

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2005-002

April 22, 2005

ACADIA FAIRVIEW PHARMACY

Review Number H0404

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

Summary: The Applicant complained that the Acadia Fairview Pharmacy (“the Custodian”) had improperly estimated the fee for services under section 67(3) of the *Health Information Act* (“the Act”). The Commissioner found that the Custodian could not charge the “professional fee” portion of the fee estimate. The Commissioner ordered the Custodian to provide a fee estimate to the Applicant that was in accordance with the Act.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(k), 1(1)(x), 67(3), 80(3)(a), 104(1)(g); *Health Information Regulation*, A.R. 70/2001, ss. 10, 10(1), 10(3), 11, 11(1), Schedule s. 2.

I. BACKGROUND

[para 1] The Applicant complained that the Acadia Fairview Pharmacy (the “Custodian”) improperly estimated the fee for services in contravention of the *Health Information Act* (“HIA” or the “Act”). The Custodian’s fee estimate contained a category entitled “professional fee” of \$40.00, which is the only aspect of the fee estimate that the Applicant disputes.

[para 2] The Custodian refused to modify the fee estimate. The Applicant requested a review and I authorized mediation under the Act, but the parties were unable to reach a resolution. The matter was set down for a written inquiry. Both parties provided written initial submissions and rebuttal submissions, which were exchanged between the parties.

II. RECORDS AT ISSUE

[para 3] The Applicant made an access request for his father's 2002 medical prescription records. As this is a complaint about the calculation of a fee estimate, there are no records at issue in the usual sense.

III. ISSUE

[para 4] The sole issue before this inquiry is: Did the Custodian properly estimate the fee for services under section 67(3) of the Act?

IV. DISCUSSION OF THE ISSUE

A. HIA Provisions

[para 5] The key provision in the Act that applies to fee estimates says:

67(3) A custodian must give an applicant an estimate of the total fee for its services before providing the services.

[para 6] Fee estimates that are provided under section 67(3) of the Act are explicitly addressed in section 11 of the *Health Information Regulation, A.R. 70/2001* (the "Regulation"). Section 11(1) of the Regulation prescribes what must be set out in the fee estimate such as the time and cost required to prepare the record including severing time and retrieval time, the cost of copying the record and the cost of computer time to locate and copy and if necessary to re-program to create a new record.

[para 7] The calculation of fees is specifically addressed in section 10 of the Regulation. An applicant may be required to pay a 'basic fee' of \$25.00 for certain activities involved in producing a copy of the information requested such as receiving and clarifying the request, locating and retrieving the records and photocopying the records (s. 10(1), Regulation). 'Additional fees' may be charged if in accordance with the Schedule (s. 10(3), Regulation).

[para 8] The Schedule to the Regulation sets out the maximum amount that can be charged to an applicant for producing copies of the records, which varies with the method of storage such as hard copies, microfilm, microfiche, floppy disks or computer tapes (s. 2, Schedule). In its submission, the Custodian has not mentioned the form in which the Custodian has stored the records. The full text of the relevant provisions in the Act and the Regulation that relate to fees are set out in Appendix I to this Order.

B. Discussion: Did the Custodian properly estimate the fee for services under section 67(3) of the Act?

[para 9] In a letter dated January 2, 2004, the Custodian provided the Applicant with a fee estimate for the records/information that had been requested. The Custodian's letter stated:

I forward to you my statement of fees regarding the above request:

Initiate and Review Request	\$25.00
Professional Fee @ \$40.00/hr.	\$40.00

i.e., Professional fee to include time, photocopies and advice to [name of Portfolio Officer].

The only issue in dispute at this inquiry is the “professional fee” component of the Custodian’s fee estimate.

[para 10] In his written initial submission, the Applicant said the Custodian has improperly calculated the fee for services in the fee estimate as the Act does not allow a custodian to charge a “professional fee”. The Applicant said:

I believe that the proposed \$25 fee should more than account for the effort [name of pharmacist] has been asked to expend. I would also submit that it is entirely inappropriate for [name of pharmacist] to be suggesting I should be accounting for her time spent working with [name of Portfolio Officer]. I might go so far as to suggest it is absurd [name of pharmacist] should think that is fair and reasonable.

[para 11] In its written initial submission, the Custodian said that the Custodian had previously provided the Applicant’s father with the records/information that were requested. The Custodian said the records already provided to the individual included the original prescription receipts on a monthly basis for several years, the original and a second copy of a written summary of the annual amount spent for income tax purposes and also a third copy of expenses, all at no charge to the individual.

[para 12] In his written rebuttal submission, the Applicant said he had “spent quite a bit of time looking through all of my Dad’s papers” before making the access request that was the subject of the fee estimate. The Applicant said he did not know the Custodian had previously provided the information to his father, but in any event he had tried to find the records and could not find the information he needed.

[para 13] In its written rebuttal submission, the Custodian replied that although this might be a “small” matter to the Applicant, providing these records for “the third time” would involve a “great of time and expense” on the Custodian’s part. The request would now require manual preparation of the records because the computer records had “long since been inactivated at the pharmacy”. The Custodian maintained that the fee estimate was appropriate and stated:

...the fee requested of the Applicant by the Custodian is of two parts, the \$25.00 basic fee and a minimal \$40.00 charge for time involved in determining and severing the relevant information to be released in this matter, i.e.: the health service providers time which is in no way representative of the allowed amount by the schedule or indeed actual time that will be required to review and document manually approximately thirty weeks of a number of prescription drugs provided weekly and the charges accordingly to the patient.

[para 14] I accept the Custodian’s submission that the Acadia Fairview Pharmacy is a “custodian” as defined in section 1(1)(x) of HIA. There is no dispute that the records/information, which are the subject of the fee estimate, fall within the definition of “health information” as provided in section 1(1)(k) of the Act. I accept the submissions of the parties that the Applicant has the authority to exercise the rights and

powers of the individual, pursuant to a power of attorney under section 104(1)(g) of the Act.

[para 15] Section 10(1) of the Regulation allows a custodian to charge a \$25.00 'basic fee' that includes various steps to produce a copy of the records/information such as receiving and clarifying the request, locating and retrieving the records, preparing the record for copying, including removing staples and paper clips, preparing a response letter and photocopying a record. The \$25.00 portion of the Custodians' fee estimate is the 'basic fee', which is allowed in the Regulation. That part of the fee estimate is not in dispute.

[para 16] In addition to the \$25.00 'basic fee' that is prescribed in section 10(1) of the Regulation, section 10(3) of the Regulation allows a custodian to charge 'additional fees' in accordance with the Schedule for producing a copy of a record. However, any 'additional fees' that are to be charged must fall within one of the categories listed in the Schedule of the Regulation.

[para 17] The Custodian says the "professional fee" that is included in the fee estimate includes compensation for the time it would take to respond to the access request and to photocopy the record. However, these general items are already included in the \$25.00 'basic fee'. Unless these items fall within the 'additional fees' that are allowed under section 2 of the Schedule, a further fee cannot be levied for those items.

[para 18] A custodian that has decided to charge fees must consider whether there are items that fall within the 'additional fees', which are allowed under section 10(3) of the Regulation. For example, it may be that the Custodian's cost to photocopy the records/information requested may exceed the \$5.00 in section 2 of the Schedule to the Regulation. If that is the case, the Custodian is entitled to charge the 'additional fees' prescribed.

[para 19] The Custodian says the "professional fee" also includes "advice to [name of Portfolio Officer] ". However, providing advice is not an item that is allowed in the Regulation. The Custodian has even admitted in its submission that there is no basis in the Act to charge the \$40.00 "professional fee". The Custodian said:

[A]gain, the \$40.00 fee is separate and apart from any fee allowed under the Act involved in this issue...

[para 20] I accept the submission of the Applicant on this point. There is simply no authority under the Act to charge a fee for advice of any kind. When a custodian decides to charge a fee under the Act, that fee must be charged strictly in accordance with the tariff or rules prescribed in the Act.

[para 21] The Custodian has the burden of proof in this case. There is no evidence before me that any of the items the Custodian has listed in the estimate, extend beyond the \$25.00 'basic fee'. I am not saying whether or not that is the correct version of the

facts in this situation; I am merely saying there is no evidence before me on that point. There may well be further items that are allowed in the Schedule that the Custodian has not included in the fee estimate.

[para 22] I commend the Custodian for previously providing multiple copies of the records to the individual on multiple occasions without imposing any fee whatsoever. This may be a situation where the time and effort expected to be spent by a custodian to respond to an access request is well beyond the amount that is recoverable in a fee that can be charged under the Act. I agree with the Custodian in its Rebuttal Submission that although the Act provides for some cost recovery, the Act was not intended to fully compensate custodians.

[para 23] What is the rationale for the restrictions on the fee that can be charged by custodians under the Act? Fee estimates arise under HIA in the context of access requests. In my view, the reason these fee limits exist is to avoid creating an inordinate cost impediment or barrier that becomes an obstacle for individuals seeking access to their own health information. Although custodians have custody and control over the physical records that contain health information, it is the individuals themselves who have the fundamental right to the information – it is their own health information.

C. Conclusion

[para 24] When a custodian decides to charge a fee for processing an access request, the custodian must calculate the fee strictly in accordance with section 67(3) of the Act and as more particularly described in sections 10 and 11 of the Regulation and in the Schedule to the Regulation. I find that the Custodian has not properly calculated the fee for services in the fee estimate that was provided to the Applicant.

V. ORDER

[para 25] Pursuant to my authority under section 80(3)(a) of the Act, I order the Custodian to:

- Properly estimate the fee for services in accordance with section 67(3) of the Act and provide that fee estimate to the Applicant;
- Comply with this Order no later than 50 days after being given a copy of this Order; and
- Notify me in writing that the Custodian has complied with this Order.

Frank Work, Q. C.
Information and Privacy Commissioner

Appendix I

HIA Fee Provisions

Health Information Act, R.S.A. 2000, c. H-5 ("HIA" or the "Act"), ss. 7(3) and 67

7(3) the right of access to a record is subject to the payment of any fee required by the regulations.

67(1) A custodian may charge the fees provided for in the regulations for services provided under Part 2.

(2) Subsection (1) does not permit a custodian to charge a fee in respect of a request for access to an applicant's own health information, except for the cost of producing the copy.

(3) A custodian must give an applicant an estimate of the total fee for its services before providing the services.

(4) A custodian may excuse an applicant from paying all or part of a fee, if in the opinion of the custodian, the applicant cannot afford the fee or in any other circumstances provided for in the regulations.

(5) If an applicant has requested a custodian to excuse the applicant from paying all or part of a fee and the custodian has refused the applicant's request, the custodian must notify the applicant that the applicant may ask for a review by the commissioner.

(6) The fees referred to in subsection (1) must not exceed the actual cost of the services.

Health Information Regulation, AR 70/2001 (the "Regulation"), ss. 9 -13, Schedule ss. 1-2

9 Where an applicant is required to pay a fee for services provided under Part 2 of the Act, the fee is payable in accordance with sections 10, 11 and 12.

10(1) An applicant who makes a request for access to a record containing health information may be required to pay a basic fee of \$25 for performing one or more of the following steps to produce a copy of the information:

- (a) receiving and clarifying the request;
- (b) obtaining consent if necessary;
- (c) locating and retrieving the records;
- (d) preparing the record for copying, including removing staples and paper clips;
- (e) preparing a response letter;
- (f) packaging copies for shipping or faxing, or both;
- (g) postage and faxing costs;
- (h) photocopying a record.

10(2) Processing of a request will not commence until the basic fee has been paid, if applicable.

10(3) In addition to the basic fee, additional fees in accordance with the Schedule may be charged for producing a copy of a record.

11(1) An estimate provided under section 67(3) of the Act must set out

- (a) the time and cost required
 - (i) to prepare the record for disclosure, including severing time, an
 - (ii) to retrieve records from another location;
- (a) the cost of copying the record;
- (b) the cost of computer time involved in locating and copying a record or, if necessary, re-programming to create a new record;
- (c) the cost of supervising an applicant who wishes to examine the original record, when applicable;
- (d) the cost of shipping the record or a copy of the record, other than by mail or fax.

11(2) An applicant has up to 20 days to indicate if the fee estimate is accepted or to modify the request to change the amount of fees assessed.

12(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on the receipt of an agreement to pay the fee, and on the receipt of at least 50% of any estimated fee.

12(2) The balance of any fee owing is payable at the time the information is delivered to the applicant.

12(3) Fees or any part of those fees will be refunded if the amount paid is higher than the actual cost of the service.

13 For the purposes of section 67(4) of the Act, a custodian may excuse an applicant from paying all or part of a fee if in the opinion of the custodian it is fair to excuse payment.

Schedule to the Regulation

1 the amount of the fees set out in this Schedule is the maximum amount that can be charged to applicants.

2 The following fees for producing a copy of a record may be charged if the cost of photocopying a record under section 10(1)(h) of the Regulation, calculated at \$0.25 per page, exceeds \$5, and then only the amount that exceeds \$5 may be charged:

- (a) photocopies, hard copy laser print and computer printouts @ \$0.25 per page
- (b) paper copies from microfilm or microfiche @ \$0.50 per page
- (c) floppy discs @ \$10 each
- (d) computer tapes @ \$55 each
- (e) microfiche (diaz film) @ \$0.50 each
- (f) 16 mm microfilm @ \$25 each
- (g) 35 mm microfilm @ \$32 each
- (h) photographs from negative @
 - 4" x 5" @ \$10 each
 - 5" x 7" @ \$13 each
 - 8" x 10" @ \$19 each
 - 11 x 14" @ \$26 each
 - 18" x 20" @ \$32 each
- (i) 35 mm slide @ \$2 each
- (j) audio cassette @ \$5 each
- (k) video cassette:
 - 1/4", 1/2" or 8 mm - one hour @ \$20 each
 - 1/4", 1/2" or 8 mm - one hour @ \$25 each
 - 3/4" - 30 minutes @ \$18 each
 - 3/4" - one hour @ \$23 each
- (l) radiology film @ \$5 each
- (m) other media not listed above @ actual costs
- (n) supervision of applicant's examination of original records @ \$6.75 per 1/4 hour
- (o) severing time to determine whether a record requires severing, and to review and to identify the parts of the record to be severed:
 - (i) technician time @ \$6.75 per 1/4 hour to maximum of 3 hours
 - (ii) health services provider time @ \$45 per 1/4 hour to maximum of 3 hours
- (p) producing a record from an electronic record:
 - (i) computer processing @ actual costs
 - (ii) computer report generation @ \$10 per 1/4 hour
- (q) other direct costs:
 - (i) charges to retrieve records or to return records, or both, from another location @ contracted fee or average past costs
 - (ii) courier charges or delivery charges, or both, to send copies to applicant other than by mail or fax @ actual cost.