ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2009-001

December 15, 2009

ALBERTA HEALTH SERVICES

Case File Number H1595

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Summary: The Applicant made a request under section 13 of the *Health Information Act* (the "Act") to Capital Health, which is now part of Alberta Health Services (the "Custodian"), asking it to correct or amend his health information contained in a discharge summary. The Custodian refused to make some of the corrections and amendments, and the Applicant elected to submit a statement of disagreement under section 14. The Custodian rejected the statement of disagreement, and the Applicant requested a review of that decision.

A custodian has a duty under section 14(3)(a) of the Act to attach an applicant's statement of disagreement to the record that is the subject of the requested corrections or amendments, if the statement meets the requirements of section 14(1)(b), and it is reasonably practicable to attach the statement to the record. Under section 14(1)(b), the statement of disagreement must be 500 words or less, set out the requested corrections or amendments, and set out the reasons for disagreeing with the custodian's decision not to make them.

The Adjudicator found that the Applicant's statement of disagreement was 500 words or less and that, for the most part, it set out his requested corrections or amendments and his reasons for disagreeing with the Custodian's decision not to make them. Although the document also contained some extraneous or irrelevant information, this did not render it non-compliant with section 14(1)(b). On the contrary, the entire document constituted a statement of disagreement, as section 14(1)(b) requires that a statement contain certain

things, not that it be restricted to or exclusively contain those things, and applicants are entitled to some latitude when preparing a statement of disagreement.

The Adjudicator found that there is no requirement under the Act that the Applicant's reasons for disagreeing specifically respond to the Custodian's own reasons for refusing to make the corrections or amendments. In addition, issues about the care that the Applicant received and comments about the professionals involved in his treatment – including unproven allegations – may form part of the statement of disagreement, provided that they are reasons for disagreeing with the Custodian's decision not to correct or amend the Applicant's health information, or fall within the permissible degree of latitude with respect to extraneous information.

The Adjudicator concluded that the Custodian did not fulfill its duty, under section 14(3)(a) of the Act, to attach the Applicant's statement of disagreement to his discharge summary, and did not fulfill its duty, under section 14(3)(b), to provide copies of the statement of disagreement to any person to whom the Custodian had disclosed the discharge summary in the year preceding the Applicant's request for the corrections and amendments. The Adjudicator accordingly ordered the Custodian to comply with these duties.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i)(i), 1(1)(i)(ii), 1(1)(k)(i), 1(1)(m)(i), 2(e), 10(a), 13, 13(1), 13(2), 13(3)(c), 13(6)(a), 14, 14(1), 14(1)(b), 14(3), 14(3)(a), 14(3)(b), 80, 80(3)(a) and 82(3); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 36(3) and 36(4). **SK:** *Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1, s. 2(1)(aa).

Authorities Cited: AB: Orders 97-020, 99-014, F2005-023, F2006-017, H2005-003, H2005-005, H2006-003 and H2008-005; *Capital Health v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 333. **ON:** Orders P-321 (1992), PO-1881-I (2001) and MO-1700 (2003). **CAN:** *Alberta Wheat Pool and Zahn*, [1992] C.L.C.R.S.O.D. No. 2 (Decision No. 92-002 of a Regional Safety Officer under the *Canada Labour Code*); *Boucher and Canada (Correctional Service)*, [2002] C.L.C.A.O.D. No. 20 (Decision No. 02-022 of an Appeals Officer under the *Canada Labour Code*).

I. BACKGROUND

[para 1] Under section 13(1) of the *Health Information Act* (the "Act" or the "*HIA*"), the Applicant made a request, dated October 23, 2006, to Capital Health which is now part of Alberta Health Services (the "Custodian"), asking it to correct or amend his health information contained in a discharge summary.

[para 2] By letter dated November 20, 2006, the Custodian advised the Applicant that it required more time to process his request. By letter dated December 21, 2006, the Custodian told the Applicant that his request had been partially accepted. It attached a table indicating which corrections and amendments had been accepted, which had been

refused, and why. In respect of the refused corrections and amendments, the Custodian advised the Applicant, in accordance with section 14(1) of the Act, that he could submit a statement of disagreement or request a review by the Commissioner, but that he could not do both.

[para 3] The Applicant submitted a statement of disagreement to the Custodian, dated January 2, 2007.

[para 4] By letter dated January 17, 2007, the Custodian rejected the Applicant's statement of disagreement, on the basis that it did not set out the requested corrections and amendments, and the reasons for disagreeing with the Custodian's decision not to make them, as required by section 14(1)(b) of the Act. The Custodian attached a revised statement of disagreement, adapted from the Applicant's own words, for his consideration and approval.

[para 5] By letter dated January 23, 2007, the Applicant indicated that he did not agree with the Custodian's revised statement of disagreement, as he believed that it did not include his reasons for disagreeing. He enclosed another version of his statement of disagreement, dated January 23, 2007, in which he attempted to present his reasons more clearly.

[para 6] By letter dated February 1, 2007, the Custodian rejected the Applicant's revised version of his statement of disagreement, again on the basis that it did not meet the requirements of section 14(1)(b) of the Act. The Custodian also believed that the statement made inflammatory or defamatory allegations, and that it set out events that did not specifically relate to the discharge summary that the Applicant wanted to have corrected or amended.

[para 7] By letter dated March 16, 2007, the Applicant asked this Office to review the Custodian's refusal to make some of his requested corrections and amendments, and its refusal to accept either of his own versions of the statement of disagreement. Mediation was authorized but was not successful. The Applicant requested an inquiry, by letter to this Office dated June 28, 2007, and a written one was set down.

[para 8] On November 25, 2008, I issued Order H2008-005. I found that the Custodian had no duty under section 14(3)(a) of the Act to attach to the Applicant's discharge summary certain parts of his statement of disagreement, and that it had no duty under section 14(3)(b) to provide copies of those parts of the statement of disagreement to any other person. The parts in question were those parts of the Applicant's statement of disagreement that did not relate to corrections or amendments of his health information that were requested but refused, and set out neither requested corrections or amendments nor the reasons for disagreeing with the Custodian's decision not to make them.

[para 9] In Order H2008-005, I further found that the Custodian had a duty under section 14(3)(a) of the Act to attach to the Applicant's discharge summary the remaining parts of his statement of disagreement, as the remaining parts set out corrections or

amendments of his health information that were requested but refused, set out the reasons for disagreeing with the Custodian's decision not to correct or amend, and were 500 words or less. I also found that the Custodian had a duty under section 14(3)(b) to provide copies of those parts of the statement of disagreement to any person to whom the Custodian has disclosed the Applicant's discharge summary in the year preceding the Applicant's correction/amendment request. Under section 80(3)(a) of the Act, I ordered the Custodian to perform the foregoing duties.

[para 10] As contemplated under section 82(3) of the Act, the Custodian brought an application for judicial review of Order H2008-005.

[para 11] On May 29, 2009, the Court of Queen's Bench issued its decision in *Capital Health v. Alberta (Information and Privacy Commissioner)*. The Court set aside the decision in Order H2008-005, returning the matter to the Commissioner for reconsideration of the extent of the Custodian's duty in this case, having regard to the statutory qualification contained in section 14(3) of the Act. A court order to this effect was entered June 19, 2009. The statutory qualification set out in section 14(3) is that, on receiving a statement of disagreement, a custodian must attach the statement to the record that is the subject of the requested correction or amendment "if reasonably practicable".

II. RECORDS AT ISSUE

[para 12] As this inquiry involves a statement of disagreement in relation to a request to correct or amend health information, rather than a request to access health information, there are no records directly at issue. For context, however, the Applicant made a request to correct or amend information contained in a discharge summary dated August 8, 2006.

III. ISSUES

[para 13] The original Notice of Inquiry, dated July 11, 2008, set out the following issue:

> Did the Custodian properly refuse to attach and provide copies of the statement of disagreement in accordance with section 14(3) of the Act?

[para 14] The Notice of Reconsideration, dated August 4, 2009, set out the following issue:

> Where an individual submits a statement of disagreement that includes information that is irrelevant or extraneous to that set out in section 14(1)(b) of the Act, to what extent is it "reasonably practicable" for the custodian to attach the statement to the relevant records under section 14(3)(a), and then provide copies to the appropriate persons under section 14(3)(b)?

[para 15] The Notice of Reconsideration asked the parties to consider the following when making their submissions:

> Is it reasonably practicable for the custodian to attach all of the statement, none of the statement, or only those parts that strictly comply with section 14(1)(b)? Does the answer depend on the circumstances and, if so, in what way?
>
> If section 14(3)(a) contemplates attaching either all or none of the statement of disagreement, but never parts of it, under what circumstances does the custodian have a duty to attach all of the statement, as opposed to none of the statement?
>
> If the custodian has, at most, only a duty to attach the strictly compliant parts of a statement of disagreement, is it reasonably practicable for the custodian to blacken out the non-compliant portions, re-prepare the statement so that it includes only the compliant portions, or do anything else to fulfill the duty under section 14(3)(a)?

[para 16] In the Notice of Reconsideration, the parties were invited to make any other submissions that they wished to make in relation to the Court's decision in *Capital Health v. Alberta (Information and Privacy Commissioner)*. Finally, they were advised that their submissions during the original inquiry would be available to the Commissioner or the designated Adjudicator, and used in the context of the reconsideration.

[para 17] For the purpose of the reconsideration, the Custodian submitted a copy of the brief that it submitted to the Court during the judicial review of Order H2008-005. That brief accordingly became a submission before me, and I consider some of the Custodian's arguments in it, later in this Order.

IV. DISCUSSION OF ISSUES

Did the Custodian properly refuse to attach and provide copies of the statement of disagreement in accordance with section 14(3) of the Act?

Where an individual submits a statement of disagreement that includes information that is irrelevant or extraneous to that set out in section 14(1)(b) of the Act, to what extent is it "reasonably practicable" for the custodian to attach the statement to the relevant records under section 14(3)(a), and then provide copies to the appropriate persons under section 14(3)(b)?

[para 18] The relevant parts of sections 13 and 14 of the Act read as follows:

> *13(1) An individual who believes there is an error or omission in the individual's health information may in writing request the custodian that has the information in its custody or under its control to correct or amend the information.*

(2) Within 30 days after receiving a request under subsection (1) or within any extended period under section 15, the custodian must decide whether it will make or refuse to make the correction or amendment.

…

(5) If the custodian refuses to make the correction or amendment, the custodian must within the 30-day period or any extended period referred to in subsection (2) give written notice to the applicant that the custodian refuses to make the correction or amendment and of the reasons for the refusal.

(6) A custodian may refuse to make a correction or amendment that has been requested in respect of

(a) a professional opinion or observation made by a health services provider about the applicant, or

…

14(1) Where a custodian refuses to make a correction or amendment under section 13, the custodian must tell the applicant that the applicant may elect to do either of the following, but may not elect both:

(a) ask for a review of the custodian's decision by the Commissioner;

(b) submit a statement of disagreement setting out in 500 words or less the requested correction or amendment and the applicant's reasons for disagreeing with the decision of the custodian.

(2) An applicant who elects to submit a statement of disagreement must submit the statement to the custodian within 30 days after the written notice of refusal has been given to the applicant under section 13(5) or within any extended period under section 15(3).

(3) On receiving the statement of disagreement, the custodian must

(a) if reasonably practicable, attach the statement to the record that is the subject of the requested correction or amendment, and

(b) provide a copy of the statement of disagreement to any person to whom the custodian has disclosed the record in the year preceding the applicant's request for the correction or amendment.

[para 19] In certain circumstances under section 14(3) of the Act, a custodian has a duty to attach a statement of disagreement to the record that is the subject of a requested correction or amendment, provided that attachment is reasonably practicable, and to provide copies of the statement to any person to whom the custodian has disclosed the record in the year preceding an applicant's correction/amendment request. The duty

arises when a custodian refuses to correct or amend an applicant's health information, the applicant elects to submit a statement of disagreement, and the applicant's statement of disagreement meets the requirements of section 14(1)(b) (Order H2005-005 at para. 15). Under section 14(1)(b), the statement of disagreement must meet three requirements in that it must (i) be 500 words or less, (ii) set out the requested correction or amendment, and (iii) set out the applicant's reasons for disagreeing with the decision of the custodian not to make the correction or amendment (Order H2005-005 at para. 16).

[para 20] As will be discussed later in this Order – further to the Court's decision in *Capital Health v. Alberta (Information and Privacy Commissioner)* and my reconsideration of this matter – a statement of disagreement does not have to be restricted to, or exclusively contain, the requested corrections/amendments and reasons for disagreeing with a custodian's decision not to make them. Some extraneous or irrelevant material is possible, provided that it falls within a permissible degree of latitude to be afforded individuals when they prepare a statement of disagreement.

[para 21] In other contexts under the Act, a custodian has the burden of proving that it fulfilled a particular duty, or that it had no duty, as it is in the best position to do so [Order H2005-003 at para. 42 and Order H2006-003 at para. 11, discussing a custodian's duty to assist an applicant and to conduct an adequate search for responsive records under section 10(a)]. I further note that, under the provision of the *Freedom of Information and Protection of Privacy Act* dealing with a public body's refusal to make a correction to an individual's personal information, the public body has the burden of showing that it properly annotated or linked the personal information with the requested correction [Order 97-020 at para. 109 and Order F2005-023 at para. 10, discussing section 36(3) of the *FOIP Act*].

[para 22] As a custodian is in the best position to show that it met its duty, or that it had no duty, with respect to attaching a statement of disagreement to a record and providing copies to any appropriate person, I find that a custodian has the burden of proof under section 14(3) of the Act. Having said this, it is in an applicant's best interest to also provide arguments and evidence, even where the other party has the burden of proof (Order 99-014 at para. 11). For instance, an applicant might make submissions as to whether his or her statement of disagreement meets the three requirements of section 14(1)(b), whether it falls within a permissible degree of latitude with respect to meeting those requirements, and whether attachment of the statement to the relevant record is reasonably practicable.

1. The Applicant's statement of disagreement

[para 23] In this reconsideration, as in the original inquiry, I will review only the Applicant's first statement of disagreement, dated January 2, 2007. In his original submissions, he states that his second version was written only in response to the Custodian's refusal of his first version, and that he prefers his first version to be attached to his discharge summary. I consider the Applicant's second version of his

statement of disagreement to have been submitted to the Custodian in an effort to reach a resolution, and that the Applicant did not give up any right to have the information in his first version attached to his health record.

[para 24] In his original submissions, the Applicant argues that his discharge summary should be corrected or amended, for instance by removing two paragraphs with which he disagrees. However, the Custodian's refusal to make the Applicant's requested corrections and amendments is not itself an issue. Section 14(1) of the Act gives an applicant a choice between requesting a review by this Office of a custodian's decision not to correct or amend health information, and submitting a statement of disagreement to the custodian, but an applicant may not do both. Here, the Applicant opted for a statement of disagreement. The only matter that can therefore proceed to a review by this Office is the Custodian's refusal to accept the statement of disagreement that was submitted to it by the Applicant.

[para 25] The Custodian refused to correct or amend some of the Applicant's health information as he requested, and the Applicant elected to submit a statement of disagreement. The Custodian's duty to attach the statement of disagreement therefore arose – provided that the statement complies with the three requirements of section 14(1)(b) of the Act, and provided that it is reasonably practicable, under section 14(3)(a), for the Custodian to attach the statement to the record that is the subject of the requested corrections or amendments, being the discharge summary. The duty to provide a copy of the statement of disagreement to appropriate persons also arose if the statement complies with the three requirements of section 14(1)(b) of the Act.

[para 26] The Applicant's own words in his statement of disagreement amount to 500 or less. However, he also included a reproduction of a computer printout at the end of the statement, which arguably brings the total number of words to slightly over 500. I say "arguably" because one might debate whether short words – such as "the", "a" or "Dr." – should count toward the 500 word limit. Here, the Custodian does not argue that the statement of disagreement is longer than 500 words, so I presume that the parties agree that the document is of an appropriate word length. I find that the Applicant's statement of disagreement meets the first requirement of section 14(1)(b) of the Act. If the foregoing analysis happens to be incorrect, I would alternatively find – as discussed later in this Order – that the computer printout may be severed, with the remaining parts of the document constituting the statement of disagreement.

2. Corrections or amendments of health information that were requested but refused

[para 27] The Applicant made five requests for corrections or amendments in his correspondence of October 23, 2006, and the Custodian agreed to two of them in its letter of December 21, 2006. It accordingly corrected or amended the Applicant's discharge summary in those two respects, providing him with a copy of the revised discharge summary by letter dated January 24, 2007.

[para 28] Because a statement of disagreement under section 14(1) of the Act is in respect of a custodian's refusal to make a correction or amendment, it is the Applicant's three correction/amendment requests that were refused by the Custodian that section 14(1)(b) contemplates to be discussed in the statement of disagreement. As set out in the table attached to the Custodian's response of December 21, 2006, those three refusals were as follows:

- a refusal to correct or amend a reference to the Applicant's hemoglobin level in paragraph 8 of his discharge summary;
- a refusal to correct or amend a reference to starting the Applicant on a particular diet in paragraph 13 of his discharge summary; and
- a refusal to correct or amend paragraphs 10 and 11 of the discharge summary, which discussed interactions between the Applicant's wife and his physicians.

[para 29] Under section 13(1), a correction/amendment request must be in respect of an individual's health information and must be in relation to an error or omission that the individual believes to exist in that information. To trigger the possibility of a statement of disagreement under section 14(1) – which refers to section 13 – a custodian must refuse to make a requested correction/amendment of an individual's health information. I will therefore first consider whether the three refusals on the part of the Custodian in this inquiry were in respect of requests to correct or amend the Applicant's "health information", as defined in the Act.

[para 30] Under section 1(1)(k)(i), "health information" means, among other things, "diagnostic, treatment and care information." Under sections 1(1)(i)(i), "diagnostic, treatment and care information" means, among other things, information about the physical health of an individual. The reference to the Applicant's hemoglobin level in his discharge summary meets this definition.

[para 31] Under section 1(1)(i)(ii) of the Act, "diagnostic, treatment and care information" also means information about a health service provided to an individual. Under section 1(1)(m)(i), "health service" means, among other things, a funded or partially funded service that is provided to an individual for the purpose of protecting, promoting or maintaining physical health, or treating illness. The information about starting the Applicant on a particular diet meets this definition.

[para 32] I find that information regarding the interactions between the Applicant's wife and his physicians, in paragraphs 10 and 11 of the discharge summary, is information about a health service provided to the Applicant. Those paragraphs record events that transpired while the Applicant was receiving health services, and the recorded exchanges between the Applicant's wife and his physicians are about those health services. Specifically, there is information about treatment of the Applicant's illness, such as decisions about surgery and transfer to another physician, which falls within the definition of "health service". For the sake of clarity, I find that the last sentence of paragraph 10, referring to threatened legal action, is also the Applicant's health

information, as the threatened legal action is in respect of health services provided to the Applicant.

[para 33] Because the discharge summary consists of the Applicant's health information, and he believed that there was wrong or missing information in it, his correction/amendment requests were directed toward what he believed to be errors or omissions in his health information. Therefore, there were corrections or amendments that were requested under section 13 of the Act, but that were refused, and which therefore can be the subject of a statement of disagreement under section 14.

3. Setting out the requested correction or amendment and the reasons for disagreeing with the Custodian

[para 34] I must now consider whether the Applicant's statement of disagreement sets out the corrections or amendments that he requested but that were refused, and sets out the reasons for disagreeing with the decision of the Custodian not to make them.

[para 35] As in Order H2008-005, I find that parts of the Applicant's statement of disagreement, dated January 2, 2007, set out a requested correction or amendment of his health information, which was refused, or set out the Applicant's reasons for disagreeing with the decision of the Custodian not to correct or amend. These parts are the following:

- all of the introductory paragraph of the statement (i.e., the paragraph before any of the date and time entries);
- the third sentence of the entry for "Jul. 31, 2006, morning" (and the date and time);
- the first sentence of the entry for "Aug. 01, 7:14am" (and the date and time);
- all of the entry for "Aug. 01, near 10am" (including the date and time);
- the second sentence of the entry for "Aug. 01, afternoon" (and the date and time);
- the first, third and fifth sentences of the entry for "Aug. 02, late morning" (and the date and time);
- all of the entry for "Aug. 02, late afternoon" (and the date and time);
- the fourth and fifth sentences of the entry for "Aug. 03, early morning" (and the date and time); and
- all of the concluding paragraph of the statement (i.e., the paragraph after all of the date and time entries).

[para 36] In particular, the introductory paragraph of the statement of disagreement (i.e., the paragraph before any of the date and time entries) sets out the corrections or amendments that the Applicant requested regarding his hemoglobin level, and regarding the exchanges between his wife and physicians about his health services. The concluding paragraph of the statement sets out the Applicant's overall reasons for disagreeing with the Custodian's decision not to make the requested corrections or amendments.

[para 37] I find that the first sentence of the entry for "Aug. 01, 7:14 am" sets out the Applicant's reasons for disagreeing with the Custodian's decision not to make the requested correction or amendment regarding his hemoglobin level.

[para 38] I find that the reference in the introductory paragraph to how the Applicant's wife was portrayed, the third sentence of the entry for "Jul. 31, 2006, morning", all of the entry for "Aug. 01, near 10am", the second sentence of the entry for "Aug. 01, afternoon", the first, third and fifth sentences of the entry for "Aug. 02, late morning", all of the entry for "Aug. 02, late afternoon", and the fourth and fifth sentences of the entry for "Aug. 03, early morning" all set out the Applicant's reasons for disagreeing with the Custodian's decision not to correct or amend paragraphs 10 and 11 of his discharge summary, which described his wife's interactions with his physicians insofar as those interactions were about the Applicant's health services. Those passages of the statement of disagreement indicate why the Applicant believes that paragraphs 10 and 11 were wrong or were missing information, in that the passages offer the Applicant's different version of events. It is the Applicant's view that events occurred differently that amounts to his reasons for disagreeing with the Custodian's decision not to make the corrections or amendments that he requested.

[para 39] The Custodian indicates that it refused to make some of the Applicant's requested corrections and amendments because the health information was a professional opinion or observation. It then argues, in respect of the statement of disagreement, that the Applicant failed to set out reasons why the opinions or observations are not properly considered to be professional opinions or observations. It accordingly submits that the Applicant's reasons are not adequate.

[para 40] In my view, the reason why a custodian refused to make a requested correction or amendment, or whether it properly did so, does not need to be discussed in a statement of disagreement, and therefore is not relevant to a custodian's duty under section 14(3) of the Act. In Order H2005-005 (at paras. 9 to 15), the Commissioner distinguished the issue of whether a custodian properly refused to make a correction or amendment – specifically because the health information was a professional opinion or observation under section 13(6)(a) – from the issue regarding the duty to attach a statement of disagreement. He stated that the duty arises once the requested correction or amendment has been refused (i.e., without reference to the custodian's reasons for refusing to make the correction or amendment) – provided that the statement of disagreement complies with section 14(1)(b). The Commissioner did not address whether, or find that, an applicant must specifically respond in the statement of disagreement to the custodian's reasons for refusing to make a correction or amendment.

[para 41] I do not believe that an applicant must respond to a custodian's reasons for refusing to correct or amend, as the statement of disagreement is not required to set out reasons for disagreeing with the *reasons* of the custodian. Under section 14(1)(b) of the Act, the statement of disagreement must set out the reasons for disagreeing with the *decision* of a custodian. That decision is the refusal to make the correction or amendment (Order H2005-005 at para. 17), as this is the decision referenced in section 14(1) – as

well as section 13(2), which uses the word "decide". Accordingly, a statement of disagreement only needs to set out the reasons why an applicant believes that the refusal to correct or amend was wrong. The reasons for disagreeing with the refusal can essentially be the same reasons for requesting the correction or amendment in the first place – or entirely new reasons – without any reference to why the correction or amendment was refused by the custodian.

[para 42] The Custodian submits that a statement of disagreement is limited in nature, as it is required to be placed in a custodian's file even though its contents are not accepted to the extent that requested corrections or amendments were refused. It argues that the statement should be concise, and that it is not the proper forum in which to raise issues that patients have with the care that they received, allegations of negligence, or comments about the professionals involved in their treatment, as there are other legal and administrative processes that address these matters.

[para 43] The objective of section 14(1)(b) of the Act is to allow individuals to place their views about their health information on record, close to the health information in question, when a custodian has refused to make a requested correction or amendment. A statement of disagreement alerts readers of an individual's health record to that individual's views about the correctness or completeness of his or her health information, *despite the fact* that those views were more or less rejected by a custodian. There are indeed limits regarding the content of a statement of disagreement – but they are only those limits set out in section 14(1)(b) itself, which include a degree of latitude to be given to applicants when fashioning their statements of disagreement, as will be discussed later in this Order. The content does not have to be "concise" – the information that forms the statement of disagreement needs only to be 500 words or less. A statement of disagreement does not have to be devoid of allegations of negligence or comments about professional care – those allegations or comments only need to set out a requested correction or amendment or the reasons for disagreeing with a custodian's decision not to correct or amend, or fall within the permissible degree of latitude when determining whether a statement of disagreement complies overall with section 14(1)(b).

[para 44] In Order H2005-005 (at para. 20), the Commissioner did not reject the statement of disagreement in that case on the basis that it contained defamatory or inflammatory allegations; he rejected it because it did not set out requested corrections or amendments, or reasons for disagreeing with the decision of the custodian not to make them, as required by section 14(1)(b) of the Act. In my view, allegations may form part of a statement of disagreement, provided that they either fulfill section 14(1)(b) or fall within the permissible degree of latitude to be given to applicants with respect to including some extraneous or irrelevant material in their statements. For instance, the substance of an allegation – even an unproven one – can be the reason for disagreeing with a custodian's refusal to make a requested correction or amendment, or be sufficiently connected to content that falls within section 14(1)(b) so as to be superfluous material that is allowed.

[para 45] The Custodian further argues that superfluous information or commentary in the form of unproven allegations creates a risk of confusion due to a variety of versions of events, or the potential for mischief should an applicant pursue a claim for medical negligence. In my view, however, the reader of a statement of disagreement will be able to ascertain that it was the applicant who prepared or submitted it, and that the statement is for the purposes of the *Health Information Act*. The reader can accordingly consider or believe the contents of the statement of disagreement as the reader sees fit. I see no real potential for confusion or mischief.

[para 46] As discussed earlier in this Order, there is no requirement that the Applicant's reasons specifically respond to the Custodian's own reasons for refusing to make the correction or amendment. For the sake of clarity, I further point out that nothing in the Act requires an applicant's reasons for disagreeing to contain his or her health information, or requires the reasons to have any other particular content. Although a correction/amendment request under section 13 must be directed toward an applicant's health information, the reasons for disagreeing with a custodian's decision not to make the requested correction or amendment do not necessarily have to.

[para 47] Here, for instance, it is acceptable for the Applicant's reasons for disagreeing to be based on, among other things, his view that his wife was portrayed inaccurately in his discharge summary. Because his initial correction/amendment request was directed toward his health information – to the extent that his wife was dealing with his physicians in respect of his health services – his reasons for disagreeing with the Custodian's decision not to correct or amend that health information can be solely in relation to his wife. In my view, quite frankly, an applicant's reasons under section 14(1)(b) of the Act can be just about anything, so long as they are reasons for disagreeing with a custodian's refusal to correct or amend the applicant's health information.

[para 48] In specific response to the Custodian's concerns that certain parts of the Applicant's statement of disagreement raise issues about the care that he received, allegations of negligence, or comments about the professionals involved in his treatment, I find that those parts properly form part of the statement of disagreement. The Applicant's different version of events regarding his care and treatment is precisely why he disagreed with the Custodian's decision not to correct or amend certain of his health information. He is entitled to include his version of events, even if there are other legal and administrative processes to address his concerns.

[para 49] In Order H2008-005, I found that parts of the Applicant's statement of disagreement, dated January 2, 2007, did not comply with section 14(1)(b) of the Act, in that they set out neither a requested correction or amendment of his health information, which was refused, nor set out the Applicant's reasons for disagreeing with the decision of the Custodian not to correct or amend. These parts were the following:

- the first and second sentences of the entry for "Jul. 31, 2006 morning" (this information about a particular treatment and being discharged was not the subject of the Applicant's correction/amendment request);

- the second and third sentences of the entry for "Aug. 01, 7:14am" (the information about being discharged was not the subject of the Applicant's correction/amendment request; the information about the Applicant's hemoglobin in the last sentence – unlike the first sentence – was not the subject of his correction/amendment request, as this information is about the physician's response to the hemoglobin level and not the level itself);
- all of the entry for "Aug. 01, noon" (this information about a particular event was not the subject of the Applicant's correction/amendment request);
- the first sentence of the entry for "Aug. 01, afternoon" (this information about two treatments and a symptom was not the subject of the Applicant's correction/amendment request);
- the second and fourth sentences of the entry for "Aug. 02, late morning" (this information discussing interactions between the Applicant's wife and his physicians – unlike the information in the first, third and fifth sentences – does not relate to a request to correct or amend the Applicant's "health information" within the meaning of section 13 of the Act);
- the first, second and third sentences of the entry for "Aug. 03, early morning" (this information about the Applicant's fever is related to his correction/amendment request, but the correction/amendment was made as opposed to refused); and
- all of the entry for "Aug. 03, near 11am" and for "Aug. 04, late afternoon" (this information about interactions between the Applicant's wife and a particular physician was not the subject of the Applicant's correction/amendment request, as this physician was not one of the physicians referenced in paragraphs 10 and 11 of the Applicant's discharge summary, which are the relevant paragraphs that he wanted corrected or amended).

[para 50] Given the Applicant's correction/amendment request of October 23, 2006 and the specific information in his discharge summary that he wanted to correct or amend, the foregoing content in his statement of disagreement is not that strictly contemplated under section 14(1)(b) of the Act. The content does not relate to the correction/amendment requests that the Applicant made regarding his hemoglobin level, his diet, or the exchanges between his wife and physicians in relation to his health services. For instance, although the Applicant appears to have concerns about the decision to discharge him from the hospital and alleged failures on the part of his physicians to address specific symptoms, the Applicant's correction/amendment request of October 23, 2006 does not expressly refer to these matters.

[para 51] In Order H2008-005, I found that the above content in the Applicant's statement of disagreement did not meet the requirements of section 14(1)(b) of the Act because it introduced information that was not related to the corrections or amendments that he expressly requested, was not related to a correction or amendment of his "health information", or was not related to a correction or amendment that was refused rather than made by the Custodian. As will be discussed in the next part of this Order, I should not have immediately characterized this content as non-compliant; I should have characterized it as extraneous or irrelevant and then determined whether it fell within a

permissible degree of latitude to be given to applicants when preparing their statements of disagreement, in which case the statement of disagreement would, as a whole, sufficiently meet the requirements of section 14(1)(b).

4. The extent of the Custodian's duty to attach the statement of disagreement

[para 52] I have found that the Applicant's statement of disagreement contains parts that set out his requested corrections or amendments and his reasons for disagreeing with the decision of the Custodian not to make them, and parts that do not. In such circumstances where there is irrelevant or extraneous content, one must consider whether that content may nonetheless be included, and if not, whether this affects the custodian's duty to attach the statement of disagreement to the record that is the subject of the requested correction or amendment.

[para 53] To address this, the Notice of Reconsideration posed the following related questions: Where an individual submits a statement of disagreement that includes information that is irrelevant or extraneous to that set out in section 14(1)(b) of the Act, to what extent is it "reasonably practicable" for the custodian to attach the statement to the relevant records under section 14(3)(a), and then provide copies to the appropriate persons under section 14(3)(b)? Is it reasonably practicable for the custodian to attach all of the statement, none of the statement, or only those parts that strictly comply with section 14(1)(b)? Does the answer depend on the circumstances and, if so, in what way? If section 14(3)(a) contemplates attaching either all or none of the statement of disagreement, but never parts of it, under what circumstances does the custodian have a duty to attach all of the statement, as opposed to none of the statement? If the custodian has, at most, only a duty to attach the strictly compliant parts of a statement of disagreement, is it reasonably practicable for the custodian to blacken out the non-compliant portions, re-prepare the statement so that it includes only the compliant portions, or do anything else to fulfill the duty under section 14(3)(a)?

[para 54] I will answer the foregoing questions, to the extent possible, in the discussion that follows.

(a) Reconsideration of this matter

[para 55] The Custodian argues that, where an applicant submits a statement of disagreement that contains immaterial or additional information that does not relate to requested corrections or amendments or to reasons for disagreeing with a custodian's refusal to correct or amend information, a custodian has no duty to redact or edit the statement of disagreement and attach the redacted or edited version to the record in question. It submits that a custodian's duty to attach a statement of disagreement to a health record arises only upon submission of a compliant statement of disagreement. I take the Custodian's reference to a "compliant" statement of disagreement to be to one that does not contain any material extraneous or irrelevant to that contemplated under

section 14(1)(b) of the Act. For ease of reference, I refer to such a statement as being one that is "strictly" compliant.

[para 56] The Custodian states that section 14(3)(a) of the *HIA* and section 36(3) of the *FOIP Act* serve a similar purpose, namely to reflect in a record that a dispute exists as to the accuracy of a record or a portion of it. Under section 36(3) of the *FOIP Act*, if a public body does not make a requested correction, it has a duty to annotate or link the personal information that was the subject of a correction request to that part of the requested correction that is relevant and material to the record in question. The Custodian submits that, in referring to the requested correction that is material and relevant, section 36(3) of the *FOIP Act* limits the extent of the duty of public bodies to annotate or link. It submits that a custodian's duty under section 14(3)(a) of the *HIA* is likewise limited, in that the duty to attach a statement of disagreement only arises in respect of one that (strictly) complies with the three requirements of section 14(1)(b).

[para 57] The Custodian accordingly submits that it is not required to attach irrelevant and immaterial information in a statement of disagreement just because other portions of the statement of disagreement do comply with section 14(1)(b) of the Act. It argues that, if statements of disagreement containing additional information were required to be attached to records, this would improperly broaden the purpose of section 14(3)(a) from simply reflecting disagreement on certain points to providing a different narrative, adding additional facts to the record, or expressing views on quality of care. While the Custodian acknowledges that it must be reasonable in determining whether a statement of disagreement meets the requirements of section 14(1)(b), it effectively argues that it has no duty to attach any part of a purported statement of disagreement if it contains extraneous or irrelevant information.

[para 58] In *Capital Health v. Alberta (Information and Privacy Commissioner)* (at para. 13), the Court of Queen's Bench found that it is not unreasonable to conclude that, once the requirements of section 14(1)(b) are met, a document submitted by an applicant to a custodian constitutes a statement of disagreement, even if it also contains some irrelevant material. The Court further stated (also at para. 13):

> Section 14(1)(b) simply requires that the statement contain certain things, not that it be restricted or exclusively contain those items. It is reasonable to recognize that lay persons will not always have the background necessary to easily fashion a fully compliant statement and therefore some latitude in this respect is reasonable.

[para 59] Here, the parts of the Applicant's statement of disagreement that do not strictly fall within that contemplated under section 14(1)(b) describe other of his experiences while obtaining health services from the Custodian, and his views about those experiences. I find that this extraneous content falls within the degree of latitude to which an individual is entitled when preparing a statement of disagreement. Although the content does not set out a correction or amendment of health information that was previously requested and refused, or set out reasons for disagreeing with the decision not

to correct or amend, it provides additional background and detail as to why the Applicant wanted to have his discharge summary corrected or amended, is sufficiently connected to the information that strictly falls under section 14(1)(b), and is consistent with the objective of allowing him to place his views about the accuracy and completeness of his own health information on record.

[para 60] I recall that, in its letter of February 1, 2007, the Custodian rejected the Applicant's statement of disagreement partly because it set out events that did not specifically relate to the discharge summary that the Applicant wanted to have corrected or amended. However, I find here that the extraneous content in the statement of disagreement is acceptable because it nonetheless relates to the Applicant's medical treatment, to events occurring while he was in hospital, and to interactions that he and/or his wife had with physicians. Although there is material about additional matters (e.g., a decision to discharge him from the hospital and alleged failures on the part of his physicians to address specific symptoms), which matters were not expressly mentioned in the Applicant's correction/amendment request of October 23, 2006, the material is sufficiently connected to the Applicant's request to have his discharge summary corrected or amended. This is particularly so, given that the discharge summary is meant to summarize the Applicant's overall treatment while in hospital. Further, while the statement of disagreement contains sentences discussing interactions between the Applicant's wife and physicians that do not *directly* relate to the Applicant's health information, other of the discussed interactions do so relate. Inclusion of the additional sentences, for the purpose of providing further background, falls within the latitude to be given to the Applicant.

[para 61] In short, although I found above that there is superfluous information in the Applicant's statement of disagreement that does not technically fall within that described in section 14(1)(b) of the Act, it is not so irrelevant and unrelated as to render all or part of the statement of disagreement non-compliant.

[para 62] I also recall that the Custodian rejected the Applicant's statement of disagreement because it believed that the statement made inflammatory or defamatory allegations. As with the parts of the statement of disagreement falling strictly within the terms of section 14(1)(b), I find that it does not matter that the Custodian disagrees with the superfluous information, or believes that some of it is defamatory or inflammatory. The extraneous material in this case is acceptable because it forms part of the Applicant's different version of events that gave rise to his correction/amendment request in the first place. I do not find the nature or quantity of the material to be equivalent, for instance, to the "list of complaints and allegations" rejected in Order H2005-005 or the "complaint letter" forming the appendix rejected in Ontario Order MO-1700.

[para 63] Given the Court's comments in *Capital Health v. Alberta (Information and Privacy Commissioner)* and my reconsideration of this matter, I now conclude that I was wrong, in Order H2008-005, to find that certain content was not properly part of the Applicant's statement of disagreement. Once I found that his statement of disagreement met the requirements of section 14(1)(b) of the Act for the most part, I was wrong to find

that the Applicant could not include some extraneous or irrelevant information. In Order H2008-005, I took too rigid an approach in determining whether the Applicant had submitted a compliant statement of disagreement.

[para 64] In making its submissions against a duty to redact or edit a statement of disagreement, the Custodian says that the process surrounding statements of disagreement should be a fairly straightforward exercise, not one that is complicated and time-consuming. I take the Custodian's point in this regard but disagree on the implications. In my view, the question of whether to accept a statement of disagreement that contains some irrelevant and extraneous information should normally be resolved in favour of the applicant. Although the Custodian argues that there are limits to an individual's right to have a statement of disagreement attached to his or her health record, it acknowledges that the purposes of sections 14(1)(b) and 14(3)(a) of the Act are to highlight for anybody else who views the record that an individual has disagreed with it or has requested additional information to be included, and to provide the individual with some control over how his or her own health information is communicated and recorded. To relieve a custodian from attaching any of a statement of disagreement achieves neither of these purposes, whereas including some extraneous or irrelevant material only minimally detracts from them, if at all.

[para 65] In response to the Custodian's concerns that the inclusion of some extraneous or irrelevant material in a statement of disagreement may result in the applicant providing a different narrative, adding additional facts to the record or expressing views on quality of care (or recording allegedly inflammatory or defamatory statements for that matter), I give the same response that I did with respect to parts of a statement of disagreement that reflect requested corrections or amendments, or reasons for disagreeing with the decision not to correct or amend, but that might also contain some of the foregoing. Specifically, any reader of a statement of disagreement will know that it was the applicant who prepared and submitted it, and that the statement was for the purpose of setting out a disagreement that the applicant had regarding his or her health record. The reader (who will usually be another health care professional) can take the contents of the statement of disagreement – including any different narrative, additional facts, views on quality of care, and inflammatory or defamatory statements – for what the reader considers them to be worth.

[para 66] Ontario orders cited by the Custodian point out that, where a statement of disagreement is attached to a record, anyone looking at or obtaining access to the record knows that there is a dispute regarding its accuracy and can take that into account in assessing the reliance to be placed on the record or in formulating his or her own view as to the validity of its contents [Ontario Order PO-1881-I at p. 12 or para. 60; Ontario Order P-321 at p. 4 or para. 11]. The same can be said of a third party's reliance on, or acceptance of, the contents of the statement of disagreement.

[para 67] In comparing the analogous provisions of the *HIA* and the *FOIP Act*, the Custodian points out that the limits of section 36(3) of the latter are to ensure that persons who access an annotation or linkage, including those required to be notified of the

annotation or linkage under section 36(4), do not inadvertently have access to other information that is unrelated to the correction request (Order F2006-017 at para. 87), and to ensure that the correction request is easily discernible and apparent upon review of the relevant record (Order 97-020 at para. 187). In my view, neither of these objectives is hindered if some extraneous or irrelevant material is allowed to be included in a statement of disagreement under the *HIA*. I do not believe that superfluous information will prevent a reader from knowing an applicant's concerns and the nature of his or her correction/amendment request. Provided that the statement of disagreement does not contain third party information the collection or disclosure of which would be unauthorized for some reason, it is acceptable for others to have access to it, as it is the applicant himself or herself who wants the information to be seen.

[para 68] Because I have found, on this reconsideration, that the document submitted by the Applicant is a statement of disagreement in its entirety, I conclude that the Custodian has a duty, under section 14(3)(a) of the Act, to attach all of it to the record that is the subject of the requested corrections and amendments – being the Applicant's discharge summary dated August 8, 2006. The question of whether it is reasonably practicable for the Custodian to blacken out parts of the document submitted by the Applicant, re-prepare the document so that it includes only certain portions, or do anything else to fulfill the duty under section 14(3)(a), does not need to be answered. It is reasonably practicable for the Custodian to attach the whole of the document to the discharge summary, as it merely involves attaching two paper records.

[para 69] Although the Custodian argues that it has no duty to edit or redact a statement of disagreement, it submits that the Commissioner or an Adjudicator may, following an inquiry into the matter, determine what portions of a statement of disagreement are acceptable and order the proper portions to be attached to the relevant record. It points out that this is distinct from a finding that the Custodian had a duty under section 14(3)(a) of the Act to attach those proper portions in the first instance.

[para 70] The Custodian misinterprets the jurisdiction of the Commissioner or his designated Adjudicator. The order-making power under section 80 of the Act does not include the authority to require an edited statement of disagreement, or only part of a statement of disagreement, to be attached to a health record if a custodian did not have a duty to do this initially. Under section 80(3)(a) of the Act, I may require that a duty imposed by the Act be performed; I may not require something to be done if there was no requirement for it to be done in the first place.

[para 71] Moreover, the Custodian's suggestion that disputes over the content of a statement of disagreement may simply be resolved by this Office if need be – but not by the parties themselves (short of an agreement) – does not lend itself to the relatively straightforward and uncomplicated process that the Custodian itself advocates. It is preferable to avoid inquiries in relation to statements of disagreement by providing guidance to parties on how to resolve disputes over content, and guidance on the extent of a custodian's duty to attach a statement of disagreement to the relevant record.

(b) Guidance for future cases involving statements of disagreement

[para 72] In *Capital Health v. Alberta (Information and Privacy Commissioner)* (at para. 16), the Court of Queen's Bench found that Order H2008-005 left uncertainty as to the extent of a custodian's duty to attach a statement of disagreement in similar future cases. In this part of the Order, I will therefore attempt to provided some guidance to custodians where, as in this case, an applicant submits a document that sets out requested corrections or amendments of health information and reasons for disagreeing with a decision not to correct or amend, in accordance with section 14(1)(b) of the Act, but also sets out some irrelevant or extraneous information, or information that is not "strictly" compliant with section 14(1)(b).

[para 73] Material submitted by an applicant under section 14(1)(b) of the Act constitutes a statement of disagreement if it is 500 words or less, sets out – for the most part – corrections or amendments that were requested but refused, and sets out – for the most part – reasons for disagreeing with the decision not to make the corrections or amendments. Once those requirements are met for the most part, it does not matter that there is also some irrelevant or extraneous information. The remaining parts are, generally speaking, also acceptable so as to render the entire thing a statement of disagreement under section 14(1)(b), and impose a duty to attach all of it under section 14(3)(a) if attachment is reasonably practicable. I will return to what is "reasonably practicable".

[para 74] The Court of Queen's Bench stated that it is reasonable to afford applicants "some latitude" when fashioning their statements of disagreement. It is difficult, for the purpose of future cases, to definitively articulate what will fall within "some latitude" – or, as I have phrased above, articulate when a document will meet the requirements of section 14(1)(b) of the Act "for the most part". All I can say here is that consideration might be given to the quantity of extraneous information, the "degree" of its irrelevance, and the extent to which an applicant has departed from the technical requirements of section 14(1)(b). For instance, a single sentence completely unrelated to an applicant's health services or health information may be permissible, whereas several such sentences may not be. On the other hand, even several sentences that do not technically reflect requested corrections or amendments that were refused, or reasons for disagreeing with the decision not to correct or amend – but that still relate somehow to the applicant's health services or health information – may be permissible. Basically, I would say that a small amount of "completely" extraneous or irrelevant material is allowable in a statement of disagreement, as is a larger amount of "somewhat" extraneous or irrelevant material.

[para 75] Given the reference of the Court of Queen's Bench to a degree of latitude to be given to individuals when they fashion their statements of disagreement, I also believe that they are entitled to some latitude with respect to word count. For instance, parties may disagree as to whether something counts as a "word" or not. However, because the objective of a statement of disagreement – and the Act generally – is to provide individuals with rights in relation to their own health information, I do not

believe that a statement of disagreement should be entirely rejected by a custodian if, in the custodian's view, it happens to be slightly over 500 words.

[para 76] I do not preclude cases where irrelevant or extraneous information in a document may render the entire document non-compliant with section 14(1)(b), and therefore not a proper statement of disagreement. By way of example, a document might properly be rejected in its entirety – even though an individual has set out a requested correction or amendment and a reason for disagreeing with a refusal to correct or amend – if the document is really an attempt to circumvent the procedure for seeking corrections or amendments of health information under the Act, or the individual is deviating from the strict requirements of section 14(1)(b) in a manner that is deliberate and in bad faith. For instance, having made a correction request in respect of one piece of health information, an individual might – in full knowledge that a statement of disagreement should relate to that correction request – proceed to complain about a host of other matters. To me, this does not fall within the latitude that is to be afforded individuals when they submit statements of disagreement.

[para 77] At other times, a custodian may have no duty to attach part of a document submitted by an applicant, yet have a duty to attach another part because it is that part that constitutes the statement of disagreement and it is reasonably practicable to attach it to the relevant record. I discuss some examples below, but will first review the meaning of "reasonably practicable" under section 14(3)(a) of the Act and discuss more of the Custodian's submissions about the extent of the duty to attach a statement of disagreement.

[para 78] I note cases and a statute that have defined the phrase "reasonably practicable" to mean "practicable unless the person on whom a duty is placed can show that there is a gross disproportion between the benefit of the duty and the cost, in time, trouble, and money, of the measures to secure the duty" [*Alberta Wheat Pool and Zahn*, [1992] C.L.C.R.S.O.D. No. 2 at para. 13, agreeing with a definition in Saskatchewan's *Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1, s. 2(1)(aa); *Boucher and Canada (Correctional Service)*, [2002] C.L.C.A.O.D. No. 20 at para. 33, citing *Alberta Wheat Pool and Zahn*]. I adopt the foregoing definition of "reasonably practicable" for the purpose of section 14(3)(a) of the Act.

[para 79] The Custodian argues that the Act does not contemplate any procedure, nor is one necessary, in which a custodian may unilaterally edit a statement of disagreement and place the edited version on file (in the absence, it says, of either an agreement from the individual or an order from this Office). It distinguishes section 14(3)(a) of the *HIA* from section 36(3) of the *FOIP Act*, which requires public bodies to effectively separate out an individual's correction request in order to annotate or link the relevant and material part to the personal information that was the subject of the correction request. The Custodian argues that, in requiring that the statement of disagreement (i.e., as a whole) be attached to the relevant record, section 14(3)(a) neither requires nor authorizes a custodian to modify it.

[para 80] The Custodian accordingly submits that whether it is "reasonably practicable" to attach a statement of disagreement to a record is not relevant until one has determined, in the first place, whether there is a legal obligation to accept non-compliant parts of a statement of disagreement or edit the statement so that it becomes compliant. The Custodian explains that, at that stage, what is "reasonably practicable" in terms of attaching the statement to a record will depend on the nature of the record, how it is used or distributed, who accesses the records and how access is provided to the record.

[para 81] I take the Custodian's first point to effectively be that section 14 of the Act contemplates that, in a given case, a custodian has a duty to accept, attach and provide copies of either *all* or *none* of whatever is submitted by an individual as a purported statement of disagreement. I take its second point to be that the qualification "reasonably practicable" addresses the question of whether it is physically or operationally practicable to attach a statement of disagreement to a particular record. I agree with the second point but not the first. In my view, the first question to be answered is whether all, none *or part* of a document submitted by an applicant is a statement of disagreement under section 14(1)(b), bearing in mind the requirements of that section and the degree of latitude to be afforded applicants when preparing their statements. The second question to be answered is whether it is reasonably practicable, in a physical or operational sense, to attach whatever parts constitute a statement of disagreement.

[para 82] In other words, the question of what is "reasonably practicable" under section 14(3)(a) of the Act can include the question of whether it is reasonably practicable to redact or sever a document in order to attach the part or parts constituting a statement of disagreement to the relevant record. This possibility was raised by the Court in *Capital Health v. Alberta (Information and Privacy Commissioner)* when it asked whether it is reasonably practicable for a custodian to "edit" a document (at para. 16). For clarity, when I repeat – above and below – the terms "edit" and "modify" as used by the Court or Custodian, I restrict their meaning to the same as that for "sever" or "redact" (i.e., remove, blacken or obscure); I do not mean that a custodian is required to redraft or change the wording in a statement of disagreement.

[para 83] A process by which one determines, first, what parts of a document constitute a statement of disagreement – and then determines, second, whether it is reasonably practicable to attach those parts – reconciles the right of individuals to have statements of disagreement placed on their health records with the possibility that they may sometimes include information that, even given a degree of latitude, they are not entitled to include.

[para 84] To accept the Custodian's argument that nowhere in the Act does it have a duty to redact or edit a document purporting to be a statement of disagreement results in an "all or nothing" approach in which either the individual *always* gets to include extraneous or irrelevant information in a statement of disagreement, or a custodian gets to reject *the whole* of a statement of disagreement once it includes material falling outside the permissible degree of latitude. This approach does not meet the purpose of the Act generally, or section 14 specifically. This "all or nothing" approach will lead either to

applicants taking advantage of the latitude that they are given when preparing their statements of disagreement, or custodians taking advantage of flaws in a statement of disagreement and refusing to attach it. It may also unnecessarily waste time and resources, in that applicants might simply repeat correction/amendment requests so that they have a second opportunity to prepare a statement of disagreement.

[para 85] The right of an individual to have a statement of disagreement attached to his or her health record is a corollary of the right to request the correction or amendment of health information set out as one of the purposes of the Act in section 2(e). In reference to the definition of "reasonably practicable" that I set out earlier, the benefit to an individual in having a statement of disagreement is the point of the duty imposed on a custodian under section 14(3)(a), and against which the measure to secure the duty must be evaluated. In my opinion, it can be reasonably practicable – in terms of time, cost and effort – for a custodian to redact, remove, blacken out or otherwise sever improper information (i.e., information falling outside even the permissible degree of latitude) from a document that otherwise qualifies as a statement of disagreement.

[para 86] By way of example, Ontario Order MO-1700 found that there was a duty to attach only part of a purported statement of disagreement submitted by an applicant. There, it was concluded that an institution properly attached certain pages, but properly refused to attach an appendix, consisting of a complaint letter, that had been included (Ontario Order MO-1700 at p. 6 or para. 23). The conclusion was effectively, first, that the portion of the overall document other than the appendix constituted the statement of disagreement and, second, that it was reasonably practicable to attach that portion, as it simply meant selecting and attaching the appropriate pages.

[para 87] Another example I can envisage is where an individual sets out previously requested corrections/amendments and reasons for disagreeing with the decision not to make them in a single paragraph of a letter, but discusses other things wholly unrelated to the correction/amendment request and disagreement in that same letter. In my view, the single paragraph would constitute the statement of disagreement, the remainder would fall outside the permissible degree of latitude, and it would be reasonably practicable for the custodian to separate out the compliant paragraph and then attach it to the appropriate record. With very little cost in time, trouble and money, the custodian can, for instance, blacken out the non-compliant portions or photocopy the document with a piece of paper covering the non-compliant portions.

[para 88] The statement of disagreement in the present inquiry illustrates another example. If I were to have found that inclusion of the computer printout at the end of the document meant that the statement of disagreement was too long, or found that the computer printout was not part of the statement of disagreement at all because it is not the Applicant's own words or is a copy of something located elsewhere in the Applicant's health care record, I would have found that everything other than the computer printout was the statement of disagreement under section 14(1)(b) of the Act, and that it was reasonably practicable for the Custodian to sever that part in order to fulfill its duty to attach the remainder under section 14(3)(a).

[para 89] It is in the foregoing types of situations that a custodian may accept information in a statement of disagreement even if it does not meet the legislative requirements (Ontario Order MO-1700 at p. 7 or para. 27). In other words, a custodian may, if it chooses, still attach a non-compliant appendix, a discussion completely unrelated to the original correction/amendment request, or parts clearly going over the 500 word limit. In cases where a custodian has a *duty* to attach only parts of document, because it is those parts constituting a statement of disagreement and attachment is reasonably practicable, it has the *option* to attach the remaining parts.

[para 90] The Custodian again cites Order H2005-005, in which the Commissioner concluded that a custodian had no duty to attach any part of a purported statement of disagreement. However, on my review of that Order, it would appear that the applicant did not set out *any* requested corrections or amendments, or *any* reasons for disagreeing with the decision of the custodian not to make them (see para. 20). Because the document was "primarily a list of complaints and allegations" (see para. 19), it failed to meet the requirements of section 14(1)(b), even considering any degree of latitude.

[para 91] To summarize, where a document submitted by an applicant meets the requirements of section 14(1)(b) of the Act, but also contains extraneous or irrelevant information that falls within a permissible degree of latitude, all of the document constitutes a statement of disagreement. A custodian will then have a duty to attach all of it, under section 14(3)(a), to the record that was the subject of the requested correction or amendment, provided that it is reasonably practicable to do so. While I do not purport to set out an exhaustive list of situations, it will be reasonably practicable to attach the statement to the relevant record if both the statement and record are available in paper format and can be fastened together, or both are in electronic format and can be connected or incorporated together in some way. It may not be reasonably practicable, on the other hand, if the statement of disagreement and the record to which it is to be attached are in different formats, or attachment would damage the record or make it difficult or impossible to use. (Having said this, it would be reasonable to retain the statement of disagreement as close as possible to the record, even if not technically required by the Act.)

[para 92] On the other hand, where a document submitted by an applicant meets the requirements of section 14(1)(b) of the Act, but also contains extraneous or irrelevant information that does not fall within the permissible degree of latitude, everything other than the unacceptable extraneous or irrelevant parts can still constitute a statement of disagreement. In such cases, a custodian will have a duty to attach the qualifying parts under section 14(3)(a), again provided that it is reasonably practicable to do so. Generally speaking, the need to sever or redact a document, in order to attach the part or parts constituting a statement of disagreement, does not mean that it is not reasonably practicable to fulfill the duty under section 14(3)(a). This is particularly so where what does or does not constitute the statement of disagreement is found in an easily separable "chunk" located on discrete pages or in discrete paragraphs (as in Ontario Order MO-1700 and the examples I discussed earlier). It would not be complicated or time-consuming to separate the compliant and non-compliant parts.

[para 93] At the same time, I do not preclude situations where severing or redacting a document would not be reasonably practicable. The answer depends on the ease with which one can separate out what constitutes the statement of disagreement, given its location among the extraneous or irrelevant material that does not fall within the permissible degree of latitude. For instance, severing or redacting may not be reasonably practicable where there are few sentences meeting the strict requirements of section 14(1)(b) or falling within a permissible degree of latitude, and those few sentences are interspersed sporadically throughout the document. In such a case, however, it is probably more correct to say that none of the document constitutes a statement of disagreement in the first place, on the basis that there is too much superfluous information.

[para 94] Unfortunately, further guidance as to when all or only part of a document qualifies as a statement of disagreement under section 14(1)(b) of the Act – and whether it is reasonably practicable for a custodian to attach the qualifying whole or parts to the relevant record under section 14(3)(a) – cannot be given here, as each statement of disagreement, as well as the record to which it is to be attached, will need to be considered by a custodian on a case-by-case basis. The main point to bear in mind is that it is not necessary for all of a document to strictly meet the requirements of section 14(1)(b) before a custodian's duty to attach it to the relevant record may arise. Some extraneous or irrelevant material is permissible.

5. The Custodian's duty to provide copies of the statement of disagreement to other persons

[para 95] On my reconsideration of this particular matter, the question of whether the Custodian must redact or edit the Applicant's statement of disagreement, before providing copies of it to others, does not arise. Because I have found that everything in the document submitted by the Applicant meets the three requirements of section 14(1)(b) of the Act or falls within the permissible degree of latitude with respect to including extraneous information, the Custodian has a duty, under section 14(3)(b), to provide copies of it to the appropriate persons.

[para 96] The Custodian submitted a copy of a letter dated January 24, 2007, in which it advised the Applicant that it had made some of the requested corrections or amendments to his discharge summary. The letter further advised that a copy of the revised discharge summary had been provided to persons to whom the discharge summary had been disclosed during the preceding year, as required by section 13(3)(c) of the Act. Because there were persons to whom the Custodian was required to provide the corrected or amended discharge summary, the Custodian would also be required to provide these persons with a copy of the Applicant's statement of disagreement. I therefore conclude that the Custodian has a duty under section 14(3)(b), with which it did not comply.

[para 97] Under section 14(3)(b) of the Act, a custodian must provide a copy of a statement of disagreement to any person to whom the custodian has disclosed the record

that is the subject of the requested correction or amendment in the year preceding the applicant's request for the correction or amendment. I note a gap in this provision. While it contemplates providing the statement of disagreement to persons who received the relevant record *before* the applicant's correction/amendment request – and anyone who receives the record *after* the statement of disagreement is attached to it will also receive the statement – the provision does not indicate that a custodian must provide a copy of the statement of disagreement to any person to whom the custodian disclosed the relevant record *between* the time of the applicant's correction/amendment request and the time of attaching the statement to the relevant record. There can be a delay between those two points in time, particularly where the matter proceeds to an inquiry, as here.

[para 98] To achieve the purpose of alerting others to an applicant's statement of disagreement if they have received the record to which it relates during a period proximate to the applicant's correction/amendment request, I believe that the Custodian should also provide copies of the Applicant's statement of disagreement to any persons to whom the Custodian has disclosed the Applicant's discharge summary between the time of the Applicant's correction/amendment request and the time that the Custodian attaches the statement of disagreement to the discharge summary. As section 14(3)(b) of the Act does not state that this is required, I can only recommend that the Custodian do so.

V. ORDER

[para 99] I make this Order under section 80 of the Act.

[para 100] I find that the Custodian has a duty under section 14(3)(a) of the Act, with which it did not comply, to attach all of the Applicant's statement of disagreement dated January 2, 2007 to his discharge summary dated August 8, 2006. I also find that the Custodian has a duty under section 14(3)(b), with which it did not comply, to provide copies of the statement of disagreement to any persons to whom the Custodian has disclosed the Applicant's discharge summary in the year preceding the Applicant's correction/amendment request.

[para 101] Under section 80(3)(a) of the Act, I order the Custodian to perform the foregoing duties.

[para 102] I further order the Custodian to notify me, in writing and within 50 days of receiving a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator