



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 04-38

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Adjudicator
December 21, 2004

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Summary: The applicant requested records related to interactions between the PHSA and CWHC and the BC Health Care Risk Management Society. The PHSA had no responsive records and fulfilled its s. 6(1) duty in conducting a search for responsive records.

Key Words: duty to assist – adequate search.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6(1).

Authorities Considered: B.C.: Order 00-15, [2000] B.C.I.P.C.D. No. 28; Order 04-25, [2004] B.C.I.P.C.D. No. 25.

1.0 INTRODUCTION

[1] The applicant made the following request to the Provincial Health Services Society (“PHSA”):

- copies of correspondence, notes, and e-mail which relate to the interactions between the PHSA, the Children’s and Women’s Health Centre of BC [“CWHC”], and their agents, physicians, or other representatives, AND the BC Health Care Risk Management Society [“BC HCRMS”]. This material would be that which is related to the interactions of myself and such individuals.

[2] The applicant provided examples of these individuals, including a number of physicians.

[3] The PHSA told the applicant that it was unable to provide access to the records the applicant had requested as “the records do not exist”. It also stated that the “personal records of the physicians, which would include their correspondence to the BC Health Care Risk Management Society are not within the custody or control of the PHSA or [CWHC] and are therefore not subject to FOI”.

[4] The applicant complained about this response to this Office, stating that there were references to correspondence between the PHSA and the BC HCRMS in records he had received from the PHSA in response to other requests he had made under the *Freedom of Information and Protection of Privacy Act* (“Act”). He also disputed the PHSA’s position that the doctors’ “personal records” were not in the PHSA’s custody or control.

[5] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[6] According to the notice for this inquiry, the issues before me are:

1. Whether the PHSA has fulfilled its duty under s. 6(1) of the Act to assist the applicant, specifically with regard to the adequacy of its search for responsive records; and
2. Whether certain records requested by the applicant (“personal records of physicians”) are in the custody or under the control of the PHSA for the purposes of ss. 3(1) and 4(1) of the Act.

[7] In post-inquiry correspondence, the PHSA said that it was abandoning the custody and control issue in this inquiry (para. 10, supplemental submission). I told the applicant that I would therefore not consider this issue in my decision. The applicant agreed that this issue could be dropped (p. 1, supplemental submission).

[8] The search of individual doctors’ files or “personal records” is not before me here, given the PHSA’s original position that it did not have custody or control of these records. Thus, the only issue that I consider here is whether the PHSA fulfilled its duty under s. 6(1) in conducting an adequate search for responsive records within the PHSA, except in individual doctors’ files or “personal records”.

3.0 DISCUSSION

[9] **3.1 The PHSA’s Search for Records** – This issue relates to the PHSA’s compliance with its duty under s. 6(1) of the Act to assist the applicant. Section 6(1) reads as follows:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[10] The Information and Privacy Commissioner has considered s. 6(1) in many orders and has set out what he expects from public bodies in searching for records and in accounting for such searches (see, for example, Order 00-15, [2000] B.C.I.P.C.D. No. 18). I will apply here, without repeating them, the principles from those orders.

[11] The PHSA said that it had no records responsive to the applicant's request and that it had complied with its s. 6(1) duty in searching for such records. It provided affidavit evidence on these points from: Ron McKerrow, Vice-President Business Development & Service Delivery for the PHSA; Georgene Miller, Director, Medical Affairs and Quality, Safety and Risk Management for the PHSA; and Janice Markin, manager with the Health Care Protection Program, Ministry of Finance, who was for a time the Executive Director of the BC HCRMS.

[12] Janice Markin deposed that the BC HCRMS was "a non-profit society established to provide risk management services and liability coverage to hospitals in British Columbia". The BC HCRMS was dissolved in 2003, she said, and its records are now with the Health Care Protection Program (part of the Ministry of Finance). Ms. Markin said that, on reviewing the relevant BC HCRMS files, she found a letter of April 27, 2000, regarding the applicant's claim against a particular doctor, from the BC HCRMS to Ron McKerrow, copied to Georgene Miller. She said she found no other letters or records of communications between the BC HCRMS and the CWHC, or individual doctors employed by the CWHC, in the relevant BC HCRMS files (paras. 2-5 & 7, Markin affidavit).

[13] Georgene Miller deposed that any correspondence between the BC HCRMS and the CWHC on specific claims is kept in claims files held in the Medical Affairs office. She said that she searched the claim files related to the applicant's claims against the CWHC and various physicians and found no correspondence or records of communications between the BC HCRMS and the CWHC. She said that the April 27, 2000 letter mentioned above was not in the files maintained by the Medical Affairs at the CWHC (paras. 3-6, Miller affidavit).

[14] Ron McKerrow deposed that he produced all of his records that related to the applicant in response to a request of September 2002 and that, apart from records that the PHSA withheld in that case, the applicant received all of the records. He said that there was no correspondence between the BC HCRMS and the CWHC among the withheld records in that case and that the April 27, 2000 letter from the BC HCRMS to him was not among his records (paras. 2-5, McKerrow affidavit).

[15] The applicant disputed the PHSA's response that it had no responsive records, saying the PHSA's denial is "not consistent with material received through other FOI releases". As examples, he enclosed copies of two records which he said he had received via earlier freedom of information requests, which in his view are also responsive to the current request but which the PHSA did not provide in response to that request. (The PHSA did not comment on these records in its submissions.) The applicant also suggested that, not only were the claim files incomplete, the search had been incomplete in that it appears to have been limited to "claim files" and did not include "legal support" in the PHSA, CWHC and BC HCRMS (para. 3, p. 2, initial submission; paras. 2 & 5, p. 2, reply).

[16] In its supplemental submission (paras. 3-8 & 12), the PHSA clarified that it had, in its view, met its s. 6(1) duty to the applicant "by making an adequate search for responsive records [in this request] that had not already been identified in previous requests from the applicant, in particular, the broad request for records" that was the subject of Order 04-25, [2004] B.C.I.P.C.D. No. 25 (a matter involving the same applicant and public body). In response to that earlier request and as a result of Order 04-25, the PHSA said, it had conducted extensive searches for records related to the applicant maintained by numerous individuals, departments and committees within the PHSA.

[17] The PHSA said it identified all records related to the applicant in those searches and that these included records responsive to the current request: "communications between the [CWHC] and the Health Care Protection Program ("HCPP"), the self-insurance program administered by the BCHCRMS, and communications within the [CWHC] regarding the HCPP. The search did not produce any direct communications between the [CWHC] and the BCHCRMS". It pointed out that I found in Order 04-25 that s. 14 applies to some records, including records responsive to this request.

[18] It is not clear why the PHSA waited until its supplemental submission to clarify that it was excluding from its response to the current request any responsive records it had located in dealing with the applicant's previous requests. Doing so might have avoided some confusion. The applicant would also have understood why he was not receiving duplicate copies of records he had previously received.

[19] In any case, after careful review of the PHSA's submissions on this matter, I am satisfied that it has made reasonable efforts to search for records responsive to the applicant's current request and that it has adequately described and accounted for these searches. I find that the PHSA has complied with its s. 6(1) to assist the applicant in conducting its search for responsive records.

Claim of solicitor client privilege

[20] The PHSA said that the letter of April 27, 2000 that Janice Markin found in the BC HCRMS files is a confidential communication between the CWHC and the BC HCRMS "for the purposes of providing professional legal advice" for the CWHC. The PHSA provided a copy of this letter on an *in camera* basis with its submission.

It said the letter is subject to solicitor-client privilege and has therefore not been disclosed to the applicant. It is not clear if the applicant has received a formal decision to this effect from the PHSA. This issue is in any case not before me.

[21] The applicant objected to the PHSA's submission of *in camera* material in this inquiry. The PHSA said that solicitor-client privilege applies to that material and that it had not for this reason been disclosed to the applicant. I consider that the material is properly received *in camera*.

4.0 CONCLUSION

[22] For reasons explained above, no order respecting s. 6(1) is necessary.

December 21, 2004

ORIGINAL SIGNED BY

Celia Francis
Adjudicator