

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2013-04

December 20, 2013

DR. NAGY YOUSSEF

Case File Number H4982

Office URL: www.oipc.ab.ca

Summary: An individual had been referred by his family physician to Dr. Youssef (the Custodian) for a psychiatric assessment. The Custodian met with the Applicant and prepared a consultation report (Report), which he sent to the Applicant's family physician.

The Applicant wrote a letter to the Custodian objecting to several statements in the Report. The Custodian responded to the Applicant, informing the Applicant that he would correct two factual errors in the Report that the Applicant had pointed out. The Custodian also informed the Applicant that he would not be making further changes to the Report on the basis that the medical report is a reflection of the Custodian's professional opinion. The Custodian provided the family physician with an addendum to the Report that noted and corrected the factual errors.

The Applicant requested a review by this office of the Custodian's response.

The Adjudicator determined that only a small portion of the Applicant's letter to the Custodian constituted a request for correction or amendment under the *Health Information Act* (HIA). Some of the information had already been corrected by the Custodian. The Adjudicator determined that regarding the remaining information that the Applicant had requested be corrected or amended, the Custodian properly refused to correct or amend the information as it consists of professional opinions and observations.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 13, 14, 80.

Authorities Cited: AB: Orders H2004-004, H2005-006, H2005-007, H2007-006.

I. BACKGROUND

[para 1] An individual had been referred by his family physician to Dr. Youssef (the Custodian) for a psychiatric assessment. The Custodian met with the Applicant on January 9, 2012. The Custodian prepared a consultation report (Report) on January 12, 2012, which he sent to the Applicant's family physician.

[para 2] The Applicant wrote an undated letter to the Custodian sometime before February 8, 2012. In the letter, the Applicant objected to several statements in the Report. The Custodian responded to the Applicant by letter dated February 8, 2012. In that letter, the Custodian informed the Applicant that he would correct two factual errors in the Report that the Applicant had pointed out. The Custodian also informed the Applicant that he would not be making further changes to the Report, because "a medical report is a legal document that cannot be altered. The content of my consultation report is a reflection of what actually happened during our meeting. The medical conclusions are my professional opinion without bias." The Custodian states that he provided the family physician with an addendum to the Report that noted and corrected the factual errors, on February 9, 2012.

[para 3] The Applicant requested a review by this office of the Custodian's response. The Commissioner authorized a portfolio officer to investigate and attempt to settle the matter. This was not successful, and the Applicant requested an inquiry.

II. INFORMATION AT ISSUE

[para 4] The information at issue consists of the Applicant's health information contained in the Report prepared by the Custodian that the Applicant has requested be corrected.

III. ISSUES

[para 5] Per the Notice of Inquiry, dated July 8, 2013, the issue in this inquiry is:

Did the Custodian properly refuse to correct or amend the Applicant's health information, as authorized by section 13 of the Act?

IV. DISCUSSION OF ISSUES

Preliminary issues

[para 6] The Applicant has expressed concerns about the steps taken by this office during the mediation process. An inquiry is not a review of the mediation process; an

inquiry is a distinct process that starts “fresh.” I will therefore not consider in this inquiry the concerns raised by the Applicant about the mediation process, nor have I reviewed the parts of the Custodian’s submission consisting of correspondence from the portfolio officer to the Custodian.

[para 7] The Applicant also raises several concerns about whether the Custodian’s actions conform to the Standards of Practice of the College of Physicians and Surgeons of Alberta (the Custodian’s governing body). I do not have jurisdiction to consider these matters.

[para 8] The Applicant argues that the Custodian did not have his consent to disclose the negative comments in the assessment, and that he only had implied consent to disclose the “supportive” comments. The Applicant concludes that the Custodian is obliged to amend the assessment, presumably to remove negative comments and include supportive comments.

[para 9] The Applicant had not raised the disclosure of his health information as an issue prior to his submissions to this inquiry. As such, it is not at issue.

[para 10] The Applicant has provided a tape recording with his submissions that he states is a recording of his meeting with the Custodian. He also provided a written transcript of the recording. The Custodian objects that neither the recording nor the transcript is complete, and that the transcript is not certified and contains additional comments inserted by the Applicant. For the reasons provided below, I do not have to rely on either the recording or the transcript to decide the matter at issue.

Did the Custodian properly refuse to correct or amend the Applicant’s health information, as authorized by section 13 of the Act?

[para 11] Section 13 of HIA states:

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.

(3) If the custodian agrees to make the correction or amendment, the custodian must within the 30-day period or any extended period referred to in subsection

(2)

(a) make the correction or amendment,

(b) give written notice to the applicant that the correction or amendment has been made, and

(c) notify any person to whom that information has been disclosed during the one-year period before the correction or amendment was requested that the correction or amendment has been made.

(4) The custodian is not required to provide the notification referred to in subsection (3)(c) where

(a) the custodian agrees to make the correction or amendment but believes that the applicant will not be harmed if the notification under subsection (3)(c) is not provided, and

(b) the applicant agrees.

(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

(b) a record that was not originally created by that custodian.

(7) The failure of the custodian to respond to a request in accordance with this section within the 30-day period or any extended period referred to in subsection (2) is to be treated as a decision to refuse to make the correction or amendment.

Does the Applicant's letter constitute a request for correction?

[para 12] The Custodian argues that the Applicant's request does not meet the requirements of section 13(1) because it is not clear from the Applicant's letter precisely what information he wants changed, or what he wants substituted for the existing information. The Custodian cites Order H2007-006, which states:

... An applicant making a request for correction or amendment must provide enough clarity to enable a custodian to respond to the request. ...

In my view, an applicant's written description of errors and omissions is not the same thing as a written request for correction or amendment under section 13(1) of HIA. A custodian's response to a written description of errors and omissions, even where the response agrees to make or refuses to make certain corrections, does not necessarily mean that an applicant has made a request for correction or amendment under HIA. The custodian's response is not determinative, but is a factor to consider.

[para 13] The Applicant's letter requests that the Custodian correct the "inconsistencies" in the Report. In the third paragraph, the Applicant points out that the Custodian stated the wrong age for the Applicant. This occurred in two places in the Report. The Applicant also pointed out that the Custodian recorded the wrong date for the assessment. The Custodian informed the Applicant in the Custodian's February 8, 2012 letter, that these errors would be corrected.

[para 14] In my view, part of the Applicant's undated letter to the Custodian meets the requirements of section 13(1). The Applicant clearly requested that information in the assessment be corrected, and pointed out a few factual errors to be corrected.

[para 15] The remainder of the Applicant's 8-page letter is less clear as to precisely what information the Applicant wants changed. For example, the Applicant argues that the year recorded by the Custodian as the year the Applicant was kicked out of school is incorrect. The Applicant does not indicate what correction he wants made, and states "I can overlook that [error]."

[para 16] With respect to most of the Applicant's objections in his letter, the Applicant offers lengthy reasons for the objections but does not offer a preferred statement. The Applicant disagrees with the Custodian's medical assessment of the Applicant and questions the Custodian's expertise to make the assessment. It appears from the Applicant's letter to the Custodian, as well as his submissions in this inquiry, that he is seeking a rewrite of the assessment, including which parts of the conversation between the Applicant and Custodian to include and which to omit, as well as the Custodian's conclusions regarding the Applicant.

[para 17] In my view, most of the Applicant's letter is not sufficiently clear to constitute a request for correction. In many instances, the Applicant disagrees with a statement in the Report and explains at length the reasons for his disagreement; however, he does not provide a clear correction, only lengthy explanations as to why the statement is wrong.

[para 18] In some other cases, the Applicant is unhappy about the Custodian's paraphrasing or summary of the conversation and the Applicant appears to want the Custodian to replace the offending statement with a verbatim account of the conversation.

[para 19] The Custodian has argued that if the Applicant's letter does constitute a request for correction or amendment, the Custodian properly refused to correct or amend the information in any event. He argues that the information in the Report consists of the Custodian's professional opinions and observations under section 13(6)(a). I will consider whether the Custodian properly refused to correct this information.

[para 20] In Order H2005-006, former Commissioner Work outlined a two-step process for determining whether section 13(6) applies to information that is subject to a request for correction or amendment. The first step is to consider whether all or part of the information at issue consists of a professional opinion or observation under section 13(6)(a) of the Act. If so, the custodian is not required to make a correction or amendment.

[para 21] If the information at issue is not a professional opinion or observation, the second step is to determine whether there are errors or omissions under section 13(1). If so, it may be corrected or amended, subject to the custodian's exercise of discretion.

[para 22] I will accordingly first consider whether the information at issue is a professional opinion or observation.

[para 23] Three requirements must be met in order for this provision to apply (Order H2004-004 (para 17)):

- There must be either a professional opinion or observation,
- The professional opinion or observation must be that of a health services provider, and
- The professional opinion or observation must be about the applicant.

Is the information a professional opinion or observation?

[para 24] The Custodian has the burden of proving the information is a professional opinion or observation (Order H2004-004).

[para 25] A professional opinion or observation does not go to the truth of its contents, but rather to the impressions, perceptions, views and understandings of the author (Order H2005-006, at para. 64). “Professional” means a belief or assessment based on grounds short of proof, a view held as probable (Order H2004-004). “Observation” means a comment based on something one has seen, heard, or notice, and the action or process of closely observing or monitoring (Order H2004-004).

[para 26] The Custodian argues that former Commissioner Work’s conclusions in Order H2005-006 regarding professional opinions and observations are applicable to this case. In that Order the former Commissioner reviewed a custodian’s refusal to correct or amend notes taken by the custodian during (or after) visits with the applicant. He stated:

For the most part the information in the Physician Notes consists of Dr. O’s recording of what he saw, heard or noticed during the Applicant’s visits to his office and consists of views or assessments based on grounds short of proof. The information that Dr. O derived from the sessions with the Applicant is not verifiable information. That information speaks to Dr. O’s understanding of what he was told rather than to the truth of what he was told. These notations are intended to be the author’s views, not the Applicant’s views, of what the Applicant said.

...

I accept the position of Dr. O that most of the information at issue is either a professional opinion or an observation or, alternatively, is a mixture of professional opinion or observation. I accept the Affidavit evidence of Dr. O that the information recorded is an accurate reflection of his understanding and views at the time the record was created. Right or wrong, these are Dr. O’s professional opinions or observations, which are not necessarily the same as the Applicant’s views.

[para 27] In the current case, the Custodian created a short Report based on a conversation with the Applicant that appears to have been approximately an hour in duration. The Custodian did not record the Applicant's remarks verbatim, but rather recorded the Custodian's own observations based on the Applicant's remarks. As in Order H2005-006, in my view the Report is intended to be the Custodian's views of the conversation. I also accept the Custodian's argument that the Custodian recorded his understanding of what he was told by the Applicant, and that the Custodian's assessment of the Applicant was based on these understandings.

[para 28] I find that the information in the Report that the Applicant requested be corrected (other than the factual items, discussed above) are the Custodian's professional opinions and observations.

Is the professional opinion or observation a health services providers' and is it about the Applicant?

[para 29] A health service provider is defined in section 1(1)(n) of HIA as an individual who provides health services. Under section 1(1)(m) of the Act, health services includes a service provided for the purpose of diagnosing and treating illness. The Custodian is a psychiatrist, specializing in adult Attention Deficit Hyperactivity Disorder (ADHD); the Applicant was sent to the Custodian by his physician to be assessed for this disorder. Therefore, the Custodian was providing a health service as defined in HIA.

[para 30] It is clear that the conversation between the Applicant and Custodian concerned the Applicant. The resulting Report contains the Custodian's observations of the Applicant and his assessment regarding a possible diagnosis of adult ADHD.

[para 31] I find that the information in the Report, other than the factual information amended by the Custodian regarding the Applicant's age and date of the assessment, is a professional opinion or observation under section 13(6)(a). The Custodian may therefore refuse to correct or amend the information.

Exercise of discretion

[para 32] In Orders H2005-006 and H2005-007, former Commissioner Work stated:

When an applicant has not discharged the burden of proof to show that there are errors or omissions, a custodian properly exercises its discretion when it refuses to correct or amend that information under section 13(1) of HIA. When the information consists of a professional opinion or observation that is accurately recorded under section 13(6)(a) of the Act, a custodian properly exercises its discretion when it refuses to correct or amend that information, as there is no error or omission and therefore nothing to correct or amend.

[para 33] The Custodian states that he properly exercised his discretion in refusing to correct or amend his professional opinions or observations about the Applicant in his

Report because the Report “accurately reflects his observations and professional opinion of the Applicant at the time that he created the record.”

[para 34] The Custodian amended the two factual errors raised by the Applicant. As stated above, many of the Applicant’s requests for correction were not clear as to what he wanted the record to state instead. In some instances the Applicant did indicate a preferred statement; however, I accept the Custodian’s explanation that the relevant information in the Report constitutes the Custodian’s observations and opinions of the Applicant at the time the Report was created and as such does not contain an error or omission to be corrected under section 13(1).

Other issues

[para 35] Section 14(1) states that where a custodian has refused to make a correction or amendment as requested by an applicant under section 13, the applicant may *either* ask the Commissioner for a review of that decision, *or* submit a statement of agreement; an applicant cannot to both of these things.

[para 36] In his initial submission the Applicant states that he would have chosen to submit a statement of disagreement rather than seek a review, had these options been explained to him. It is true that the Custodian’s original response to the Applicant did not inform him of his choice under section 14(1); however, the Custodian’s subsequent letter of August 30, 2012 did inform the Applicant of the choice. Even if the Applicant cannot have been said to have made a choice under section 14(1) when he originally requested a review by this office (as he had not been informed of his options), by further requesting an inquiry, it is clear that the Applicant has chosen to pursue the review option, rather than submit a statement of disagreement.

V. ORDER

[para 37] I make this Order under section 80 of the Act.

[para 38] I find that most of the Applicant’s letter to the Custodian is not sufficiently clear to constitute a request for correction.

[para 39] I find that the Custodian properly refused to correct or amend the items for which the Applicant requested a correction (other than the two factual items that were amended by the Custodian prior to the inquiry).

Amanda Swanek
Adjudicator