

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2021-08

August 10, 2021

DR. RYAN YAU

Case File Number 012381

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request under the *Health Information Act* (HIA) to Dr. Ryan Yau (the Custodian) for specific medical records. The Custodian provided some records; however, the Applicant believes additional records should have been provided. The Applicant specified that he was seeking copies of particular scans.

The Applicant requested an inquiry into the Custodian's search for records.

The Adjudicator found that the Custodian conducted an adequate search for records.

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

Authorities Cited: **AB:** H2005-003, H2006-003

I. BACKGROUND

[para 1] An Applicant made an access request under the *Health Information Act* (HIA) to Dr. Ryan Yau (the Custodian) for specific medical records. The Custodian provided some records; however, the Applicant believes additional records should have been provided. The Applicant specified that he was seeking copies of particular scans of his eye, as well as records confirming the date of a particular surgery.

[para 2] The Applicant requested a review by this Office of the Custodian's response. During the review, the Custodian located records confirming the date of the surgery. The Applicant is satisfied with that aspect of the Custodian's response.

[para 3] With respect to scans of the Applicant's eye, the Applicant requested copies of scans of his lens. The Custodian stated that no such scans exist, but that the Custodian had provided the Applicant with scans of his retina.

[para 4] The Applicant requested an inquiry into the Custodian's search for records.

[para 5] The Commissioner authorized an investigation to attempt to settle the matter. This was not successful, and the Applicant requested an inquiry.

II. INFORMATION AT ISSUE

[para 6] As this inquiry addresses the adequacy of the Custodian's response under section 10 of the Act, there are no records directly at issue.

III. ISSUES

[para 7] The issue in this inquiry, as set out in the Notice of Inquiry dated June 10, 2021, is:

Did the Respondent meet its obligations required by section 10(a) for HIA of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

IV. DISCUSSION OF ISSUES

[para 8] Section 10 of HIA 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.

[para 9] Past Orders of this office have determined that a custodian is in the best position to show that it conducted an adequate search for responsive records; therefore, the burden of proof is on the custodian to show that it has done so (see Orders H2005-003 and H2006-003).

[para 10] Regarding the test for whether an adequate search was conducted, former Commissioner Work stated the following in H2005-003 (at paras. 19-21):

These FOIP Orders have not established a specific test for adequacy of the search; this is a question of fact to be determined in every case. The standard for the search is not perfection but rather what is "reasonable" in the

circumstances. The decision about adequacy of a search is based upon the facts of how the search was conducted in the particular circumstances. In order to discharge its burden of proof under FOIP, a public body must provide sufficient evidence to show that it has made a reasonable effort to locate responsive records.

In its written and oral submissions, the Custodian argued that the FOIP approach to interpretation should be applied to the parallel provision in HIA. I accept this argument. I hereby adopt the above described FOIP criteria and approach for deciding whether the adequacy of the search and therefore the duty to assist under section 10(a) of HIA has been satisfied by a custodian.

To address the Applicant's concerns, I must review the thoroughness of the Custodian's search. In its written and oral submissions, the Custodian provided detailed descriptions of the steps that were taken, the communications that occurred, the documentation utilized and the efforts that were made to attempt to locate the information requested.

[para 11] The Applicant states that a technician took nine scans of his eye on July 20, 2018, and that the Custodian reviewed those scans with the Applicant on that day. The Applicant states that he noticed a mark on three of the images at that time. These are the images of which the Applicant is requesting a copy.

[para 12] Regarding the Custodian's search, the Custodian states that photos such as the requested images are kept on a secure EMR platform and are easy to locate and produce, as was done in this case. The Custodian states that the Applicant was seeking digital images and that no physical sites needed to be searched to produce the requested photos. The files were compiled by the Custodian and technicians.

[para 13] In his submission, the Custodian states that the Applicant may believe additional images exist because the Applicant was asked to look in several directions when the images were taken. The Custodian states that the images are "digitally combined into the files [the Applicant] received." The Custodian also states that the scans taken of the Applicant's eye are images of his retina, and not his lens. In other words, the Custodian does not have images of the Applicant's lens.

[para 14] The Custodian's explanation of his search is satisfactory. The Applicant is seeking a particular type of record; the Custodian has explained that such a record, if it existed, would be an electronic record maintained in one location, which is easily searchable.

[para 15] The Applicant's concern is that he believes that the Custodian also has photos of his *lens* in addition to photos of his retina that he received from the Custodian. The Applicant believes photos of his lens would show a scratch on the lens, which he states he received during a procedure performed by the Custodian.

[para 16] The Custodian has consistently stated that the images he has are of the Applicant's retina and not his lens. In this case, I understand it is difficult for the Applicant to provide evidence substantiating his belief that images of his lens exist, and

are in the custody or control of the Custodian. However, absent any evidence or other indication that images of the lens exist, I have no reason to conclude that they do, or to doubt the Custodian's explanation.

[para 17] I find that the Custodian conducted an adequate search for the requested records.

V. ORDER

[para 18] I make this Order under section 80 of the Act.

[para 19] I find that the Custodian met his duty under section 10 of the Act.

Amanda Swanek
Adjudicator