Office of the Access to Information and Privacy Commissioner
New Brunswick

Commissariat à l'accès à l'information et à la protection de la vie privée
Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-1038-AP-531

Date: April 7, 2014

Case about access to records that are part of on-going litigation

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the *Act*"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into this matter.

2. On July 5, 2012, legal counsel for the Applicant made an access to information request to Horizon Health Network ("Horizon") for information relating to the use of specialized equipment at the Moncton City Hospital, as well as injuries sustained by patients who had undergone use of that equipment since year 2000. The request followed the Applicant having commenced litigation against Horizon after having sustained injuries at the Moncton City Hospital.

3. The Applicant's request was for the following information:

> We are forwarding you the enclosed Request for Information Form signed by [the Applicant] and we would ask that you provide us with the documents listed in Appendix "A". Also enclosed is a Revocation, Authorization and Direction.
>
> Appendix A
>
> 1. Complete maintenance records on the MRI at the Moncton City Hospital since 2000;
> 2. Records of all injuries sustained by people who have undergone MRI's at the Moncton City Hospital since 2000, including the date on which the injury was sustained and the nature of the injury;
> 3. Records of any investigation or report with respect to injuries sustained by people who have undergone MRI's at the Moncton City Hospital since 2000;
> 4. Records of any disciplinary action against any employees of the Moncton City Hospital since 2000 as a result of injuries sustained by people who have undergone MRI's;
> 5. Any safety review or audit of the operation of the MRI at the Moncton City Hospital since 2000;
> 6. Any operational or management review of the operation of the MRI at the Moncton City Hospital since 2000;
> 7. A record of who was responsible for the operation of the MRI when someone was injured during the MRI since 2000.
>
> ("the Request")

4. On August 2, 2012, Horizon responded and refused to grant access in full for the following reasons:

> …
> We have reviewed and processed your request which we received on July 10, 2012, and unfortunately we are unable to provide the information which you have requested under this *Right to Information* request.
>
> Access is denied on the grounds that the matter is in litigation, an action having been filed in the Court of Queen's Bench of New Brunswick by [Applicant] against Regional Health Authority B, Court File No. F/C/233/11. The information you are requesting relates to the action [Applicant] has commenced. Any request for documentation/information should be made through the litigation process including the Rules of Court.
>
> If you are not satisfied with this decision, you may file a complaint with the Access to Information and Privacy Commissioner as per section 67(1)(a)(i) within 60 days of receiving this response, or refer the matter to a judge of the Court of Queen's Bench as per section 65(1)(a) within 30 days of receiving this response. For your convenience, please find enclosed the relevant forms.
>
> ("the Response")

5. Not being satisfied with the Response provided, the Applicant filed a complaint at our Office on September 27, 2012.

INVESTIGATION

6. The initial step undertaken in this process was to meet with Horizon's officials and discern how Horizon had processed the Request and formulated its response. Horizon officials informed us that the Applicant had requested the same information through an on-going litigation process known as *discovery* of evidence, and for that reason, Horizon was of the view that the Applicant was only entitled to receive the records through the discovery process rather than by an access request made under the *Act*. Along those same beliefs, Horizon did not produce the records found relevant to the Request for our review.

7. Horizon agreed with our finding that the Request in this case had been properly brought under the *Act* and this would require us to review the records relevant to the Request in order to determine whether the records should be withheld from or disclosed to the Applicant and Horizon agreed.

8. Over the course of many months, Horizon produced all of the records for our review, those that had been released to the Applicant during the discovery process and the remainder of the relevant records.

9. This case brought into sharp focus the interplay between an access to information request brought under the *Act* and the discovery process that is used in civil litigation through the *Rules of Court*.

10. The *Rules of Court*, as well as the *Act*, determine access to information, and how they co-exist when there is on-going litigation between the same parties, i.e., between an applicant who is a named party in a civil suit, and a public body that is another named party in the same civil suit.

11. We found that an access request can be made under the *Act* despite the on-going litigation and believe it to be of educative value to formally publish these findings in this Report.

Access to Information and Litigation

12. Horizon denied access to the requested information on the grounds that the parties were in litigation and believed that any request for documentation and/or information should be made through the litigation process pursuant to the New Brunswick *Rules of Court*.

13. Litigation having commenced when the Request was filed ought to have directed Horizon to read the Request carefully and search for and examine all of the relevant records; then, if the records identified were of the same subject matter as that of the litigation, Horizon could have looked to paragraph 29(1)(o) of the *Act*, an exception to disclosure that is discretionary and may permit a public body to refuse access to some of the information on the basis that its disclosure could reasonably be expected to be injurious to the legal proceedings.

14. Given that one of the main concerns behind the proposed legislation is the high probability that a patient who is informed of harmful incident by a health care provider will seek legal advice about the matter, it may be reasonable for a public sector health care organization to consider whether the section 29 exception to disclosure would apply to quality of care information.

15. Paragraph 29(1)(o) provides:

> 29(1) The head of a public body may refuse to disclose to an applicant if disclosure could reasonably be expected to
>
> …
>
> (o) be injurious to the conduct of existing or anticipated legal proceedings.

16. This exception requires the public body to show how the disclosure of information could reasonably be expected to have a negative impact on actual or anticipated legal proceedings; however, the public body's statutory obligation to respond to the access request made under the *Act* will nevertheless remain.

17. Horizon was of the view that incident and follow-up reports with patients who suffered injuries could not be disclosed because these records were privileged in that they were prepared solely for the purpose of identifying opportunities for improvement in medical or hospital patient care services. In that regard, Horizon looked to the *Evidence Act* that can prevent the compellability of records that speak to improvements in a hospital setting.

18. We read the applicable portions of the *Evidence Act* and, in our view they do not apply to the processing of the Request but more in the context of the litigation between the parties. In that regard, the incident and follow-up reports are subject to the *Act* and their disclosure is lawful provided that personal health information of patients is redacted.

19. Efforts to follow-up with patients after incidents of injuries in a hospital are to be applauded as they strengthen accountability and transparency of public sector health care providers. The key is to ensure that the initiative strikes the proper balance between quality of care information to allow for thorough investigation of incidents while making information available to patients and the general public as necessary to ensure transparency and accountability in the management of quality of care matters.

20. Patient safety incidents are unfortunate but we have found that where health care organizations are forthright in such cases, show they are taking such issues seriously, and demonstrate that steps are being taken to prevent them, the public will recognize these efforts and will accept to participate in the ultimate goal: to improve the overall safety of the public health care system.

21. In that regard, quality assurance is in keeping with the spirit and intent of both the *Right to Information and Protection of Privacy Act* as well the *Personal Health Information Privacy and Access Act*. The goal of these pieces of legislation is to ensure public sector health care providers are completely forthcoming in all investigations of incidents involving patient safety. Some health care providers may be reluctant in making this information available for fear of liability from admissions of wrongdoing. As we understand it, the goal in discovering and developing improved patient care practices is for quality of care purposes and not as grounds for legal liability in the court system.

22. The *Evidence Act* provisions referred to provide a privilege that can prevent this kind of information from being compellable in the courts; however, we question whether it prevents the information from being disclosed as a result of access to information rights.

23. Another point raised that might be raised is that incident and follow-up reports represent advice and recommendations for corrective or preventative measures. Where an access request is made to a public sector health care organization for such reports, the following exception to disclosure may be applicable:

> **Advice to a public body**
> 26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
>
> (a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown…

24. It is important to note that this exception would only apply to information that actually constitutes advice, opinions, proposals or recommendations, and would not protect factual or background information, interview statements, etc. In the present case, the incidents and the follow-up reports did not contain advice or recommended courses of action to correct the risk of injuries to patients.

25. In addition, despite the possibility of the applicability of exception to disclosure provisions, we draw attention to public interest override clauses that may be applicable in certain circumstances, thus rendering the disclosure of the information mandatory. Subsection 28(2) of the *Right to Information and Protection of Privacy Act* states:

> 28(2) Despite any provision of this Act, whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of

> significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

26. A similar, although discretionary, override is also found in section 39 of the *Personal Health Information Privacy and Access Act*:

> 39(1) A custodian may disclose personal health information without the consent of the individual to whom the information relates if the custodian reasonably believes that disclosure is required
>
> (a) to prevent or reduce a risk of serious harm to the mental or physical health or safety of the individual to whom the information relates or another individual, or
>
> (b) to prevent or reduce a risk of significant harm to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

27. As for the *Rules of Court*, they set out a process by which litigants get access to the evidence they need to determine the merits of their case, i.e., through the discovery process. The review process under the *Act* is independent of the *Rules of Court*, and establishes a mechanism by which an individual can seek access to information that is derived from the public business of government, as a recognized right.

28. Unmistakably, the *Act* was not designed to provide parties involved in a litigation matter another forum in which to exchange evidence. That forum was established in the practices and procedures known as the *Rules of Court*. The *Rules of Court* are utilized for all matters and procedures involving litigation and these *Rules* appropriately guide litigants in structured procedures that involve the disclosure and discovery of facts, information and records relevant to the issues being litigated. The review of a complaint filed under the *Act* was not meant to become an additional procedure to the existing litigation discovery process under the *Rules of Court*.

29. The Commissioner's Office is a statutory creation mandated to ensure that a public body properly responds to a request for access to information in accordance with the principles and the rules set out in the *Act*. It would be entirely improper for our Office to conduct our review of complaints on the premise that we act for applicants. It would be equally improper for us to conduct our work in defense of public bodies. The Commissioner's Office is an independent body whose sole responsibility in complaint investigations is to ensure compliance with the *Act.*

30. The view we hold is consistent with the Federal Court of Appeal's decision in *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110:

> "This distinction may be relevant in the context of discovery of documents, but there is no analogy between discovery of documents in litigation and access to records under the Act [Access to Information Act (R.S., 1985, c.A-1)]. The discovery process is adversarial in nature and relevancy is the predominant test for disclosure. By contrast, access under the Act is based on the public interest in disclosure and not on the private interest of the litigants. There are many exemptions justifying confidentiality under the Act that would not be available in the discovery process. The considerations for disclosure and confidentiality under the Act constitute a code in themselves which cannot be interpreted by reference to considerations in the discovery process."

31. This approach is shared by the access to information community, in a decision by the Office of the Information and Privacy Commissioner in Saskatchewan, where a similar complaint investigation concerned a public body not having responded to a request due to anticipated litigation with the applicant. The Saskatchewan Commissioner, in Report H-2008-001, stated that "*the review process under the Act is independent of any other proceedings that may provide access to documents.*"

32. We agree with these statements and find that the existence or anticipation of litigation is an irrelevant consideration when having to process an access request that has been properly brought under the *Act*. Having said this, however, we must state that the existence of, or anticipated, litigation may be a relevant factor in determining whether access to the requested information will or will not be granted, as per the exceptions to disclosure found in the *Act* that may be relevant to the requested information and the circumstances surrounding the request. The *Act* is not to be used as a corollary process to that of discovery under the *Rules of Court*; when a request is made under the *Act*, a public body will be required to search for records that are relevant to the request, not those relevant to the litigation, unless the request is clearly seeking the same information.

33. In this regard, we find that Horizon should have accepted and processed the Request, one that had been properly brought under the *Act,* and should have searched and identified the information relevant to the Request with a view to examine it and make a decision regarding access based on the rules found under the *Act*. The on-going litigation with the Applicant, although arguably an important consideration, ought to not have dismissed Horizon's obligation to provide a properly constituted response as

per its obligation to do so under section 14 of the *Act*. By Horizon simply stating in its Response that litigation between the parties had begun and disclosure of the requested information would be governed by the *Rules of Court*, we find this decision was insufficient in meeting the requirements of a proper response under the *Act*.

34. Horizon had the statutory obligation to process the Applicant's Request, and provide a response in conformity with subsection 14(1) the *Act*, that included:

- whether the requested records existed;
- providing a list of the relevant records; and,
- explaining in a meaningful manner the reasons why access to any of the relevant information identified was being refused, including referencing the specific provision of the *Act* relied upon as an exception to disclosure.

35. To meet its burden of proof for discretionary exceptions to disclosure, Horizon had to establish that the information in question fell within the scope of one of these provisions, and how Horizon exercised its discretion in deciding to refuse access, based on the relevant circumstances at the time. The exercise of the discretion is reviewable and we address each point of that process below.

Search for relevant records

36. As stated above, Horizon did not, at first, undertake a search to identify all of the records relevant to the Request believing that the Applicant could not make an access request under the *Act* given the fact that litigation had begun between the parties. We explained to Horizon that it had to search its records for information relevant to the Request rather than being concerned of the litigation or allowing the presence of the litigation to guide the search.

37. Despite this important distinction, Horizon searched for records relevant to the Request on the basis of those records that could be properly refused due to the litigation. That search was therefore flawed.

38. A public body must first locate <u>all</u> the records relating to a request and only when that full list of records has been created can the public body address each record in relation to access. Processing a request cannot be commenced with a mindset as to what information it is believed the applicant will be entitled to receive, as assuredly, mistakes in the search will be made that may lead to some information not being made available,

therefore violating the applicant's right of access. A public body should always identify all of the relevant records and only then can the task of determining if some information must remain protected take place.

39. With discussions held with Horizon on this important facet for a proper search of records, we were given a list of all of the records relevant to the Request. The list had a table that identified those records that had been provided to the Applicant in full through the discovery process, those that corresponded with the Applicant's Request, as well as those identified with the full search as being relevant to the Request. We are satisfied that, in the end, Horizon performed an adequate search of all of the records relevant to the Request in this case.

Access to records

40. Upon examination of the records, we found that the Applicant had already been granted access to the majority of the relevant records (albeit through the discovery process).

41. More specifically, we found that the records relating to the maintenance records of the specialized equipment (safety review, audit of the operation, management review) had all been disclosed to the Applicant, in full, and that neither Horizon nor the Moncton City Hospital had any other records in its custody or under its the control relating to those records. We understand that the majority of the records relating to the maintenance of the specialized equipment were kept by the company who maintained the equipment.

42. With regards to records relating to any disciplinary actions undertaken, neither Horizon nor the Moncton City Hospital had any records on that topic as no disciplinary measures against employees of the Moncton City Hospital had taken place in relation to injuries sustained by people having used the specialized equipment.

43. As other records identified, they regarded injuries sustained by people having used the specialized equipment, investigation report of injuries, and records showing those employees responsible for the operation of the specialized equipment when injuries were sustained. These records were not provided to the Applicant, except for a copy of an incident report when the Applicant herself had sustained an injury, as well as a summary of 14 incidents involving injuries sustained by people since 2000.

44. As indicated above, the Applicant received a large portion of the relevant records outside of the processing of the Request, i.e., not within the confines of the rules regarding disclosure established under the *Act*. In fact, Horizon believed the disclosure of these same records would be deemed an unreasonable invasion of third parties' privacy, i.e., the privacy of those patients whose names were recorded on the injuries/incidents reports.

45. Most of the information contained in the incident reports consisted of the patients' personal information and personal health information. The determination as to whether these records can be withheld from disclosure was the subject of a previous Report of the Findings by our Office in Complaint Matter 2012-728-AP-379. In that case, the Applicant (same as in this case) sought access to a copy of an incident report from Horizon that had been generated following an injury the Applicant had sustained after undergoing a procedure with a specialized equipment. Horizon refused to grant access to the incident report, even though it had already provided a copy of it to the Applicant during the discovery process of on-going litigation.

46. In that case, we found that the incident report, while containing some of the Applicant's personal health information, did not represent a report about the Applicant but rather consisted of a public body's record:

> 21. […] The report concerned a prior *occurrence* that had involved the Applicant in a hospital. The report included all kinds of facts and details surrounding the incident: an account of what took place, notifications given to doctors and supervisors concerning the incident, follow-ups undertaken by management, functioning of the equipment, name of the attending physician, reason for the visit, a description of what occurred and what steps were undertaken and by whom when notified of the incident, and so on. The fact that the incident report contained some other type of information, i.e. personal health information belonging to the Applicant, did not have the effect of converting the entire document as anything other than a report about an incident.

47. The majority of the information contained in the incident report related to an incident, an incident that pertained to the affairs of a hospital, thus a public body. Accordingly, the incident report constituted information to which the *Act* applied and its disclosure had to be determined in accordance with the rules set out in the *Act*.

48. In the present case, the records at issue consist of 14 incident reports generated after patients sustained injuries (one of these incident reports was the report generated after the Applicant sustained an injury, as referenced above). The reports contain some of the

injured patients' personal health information but they still are records that report incidents having occurred in a public sector hospital and in that regard, they are records to which the *Act* applies.

49. Was Horizon correct in refusing access in full of these records? We apply the rules that ought to have governed their disclosure.

Third party personal information

Incident reports

50. Personal information that belongs to a third party does merit protection, as its release may intrude into the private life of that person. Such rule regarding protection of personal information is found in subsection 21(1), and the *Act* provides some circumstances in which the disclosure about a third party's personal details will be deemed to be an unreasonable invasion of privacy (see paragraphs 21(2)(a) to (i)).

51. Having reviewed the incident reports, we are satisfied that some of the information contained therein consists of third party personal information: patients' injuries, names of employees of the Moncton City Hospital as operator of the specialized equipment, hospital supervisors, etc.

52. All patients' identifying personal information, i.e., their name, date of birth, address, age, or any other identifying information is third party personal information and its disclosure would be deemed to be an unreasonable invasion of their privacy. That information should therefore not be released.

53. Our review of the remaining information in the incident reports, however, does not present personal information that warrants protection. For instance, an individual's employment is defined as "personal information" under the *Act*, and reliance could be placed on subsection 21(1) as an exception to disclose the names of the employees identified in the incident reports. The analysis, however, does not stop there. The employees are employees of a hospital, a public body, and that fact draws upon the application of subsection 21(3). Subsection 21(3) is a deeming provision that is an exception to the exception, or in other words, states cases where personal information about a third party can be disclosed, as to do so will not be considered an unreasonable invasion of his or her privacy.

54. In the case of employees of public bodies for instance, releasing their name, job classification, salary range, benefits, employment responsibilities or travel expenses is not only permitted, it is required (see paragraph 21(3)(f)).

55. Consequently, access is lawful to the names of hospital employees who authored the incident reports (being the operators of the equipment) as well as the name of the supervisors who were notified of the incidents, and any other employees of the hospital whose names appear on these records.

56. As a result, the disclosure of this kind of information found in the incident reports is not an unreasonable invasion of privacy and access to that information must be granted to the Applicant.

Follow-up reports

57. Attached to some of the incident reports were follow-up reports of the injuries sustained by the patients (identified as QM *quality management* Account of Occurrence).

58. These were type-written notes about any follow-up with the patients who sustained injuries after having undergone a procedure with the specialized equipment, and whether any treatments were given or recommended by their family physician. These follow-up reports also contained the patients' personal information (their name and family physician).

59. We find that the patients' identifying personal information found in the follow-up reports must be protected and therefore should be redacted for the same reasons provided above. As for the remaining information contained in the follow-up reports, we do not find that the disclosure of this information should be withheld from disclosure. They are reports generated from the workings of a public hospital, and consist of records of a public body and are subject to disclosure.

Commissioner's Findings and Recommendations

60. Horizon was obligated to provide the Applicant a properly constituted response to the Request in conformity with subsection 14(1) of the *Act* but failed to do so in this case. Horizon's initial search for relevant records was not adequate as it was carried out on the belief that most of the records would be refused due to the on-going litigation with

the Applicant. To its credit, Horizon corrected this deficiency and fully identified all of the relevant records and produced them to us for review.

61. We found that Horizon does not have in its custody or under its control any other records than those previously provided to the Applicant in another process, i.e., that of the discovery court procedure in the litigation. As for incident reports, we found that Horizon only provided a copy of a summary list of injuries sustained by patients since 2000, but did not grant access to copies of the actual records to the Applicant.

Recommendations

62. Given our findings above and pursuant to subsection 73(1) of the *Act*, the Commissioner recommends that:

a) Horizon provide a list of all records relevant to the Request to the Applicant; and

b) Horizon provide access to the identified 14 incident reports along with follow-up reports concerning the patients treatment, but with redactions for patients' personal information and personal health information pursuant to subsection 21(1) of the *Act* (being their name, date of birth, address, age, and any other identifying information that could lead to revealing who they are). Access can be provided to employees' names, including the name of the operator of the specialized equipment as that personal information is not deemed an unreasonable invasion of their privacy pursuant to paragraph 21(3)(f) of the *Act*.

Dated at Fredericton, New Brunswick, this _____ day of April 2014.

_____
Anne E. Bertrand, Q.C.
Commissioner