

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-027

November 12, 2007

CALGARY HEALTH REGION

Case File Number F4112

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Summary: Family history was provided for a psychiatric assessment of the Applicant's daughter at Alberta Children's Hospital ("ACH"), which included information about the Applicant and other family members. The Applicant alleges that the information about herself in her daughter's hospital record at ACH is her own health information and that Calgary Health Region ("CHR") improperly refused to correct or amend health information in contravention of section 13 of the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA").

The issue arose as to whether the Applicant's request to CHR is deemed to be a request for correction or amendment under section 36 of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP") by virtue of the deeming provision in section 16(2) of HIA. The Inquiry for Case File Review Number F4112 resulted in Order F2007-027 and involved CHR and the same Applicant as the concurrent HIA inquiry for Case File Review Number H0178 that resulted in Order H2007-006.

The Adjudicator found that the information is in the custody or under the control of CHR as a public body that is a custodian as defined in HIA under section 16(3) of HIA. However, she found that section 4(1)(u) of FOIP excludes the information from FOIP because the information is "health information" as defined in HIA. As FOIP does not apply to the information, section 16(2) of HIA does not deem the Applicant's correction request to be made under section 36 of FOIP.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(g)(v), 1(j)(ii), 4(1)(u), 36, 36(1), 72(3)(d); *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(f)(iv), 1(1)(k), 13, 13(1), 16, 16(2), 16(3).

Orders Cited: AB: Orders H2007-006, F2005-017 & H2005-001, F2004-005 & H2004-001.

I. BACKGROUND

[para 1] Family history was provided for a psychiatric assessment of the Applicant's daughter at Alberta Children's Hospital ("ACH"), which included information about the Applicant and other family members. The Applicant alleges that the information about herself in her daughter's hospital record at ACH is her own health information and that Calgary Health Region ("CHR") improperly refused to correct or amend the health information in contravention of section 13 of the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA").

[para 2] The matters before the Inquiry arise in the context of multiple requests for access and correction or amendment made by the Applicant to CHR, which pertain to the Applicant's health information as well as her daughter's health information. As the matters were not resolved by mediation, Case File Review Numbers 3353, H0307 and H0178 were set down for inquiry. The Applicant asked that Case File Review Number H0178 (errors or omissions) be put into abeyance until the inquiries were concluded for Case File Review Numbers 3353 and H0307 (access request issues), which was granted.

[para 3] In Orders F2005-017 & H2005-001, the Commissioner found that the Applicant did not have authority to exercise her mature minor daughter's rights or powers under section 104(1) of HIA. Therefore, the Commissioner did not have jurisdiction to decide issues about the Applicant's requests pertaining to access to her daughter's health information. The background facts already provided in those previous Orders will not be repeated in this Order.

[para 4] A written inquiry for the issues remaining under Case File Review Number H0178 was reconvened under HIA. When the Inquiry was being reconvened, an issue arose about application of section 36 of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP") under Case File Review Number F4112 (the "Inquiry"). On March 5, 2007, the Information and Privacy Commissioner, Frank Work (the "Commissioner"), delegated me to hear the Inquiry. The Applicant made a request for extension, which was granted.

[para 5] Later, CHR made a request for extension as well as a request for change in the inquiry process, in particular, for change in the submission exchange process. CHR's request for extension was denied. However, CHR's request for change in the inquiry process was partially granted. The Applicant was required to provide the records at issue at the Inquiry. Additionally, the parties were granted additional time to prepare rebuttal submissions after initial submissions were exchanged, due to the unique circumstances of this case.

[para 6] At the Inquiry, the parties provided written initial and written rebuttal submissions that were exchanged between the parties. In its written initial submission,

CHR (also the “Public Body”) provided the Affidavit of its Access and Privacy Coordinator that contains the further Affidavit of a former CHR employee who was involved in responding to the Applicant’s requests. In its rebuttal submission, CHR provided the further Affidavit of an ACH psychiatrist who was involved in providing health services to the Applicant’s daughter. In her written initial submission, the Applicant provided the records at issue.

[para 7] The Inquiry was held concurrently with an inquiry for Case File Review Number H0178 under HIA, which resulted in Order H2007-006. CHR and the Applicant provided the same written submissions for both inquiries.

II. RECORDS AT ISSUE

[para 8] Order H2007-006 (paras 8-19) provides a detailed description of the records provided by the Applicant, which I will not repeat here. The Applicant’s description of alleged errors and omissions and the records at issue are as follows:

[para 9] *Description of Alleged Errors and Omissions* - The Applicant’s written initial submission has a 56-page overview pertaining to alleged errors and omissions. The 56 pages contain 14 numbered points summarizing corrections and amendments requested for the alleged errors and omissions. The 56 pages refer throughout to the Applicant’s previous descriptions of alleged errors and omissions in two October letters provided in Tab 1 and Tab 2. Therefore, the Applicant describes the alleged errors and omissions in her own health information in the following 82 single spaced pages:

- Written initial submission (56 pages),
- Tab 1: Letter from Applicant to CHR, October 14, 2002 (20 pages), and
- Tab 2: Letter from Applicant to CHR, October 28, 2002 (6 pages).

[para 10] *Records At Issue (ACH Records)* - The Applicant’s 14 points of corrections and amendments for the alleged errors and omissions in her own personal information pertain to the following five Tabs. The Applicant requests correction or amendment to this information. Therefore, I am regarding the following five Tabs consisting of 20 severed pages, as the records at issue, which I will refer to as the Alberta Children’s Hospital Records (“ACH Records”) at the Inquiry:

- Tab 4: ACH Psychiatrist Outpatient Contact Note, June 14, 2000 (2 severed pages),
- Tab 5: ACH Psychiatrist Report, June 20, 2000 (3 severed pages),
- Tab 8: ACH Social Work Genogram, undated (1 severed page),
- Tab 16: ACH Psychologist Report, August 17, 2001 (10 severed pages), and
- Tab 28: ACH Psychiatrist Report, July 24, 2000 (4 severed pages).

[para 11] In summary, the Applicant provides a total of 159 pages in support of the allegation that there are errors and omissions in her own health information, which consists of 82 pages of description and 77 pages in 29 Tabs. The alleged errors and omissions consist of 20 severed pages in the ACH Records.

III. ISSUES

[para 12] The issues in the Notice of Inquiry are:

ISSUE A: If the Applicant did not request correction or amendment of her own health information, is the Applicant's correction request deemed to be a correction request under FOIP as provided by section 16(2) of HIA?

ISSUE B: If the answer to Issue A is yes, was the Public Body's refusal to correct the Applicant's personal information authorized by section 36 of FOIP?

[para 13] In this Order, the references to Questions 5 and 6 in the Notice of Inquiry are to be read as references to Issues A and B, respectively. The references to the Custodian in Question 6 in the Notice of Inquiry are to be read as references to the Public Body.

IV. PRELIMINARY ISSUES

[para 14] The preliminary issues pertaining to the scope of inquiry, records at issue and production of records have been addressed in Order H2007-006 (paras 22-31), so there is no need to repeat those discussions here.

[para 15] This Order adopts the discussion in Order H2007-006 pertaining to non-inquiry issues (paras 32-33), except that my jurisdiction at the Inquiry is restricted to correction issues raised by the Applicant under section 36 of FOIP. Section 72(3)(d) of FOIP allows me to confirm a decision not to correct personal information or to specify how personal information is to be corrected. My authority in this case is restricted to reviewing CHR's decision not to correct the Applicant's own personal information under section 36 of FOIP.

[para 16] This Order takes the same approach to burden of proof as in Order H2006-007 (paras 34-36). I find that the Applicant is in the best position to show that she made a request for correction, that the request pertains to the Applicant's own personal information and that there are errors or omissions in the Applicant's own personal information so the Applicant has the initial burden of proof for these issues. If the Applicant discharges this initial burden, then the burden of proof shifts to CHR who is in the best position to justify its refusal to correct the Applicant's own personal information.

V. DISCUSSION OF INQUIRY ISSUES

ISSUE A: IF THE APPLICANT DID NOT REQUEST CORRECTION OR AMENDMENT OF HER OWN HEALTH INFORMATION, IS THE APPLICANT'S

CORRECTION REQUEST DEEMED TO BE A CORRECTION REQUEST UNDER FOIP, AS PROVIDED BY SECTION 16(2) OF HIA?

[para 17] I will consider Issue A in the following parts:

1. Did the Applicant make a *request* for correction or amendment of her own health information? If the answer to the first part of Issue A is “no”, I will go on to consider the second part of Issue A.
2. Is the Applicant’s correction request deemed to be a correction request under FOIP, as provided by section 16(2) of HIA? If the answer to the second part of Issue A is “yes”, then the answer to Issue A is “yes”.

[para 18] If the answer to Issue A is “yes”, I will go on to consider Issue B at the Inquiry. However, Issue A is a threshold issue. If the answer to the second part of and therefore, to Issue A is “no”, there is no issue to consider under Issue B at the Inquiry.

1. Did the Applicant make a request for correction or amendment of her own health information?

[para 19] In Order H2007-006, I found that this Applicant discharged the burden of proof to show that there was a *request* for correction or amendment of alleged errors or omissions in the ACH Records. However in Order H2007-006, I also found that the Applicant failed to discharge the burden of proof to show that this Applicant’s requests for correction or amendment pertained to the Applicant’s *own health information*, as “health information” is defined in section 1(1)(k) of HIA.

[para 20] In Order H2007-006, I found that the information was not the “health information” of this Applicant, but rather the Applicant’s daughter’s “health information”. As these matters were thoroughly discussed in H2007-006, there is no need to repeat the discussion here. These findings mean that the answer to the first part of Issue A at the Inquiry is “no”, in that although this Applicant made a request for correction or amendment, the request did not pertain to the Applicant’s *own health information*. As the answer to the first part of Issue A is “no”, I will go on to consider the second part of Issue A.

2. Is the Applicant’s correction request deemed to be a correction request under FOIP, as provided by section 16(2) of HIA?

General

[para 21] The relevant parts of section 16 of HIA read:

16(2) If a written request is made under section 13(1) to correct or amend information to which the *Freedom of Information and Protection of Privacy Act* applies, the request is

deemed to be a request under section 36(1) of the *Freedom of Information and Protection of Privacy Act* and that Act applies to the request as if it had been made under section 36(1) of that Act.

16(3) This section does not apply if the custodian that receives the request is not a public body as defined in the *Freedom of Information and Protection of Privacy Act*.

[para 22] Section 4(1)(u) of FOIP says:

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

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

Facts, Evidence and Argument

[para 23] In its written rebuttal submission, CHR says that the Applicant's correction requests are properly deemed to be requests pursuant to section 36 of FOIP. However, CHR did not expand on this comment.

Application

[para 24] The deeming provision in section 16(2) of HIA and the HIA carve out in section 4(1)(u) of FOIP have been discussed in Orders issued under HIA and FOIP. See, for example, Orders F2004-005 & H2004-001 (paras 77-90) and Orders F2005-017 & H2005-001 (paras 59 and 63). Orders F2004-005 & H2004-001 describe the interface of HIA and FOIP and the parallel "deeming provisions" in HIA and FOIP as they pertain to access requests, as follows:

The effect of these mirror provisions is that a custodian/public body is not limited to considering an access request under only one piece of legislation; that is under either HIA or FOIP. A custodian/public body can respond to an access request under the applicable piece of legislation regardless of which piece of legislation an applicant has used to make the access request. The Applicant in this matter did not specify under which statute he was making the access request; he merely asked the CHR for his records.

The practical effect of the deeming provisions is that applicants and custodians/public bodies do not need to start the access request process all over again if it is eventually determined that all or part of the information in the records requested falls under the other privacy statute. The deeming provisions streamline access requests for applicants as well as for custodians/public bodies. The deeming provisions in HIA and FOIP create a logical conduit between the two provincial privacy regimes that apply in the public sector (paras 81-82).

[para 25] Orders F2004-005 & H2004-001 describe the interface of HIA and FOIP as set out in the “HIA carve out” in FOIP, as follows:

The effect of the “HIA carve out” is that in situations where information could fall under either HIA or FOIP, FOIP does not apply where the information is properly categorized as health information as that term is defined in HIA. The effect of the “HIA carve out” is that FOIP ends where HIA begins (para 89).

[para 26] Section 16(3) of HIA says that the deeming provision in section 16(2) of HIA does not apply where the custodian that receives the request is not a public body as defined in FOIP. I find that CHR is a hybrid or dual entity and is both a “custodian” under HIA (section 1(1)(f)(iv)) and a “public body” under FOIP (sections 1(g)(v), 1(j)(ii)). The finding that CHR is a dual entity means that section 16(3) of HIA does not preclude the Applicant’s correction or amendment request made under HIA to CHR from being a correction request that is deemed to have been made under FOIP.

[para 27] Section 16(2) of HIA applies when a written request is made under section 13(1) of HIA to correct or amend information to which the *Freedom of Information and Protection of Privacy Act* applies. In Order H2007-006, I said that none of the information at issue in the ACH Records is the health information of the Applicant. However, Order H2007-006 says that all of the information in the ACH Records is the health information of the Applicant’s daughter, as “health information” is defined under HIA.

[para 28] Section 4(1)(u) of FOIP says that FOIP does not apply to “health information” as defined in HIA. Section 4(1)(u) of FOIP is the health information carve out of FOIP, meaning that FOIP does not apply to health information. In my view, the information at issue is “health information” as defined under HIA, so the information in the ACH Records is carved out of FOIP by section 4(1)(u) of FOIP. This means that FOIP does not apply to the ACH Records.

[para 29] Therefore, I find that the information in the ACH Records is excluded from FOIP. This means that the answer to the second part of Issue A is “no”, in that the Applicant’s correction request is not deemed to be a correction request under FOIP, as provided by section 16(2) of HIA. This finding also means that the answer to all of Issue A is “no”. As a result, I find that the Applicant’s correction request is not deemed to be a correction request under section 36(1) of FOIP, as provided by section 16(2) of HIA.

[para 30] In my view, this finding is consistent with the intended interface of HIA and FOIP. HIA creates rights and powers for individuals over their own health information. The practical effect of the “HIA carve out” from FOIP is that the “health information” at issue in the ACH Records remains under HIA. Otherwise, an applicant could achieve through the back door in a request for correction under FOIP, something that is not allowed for the same information through the front door in an applicant’s request for correction or amendment under HIA.

ISSUE B: IF THE ANSWER TO ISSUE A IS YES, WAS THE PUBLIC BODY'S REFUSAL TO CORRECT THE APPLICANT'S PERSONAL INFORMATION AUTHORIZED BY SECTION 36 OF FOIP?

[para 31] Given my decisions that there is "health information" of the Applicant's daughter under HIA and that the information is carved out of FOIP by section 4(1)(u) of FOIP and that the answer to Issue A is "no", I find that there is no issue to consider under Issue B, as to whether the Public Body's refusal to correct the Applicant's personal information is authorized by section 36 of FOIP.

VI. ORDER

[para 32] I make the following Order under section 72(3)(d) of FOIP:

- In regard to the issues that are before me at the Inquiry, I find:
 - Issue A:
 - I find that the Applicant did not request correction or amendment of her own "health information", as all of the information in the ACH Records is the Applicant's daughter's "health information" as "health information" is defined in HIA;
 - I find that section 16(2) of HIA does not deem the Applicant's request to be a correction request made under FOIP, because section 4(1)(u) of FOIP says that FOIP does not apply to "health information"; and
 - As FOIP does not apply to the information in the ACH Records, I find that the answer to all of Issue A is "no", in that the correction request is not deemed to be a correction request under FOIP, as provided by section 16(2) of HIA.
 - Issue B: As the answer to Issue A is "no", in that the Applicant's request is not deemed to be a correction request made under FOIP, there is no issue to consider under Issue B as to whether the Public Body's refusal to correct the Applicant's personal information in the ACH Records is authorized by section 36 of FOIP.

Noela Inions, Q. C.
Adjudicator