOIP that applies to hybrid entities such as regional health authorities (for example, see Order F2004-005 & H2004-001 (paras 85-90)), so there is no need to repeat that discussion here.

[para 25] It is not in dispute that the Incident Report is in the custody or under the control of CH and that CH is a public body under FOIP as well as a custodian under HIA. As the information in the Incident Report consists of health information as defined in section 1(1)(k) of HIA, this means that the information is excluded from FOIP under section 4(1)(u) of FOIP.

**ISSUE D: IS THE RECORD A “QUALITY ASSURANCE RECORD” AS DEFINED BY SECTION 9 OF THE EVIDENCE ACT?**

[para 26] Section 9(1)(c) of the *Evidence Act* says:

9(1)(c) “quality assurance record” means a record of information in any form that is created or received by or for a quality assurance committee in the course of or for the purpose of its carrying out quality assurance activities, and includes books, documents, maps, drawings, photographs, letters, vouchers and 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 27] A “quality assurance record” is a defined term within the *Evidence Act*, as are many of the other words and phrases that pertain to this definition. For example, a “quality assurance record” is a record of information that must be created or received by or for a “quality assurance committee” in the course of or for the purpose of carrying out “quality assurance activities” as defined in section 9 of the *Evidence Act*. Section 9 of the *Evidence Act* pertains to a “witness” in an “action” before a “court”.

[para 28] The matter being reviewed at the Inquiry is CH’s refusal of access to the Applicant. In order to show that a record is a “quality assurance record” under section 9 of the *Evidence Act*, a custodian must show that all of the information at issue falls within that definition in the circumstances of the case. In its written submission, CH said it was no longer asserting that the Incident Report is a “quality assurance record” under section 9 of the *Evidence Act*, as it “could not definitely establish that the records in issue were quality assurance records”.

[para 29] Given CH’s position as well as my decision that all of the information in the Incident Report is “health information” under section 1(1)(k) of HIA, I do not find it necessary to determine whether the information is also a “quality assurance record” under section 9 of the *Evidence Act*.

**ISSUE E: IS THE RECORD EXCLUDED FROM THE APPLICATION OF FOIP BY SECTION 4(1)(c) OF FOIP (QUALITY ASSURANCE RECORD)?**

[para 30] Section 4(1)(c) of FOIP says:

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

...

(c) A quality assurance record within the meaning of section 9 of the *Alberta Evidence Act*.

[para 31] Section 4(1)(c) of FOIP means that FOIP does not apply to a “quality assurance record” that falls within the meaning of section 9 of the *Alberta Evidence Act*.



Act". In its written submission, CH said the Incident Report is not a "quality assurance record" as defined under section 9 of the *Evidence Act* so the Incident Report is not excluded from FOIP under section 4(1)(c) of FOIP (quality assurance record).

[para 32] However, given my decision that all of the information in the Incident Report is "health information" under section 1(1)(k) of HIA and is therefore excluded from the application of FOIP by section 4(1)(u) of FOIP, I do not find it necessary to also consider whether the record is excluded from the application of FOIP by section 4(1)(c) of FOIP as a "quality assurance record" as defined by section 9 of the *Evidence Act*.

**ISSUE F: DOES SECTION 17(1) OF FOIP (UNREASONABLE INVASION OF THIRD PARTY'S PERSONAL PRIVACY) APPLY TO THE RECORD?**

[para 33] As a result of the above determination that the information in the Incident Report consists of health information as defined in section 1(1)(k) of HIA and that the information is excluded from FOIP by section 4(1)(u) of FOIP, I find that there is no information remaining to be considered under section 17(1) of FOIP.

**ISSUE G: DID CH PROPERLY APPLY SECTION 24(1)(a) OF FOIP (ADVICE OR RECOMMENDATIONS) TO THE RECORD?**

[para 34] As a result of the above determination that the information in the Incident Report consists of health information as defined in section 1(1)(k) of HIA and that the information is excluded from FOIP by section 4(1)(u) of FOIP, I find that there is no information remaining to be considered under section 24(1)(a) of FOIP.

**ISSUE H: DID CH PROPERLY APPLY SECTION 24(1)(b)(i) OF FOIP (CONSULTATIONS OR DELIBERATIONS) TO THE RECORD?**

[para 35] As a result of the above determination that the information in the Incident Report consists of health information as defined in section 1(1)(k) of HIA and that the information is excluded from FOIP by section 4(1)(u) of FOIP, I find that there is no information remaining to be considered under section 24(1)(b)(i) of FOIP.

**ISSUE I: DID CH PROPERLY APPLY SECTION 27(1)(a) OF FOIP (LEGAL PRIVILEGE) TO THE RECORD?**

[para 36] As a result of the above determination that the information in the Incident Report consists of health information as defined in section 1(1)(k) of HIA and that the information is excluded from FOIP by section 4(1)(u) of FOIP, I find that there is no information remaining to be considered under section 27(1)(a) of FOIP.

## ISSUE J: DOES SECTION 11(2)(b) OF HIA (INVESTIGATION OR PRACTICE REVIEW) APPLY TO THE RECORD?

### A. General

[para 37] Section 11(2)(b) of HIA reads:

11(2) A custodian must refuse to disclose health information to an applicant

...

(b) if the health information sets out procedures or contains results of an investigation, a discipline proceeding, a practice review or an inspection relating to a health services provider.

[para 38] An individual has a right of access to any record containing their own health information, but the right of access does not extend to information to which a custodian is authorized or required to refuse access under section 11 (HIA sections 7(1), 7(2)). Section 11(2) of the Act is a “must” or mandatory refusal provision that requires a custodian to refuse an applicant access to health information; a custodian must not disclose section 11(2) information to an applicant.

[para 39] When a custodian refuses to provide an applicant with access to a health record or part of a health record under HIA, the custodian has the burden of proof to show that the applicant has no right of access to the record (section 79). In other words, a custodian has the onus to show why the information in the record should not be released. As the custodian has refused access in this case, I find that CH has the burden of proof to show why the Applicant should not have access to the Incident Report.

### B. Argument and Evidence

[para 40] In its written submission, CH says that one of the reasons it refused to disclose the Incident Report to the Applicant is that section 11(2)(b) of HIA (investigation or practice review) applies and prohibits the disclosure. In its written submission, CH states:

Capital Health acknowledges the purpose of both the HIA and the FOIPP Act is to provide access to information, particularly where, an individual is requesting disclosure. However, in responding to the Applicant’s request, Capital Health has also considered ...  
(ii) the importance of maintaining the confidential nature of such documents where the purpose is to record a frank and complete description of an event and recommendations with respect to preventing recurrence for review by counsel and senior management; and  
(iii) the incident has already been fully disclosed to, and discussed with, the Applicant.

[para 41] CH also states:

The Incident Reporting Follow-Up document includes recommendations and comments by the individual who created the report for Capital Health. It is intended to be a frank

and open statement concerning that party's advice and recommendations concerning the event. Capital Health has exercised its discretion not to disclose such recommendations and comments in reliance upon this section in order to ensure that such reports remain confidential in order to promote frank and complete comments and recommendations from its employees regarding controversial incidents.

### **C. Application**

[para 42] In order for section 11(2)(b) of HIA to apply to the information in the Incident Report, the following two requirements must be met:

- There must be health information, and
- The health information must set out the procedures or contain the results of an investigation, a discipline proceeding, a practice review or an inspection relating to a health services provider (emphasis added).

[para 43] As a general rule "or" is to be read disjunctively, as I have previously said in Order H2004-005 (para 81). This means that the health information must either set out the procedures or contain the results and that the procedures or results must pertain to an investigation or a discipline proceeding or a practice review or an inspection relating to a health services provider.

#### ***Health Information***

[para 44] I have already determined that the Incident Report consists of "health information" as the information in the Incident Report includes "diagnostic, treatment and care information", "health services provider information" and "registration information" under section 1(1)(k) of HIA.

#### ***Investigation or Practice Review***

[para 45] In order to interpret the scope of section 11(2)(b) of HIA, I will utilize the "modern principle" of interpretation, which the Supreme Court of Canada has adopted as the preferred approach to the interpretation of legislation. The "modern principle" says I must read the words in HIA "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Sullivan and Driedger on the Construction of Statutes* (4<sup>th</sup> ed. 2002), p. 1).

[para 46] Following the "modern principle", I must give the words the "fair large and liberal construction" that best ensures the attainment of its objects (*Interpretation Act*, R.S.A. 2000, c. I-8, s. 10). I have canvassed the "modern principle" in previous Orders (for example in Orders F2005-017 & H2005-001 (paras 25-26) and F2004-005 & H2004-001 (paras 46-51), so there is no need to repeat those discussions here.

[para 47] I have previously interpreted section 11(2)(b) of HIA in previous Orders issued under the Act, so there is no need to repeat those full discussions here. In Order H2002-002, I found that a letter prepared by a physician when conducting an internal review to address a complaint about the medical treatment provided by another physician, was practice review information under section 11(2)(b) of HIA (paras 7-22).

[para 48] In Order F2002-015 & H2002-006, I found that records which were created by the subcommittee of a regional health authority in the course of addressing a series of complaints about a physician, consisted of practice review information under section 11(2)(b) of HIA (paras 38-39). Similarly, in Order H2004-003 I found that two hospital incident reports pertaining to slip-and-fall incidents fell under section 11(2)(b) of HIA as the reports related to investigations, practice review or inspections relating to health services providers (paras 42-70).

[para 49] Applying the “modern principle” of statutory interpretation, I must read the words in HIA in their grammatical and ordinary sense. The key words and phrases in section 11(2)(b) of HIA pertaining to the circumstances of this case are “investigation”, “practice review” and “inspection”.

[para 50] The *Canadian Oxford Dictionary* says that “investigation” means:

The process or an instance of investigating; a formal examination or study. The verb, investigate, means to inquire into; examine or study carefully; make an official inquiry into; make a systematic inquiry or search (Katherine Barber, Ed., *Canadian Oxford Dictionary* (2<sup>nd</sup> ed.), 2004, p. 793).

[para 51] The *Canadian Oxford Dictionary* says that “practice” means:

Noun - A way of doing something that is common, habitual, or expected (*it is standard practice to ask for ID*); repeated exercise in an activity requiring the development of skill; the professional work or business of a doctor, lawyer, etc.; procedure generally, esp. of a specified kind (*bad practice*). As a verb - Do repeatedly as an exercise to improve a skill. Adjective (Practiced) - Experienced, expert (*practiced hand*); gained or perfected through practice (*a practiced accent*) (Katherine Barber, Ed., *Canadian Oxford Dictionary* (2<sup>nd</sup> ed.), 2004, p. 1218).

[para 52] The *Canadian Oxford Dictionary* says that “review” means:

A general survey or assessment of a subject or thing; a reconsideration or examination, with the possibility or intention of change if desirable or necessary (*is under review; rent review*); an account or criticism of a book, performance, etc.; a periodical publication with critical articles on current events, the arts, etc. (Katherine Barber, Ed., *Canadian Oxford Dictionary* (2<sup>nd</sup> ed.), 2004, p. 1322).

[para 53] The *Canadian Oxford Dictionary* says that “inspection” means:

To look at; The verb, inspect, means to look closely at or into, esp. to assess quality or check for shortcomings; examine officially (Katherine Barber, Ed., *Canadian Oxford Dictionary* (2<sup>nd</sup> ed.), 2004, p. 781).

[para 54] All of these words have a similar theme that pertains to conducting self-critical activities for the purpose of critiquing, changing and improving the practices or procedures that are being investigated, reviewed or inspected. The Incident Report at issue pertains to the investigation, review or inspection that was conducted for the medication incident that involved the Applicant.

[para 55] Provisions in statutes are not intended to duplicate one another. Section 11(2)(b) of HIA applies to the information that is gathered in the context of conducting a fairly broad spectrum of candid self-critical activities in the publicly paid health sector. The information gathered under HIA section 11(2)(b) activities is not to be disclosed in the context of access, which is a parallel provision to the information that is not to be disclosed in the context of judicial and quasi-judicial proceedings under section 9 of the *Evidence Act*.

[para 56] The intention of the Legislature to prohibit access to the self-critical information that arises when conducting investigations or reviews or inspections of practices in the public sector is evident in the debate recorded in Hansard in the context of *Bill 17: Quality Assurance Activity Statutes Amendment Act, 1999* (Royal Assent, April 29, 1999). Mr. Victor Doerksen moved second reading of the bill, which was a response to concern about loss of *Evidence Act* protection under amendments to FOIP. Mr. Doerksen described the policy behind not disclosing this type of information, as follows:

One of the most important priorities of our health system is to ensure that each patient receives the highest degree of patient care and to find new ways to further improve patient care throughout the province. Mr. Speaker, the amendment to the *Alberta Evidence Act* is about improving patient care without diminishing professional accountability by ensuring that quality assurance reviews will continue to be carried out in an environment that encourages full and frank discussion. This can only occur if the confidentiality of such reviews is ensured. ...

Section 9 of the Alberta Evidence Act historically applied only to physicians. This amendment also recognizes the multidisciplinary approach required in modern-day health care delivery and clarifies that quality assurance records cannot be accessed under FOIP or a freedom of information request made under FOIP. Prior to the amendment of the FOIP regulation, the possibility of disclosure, that records relating to quality assurance reviews might be accessible, had a significant impact on medical staffs throughout the province. If this amendment is not passed, physicians may not be willing to participate in these important processes, and we will lose a very important tool in improving patient care.

I would like to emphasize that this amendment ensures the continuation of an existing process without reducing the accountability of health care providers. This amendment does not limit the processes and remedies available for complaints against health care providers, nor does it limit a patient's right to access their medical records to deal with

such complaints (*Alberta Hansard*, Legislative Assembly of Alberta, Second Reading of Bill 17: *Quality Assurance Activity Statutes Amendment Act*, 1999, March 22, 1999, afternoon (1:30 pm) session, pp. 668-671).

[para 57] In further discussion that afternoon in the Legislature, Mr. Gary Dickson (then Member for Calgary-Buffalo) said that due to concern about loss of protection for quality assurance activities, the Calgary Health Region's medical critical care committee had essentially ceased operating. This step had been taken because the physicians had not received reassurance that health services providers and the information involved in the quality assurance activities would continue to receive protection from disclosure.

[para 58] The courts have also described the policy basis for protecting this type of information under section 9 of the *Evidence Act*. In a plaintiff's application to compel further answers to questions asked during examinations for discovery, Justice Trussler refused to order a physician to produce copies of a summary he prepared in the minutes of the Medical Advisory Committee. Justice Trussler stated:

The legislature has seen fit to pass legislation in the form of the Alberta Evidence Act and to include therein s. 9. In doing so the legislature has obviously, as elected representatives, made a decision of public policy. This section may be restrictive in an age of fuller disclosure, but the section does exist and it is up to the legislature to make any amendments to it. The object of the section is obviously to promote full discussion by the groups mentioned therein with the purpose of creating an atmosphere in which matters can be investigated and improvements can be made (*Goad (Guardian ad litem of) v. Cavanagh*, [1992] A.J. No. 1268, (1992) 3 Alta. L. R. (3d) 18, (1992) 5 C.P.C. (3d) 105, Action No. 9003-18347, Oral Judgement, April 8, 1992 (AB QB), para 7).

[para 59] A similar approach was taken by Master Breitkreuz, when he quoted the above passage from *Goad* as "the only reported decision on this point" and refused part of an application for further Answers to Undertakings from examinations for discovery that pertained to the minutes of meetings of the Northern and Central Perinatal Advisory Committee, the Perinatal Mortality Committee and the Reproductive Care Committee (*Yellowbird v. Lytviak*, [1998] A.J. No. 372, 1998 ABQB 272 (CanLII), (1998) 218 A.R. 393, (1998) 78 A.C.W.S. (3d) 887, Action No. 9103 07522, Reasons for Decision, April 2, 1998 (AB QB), paras 17-22).

[para 60] The Incident Report form includes subject headings that describe the type of information that is to be collected about the procedures that are to be followed for incidents in general as well as for the procedures that were followed in the specific situation when this incident occurred. The Incident Report form outlines the steps that are to be taken by the health services providers who are involved in a particular incident.

[para 61] The Incident Report contains the results of the assessment and findings of the investigation or practice review or inspection of the incident. These results are reflected in the headings that pertain to making assessments, recommendations and

findings about the incident by health services providers. The two pages of the Incident Report are entitled, "Incident Reporting" and "Incident Reporting Follow-Up". These headings indicate the type of information that is to be included as well as the purpose of the reports, which is to conduct an investigation or review or inspection into an incident.

[para 62] Applying the "modern principle" of statutory interpretation and taking a fair, large and liberal interpretation, in my view the information in the Incident Report sets out the procedures or results of an investigation or a practice review or an inspection relating to the health services providers. For all of the above reasons, I find that section 11(2)(b) of HIA applies to all of the information in the Incident Report.

#### **D. Conclusion**

[para 63] Based upon the records and the argument provided by CH at the Inquiry, I find that all of the information in the Incident Report consists of health information, which sets out the procedures and contains the results of an investigation or a practice review or an inspection relating to health services providers under section 11(2)(b) of HIA. This means that CH is required to refuse access and must refuse to disclose to the Applicant all of the information in the Incident Report.

#### **ISSUE K: DOES SECTION 11(2)(d) OF HIA (ANOTHER ENACTMENT) APPLY TO THE RECORD?**

[para 64] Section 9(2)(b) of the *Evidence Act* says:

9(2) A witness in an action, whether a party to it or not,

...

(b) is not liable to be asked to produce and shall not be permitted to produce any quality assurance record in that person's or the committee's possession or under that person's or the committee's control.

[para 65] In its written submission, CH said that it "could not definitely establish that the records in issue were quality assurance records" under section 9 of the *Evidence Act*, so section 4(1)(c) of FOIP (exclusion of quality assurance record) does not apply to exclude the information from FOIP. Additionally, CH said that because this was not health information under HIA, section 11(2)(d) of HIA (another enactment) does not apply.

[para 66] In order to discharge the burden of proof under section 11(2)(d) of HIA, a custodian must prove that its refusal to an applicant of access to a record falls under another enactment of Alberta that prohibits disclosure of the record. In order for a custodian to show that its refusal to a record falls under section 9 of the *Evidence Act*, a custodian must show that the record is a "quality assurance record" as the term is

defined, and that the record and the related activities meet all of the requirements set out in section 9 of the *Evidence Act*.

[para 67] However, as a result of the above determination that CH must refuse to disclose the Incident Report to the Applicant under section 11(2)(b) of HIA, I do not find it necessary to also consider whether CH is required to refuse access to the health information under the mandatory exception to access in section 11(2)(d) of HIA (another enactment) and under section 9 of the *Evidence Act*.

**ISSUE L: DID CH PROPERLY APPLY SECTION 11(1)(b) OF HIA (IDENTIFICATION OF ANOTHER PERSON) TO THE RECORD?**

[para 68] As a result of the above determination that CH must refuse to disclose the Incident Report to the Applicant under section 11(2)(b) of HIA, I do not find it necessary to also consider whether CH is allowed to refuse access to that health information under the discretionary exception to access in section 11(1)(b) of HIA.

**ISSUE M: DID CH PROPERLY APPLY SECTION 11(1)(d) OF HIA (ADVICE OR RECOMMENDATIONS) TO THE RECORD?**

[para 69] As a result of the above determination that CH must refuse to disclose the Incident Report to the Applicant under section 11(2)(b) of HIA, I do not find it necessary to also consider whether CH is allowed to refuse access to that health information under the discretionary exception to access in section 11(1)(d) of HIA.

**ISSUE N: DID CH PROPERLY APPLY LEGAL PRIVILEGE (COMMON LAW) TO THE RECORD?**

[para 70] In its written submission, CH says that the Incident Report is subject to solicitor-client privilege and litigation privilege and therefore legal privilege at common law exists to preclude disclosure of the Incident Report. In particular, CH says:

The Incident Report and Incident Reporting Follow-Up documents at issue in this Inquiry were created as part of Capital Health's investigatory process with respect to an incident that could result in litigation. Each document records information that is not placed on the patient's file but is prepared by Capital Health for use by Capital Health's lawyers to provide legal advice with respect to those incidents and is used also by Capital Health to make changes and improvements to its own administrative and health care services.

[para 71] However, CH's own internal documents refute CH's claim of solicitor-client privilege or litigation privilege. In its written submission, CH provided a copy of an internal memorandum that pertains to the incident and the Incident Report at issue. The memo is entitled "Home IV Patient Concern" and dated June 15, 2004 and states:



- 1.0 An incident report was completed, filed and sent to the quality assurance committee.
- 2.0 The actual incident report is an internal document to promote improvements and remains with the committee.

[para 72] A custodian who is refusing access has the burden of proof to show why an applicant should not have the information. CH has not provided any evidence whatsoever to show that the Incident Report is subject to solicitor-client privilege, litigation privilege or any other type of common law privilege. Therefore, I find that CH has not discharged its burden of proof to show that common law legal privilege applies to the information in the Incident Report.

[para 73] In any event, I have already decided that CH must refuse to disclose the Incident Report to the Applicant under section 11(2)(b) of HIA.

## VI. ORDER

[para 74] I make the following Order under section 80 of HIA and section 72 of FOIP:

- The Incident Report contains “personal information” as defined in section 1(n) of FOIP;
- The Incident Report consists of “health information” as defined in section 1(1)(k) of HIA;
- Given my decision that the record consists of health information under HIA, I find that all of the information in the Incident Report is excluded from the application of FOIP by section 4(1)(u) of FOIP (health information);
- Given my decision that all of the information in the Incident Report is excluded from the application of FOIP by section 4(1)(u) of FOIP (health information), I do not find it necessary to also consider under FOIP whether:
  - The record is a “quality assurance record” as defined by section 9 of the *Evidence Act*; and
  - The information is also excluded from the application of FOIP by section 4(1)(c) of FOIP (quality assurance record);
- Given my decision that all of the information in the Incident Report is excluded from the application of FOIP by section 4(1)(u) of FOIP (health information), I find that there is no information remaining to be considered under FOIP pursuant to:

- Section 17(1) of FOIP (unreasonable invasion of third party's personal privacy);
  - Section 24(1)(a) of FOIP (advice or recommendations);
  - Section 24(1)(b)(i) of FOIP (consultations or deliberations); and
  - Section 27(1)(a) of FOIP (legal privilege);
- I find that section 11(2)(b) of HIA (investigation or practice review) applies to the health information in the Incident Report and requires CH to refuse to disclose that information to the Applicant. Therefore, I confirm CH's decision to refuse access to the health information and I order CH to refuse to disclose all of the information in the Incident Report to the Applicant;
  - Given my decision under section 11(2)(b) of HIA that CH must refuse to disclose all of the information in the Incident Report to the Applicant, I do not find it necessary to also consider whether CH is entitled to refuse access to the health information under HIA pursuant to:
    - Section 11(2)(d) of HIA (another enactment) and section 9 of the *Evidence Act*;
    - Section 11(1)(b) of HIA (identification of another person);
    - Section 11(1)(d) of HIA (advice or recommendations); and
  - In spite of my decision under section 11(2)(b) of HIA, I have decided that legal privilege (common law) does not apply to the Incident Report.

Frank Work, Q. C.  
Information and Privacy Commissioner