ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2015-03

December 3, 2015

ALBERTA HEALTH SERVICES

Case File Number H5953

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Alberta Health Services (the Custodian) for her health records regarding her attendance at the Adult Aboriginal Mental Health Program.

The Custodian conducted searches for responsive records. It located responsive records and severed two records under section 11(1)(b) (confidential information) and 11(2)(a) (health information about another individual).

The Applicant requested an inquiry on the basis that the Custodian had not produced audio or visual recordings of her counselling sessions and on the basis that it should not have severed information from the records.

The Adjudicator ordered the Custodian to search for audio or visual recordings of counselling sessions, or if it already had, to explain the search it conducted and its results to the Applicant. She ordered the Custodian to disclose the information it had withheld from the Applicant.

Statutes Cited: AB: *Health Information Act,* R.S.A. 2000, c. H-5, ss. 1, 10, 11, 79, 80,

Authorities Cited: AB: Orders F2009-001, F2009-005, H2015-01

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 89

I. BACKGROUND

[para 1] The Applicant made an access request to Alberta Health Services (the Custodian) for her health records regarding her attendance at the Adult Aboriginal Mental Health Program.

[para 2] The Custodian conducted a search for the requested records. The Custodian located responsive records and severed information from two records under sections 11(1)(b) (confidential information) and 11(2)(a) (health information of another individual) of the HIA.

[para 3] The Applicant requested review of the Custodian's search for her health records and its decision to sever information from the records.

[para 4] The Commissioner authorized a mediator to investigate and attempt to settle the matter. As this process did not resolve the issues between the parties, the matter was scheduled for a written inquiry.

II. INFORMATION AT ISSUE

[para 5] Information severed from records 279 and 280 is at issue.

III. ISSUES

Issue A: Did the Custodian meet its duty to the Applicant as provided by section 10(a) of the HIA (duty to assist applicants)?

Issue B: Did the Custodian properly refuse access to health information in the records when it applied section 11(1)(b) (confidential information) and 11(2)(a) (health information about another individual)

IV. DISCUSSION OF ISSUES

Issue A: Did the Custodian meet its duty to the Applicant as provided by section 10(a) of the HIA (duty to assist applicants)?

[para 6] The Applicant's access request is for records containing her health information from the Elbow River Healing Lodge (EHRL). In her request for an inquiry, the Applicant states that she is seeking recordings of therapy sessions at the ERHL, in addition to affidavits of EHRL employees stating that she had asked them for money.

[para 7] The Custodian submitted the affidavit of the access and disclosure specialist who performed the search for responsive records. She states:

On November 22, 2013 I replied to the Applicant's request and provided "all available records from the Adult Aboriginal Mental Health Program chart by [an employee referred to in the Applicant's access request]". Attached to this and marked as Exhibit "B" is a true copy of my reply. On December 4, 2013 the Applicant wrote to the Records Department at the SMCHC requesting "ALL MY FILES while under the care of staff from Elbow River programs I have only been sent five pages from [the employee referred to in the access request ..." […]

After receiving this request for all records I searched the "Sunrise Clinical Manager" system and provided copies of all records to the Applicant in that system and copies of all paper records relating to urgent care visits in Health Records. On January 10, 2014 I telephoned Elbow River Healing Lodge-Adult Aboriginal Mental Health Program ("ERHL / AAMH") which is located at the SMCHC to get all records sent to me to process. The program area told me that they had no records in the program area. All records were inactive and had therefore been transferred to SMCHC Health Records. I therefore retrieved the chart and provided a copy of the complete chart to the Applicant.

In reviewing the records I found that no severing was needed and copies [*sic*] the records (225 pages) and responded to the Applicant on January 17, 2014. I also phoned the Applicant to advise that she could pick the records up as requested. A true copy of my January 17, 2014 letter to the Applicant is attached to this my affidavit and marked as Exhibit "D". On January 30, 2014 the Applicant telephoned me to say that she did not believe she had received all the requested records. I followed up with ERHL / AAMH and found that a therapist had some records that were still considered active and had not been sent to SMCHC Health Records. I reviewed the records (115 pages) and severed a portion of one record (2 entries on 2 pages of a contact record). A true copy of my February 7, 2014 letter to the Applicant is attached to this my affidavit and marked as Exhibit "E".

Given that I searched both active and [inactive files] pertaining to the Elbow River programs and that these records of these programs reside solely within SMCHC I believe no more responsive records exist other than what have been found.

The Duty to Assist

[para 8] Section 10 of the HIA requires Custodians to make reasonable efforts to assist applicants. It states:

10 A custodian that has received a request for access to a record under section 8(1)

(a) must make every reasonable effort to assist the applicant and to respond to each applicant openly, accurately and completely,

(b) must create a record for an applicant if

(i) the record can be created from information that is in electronic form and is in the custody or under the control of the custodian, using its normal computer hardware and software and technical expertise, and

(ii) creating the record would not unreasonably interfere with the operations of the custodian,

and

(c) must provide, at the request of an applicant and if reasonably practicable, an explanation of any term, code or abbreviation used in the record.

[para 9] Past orders of this office have held that the duty to assist applicants includes the duty to conduct an adequate search for records and to explain to the Applicant what has been done. In H2015-01, the Adjudicator noted that a Custodian's evidence should address the following factors in order to establish the adequacy of its search. She stated:

> In general, evidence of an adequate search should include:
>
> ▪ The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
>
> ▪ The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
>
> ▪ The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
>
> ▪ Who did the search
>
> ▪ Why the Public Body believes no more responsive records exist than what has been found or produced

[para 10] I turn now to the question of whether the Custodian conducted an adequate search for the two types of records to which the Applicant refers in her request for an inquiry, and whether it responded to the Applicant openly, accurately, and completely. These two types of records are (1) audio or visual recordings and (2) affidavits of employees.

Recordings of sessions

[para 11] The evidence of the access and disclosure specialist is that she searched for the Applicant's health information electronically and by contacting the Elbow River Healing Lodge by telephone to determine where records were likely to be located. She searched through inactive records, and once the Applicant contacted her to express concerns that records were missing, she also contacted the Applicant's former therapist to obtain active records that may not have been located in the previous search.

[para 12] Typed notes of therapy sessions are contained in a group of records each of which is numbered "243". These records were provided to me in a folder the Custodian entitled "6 Adult Aboriginal Mental Health Divider 1 SCM". The notes of therapy sessions are made by the therapist whom the Applicant named in her access request.

[para 13] Although the Custodian produced the therapist's typed notes of sessions with the Applicant, it has not produced any audio or visual recordings of the sessions. The Custodian does not refer in its arguments or its evidence to having searched for audio

or visual recordings and it has not provided evidence as to whether the therapist was asked about such recordings.

[para 14] The Applicant takes the position in her submissions that the sessions she attended with the therapist were recorded in this manner. The Custodian does not contradict this position in its submissions. On the evidence before me, it appears to be possible that the therapist made audio or visual recordings of the therapy sessions with the Applicant.

[para 15] It may be the case that the therapist did not, in fact make audio or visual recordings despite the belief of the Applicant that she did, or alternatively, made such recordings, but destroyed them once the written notes were created. It may also be the case that the Custodian did search for these records, but did not provide evidence regarding this aspect of its search in its submissions.

[para 33] Previous orders of this office (See Orders F2009-001, F2009-005) have held that the duty to respond openly, accurately, and completely includes explaining the steps taken to locate responsive records and to explain to why a public body believes no further records exist. In *University of Alberta v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 89 the Alberta Court of Queen's Bench confirmed the reasonableness of this interpretation of section 10, stating:

> The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the informational component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.
>
> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, Lethbridge Regional Police Commission, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> > In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and why the Public Body believes that no more responsive records exist than what has been found or produced.
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.
>
> The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to

> explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.
>
> In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

[para 16] If a custodian's search for responsive records omits areas where it would seem reasonable to assume records would be located, or the Applicant points to potentially responsive records that have not been produced, then a public body should explain why it has searched only the areas it did or explain why it has not, or cannot produce the records referred to in the records it is producing. In this case, the Applicant requested an inquiry on the basis that audio or visual recordings have not been produced to her and has provided her reasons for believing that audio or visual recordings were made at her counselling sessions and existed at one time. The Custodian does not address audio or visual recordings in its submissions.

[para 17] The Custodian does not appear to have explained its search, if any, for the audio or visual recordings to the Applicant, nor does it appear to have explained why it believes these records do not exist (if it is the case that it has formed this opinion.) On the evidence before me, the possibility cannot be discounted that such records exist, but the Custodian has not yet searched for them. I must therefore ask the Custodian to search for audio or visual recordings of the Applicant's sessions with the therapist or to provide its reasons for believing that it cannot produce such records.

Affidavits of EHRL employees

[para 18] In her request for an inquiry, the Applicant also stated that she was requesting affidavits of staff members:

> I am STILL requesting affidavits from these "Supposed" staff members that I "supposedly" asked for money. As I can guarantee the statement from [the therapist] is an absolute lie, and I am calling her on this… I expect proof of such false statements towards me. Prove these blatant lies.

[para 19] Section 7 of the HIA gives applicants the right to request their health information in the custody or control of custodians. It does not create a right in an applicant to demand that employees of custodians swear affidavits regarding questions the Applicant has.

[para 20] The Custodian has produced records containing the Applicant's health information. None of these records contain references to the Applicant having asked anyone for money. As a result, the Applicant has confirmation, from the records that have been produced, that comments of the kind she attributes to employees of the Custodian do not appear in her health records.

Issue B: Did the Custodian properly refuse access to health information in the records when it applied section 11(1)(b) (confidential information) and 11(2)(a) (health information about another individual)?

[para 21] The Custodian applied sections 11(1)(b) and 11(2)(a) to information appearing in records 279 – 280. However, where this same information appears among the records labelled "243" the information does not appear to have been severed, but to have been provided to the Applicant.

[para 22] The information severed from records 279 and 280 consists of an account of a telephone conversation between an employee of the Custodian and another person.

[para 23] Section 11 of the HIA authorizes a Custodian to withhold health information from a requestor in some circumstances. It states, in part:

> *11(1) A custodian may refuse to disclose health information to an applicant*
>
> > *[…]*
> >
> > *(b) if the disclosure could reasonably lead to the identification of a person who provided health information to the custodian explicitly or implicitly in confidence and in circumstances in which it was appropriate that the name of the person who provided the information be kept confidential […]*
>
> *(2) A custodian must refuse to disclose health information to an applicant*
>
> > *(a) if the health information is about an individual other than the applicant, unless the health information was originally provided by the applicant in the context of a health service being provided to the applicant […]*

[para 24] When making decisions to sever information under the HIA, the Custodian bears the burden of proof. Section 79 of the HIA states:

> *79 If an inquiry relates to a decision to refuse access to all or part of a record, the onus is on the custodian to prove that the person asking for the review has no right of access to the record or part of the record.*

[para 25] As it was not clear to me that the information severed from records 279 and 280 was health information or that it was intended to be confidential, I requested more information from the Custodian about the role of the employee who made and documented the phone call. I also asked for a detailed explanation and supporting evidence as to how the information severed from the records was the health information of the Applicant, or of the person involved in the conversation, and how the information

in the records relates to a health service. Finally, I asked the Custodian to provide evidence or detailed argument as to how the information in records 279 – 280 could have a “negative effect” if disclosed. I did so because the Public Body confined its discussion of its severing decision in its initial submissions to the broad statement that “disclosure could have a negative effect on both the Applicant and the third party who provided the information as well as the trust relationship with health service providers”. However, the Public Body did not explain, with reference to the information it severed or any facts within its knowledge as to how this negative effect could be expected to result from disclosure.

[para 26] The Custodian provided the affidavit of the access and disclosure specialist. This affidavit states:

> With regard to the severing pursuant to section 11(1)(b) and 11(2)(a) of the Health Information Act reviewing the face of the record the information that was severed appears to be provided implicitly in confidence and therefore it was appropriate that the identity of the person who provided the information be kept confidential as disclosure of the severed information could have [led] to the identification of the individual who provided the information. Additionally, there was also some information about another third party.
>
> Recognizing that section 11(1)(b) is a discretionary section I decide to sever the information for the following reasons:
>
> 1. The Applicant had been given access almost all of her records unsevered in accordance with the purpose of the Health Information Act respecting the right to access;
>
> 2. Disclosure could have had a negative effect on the Applicant and the provider of the information as well as the trust relationship with health service providers;
>
> 3. The records at issue were very recent (2012) and disclosure could have had a detrimental effect on the Applicant.

The Custodian also provided the job description of the employee who participated in the telephone call and took the notes that were severed from record 279 – 280.

[para 27] To establish that section 11(1)(b) applies, a custodian must establish that disclosure of the information to which it has applied this provision could reasonably lead to the identification of a person who provided health information to the custodian explicitly or implicitly in confidence and in circumstances in which it was appropriate that the name of the person who provided the information be kept confidential.

[para 28] From the records the Custodian provided for the inquiry, I conclude that the employee who made the phone call that is documented in records 279 – 280 provided counseling services to the Applicant. It was for this purpose that she contacted the person referred to in the records and asked that person to have the Applicant contact her.

[para 29] As counseling is intended to promote mental health, I find that the employee was providing a health service to the Applicant by obtaining information about her that possibly could assist her in counseling the Applicant.

[para 30] From my review of records 279 - 280, I am unable to say that there were any expectations of confidentiality in the telephone conversation. The conversation ended with the employee requesting that the person she spoke with tell the Applicant to contact her within the next five minutes. The Applicant did speak with the employee within five minutes of that conversation, which suggests that the person did speak to the Applicant as requested and convey the message.

[para 31] Given that the employee requested that a message be passed to the Applicant, I am unable to conclude that the employee provided any assurances of anonymity to the person with whom she spoke, or that that person had any expectations of anonymity as a result of the conversation. Certainly, neither party ever refers to confidentiality or anonymity in the conversation.

[para 32] In any event, the Custodian bears the burden of establishing that the information in the records was provided in explicit or implicit confidence. The Custodian states that "[the information] *appears* to have been provided implicitly in confidence". Despite being invited to make *in camera* submissions so that it could freely discuss the content of the records, the Custodian chose not to address the information in the records or to explain what it was about the information it considered to be indicative of expectations of confidentiality. I have reviewed the information in these records, and I am unable to identify any information in them that would lead me to conclude that it was supplied in confidence. I am unable to find that section 11(1)(b) authorizes the Custodian to sever information from records 279 – 280.

[para 33] Section 11(2)(a) requires a Custodian to sever health information if the health information is about an individual other than the applicant, unless the health information was originally provided by the applicant in the context of a health service being provided to the applicant. Section 11(2)(a) applies to the *health information of an individual other than an applicant*, as opposed to information about an applicant that another person has provided to a Custodian.

[para 34] I am unable to identify any information in records 279 – 280 that could be construed as the health information of the person who spoke with the Custodian's employee. I am therefore unable to agree with the Custodian that section 11(2)(a) requires it to sever information from these records.

[para 35] As I find that neither section 11(1)(b) nor section 11(2)(a) authorizes or requires the Custodian to sever the Complainant's health information, I need not address the Custodian's arguments in relation to its exercise of discretion.

[para 36] As discussed above, records 279 – 280 appear among records the Custodian labelled as record "243". These records do not indicate that the information they contain was severed from them, which suggests that the information severed from records 279 – 280 may have been provided to the Applicant. If so, the issue of whether the Custodian properly applied sections 11(1)(b) and 11(2)(a) to the information may be moot. However, if it is not the case that record 243 was provided to the Applicant in its

entirety, my decision is that the Custodian is not authorized or required to sever information from the records under sections 11(1)(b) and 11(2)(a). I will therefore order the Custodian to disclose records 279 – 280 to the Applicant without severing.

V. ORDER

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

[para 38] I order the Custodian to search for audio or visual recordings of the Applicant's sessions with the therapist. In the alternative, if it has already conducted a search for such records, to provide the results of its search to the Applicant.

[para 39] If the Custodian is, or has been, unable to locate such records despite searching for them, I order it to provide its reasons for believing that it cannot produce the audio visual recordings the Applicant has requested.

[para 40] In the event that Custodian locates responsive audio or visual recordings, I order the Custodian to provide these to the Applicant subject to any applicable exceptions.

[para 41] I order the Custodian to disclose records 279 – 280 to the Applicant.

[para 42] I order the Custodian to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator