ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2019-02

August 12, 2019

COVENANT HEALTH

Case File Number 002252

Office URL: www.oipc.ab.ca

Summary: The Applicant made three access requests (dated November 2, 19 and 22, 2015) under the *Health Information Act* (HIA) to Covenant Health (the Custodian) for access to her medical records from February 19, 2015 to the date of the request. She also requested records relating to the standardized designated living option assessment process and tool for "[the Applicant] and Bed Hub Assessment". She noted that the records should include written supportive living 4 SLR assessment and any consultant reports or assessment from Norwood and any other reports or assessments.

The Custodian provided copies of records to the Applicant. The Applicant requested review by the Commissioner of the adequacy of the Custodian's response to her access request and complained that the Custodian had not responded within the statutory time limit. In particular, the Applicant complained that the Custodian had been late in responding to her access request as it did not initially provide current documents, and had not provided a written assessment behind the decision to downgrade her care status from LTC to SL4 or documents containing reasons for the change in status.

The Adjudicator found that the Custodian conducted an adequate search for responsive records. The Applicant appeared primarily concerned with records she felt the Custodian ought to have or ought to create. The Adjudicator accepted that the records did not exist in any form, and therefore there was no duty under the Act for the Custodian to create the records.

The Adjudicator found that the Custodian erred in determining its statutory response date as 30 days from the date of the last request. The Adjudicator cited guidance in former Commissioner Work's Order H2005-004 when dealing with multiple access requests from one requestor (see para. 37). In this case, the Custodian did not obtain agreement from the Applicant to amalgamate the three requests and adjust the timelines. As such, most of the responsive records should have been provided within 30 days of the first request. Some of the records responsive to the first request were provided by the Custodian after the 30 days. As the Custodian did not extend its time to respond, the Adjudicator found that the Custodian did not meet its timelines under section 12 with respect to the first request. However, as the Custodian had already provided all responsive records to the Applicant, there was nothing further to order. The Adjudicator found that the timelines for the second and third request were met.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 10, 12, 80.

Authorities Cited: AB: Orders F2006-003, H2005-004, H2015-01.

I. BACKGROUND

[para 1] The Applicant made three access requests (dated November 2, 19 and 22, 2015) *Health Information Act* (HIA) to Covenant Health (Custodian) for access to her medical records from February 19, 2015 to the date of the request. She also requested records relating to the standardized designated living option assessment process and tool for "[the Applicant] and Bed Hub Assessment". She noted that the records should include written supportive living 4 SLR assessment and any consultant reports or assessment from Norwood and any other reports or assessments.

[para 2] The Custodian provided copies of records to the Applicant. The Applicant requested review by the Commissioner of the adequacy of the Custodian's response to her access request and complained that the Custodian had not responded within the statutory time limit. In particular, the Applicant complained that the Custodian had been late in responding to her access request as it did not initially provide current documents, and had not provided a written assessment behind the decision to downgrade her care status from LTC to SL4 or documents containing reasons for the change in status.

[para 3] 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.

[para 4] In this inquiry, submissions made on behalf of the Applicant were made by a representative of the Applicant's legal guardian. In this Order I will continue to refer only to the Applicant.

II. INFORMATION AT ISSUE

[para 5] As this inquiry relates to the Custodian's search for responsive records, and the time taken to respond to the Applicant, there are no records at issue.

III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry, dated January 30, 2019, are as follows:

1. Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly accurately and completely, as required by section 10(a) of the Act? In particular,

    a) Did the Custodian fail in its duty to assist by failing to create and provide a summary or written reasons for the changed assessment?

    b) Did the Custodian conduct an adequate search for responsive records?

2. Did the Custodian comply with section 12(1) of the HIA (time limit for responding)?

IV. DISCUSSION OF ISSUES

1. Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly accurately and completely, as required by section 10(a) of the Act? In particular,

a) Did the Custodian fail in its duty to assist by failing to create and provide a summary or written reasons for the changed assessment?

[para 7] The Applicant states in a letter attached to her Request for Review that she has not received "specific documents [that she requested] be created by the Acute Care department for the purposes of evaluation" (at pages 1-2).

[para 8] With its initial submission the Custodian provided an affidavit sworn by an access and disclosure specialist with direct knowledge of the Applicant's request (the specialist). The specialist states that she informed the Applicant that the records specified by the Applicant (described at paragraph 1 of this Order) do not exist.

[para 9] With its initial submission, the Custodian also provided an affidavit sworn by a Senior Director at Grey Nuns Community Hospital (GNCH), which is operated by the Custodian. The Director briefly described the process for transitioning a patient from acute care to community or continuing care. The Director provided a copy of a guidance document that describes this process, which is a joint document of the Custodian and Alberta Health Services. That document notes that an assessment will be performed to determine a patient's needs; however, no particular type of assessment or report is specified. Nothing else in the materials before me suggests that the particular records sought by the Applicant must exist.

[para 10] In her Request for Inquiry, the Applicant raises concerns about the Custodian's "refusal to create a brief written document summary of reasons for a care level downgrade." The Applicant indicates that the information she did receive from the Custodian contained errors and gaps and therefore a written summary from the Custodian is necessary for her to appeal her level

of care. I infer from this argument that the Applicant is not necessarily disputing whether the records she seeks currently exist, so much as she is arguing that the Custodian ought to create them.

[para 11] At page 3 of a letter attached to the Applicant's Request for Review, she states (emphasis mine):

> **Covenant Health has failed to provide a written assessment behind the action to downgrade** R status from LTC to SL4 (criteria used, explanation/rationale why, specific evidence for such conclusion, etc) that should have been created when the reassessment was done (by Covenant and Community Care Transitions staff). **The document they have cited as being that written assessment document (RAI-HC assessment done in early July) is <u>not</u> the necessary document** ---as it indicated LTC, as evidenced by a July 28 email indicating R being listed for Norwood (a LTC site) and a Norwood doctor consult being done July 28. We were informed of the decision to change care status by phone August 13, confirmed by email August 14. **There should be a Standard Designated Living Option Assessment Process and Tool for [the Applicant] and Bed Hub Assessment.**
>
> **The absence of these specific documents indicates a non-compliance to the Health Information Act** for which I am seeking remedy in this complaint. We are seeking the specific reasons why [the Applicant] was downgraded from her original long term care status to assisted living 4 status (a lower level of care), not vague generalities. It is unreasonable to simply indicate that the assessment team has made a decision without providing the evidence and rationale for this life changing decision.

[para 12] The Custodian states that it is not required to create the new records requested by the Applicant, relating to her assessment for ongoing care. It cites the obligation to create a record under section 10(b) of the HIA, which states:

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

[para 13] The Custodian argues that the circumstances set out in section 10(b) of the Act are the only circumstances that require a custodian to create a record at the request of an applicant. The Custodian further argues that section 10(b) would not require it to create the record(s) requested by the Applicant because an electronic form of the requested record does not exist in the custody or control of the Custodian (section 10(b)(i)).

[para 14] The Custodian also responded to the specific concerns raised by the Applicant quoted above (at paragraph 11), stating that "disagreement with a clinical decision does not

create an obligation under the HIA for the custodian to create a record to explain" (initial submission, at para. 30).

[para 15] I agree with the Custodian that a duty to create a record falls under section 10(b) rather than 10(a). I also agree that for a duty to exist under section 10(b), an electronic record must exist in the custody or control of the Custodian. In this case, I accept the evidence sworn by the specialist that the records specified by the Applicant do not exist. Therefore, the duty to create a record from an electronic record in section 10(b) does not apply.

[para 16] The Applicant argues that the absence of specific documents indicates "non-compliance with the Health Information Act." To the extent that the Applicant means to argue that these documents exist (whether electronically or hardcopy) and were not provided to her by the Custodian, I have already noted that nothing before me indicates that the records exist.

[para 17] To the extent that the Applicant may be arguing that the Custodian has a duty to create an entirely new document as part of its medical duty of care to the Applicant, the HIA does not include any such duty. The HIA does not include a duty to document in general, nor a duty to create particular records requested. In other words, if the Applicant means to argue that the Custodian was negligent in failing to create certain documents in the first place, this Office does not have jurisdiction to deal with that complaint.

1. Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly accurately and completely, as required by section 10(a) of the Act? In particular,

b) Did the Custodian conduct an adequate search for responsive records?

[para 18] 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 19] 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 Order 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 (at para. 9):

> 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 20] The Custodian agrees that it has the burden of proof to show that it conducted an adequate search for records, as it is in the best position to do so (citing Order F2006-003).

[para 21] The Custodian states that the access and disclosure specialist took the following steps to respond to the requests:

- reviewing the requests to ensure all details were provided to process the request;
- reviewing the records to confirm the Applicant was authorized to request and receive the information;
- accessing the relevant information systems to determine if and where responsive records were located.

[para 22] The Custodian states that the specialist's search included all possible locations: physical records; microfilmed records; off-site records; chart tracking systems; admission, discharge and transfer system; and Netcare. The Custodian believes that no additional records exist.

[para 23] The affidavit sworn by the access and disclosure specialist provides additional detail of the steps taken to locate responsive records. I accept the evidence of the affiant, and agree that the Custodian conducted an adequate search. The concerns raised by the Applicant regarding records she expected to receive relate to records she believes the Custodian *ought to* create as part of the care being provided. I have discussed the Custodian's duty to create records, above. The Applicant has not specified other records she expected to receive, or provided other details to call the Custodian's search into question.

[para 24] The Custodian also states that it fulfilled its duty to inform the Applicant of the steps taken to respond to her request. Specifically, the Custodian informed the Applicant about the availability of health records, and that the particular records identified by the Applicant do not exist.

[para 25] Regarding the availability of health records, the Custodian informed the Applicant on November 23, 2015, that the Applicant's 'current' medical records (from February 2015 to November 2015) would not be available until she is discharged. The Custodian suggested that the Applicant contact the unit for those records. The Applicant argued that "these documents are on the ward and are easily accessible to the Access and Disclosure department" (at page 1 of the letter attached to the request for review).

[para 26] The affidavit of the specialist states that "as the patient is still in the hospital, my office was not able to provide the complete chart, but that it would be provided as it became available" (at para. 5). In her affidavit, the Director states that "there were several responses to the Request for Access to Information from the Health Board because the patient chart was kept on the unit where the Applicant was receiving care. The patient chart was therefore required on a daily basis for ongoing care" (at para. 7). I infer from these statements, as well as the November 23, 2015 email to the Applicant, that the access and disclosure specialist does not have access to a patient's current chart until that patient is discharged, because the chart must stay on the unit where the patient is located. However, the Applicant was informed in the November 23 email that she could request the information from the unit. Therefore, some process exists to provide current chart information upon request.

[para 27] I entirely understand the Custodian's point that a patient's current chart must remain in the unit in which they are located. However, if staff on the unit can make a copy of a patient's chart for the Applicant (as she was told in the November 23 email), then it seems possible for staff to make a copy for the access and disclosure specialist. Or the specialist could possibly make her own copy without relocating the file to her office. Therefore, it was not appropriate to tell the Applicant to go to a different area within the Custodian to obtain some of the records responsive to her request, while the specialist would provide the remainder.

[para 28] That being said, the specialist did obtain a copy of the patient chart for the Applicant and provided it on December 14, 2015, which met the Custodian's deadline for responding to the second and third request, though not the first (as will be discussed in the next section of this Order). Therefore, any fault in the Custodian's November 23 email to the Applicant was rectified by December 14, 2015. Given this, and the Custodian's description of steps it took to inform the Applicant as to how it would respond to her requests, I find that the Custodian met its duty to assist the Applicant.

2. Did the Custodian comply with section 12(1) of the HIA (time limit for responding)?

[para 29] Section 12 of HIA states in part:

> *12(1) A custodian must make every reasonable effort to respond to a request under section 8(1) within 30 days after receiving the request or within any extended period under section 15.*

[para 30] The Custodian states that it received a Consent to Disclose Health Information on November 2, 2015, and two access requests, on November 19 and 22, 2015. It states that there

was overlap between the consent to disclose and the two access requests. The two access requests were identical, except that the later request specified that the date range of the request was to November 22, 2015, rather than "current date" as specified in the November 19 request. The Custodian states that it assessed its deadline to respond as December 22, 2015, which is 30 days from the later access request.

[para 31] The Custodian provided some records to the Applicant on December 1, 2015. Those records encompassed June 24, 2005 – January 14, 2015 and February 19, 2015 to May 31, 2015. The Custodian states that it notified the Applicant that some specified records do not exist.

[para 32] On December 14, 2015, the Custodian provided additional records to the Applicant, with the date range of February 19, 2015 – December 3, 2015.

[para 33] In her request for review, the Applicant argues (at page 1 of attached letter):

> Contrary to the requirements of the Health Information Act, the Access and Disclosure department at the Grey Nuns Hospital indicated that medical file information for the period of February 19, 2015 to present (November 30, 2015) would not be included in the responsive documents that would be provided for the first request.

[para 34] The Applicant's first request was made on a Consent to Disclose Health Information form. A consent to disclose is not the same as an access request. That said, the Custodian's submissions indicate that it treated the consent to disclose as an access request for health information. The notation at the top of the page (showing that the form was received on November 2, 2015) also indicates that it was forwarded to the access and disclosure specialist who swore an affidavit for this inquiry.

[para 35] While I conclude that the consent to disclose was treated as an access request, it was received on November 2, 2015 and therefore could not have encompassed records to November 30, 2015. An applicant cannot make an access request for records that do not yet exist, and expect those records to be provided within 30 days of the date of the request. (Unlike section 9 of the FOIP Act, the HIA does not have a provision allowing for continuing requests). The Applicant's subsequent two requests were received November 19 and 22, 2015. (Neither could have included records up to November 30, 2015 for the same reason).

[para 36] The Custodian's first response to the Applicant was December 1, 2015, which is within the time frame of the Act for all three requests. The Custodian provided additional records on December 14, which is past the timeframe for the first request, but within the timeframe for the second and third requests.

[para 37] In Order H2005-004, former Commissioner Work addressed a Custodian's time to respond to multiple requests from an applicant. He said (at para. 43, footnotes omitted, emphasis added):

> I take this opportunity to provide some guidance to custodians about dealing with multiple requests from the same individual, or unclear requests. This case underlines the challenges faced by custodians (or public bodies or organizations) in such cases. The custodian is placed in a

difficult situation, one to which I am sympathetic. However, it is the custodian that must take charge of such situations, in order to meet its obligations under the Act. I would suggest the following:

1. Decide what the applicant is after. This should be done in consultation with the applicant but that is not always possible. Where there are apparently multiple requests for the same information, the custodian can define what it thinks the requests are for. In other words, the custodian can say "This is how we interpret your request and this is what we are going to process." This should be done in writing and communicated to the applicant. Hopefully there will be agreement or dialogue. The custodian must define the request at a given point in time so that there is certainty as to the task on which the clock is running. It is very hard to fulfill a 'moving' access request.
2. If the applicant makes subsequent requests that are different, one option for the custodian is to continue to process the original one, as well as start an additional application with a new time limit. If this is the course it chooses, the custodian should communicate this in writing, by saying "this is what we understand the first request to be, and here are the timelines for dealing with it; this is your second request and we will deal with that on the following timeline". Custodians have 30 days on a request and, if the terms of section 15 are met, can give themselves another 30. Ideally the applicant should agree to the schedule, but this is not always possible. A custodian can seek further extensions from this Office with or without the applicant's agreement. A custodian that presented this Office with a schedule of how it is going to handle multiple requests, in a sequential, reasonable manner, would, other things being equal, have a good chance of getting the necessary extensions.
3. The other alternative for the custodian is to amend the original request so as to add the new one, and advise the applicant in writing that it is doing this. If the applicant agrees, it can set out a new time schedule. If the applicant doesn't agree, the custodian may still be able to extend the time under section 15. It is open to the Applicant to object to this Office. Though this puts the whole process on hold while the decision is reviewed, that is a choice available to the applicant.
4. If an applicant insists on having its several access requests dealt with immediately and they appear to be for the same or similar information, the custodian may ask this Office for permission to disregard duplicate requests under section 87. This Office does not use section 87 lightly, but it is there to be used. This may be preferable to struggling under numerous similar or identical requests, then failing to meet the timelines on all of them, occasioning deemed refusals and reviews by this Office.
5. In a large organization, or where the requests are made to different units or individuals, one unit within the organization should be made aware of all requests. Such organizational approaches can save duplication of effort.

[para 38] Insofar as the Applicant's three requests all encompassed "all health records" or "all medical records" from GNCH, they were similar in scope. The primary difference was the end date for responsive records. The Custodian did not explain why it determined that the date of the last request is the appropriate date from which to calculate its deadline to respond. Nothing in the Act indicates that one request can be overridden by a later, similar request. As such, and given the former Commissioner's guidance in Order H2005-004, the Custodian's response to the Applicant's November 2, 2015 request for records up to and including that date was due on December 2, 2015. To be clear, any records dated after the date of the first request would not have been responsive to that request.

[para 39] This is not to say that the Custodian could not have consolidated the three requests, but this would require communicating with the Applicant, as described in the second and third bullets, above.

[para 40] The Custodian's December 1, 2015 response to the Applicant encompassed records only up to May 31, 2015; responsive records from June to December 2015 were not provided until December 14, 2015. As such, it would seem that the Custodian failed to meet its timelines for responding completely to the November 2, 2015 request. To meet its timelines under the Act, the Custodian should have provided all responsive records – *up to the date of the first request* – by December 2, 2015. In the alternative, the Custodian could have extended its time to respond under section 15 of the Act.

[para 41] The Custodian's December 14, 2015 response was in time to meet the deadlines for the subsequent two requests. Therefore, the records dated between November 2, 2015 and December 3, 2015 were provided within the timelines of the Act.

[para 42] As discussed above, the Custodian states that it could not provide the Applicant's 'current' hospital records until the Applicant was discharged – it is for this reason that they were not provided on December 1, 2015. The Applicant questioned this claim and I found it to be implausible (as discussed at paragraphs 26-27 of this Order). However, the validity of this claim is not relevant to my finding regarding the timeliness of the Custodian's response. If the Applicant is correct, then the Custodian missed its deadline to completely respond. If the Custodian is correct, it still missed its deadline to completely respond. Even if the Custodian *could not* provide some of the requested records until after the Applicant was discharged, the Custodian should have extended its time to respond under section 15, citing that reason. As the Custodian did not extend its time, it failed to meet the timelines under section 12.

[para 43] In other words, whether or not the Custodian could have provided the 'current' hospital records before the Applicant was discharged does not affect my finding that the Custodian failed to meet its deadline to respond completely to the Applicant's first of three requests. As the Custodian has now responded, there is nothing for me to order.

V. ORDER

[para 44] I make this Order under section 80 of the Act.

[para 45] I find that the Custodian conducted an adequate search for records under section 10 of the Act.

[para 46] I find that the Custodian met its duty to assist the Applicant.

[para 47] I find the Custodian failed to meet its duty under section 12 of the Act to respond to the Applicant's first request completely, within the time limits imposed by the section. However, as the Custodian completed its response, there is nothing for me to order.

[para 48] I find that the Custodian met its duty under section 12 of the Act to respond to the Applicant's second and third requests within the time limits imposed by that section.

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Amanda Swanek
Adjudicator