

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-20 / H2014-01

April 30, 2014

**ALBERTA HEALTH
(formerly ALBERTA HEALTH AND WELLNESS)**

Case File Numbers F5909, F7368 & H4452

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Alberta Health and Wellness (AHW, now Alberta Health) pursuant to the *Freedom of Information and Protection of Privacy Act*. His request was for the non-personally-identifying parts of Group Coverage Commencement and Termination Notices (single-page documents relating to individual employees), that were received by AHW from Tesco Corporation, relative to AHW group coverage account numbers, for a specified time period. The Applicant specified a particular group coverage account number, but also asked for “any additional group coverage accounts”. Later he narrowed his request to the specific account number.

AHW provided a fee estimate of \$1701, but later it decided to refuse access to the requested records on the basis they were ‘health information’ as defined in the *Health Information Act* (the HIA) and therefore exempt from the FOIP Act. The Applicant asked the Office of the Information and Privacy Commissioner to review AHW’s response. He argued that AHW was in breach of section 10 of the FOIP Act (duty to assist) because it had overestimated the fee so as to dissuade him from proceeding with his request, and because it had failed to apply previous orders of this office, one of which dealt with a similar request he had made earlier.

Prior to the commencement of this inquiry, AHW provided the Applicant with access to part of a single record, which it says was the only record it located that was responsive to

his request. The Applicant then complained to this office that AHW had not performed an adequate search for responsive records. This issue was added to this inquiry.

The Adjudicator found that AHW had met its duty to assist the Applicant and had performed an adequate search for records responsive to the Applicant's narrowed request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 11, 12, 16, 17, 72, and 93; *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 10, 11; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, s. 14.

Authorities Cited: AB: Orders 2001-016, F2002-015 and H2002-006; F2004-026, F2006-021 and H2006-001, H2006-003, F2007-029, F2010-013, and F2012-04 and H2012-01.

Cases Cited: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

I. BACKGROUND

[para 1] Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act or the FOIP Act) the Applicant made an access request to Alberta Health and Wellness (AHW¹ or the Public Body²) on June 27, 2011. He asked for the non-personally-identifying parts of Group Coverage Commencement and Termination Notices (single-page documents relating to individual employees), that were received by AHW from Tesco Corporation, relative to AHW group coverage account numbers, for the time period January 1, 2004 to March 31, 2005. During this time, Alberta employers were required to collect Alberta health care premiums from those of their employees who met certain criteria, and the documents reflect the commencement and termination dates for that coverage. They consist of individual pages: the top part of each page contains data identifying the individuals to whom they pertain; the bottom part consists of data (the commencement and termination dates for an individual's enrollment in the group plan) that does not identify the individuals. The Applicant requested only the bottom parts.

[para 2] The Applicant specified a particular group coverage account number, but also asked for "any additional group coverage accounts", noting that Tesco Corporation had various divisions, some of which included a products division, a manufacturing division, a casing drilling division, a research division, as well as the oilfield equipment rental division (a subsidiary of Tesco Corporation). (The Applicant had made an earlier access

¹ I will refer to the Public Body throughout as 'Alberta Health and Wellness' (AHW), even though it is now properly designated as 'Alberta Health'.

² I will refer to AHW as 'the Public Body' throughout, rather than as a custodian under the HIA, even though this inquiry involves the question of whether the information at issue is "health information" as defined in the *Health Information Act*, and this order concludes that it is. This is because the Applicant made his access request under the FOIP Act, and because AHW presumably provided this information to the Applicant (as it ultimately did) in its capacity as a Public Body under the FOIP Act rather than as a custodian under the HIA, given that the procedure for access requests under the HIA contemplates requests for one's own health information only.

request for similar records associated with only the last of these company accounts, number 10276. He had received records (20 pages) for a fee of \$25.)

[para 3] On June 28, 2011, the Public Body received the Applicant's access request. On June 30, 2011, it provided the Applicant with a fee estimate of \$1701. On July 18, 2011, the Public Body received a letter from the Applicant asking for clarification as to why the fee estimate was so high relative to the one that had been charged in the earlier request. On July 21, 2011, the Public Body responded to this question by providing a rationale for the fee in the second (present) request.

[para 4] The Public Body's letter of July 21, 2011 also reflected that there had been a discussion about the Applicant's narrowing of his request to the single account number that he had specified (number 34482), in order to reduce the fees. The letter attached a revised fee estimate for the narrowed request.³

[para 5] Then, on July 28, 2011, the Public Body wrote to the Applicant and advised that access to the records he requested would be denied because it was believed that the information the Applicant requested was "health information" within the terms of the *Health Information Act* (the HIA) and was therefore exempt from the FOIP Act (under section 4(1)(u) of the FOIP Act). The Public Body further stated that the Applicant was not entitled to access the health information under the HIA because that legislation did not contemplate accessing health information of third parties. For these reasons, the Public Body withheld the records from the Applicant that he had requested. The Public Body also advised the Applicant that he could ask this office to review its response.

[para 6] On August 23, 2011, this office received the Applicant's request that the Public Body's response to his access request be reviewed. The Commissioner authorized mediation, but this was not successful in resolving the issues between the parties, and by way of a form dated March 29, 2012, (conveyed on March 30) the Applicant requested an inquiry.

[para 7] On May 24, 2013, the Public Body provided the Applicant access to the bottom portion of a single record, which it says is the only record it found that was responsive to his request (as narrowed to the single specified group account number). The Public Body said (in a letter of May 13, 2013), that "Given our delays, Alberta Health will not be charging any additional fees ...". In a subsequent letter attaching this record (of May 24, 2013) it added the fact that the search had yielded only limited information as another reason it had withdrawn the fee. There was no mention of the HIA in the Public Body's response.

[para 8] On July 9, 2013, a Notice of Inquiry was issued by this Office, listing one issue (the duty to assist under section 10(1)). However, on July 22, 2013 the Applicant submitted another Request for Review to this Office, asking that this Office review the

³ According to the Public Body's letter of May 24, 2013, it is the narrower search, described at para 7, that was ultimately conducted.

adequacy of the Public Body's search for records responsive to his request. The Commissioner determined that this issue should be added to this inquiry, and the parties were advised to address this additional issue in their submissions. I also asked the parties to address additional issues, as discussed at para 13 below, when I assumed carriage of this file.

[para 9] I received initial and rebuttal submissions from both parties, and additional submissions as to the added questions, as well as a final rebuttal from the Applicant in relation to the 'adequacy of search' issue.

II. RECORDS AT ISSUE

[para 10] The Public Body has provided the Applicant with the only responsive record it says it located. The Applicant disputes there could be only one such record.

III. ISSUES

[para 11] The Notice of Inquiry dated July 9, 2013 lists the issue in this inquiry as follows:

Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the FOIP Act and/or section 10(a) of the HIA (duty to assist applicants)?

[para 12] Following the Applicant's Request for Review dated July 22, 2013, the issue of adequacy of search was added as an issue in this inquiry.

[para 13] As well, on November 26, 2013, I asked the parties to address the following additional issues:

Was the information requested by the Applicant "health information" as defined in the *Health Information Act*?

If the answer is no, was the Public Body's refusal to provide the information in the face of earlier orders of this office on this question a breach of its duty to assist the Applicant?

IV. DISCUSSION OF ISSUES

Issue 1: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the FOIP Act and/or section 10(a) of the HIA (duty to assist applicants)?

[para 14] For the reasons already given at note 2 above, and discussed further below, only section 10 of the FOIP Act applies in this case. It says:

10(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 15] The provisions that immediately follow set out more specifically how a public body must respond to an applicant, in terms of time limits, contents of the response, and how access is to be given.

[para 16] A public body must either respond to an applicant's access request, or extend the time to respond, within 30 days (section 11 of the FOIP Act). The response must state: whether access to the record will be granted or refused; if access will be granted, how, and; if access is being refused, on what basis. The applicant must also be told that he or she can have the decision of the public body reviewed by this office (section 12 of the FOIP Act). If a public body is requiring an applicant to pay a fee for services for providing the requested records, it must provide the applicant with a fee estimate (section 93 of the FOIP Act). If the public body provides a fee estimate, it may cease processing the applicant's access request until the applicant agrees to pay the fee and pays at least half of the fee estimate (section 14 of the FOIP Regulations).

[para 17] In terms of the foregoing specific requirements, the Public Body met its duty to respond to the Applicant as required by section 10 of the FOIP Act. It responded to the Applicant's access request within 30 days, provided an explanation as to why it was denying access to the records, and advised the Applicant he could ask this office to review the Public Body's response.

[para 18] However, the Applicant argues that the Public Body failed to meet its duty to assist him. He makes several points in support of this argument.

i. Fee estimate:

[para 19] The first is his view that the Public Body assessed an unjustifiably high fee estimate as a way to discourage him from proceeding with his access request. The Applicant notes that less than two years prior to the request which is the subject of this inquiry, he had made a similar access request for similar records to the same Public Body, and the search for those records had taken only 6 hours; he says that as a result he had been required to pay only the \$25 initial fee. He suggests that in this case the much higher fee the Public Body set (\$1701) may have been a retaliatory reaction to the fact its decision to withhold the records in an earlier case file had been overturned by this office. The Applicant argues that deliberately dissuading him in this way would be a breach of the Public Body's duty to assist.

[para 20] There are specific provisions in the FOIP Act under which fees may be charged, and fees and fee estimates challenged. The Commissioner's order-making powers relating to these duties include the ability to waive fees in appropriate circumstances, which could, presumably, include impropriety on a public body's part (FOIP Act section 72(3)(c)).

[para 21] Earlier orders of this office hold that section 10 of the FOIP Act is not generally meant to apply to failures to meet duties relating to access requests imposed by

other provisions in Act.⁴ If the present case involved a fee estimate that the Applicant would ultimately be asked to pay, and if he thought the estimate was too high, these would be the operative provisions, rather than section 10. If the Applicant complained to this office and the Commissioner concluded that the fees as assessed by the public body had been too high, they could be reduced. If it were shown they had been set too high deliberately for an improper purpose, any remaining fees could, conceivably, be waived on this account.

[para 22] However, here the Applicant is not asking to have the fee waived, since the Public Body has already given him all the records it says it can locate, and has not asked for any fee (despite its initial estimate). The question of a remedy under section 72(3)(c) of the FOIP Act, such as reduction or waiver of the fee, does not arise, so that provision does not apply.

[para 23] Typically, the Public Body's withdrawal of its fee estimate would settle any fee issues. Here, however, the Applicant is not satisfied. He believes the fee was deliberately overestimated to dissuade him from continuing with his access request, and he wants that issue addressed. He points to section 10 as the provision under which it can be addressed even in circumstances where fees no longer need to be paid.

[para 24] I do not rule out the possibility that section 10 could be used to address an issue such as this, in circumstances in which facts put forward by an applicant raised a reasonable likelihood that the public body's motives were as the Applicant alleged in this case. Resort should not be had to section 10 to challenge *the amount of* a fee that no longer needs to be paid. However, if an Applicant were to put forward facts sufficient to raise a serious concern that a public body's motive may have been improper, section 10 might afford the mechanism to address this, and further investigation might be called for to elicit further information to settle the issue.

[para 25] As already noted, the Applicant asked the Public Body to explain the disparity between the fees for the earlier request and those estimated for the latter. The Public Body responded as follows:

The search process to locate and retrieve the requested records is complex and has many steps. As all groups were canceled a request must be made for the purged information from Archives. The documents you requested are filed by personal health number not by the corporation name. Therefore as[sic] search must first be conducted to identify all Tesco Corporation account numbers, then the program area will identify all the individuals who commenced and/or terminated within the specified time period. Their individual records then need to be located, retrieved from either on site or off site storage and the individual documents pulled and then confirmed against the scope of your request.

⁴ There are exceptions to this principle. See, for example, Order F2004-026 at footnote 10.

The Public Body also indicated that the estimate of 63 hours that it would take to search for, locate and retrieve the requested records was provided by the program areas. It made no mention of the much lower fees it had charged in the earlier request.

[para 26] Taking into account the Public Body's explanation and the various points made by the Applicant, the salient facts relative to the fee issue are as follow: (I will refer to the Applicant's earlier request for records as the first request, and his request of June 27, 2011 as the second request.)

- the fee for the second request was set at \$1701 [$\$27 \times$ an estimated 63 hours]
- The fee charged for the first request was \$25, but the search appears to have taken six hours, which means that [$\$27 \times 6 =$] \$162 could have been charged for the search alone (under the FOIP Act, fees may be charged only if they exceed \$150, so presumably the Public Body decided not to charge the \$162 even though it could have, based on the time that AHW's "Information and Privacy Request" form⁵ indicates was actually taken
- the first request was for records relating to a single Tesco Corporation AHW group coverage account number
- the second request was for records relating to one particular Tesco account number, as well as in relation to any other Tesco account numbers, which, since not specified, was an unknown number and therefore could have been larger, or even considerably larger; (as noted above, the Applicant listed several divisions of Tesco Corporation in a manner which suggested each of these could be associated with a different account number, and which also suggested there could be additional divisions)
- the estimate of 63 hours was, according to the Public Body, provided by the program areas; I was not told whether the same individuals who conducted the first search were involved in providing this estimate
- The reduced fee for a second search (of \$837), for records related to a particular account number, was based on an estimated time of 31 hours
- the Public Body was asked by the Applicant to explain the disparity between the two fees, but in its explanation of the fee estimate relative to the second request, it made no reference to this disparity
- The Applicant pointed out to the Public Body that it could check with the (named) program area people about the disparity; it is not clear if the Public Body took this suggestion
- emails about the first search (that the Applicant obtained in a separate access request and provided in his submissions⁶) confirm that the estimate was tied to the belief that the search would require research since the forms were filed under personal health numbers, rather than under the group account numbers
- the Public Body stated that only one record was ultimately found in the second search.

⁵ This record was obtained by the Applicant in a separate access request and provided in his submissions. It was completed for Request # 2009-G-0148 on March 24, 2009. It was numbered 000016 in the Public Body's response.

⁶ This record was numbered 000011 in the Public Body's response to the separate access request.

[para 27] There seems to be a significant possibility that the fee set for the second request was unjustifiably high. The fact only one record was found might be taken to suggest this. On the other hand, the search may have taken the same amount of time regardless how many records had been located. The fact the number of account numbers was initially unknown may account for the multiple of 10 relative to the first search. This is countered by the fact that 31 hours was still estimated for a second search for only a single specified account number. There is no positive assertion by the Public Body that the first search did in fact take only the 6 hours that is indicated on the “Information and Privacy Request” form discussed in the second bullet above (conceivably, this time might have been exceeded but was nevertheless assigned because the search was initially treated as one not requiring the additional notifications that searches exceeding 6 hours entail). On the other hand, if the actual time was longer, the Public Body might have explained this (since the Applicant had pointed to the apparent significance of the 6 hours in his correspondence).

[para 28] All of these factors might lead to a request for a further explanation of the fee if there were still a fee to be paid, and some of them might ultimately lead to a fee reduction in such circumstances.

[para 29] However, here, the Applicant is not asking for a reduction; rather, he is asking that an improper motive be imputed to the Public Body’s employee. He asks that this be done based on the circumstances outlined above, together with a second factor he believes I should consider, which is that the fee was conveyed to him (and possibly finally calculated) by the same person who had been unsuccessful in defending the Public Body’s decision to withhold records in the inquiry relative to another access request by the Applicant to the same Public Body, which culminated in Order F2010-013. He says he believes this Public Body employee was taking retaliatory action in setting the amount of the fee.

[para 30] I acknowledge it is not entirely inconceivable that a public body employee might take punitive action relative to persons whose positions in an access request had prevailed over that of a public body. However, in my view, before such a finding could be made, the facts would have to be such that the only reasonable conclusion would be that the fees were purposely over-estimated, in this case, for the reason the Applicant suggests.

[para 31] However, there could be many reasons for an over-estimate besides an impropriety of motive, such as mistakes about the steps to be taken or the time each will take, or a wish to avoid later surprising an applicant with an actual fee higher than had been estimated.

[para 32] The disparity in the two estimates described above is not so severe, nor is animus toward the Applicant on the part of the Public Body’s employee sufficiently probable, to lead me to regard a purposeful overestimate as the most likely explanation for the high fees in this case. It would take far more compelling evidence than that set out above to reach a conclusion about the inner workings of the employee’s mind so as to

impute the suggested motive; nor do I believe that exploring this issue further would be reasonably likely to raise any additional evidence that could ground such a conclusion. I therefore decline to make such a finding based on the evidence at hand, or to pursue this highly speculative idea further.

ii. *Inadequacy of reasons:*

[para 33] The second ground for the Applicant's assertion the Public Body failed to meet its duty to assist him is that it failed to provide him with adequate reasons for initially refusing his request. The Applicant notes that after being advised the Public Body was relying on section 4 of the FOIP Act to deny him access to the records, he wrote to the Public Body asking for further reasons. In response, he was told only that the records were considered health information and therefore were exempt from the FOIP Act, and that he was not entitled to access the information under Part 5 of the HIA.

[para 34] While these reasons were unsatisfactory to the Applicant, for the reasons explained further below, I find they were satisfactory reasons given the state of the law at the time the decision was made.⁷ Therefore the Public Body met the standard set under section 10 of the FOIP Act.

iii. *Failure to apply F2010-013*

[para 35] A third reason the Applicant believes the Public Body failed to meet its duty to assist him is that it did not apply an earlier order of this office dealing with similar facts. As part of his access request, the Applicant provided the Public Body with a copy of Order F2010-013. In that Order, the Adjudicator decided that the Public Body incorrectly applied sections 16 and 17 of the FOIP Act to the information the Applicant had requested, because the information at issue was not personal information. The Applicant pointed out that the only difference between the information he had requested and received in the inquiry giving rise to Order F2010-013, and the information at issue in the present inquiry, is that in this one, the Applicant broadened his request to include more potential third party company names.

[para 36] I agree with the Applicant that Order F2010-013 would be directly on point if the Public Body had relied on sections 16 and 17 of the FOIP Act to withhold the records in the present inquiry.

[para 37] However, for the new request, it chose to rely instead on section 4(1)(u), asserting the requested information was "health information" as defined by that section and was thus excluded from the application of the FOIP Act. The idea the information was health information had not been raised as an issue in Order F2010-013.

⁷ I note the Applicant also points to section 32 of the HIA as another ground for his contention that the Public Body was required to provide records to him. That section permits a custodian to disclose non-identifying health information for any purpose. However, I believe that provision is permissive, and does not create a duty in custodians to respond in the same way they are obliged to respond to access requests. Thus it would not create an *entitlement* to the records for the Applicant.

[para 38] In my view, for the reasons given below, this is a position it was entitled to take, given it was a defensible position in light of the orders this office had issued on the topic up to that time.

[para 39] The first question to be addressed in deciding this point is the first question I asked the parties to address in my letter to them of November 26, 2013 – whether the information at issue is “health information” within the terms of the HIA.

[para 40] Section 1(1)(k) of the HIA defines health information as follows:

1(1)(k) “health information” means one or both of the following:

- (i) diagnostic, treatment and care information;*
- (ii) registration information;*

[para 41] The information requested by the Applicant was not diagnostic, treatment and care information. However, registration information is defined by section 1(1)(u) of the HIA as follows:

1(1)(u) “registration information” means information relating to an individual that falls within the following general categories and is more specifically described in the regulations:

- (i) demographic information, including the individual’s personal health number;*
- (ii) location information;*
- (iii) telecommunications information;*
- (iv) residency information;*
- (v) health service eligibility information;*
- (vi) billing information,*

but does not include information that is not written, photographed, recorded or stored in some manner in a record;

[para 42] The information requested by the Applicant appears to fall within the category of health service eligibility information. The Applicant argued that the information at issue is not “health service eligibility information” (within the terms of HIA section 1(1)(u)(v)) because it is “very generic and general”. In this regard, I agree with the Public Body that the information “would show that health care premiums were being paid on [the individuals’] behalf which would confirm their eligibility for health

care service”, as well as the basis for that eligibility. A valid Alberta Health Care card would be another way of ascertaining eligibility, but it does not follow that the information here under consideration is not, also, about an individual’s health service eligibility. (I am less convinced the information would aptly be termed “billing information”, since that phrase is possibly meant to describe a bill for a particular service. On the other hand, the latter phrase may also be applicable in the sense that the information may indicate how the service is to be billed. In any event, the information is “health information” if it is health service eligibility information, which I find it to be.)

[para 43] I also considered the Applicant’s argument that only *identifying* information can qualify as “registration information”, since the definition of registration information must by its terms “relate to an individual”.

[para 44] I do not agree. The definitions of both identifying and non-identifying information refer to the individual who is the subject of the information. Registration information “relates to” the individual insofar as there is an individual who is its subject whether a particular document containing that information identifies that subject or (if it has been severed) does not. Contrary to the Applicant’s suggestion, there is no basis on which to conclude that the definition of “registration information” limits its coverage by its own terms to persons who are identifiable to any person viewing that information. Information is captured by the definition as long as it is a discrete item of information relating to an individual, ascertainable from the information alone, or otherwise.

[para 45] The next question that arises is whether, as ‘health information’, the information in this case is excluded from the Act by section 4(1)(u).⁸

[para 46] Section 4(1)(u) reads as follows:

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.

[para 47] The Applicant says the information is not excluded, relying on Orders F2012-04 and H2012-01. These orders hold that the FOIP Act permits access requests for *another’s* health information despite section 4(1)(u). In other words, the Orders hold that health information is excluded from the FOIP Act only if the access request is one that

⁸ This raises a very similar question to the second question I asked the parties to address in my letter to them of November 26, 2013. The second question was based on the premise that the information is not “health information” within the terms of the HIA. However, even if it is (as I have found) there is still an issue as to whether a request can be made for such information under the FOIP Act if the information is that of someone other than the requestor. (If the answer is yes, the Applicant’s argument that failure to apply a precedent holding that it can (as was held in Orders F2012-04 and H2012-01, discussed below) constitutes a breach of the duty to assist under section 10 must also be addressed. As will be seen, the answer to this last question depends upon the state of the related law, which has changed over time.)

can be made – by a person for *their own* health information – under the HIA. If it cannot, the request can be made under the FOIP Act.

[para 48] However, the Applicant’s access request was made and the Public Body responded in 2011, before Orders F2012-04 and H2012-01 were issued (on January 26, 2012). At that time, the applicable precedents in this office were to the effect that if information is anyone’s “health information” within the terms of the HIA, the FOIP provisions for access did not apply. (See, for example, Order F2002-015 and H2002-006; Order F2006-021 and H2006-001.)

[para 49] It may be presumed that at the time the Public Body made its decision, it was following the then-current authorities, since the information at issue was ‘health information’, and since in accordance with the orders just cited, a FOIP request could not be made for such information (nor could the Applicant make an access request for another’s health information under the HIA).

[para 50] It cannot be said that by following established precedent that was then current, the Public Body was failing in its duty to assist the Applicant. This is so even though the Public Body responded in a manner contrary to that in which it had been required to respond in Order F2010-013. In the earlier case, Alberta Health had not relied on the idea (as it presumably might have done) that the information was health information within the terms of the HIA. It was not wrong for it to take such a position subsequently (and the accompanying position, in accord with the state of the applicable law at the time, that such information could not be accessed under the FOIP Act).⁹

[para 51] Accordingly, I find that Alberta Health did not fail in its duty to assist the Applicant in taking this position. Pursuant to Orders F2012-04 and H2012-01, it would have to respond under FOIP now (though again, orders of this office are not binding precedents, and another Adjudicator reviewing a Public Body’s decision might take a different view). However, since it has now responded to the Applicant’s access request by giving him the only record it located (which it did under the FOIP Act and not under the HIA), this question is no longer in issue.

[para 52] I am strengthened in this conclusion by the decision in Order H2006-003, which treats a similar question in terms of whether a moot issue had been raised. In that case, the custodian had initially refused to provide the applicant with some information on the basis of section 11 of the HIA. Prior to the start of the inquiry, the custodian reversed its decision and provided the applicant with the information that it had withheld.

⁹ Given this conclusion, I have not found it necessary to consider or adopt the Public Body’s arguments that section 10 of the FOIP Act does not impose a duty on public bodies to “comply with” previous orders of this office in deciding new requests. I am not sure this is the same idea as a failure to apply precedents (in the sense they constitute the current state of the law), which is the issue I am considering here. Further, while I agree with the Public Body that a given order of the Commissioner is binding only for the circumstances of a given inquiry, I believe there may be circumstances in which a refusal to apply a clearly-applicable precedent *for inappropriate reasons* could constitute a failure in the duty to assist. However, despite the Applicant’s numerous assertions to this effect, I do not believe he has demonstrated such impropriety here.

The applicant argued that the custodian's application of section 11 should still be reviewed, as part of the inquiry, under section 10(a) of the HIA (the duty to assist).

[para 53] The Adjudicator found that the issue was moot because there was nothing she could practically order given that the public body had already disclosed all the information the applicant had requested. She went on to consider if she should exercise her discretion to review and making findings on the moot issue in any event. In considering this issue, she applied the criteria set out in *Borowski v. Canada (Attorney General)* as follows:

(i) *Adversarial Context*: The issue must exist within an adversarial context, the adversarial relationship must prevail even though the issue is moot and a party must suffer collateral consequences if the merits are left unresolved. In the case before me, there is no current live controversy between the parties about disclosing the information withheld under section 11(2)(a) of HIA, as CHR has disclosed all of the information sought... There is no evidence before me of collateral consequences to a party if I decide to exercise my discretion not to decide the issue.

(ii) *Judicial Economy*: The special circumstances of the case must justify applying scarce resources to decide the issue. It must be considered whether the decision will have practical effect on the rights of the parties, whether there is a recurring issue and whether there is a public interest such as the social cost of continued uncertainty in the law in leaving the matter undecided. In this case, there is no practical effect on the rights of the parties as the only remedy available under section 11(2)(a) of HIA is an Order for disclosure of the very information that the Applicant has already received. Section 11(2)(a) of HIA has already been interpreted in previous Orders issued from the Office (Orders F2002-015 & H2002-006 and H2002-001).

(iii) *Role of the Legislative Branch*: It must be considered whether exercising the discretion would intrude into the role of the legislative branch. The Applicant argues that the application of section 11(2)(a) pertains to the duties owed to applicants under section 10(a) of HIA. However, previous Orders say the duty to assist under section 10(1) of FOIP is a separate duty that is not linked with and does not encompass other duties under FOIP (Orders F2005-023, para 40; F2005-012, para 26; 2000-014, paras 84-85). The creation of a link between the general duty to assist in section 10(a) and the duty to properly apply section 11(2)(a) of HIA is not my prerogative, but that of the Legislature. (Order H2006-003 at para 18)

[para 54] The present case is different from that which resulted in Order H2006-003 because here, the Public Body appropriately applied the precedents applicable at the time. However, even if that had not been the case, the reasoning of the Adjudicator in Order H2006-003 would support the conclusion that the question of whether an exception to disclosure was appropriately applied at the outset need not be addressed in situations in which records that were initially withheld are later supplied.

[para 55] I note that in the decision just quoted, the Adjudicator states that the duty to assist is not meant to overlap with the question of whether an exception to access (or in this case an exclusion from the Act) has been appropriately applied. While I do not altogether discount the idea that a wilful misapplication of precedent might constitute a

failure to assist (much like a deliberate over-setting of a fee to dissuade requests could be similarly characterized in appropriate cases), that can most certainly not be the case where the Public Body was appropriately applying existing precedent when it made its decision.

iv. Failure to apply Orders F2012-04 and H2012-01

[para 56] The Applicant also suggests that the Public Body did not meet its duty to assist because it did not, at the time the period for judicial review of Orders F2012-04 and H2012-01 had expired, reverse its position and search for and provide responsive records. As the Applicant has pointed out, this office alerted the Public Body to the existence of the orders in August, 2012, not long after they were issued, but the Public Body did not reverse its position until many months later. The Applicant makes similar comments with respect to a parallel lack of action on the part of the portfolio officer and the Commissioner.

[para 57] I understand it would be frustrating to the Applicant that there was no mechanism by which an order issued by this office that might favourably impact the outcome of his own matter would be applied by the Public Body to his case, particularly after these orders were brought to the Public Body's attention by this office and it was invited to reconsider its decision. However, the issues in this case are complex, as were the issues and the reasoning in the cited orders. Moreover, a given order is not binding on other Adjudicators in different inquiries, and they are free to depart from precedents providing they explain why they have done so (as indeed was done by the Adjudicator in Orders F2012-04 and H2012-01 when he departed from earlier precedents). I would not regard it as unreasonable in a circumstance in which a matter has already come to inquiry for a public body to wait to see whether the Commissioner or her delegated Adjudicator adopted the reasoning in the new orders, and if so, to allow that person to determine how the orders applied to the case. (Here, the Public Body ultimately reversed its position itself, though waiting nine months to do so, and it is not known to me why this happened. However, as I would not fault the Public Body for waiting for the inquiry to decide the issue, I will not fault it for making the decision itself before the matter concluded.)

[para 58] I have the Applicant's stated concerns that the single record was provided after deliberate delays, and was done only to avoid an inquiry and resolution of his issues when it became clear this could not otherwise be avoided. However, as with the issue of the Public Body employee's motive in assessing the fee, the Applicant's assertions in this regard are speculative and insufficiently substantiated for me to impute the improper motives that he suggests to the various participants in the process.

[para 59] As for this office, with respect to the Applicant's comments concerning the mediation/investigation process, I have no access to what transpired during this process beyond the Applicant's assertions, and cannot comment thereon.

[para 60] With respect to this inquiry, it is not uncommon for the Registrar's unit to ask parties to reconsider decisions when circumstances change, as happened in this case,

and this inevitably leads to some delay. I see no reason to regard efforts to facilitate a resolution so as to avoid the time and expense of an inquiry as in any way unwarranted, especially given the expenditure of public resources that is involved.

[para 61] I note the Applicant also objects to the way the issues were set for the inquiry, and strongly asserts that the issue of whether he is legally entitled to responsive records under the FOIP Act should be decided even though no records are presently being withheld by reference to section 4(1)(u).

[para 62] I have noted above that it is not necessary to decide this issue in this inquiry because by providing the single item of non-identifiable “health information” to the Applicant, which was presumably done under the FOIP Act and not under the HIA, the Public Body appears to have implicitly conceded that the former statute rather than the latter applies, and that the Applicant was indeed entitled to the record. I also note the Public Body did not raise the section 4(1)(u) exclusion as a ground for withholding records in its submission concerning whether the information falls within the definition of “health information” in the HIA. However, for further certainty, I adopt the reasoning in Orders F2012-04 and H2012-01 about the operation of section 4(1)(u) of the Act. Accordingly, I concur with the result that the record was released (which I note is in accord with Order F2010-13).

Issue 2: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (adequate search for responsive records)?

[para 63] In Order 2001-016, the then Commissioner stated:

Previous orders...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.

(Order 2001-016 at para 13)

[para 64] Many previous orders issued by this office have stated that evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search

- Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029 at para. 66)

[para 65] In its rebuttal submissions, the Public Body submitted that:

- A Business Manager whose program area has responsibility for the commencement and termination group information (the information requested by the Applicant) processed the Applicant's request.
- The Business Manager determined that responsive records would be found on Alberta Health's Eligibility and Premiums system, which she reviewed.
- The name of the of the company or group information was searched to find all group plan number assigned under the corporation named by the Applicant in his access request or any other identified sub-company names.
- The search was done for the time period specified by the Applicant in his request.
- The Business Manager discovered two related companies that may have submitted commencement and termination notices during the time period identified by the Applicant.
- The Business Manager then contacted the off-site contractor responsible for the storage of the records and provided that contractor with the group names, numbers and time period within which to search.
- The records were all stored on micro-fiche which was searched by the off-site contractor, and the responsive records were printed from the micro-fiche. These records were then sent to the Business Manager.
- The Business Manager then searched a data base called, "Self-Serve Document Retrieval System" for each of the employees listed in the records provided by the off-site contractor to find the corresponding commencement or termination form.
- These forms were then forwarded to the Public Body's FOIP office.
- The Public Body does not maintain any other historical deposit for group account information for the period identified by the Applicant in his access request and so it does not believe that there are any further responsive records.

[para 66] The Applicant believes that there are further records which were not provided to him. He bases this on documents he received from EI Canada, in particular, temporary foreign worker application forms, and Records of Employment (ROEs). He contends that the numbers of these records, especially the 151 records for employees in

the EI groups associated with Tesco Products Canada, show that there should be a greater number of commencement and termination forms for Tesco Corporation.

[para 67] The Public Body has set out a number of possible explanations for this apparent disparity in numbers, and the Applicant has responded, as follows.

The timing of foreign worker application forms

[para 68] First, the Public Body says that the (undated) temporary foreign worker application forms obtained from EI Canada are for a longer time frame (2002 to the present) than the much shorter (January, 2004 to March, 2005) time period of the Applicant's access request. It points to fax dates on the documents close to or within the period of the access request, but says the significance of these fax dates is unknown. It asserts that the numbers of workers under the various headings in these forms cannot give rise to conclusions about the numbers of workers in the time period of the request.

[para 69] The Applicant asserts in his rebuttal that the federal documents all relate to the relevant time period, but does not explain how this can be ascertained. However, for the present purposes, I will accept the Applicant's contention that the federal records are for the relevant time period.

The naming and numbering of group plans

[para 70] The Public Body also points out that the Tesco Corporation may have assigned different 'group names' for the purpose of collecting Alberta Health Care premiums than those used for its EI records, noting that group #10276 is not identified in any of the ROEs submitted by the Applicant. It also states that Tesco may have used group plan names that did not include "Tesco" in their name.

[para 71] The Applicant says that group plan account number 34482 is the number used for AHW group plans in Tesco's products division. He provides evidence that there were 151 ROEs for employees of Tesco Products Canada. He concludes from this that there should have been more AHW termination notices in the relevant time period for that group plan number (the one relative to which the search was done) than the single one found by the Public Body.

[para 72] The significance of group plan number 34482 is critical to the present question. With respect to this number, the Applicant says the following:

Tesco's Services Division (or Tesco Drilling Technology, TDT) had AHW group account #10276. I worked for the services division for over four years. Tesco's Products Division had AHW group account #34482. The records produced in Tab 6 verify that these AHW group plans existed as an employee had transferred from account #10276 (services division) to account #34482 (products division).

In the records the Applicant supplies under Tab 6 of his submissions, a single group plan commencement and termination document dated Jan 27/05 for group number 10276 indicates a "Transfer to Group No. 34482" in a field titled "Other (explain)", with an accompanying date. The Applicant does not provide any other evidence, beyond his

assertion, that all employees in Tesco's products division who were enrolled in a group plan fell under group plan number 34482.

[para 73] Possibly the Applicant regards this as an obvious fact, but if it is, he has not pointed to any evidence that demonstrates it. At most, the Applicant has established in his documentary evidence that Group plan #34482 existed; he does not point in his argument to any evidence showing that this plan was associated with Tesco's Products Division (the single record under Tab 6 – record number 000019 – does not contain any indication of this on its face). Even if it did, it would not demonstrate that *all* such employees were enrolled under this number. (I note the person who conducted the search for records provided the term “Tesco Products – group # 34482” as search terms to the ‘CriticalControl’ unit, but the description of her search provided by the Public Body does not establish that she had concluded that *all* “Tesco Products” employees were enrolled under this plan. It is possible given this description that she was relying on the fact the Applicant had supplied this account number as associated with that company division.)

Whether all Tesco employees are enrolled in group plans

[para 74] The Public Body also responds to the Applicant's challenge to the adequacy of its search by saying that the Applicant has not shown that a worker's enrollment in EI necessarily corresponds with enrollment in a provincial group health plan. It says that the people to whom the ROEs relate were not necessarily eligible for enrollment under a Tesco or Tesco-affiliated group plan, that employees or their unions could choose to remain outside an employer's group plan, and that there are a number of situations in which the named corporation would not be required to collect Alberta health care premiums from its employees: for example, temporary employees, non-residents of Alberta, and employees that worked less than a specified number of hours were exempt from having Alberta health care premiums collected by their employers.

[para 75] The Applicant responds to this contention by noting that employees not covered by the employer group plan would fall into specific categories that would constitute only a minority of employees in total. He also makes a number of points to establish that Tesco Products Division had more employees than the service division (as indicated by the POEs), as well as a high turnover rate (which presumably would mean there should be a correspondingly high number of commencement and termination notices).

Alternate ways of communicating terminations

[para 76] Finally, the Public Body notes that cancellation of a given employee's enrollment in a plan could occur by means other than a termination document, such as direct correspondence between the employee and the Public Body.

The parties' main points

[para 77] The Public Body concludes by saying that without further particulars from the Applicant as to “the criteria used by Tesco in naming its group plans”, and how and when it would enroll an employee, it is impossible to conclude there should be group

health plan commencement and termination records corresponding in numbers to the federal records.

[para 78] The Applicant's main point with respect to the 'adequacy of search issue', it is that the products division of Tesco Corporation must necessarily have had more employees for whom health care coverage was commenced and terminated during the time period of his request (as evidenced by the documents he obtained from EI). Because he believes that group account #34482 is the account associated with all such employees who were enrolled for health care coverage, he asserts that the search the Public Body conducted must have been inadequate, in that it did not locate a reasonably commensurate number of such forms associated with that account number.

[para 79] In his rebuttal submission the Applicant also canvasses a number of the steps taken by the Public Body during its search which he regards as redundant, and descriptions of these steps which he regards as internally inconsistent and confusing. He also objects that the Public Body employed a contractor to perform part of the search. However, while I agree that some of the steps taken do appear to be superfluous, particularly given that the search had been narrowed to a single account number, none of these points leads me to the conclusion that the search was inadequate in terms of locating all responsive records under group account number 34482.

[para 80] The Applicant also complains that the Public Body did not, as was suggested by the Adjudicator previously assigned to this file, provide an affidavit with respect to the steps that were taken during the search. However, it is open to me to accept unsworn evidence, and I see no reason to doubt that the Public Body took all necessary steps, as it says it did, to locate all records responsive to the request.

Conclusion re adequacy of the search

[para 81] Group coverage account #34482 was the only number relative to which the Public Body conducted a search, and the Applicant does not dispute that this was appropriate given his communications with the Public Body. Though the Applicant appears to regard it as obvious that this particular account number was the only one that could have been used for commencement and termination notices for the Tesco Corporation employees in the products division for the period in question, he has not provided evidence to demonstrate this. Therefore, even on the assumption there should have been more employees for whom coverage was commenced or terminated in Tesco's products division during the specified time period, I cannot conclude, based on the Applicant's evidence, that there should have been more than the single form that was located relative to that particular account number.

[para 82] However, I have not discounted the Applicant's evidence insofar as it appears to demonstrate the likelihood that there were more employees than a single one, employed by Tesco's products division, and enrolled in a group plan for health care premiums and corresponding commencement and termination notices for some of them. Possibly, there are other names for the plans, and other associated numbers, pertaining to these employees. The Public Body itself noted the problem that the Applicant had not

provided enough information with respect to the criteria used by Tesco in naming its group plans. The obstacle to fulfillment of the Applicant's obtaining the records he seeks seems to be that account names and associated numbers are presently unknown.

[para 83] I also note the Public Body said that:

The name of the company or group information was searched to find all group plan number assigned under the *corporation named by the Applicant* in his access request or any *other identified sub-company names*. [my emphasis]

I cannot tell from these statements whether or not the Public Body might itself have some means for searching for other names assigned by Tesco Corporation or its affiliates, etc., for the purpose of collecting Alberta Health Care Premiums, or related account numbers in some way associated with Tesco Corporation, other than by reference to "further particulars" from the Applicant. Possibly there might be other key words it might use, or other of its own data bases or documents it might itself search, to obtain such information. If the Public Body is in possession of records which might reveal such other "names assigned by the corporation" or associated account numbers, I believe it might have been incumbent on it, as part of its duty to respond to the Applicant "openly, accurately and completely" to the broad access request that the Applicant initially made, to alert him to the fact that it is or might be in possession of records which would reveal this information.

[para 84] Even if it were not part of the Public Body's duty to assist, it would certainly be open to the Applicant to make a new request to the Public Body for any records it might have that would reveal such information to him (i.e. records that might reveal additional group coverage account numbers associated with Tesco Corporation including its products division, or any of its sub-companies or associated companies). (On the other hand, it is also possible that the Public Body has no such additional information and can indeed only rely on the Applicant for information about this question.)

[para 85] However, given that it appears the Applicant narrowed his request to the single account number 34482, these questions do not fall within the scope of the present inquiry. I believe that the Public Body has provided sufficient evidence that it performed an adequate search relative to the single account number, as well as possible explanations as to why additional records were not found, even in the face of the evidence supplied by the Applicant about the likely number of commencement and termination forms created for Tesco products division employees in the relevant time period. Accordingly, I find that the Public Body has discharged its burden to show it met its duty under section 10 of the FOIP Act in this regard.¹⁰

¹⁰ The Applicant also points to the fact the record under account number 10276 that was located in the earlier search, which indicates a transfer to account number 34482, was not located in the new search. He suggests this indicates an inadequate search. However, since this was not a record under the account number specified for the second search, I do not believe it was responsive to the request.

V. ORDER

[para 86] I make this Order under section 72 of the FOIP Act.

[para 87] I find that the Public Body met its duty under section 10 of the FOIP Act to assist the Applicant and to perform an adequate search for responsive records.

Christina Gauk, Ph.D.
Director of Adjudication