

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2018-01

December 21, 2018

ALBERTA HEALTH SERVICES

Case File Number 002374

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Summary: The Applicant made a request for access to his deceased mother's health information under the *Health Information Act* (the HIA) from Alberta Health Services (the Custodian) in his capacity as the executor of her estate. The Applicant explained that the requested records were "required for the administration of [his mother's] estate" and that he was making the access request as the "personal representative" of his deceased mother. The Applicant requested:

all records in any form (written, audio, or electronic) including notes from meetings, post-it notes, personal notes, emails or entries / logs, pertaining to [his mother and her care] at the Calgary South Health Campus between the dates of July 2, 2014 and July 2, 2015, written by or within the possession of the following personnel of the South Health Campus [...]

The Applicant provided the names of the Custodian's employees he believed had created or held responsive records. He also provided descriptions of particular categories of records he was seeking from specific employees and assigned item numbers to these categories.

With regard to two categories of records the Custodian indicated that it considered the Applicant did not have authority to request his mother's records, and even if he did, the records he had requested were unnecessary for administering his mother's estate.

The issues for inquiry were whether the Applicant was authorized by section 104 of the HIA to make an access request for his deceased mother's health information, and whether

the Applicant was entitled to receive the records he had requested in items 4 and 5 of his access request.

The Adjudicator determined that the Applicant, as the executor of his mother's will, was authorized to make an access request for the purpose of administering his mother's estate. The Adjudicator found that the access request, which had been made for the purpose of determining whether to bring a legal action, had been made for the purpose of administering his mother's estate. The Adjudicator interpreted section 104 in the following way:

I do not interpret section 104 as authorizing a custodian to step into the shoes of an executor so as to assess, on a record-by-record basis, which particular records he or she needs, once an executor has established he or she is an executor and indicated the request *relates* to the administration of the estate. Section 104 confers the rights or powers of a deceased person on an executor provided *the exercise of the right or power* relates to the administration of the estate. Once the executor of a will has established that *making the access request* – the exercise of a right in this case – *relates* to the administration of the estate, the executor may exercise the right. A custodian may then withhold health information from the executor only if it would be authorized to withhold the information from the testator under section 11 of the HIA.

In addition, where litigation is being contemplated, a custodian's questions as to how requested records relate to the litigation could require the executor to disclose privileged communications and litigation strategies to the custodian, who may be the respondent in the litigation. In my view, while section 104 contains implicit authority for a custodian to ask whether an individual is acting in the capacity of an executor of a will and administering an estate, it does not contain authority to require a requestor to divulge privileged communications in order to obtain individual records that are the subject of the access request.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. F-25, ss. 7, 11, 80, 104

Authorities Cited: AB: F2007-029 **ON:** Order MO-2137

I. BACKGROUND

[para 1] On September 16, 2015, the Applicant made a request for access to his deceased mother's health information under the *Health Information Act* (the HIA) from Alberta Health Services (the Custodian) in his capacity as the executor of her estate. The Applicant explained that the requested records were "required for the administration of [his mother's] estate" and that he was making the access request as the "personal representative" of his deceased mother. The Applicant requested:

all records in any form (written, audio, or electronic) including notes from meetings, post-it notes, personal notes, emails or entries / logs, pertaining to [his mother and her care] at the Calgary South Health Campus between the dates of July 2, 2014 and July 2, 2015, written by or within the possession of the following personnel of the South Health Campus [...]

The Applicant provided the names of the Custodian's employees he believed had created or held responsive records. He also provided descriptions of particular categories of records he was seeking from specific employees and assigned item numbers to these categories.

[para 2] On January 25, 2016, the Custodian informed the Applicant that it was closing its file as it considered it abandoned because the Applicant had not paid an initial fee.

[para 3] On February 1, 2016, the Applicant requested review by the Commissioner of the Custodian's response to his access request.

[para 4] On February 29, 2016, the Applicant wrote the Custodian to explain that the access request had not been abandoned. The Applicant also explained that he had paid the initial fee, but that the Custodian had returned it to him, on the basis that the access request was considered complex. The Applicant resubmitted the access request.

[para 5] In a letter dated March 16, 2016, the Custodian wrote the Applicant to inform him of the records it had provided him in response to a previous access request, and in response to a Court order directing it to provide records to the Applicant. However, with regard to two categories of records it stated:

4. All records regarding [the Applicant's mother] between the dates of July 2, 2014 and July 2, 2015, including charting notes between September 01 to 08, 2014 written by [name of employee].

Please be advised that the rule is that a Personal Directive becomes invalid after the death of the maker. As a result of this, you are not entitled to receive the medical records of your mother as the rights granted to you under the Personal Directive are no longer valid since your mother is deceased. Further, the right of access granted under the Health Information Act can only be exercised by the personal representative of a deceased person in relation to the administration of the deceased individual's estate. It is our understanding that you do not require the records for the administration of your late mother's estate and as such you are not entitled to your late mother's medical records. Assuming without conceding that the records are required for the administration of the estate, you are not entitled to the entire medical record. You have received a copy of the Discharge Summary which is sufficient documentation for the administration of the estate.

5. All records regarding [the Applicant's mother] including charting notes, written by Dr. [name of doctor] between September 12 to 15, 2014.

As previously explained, you are not entitled to receive the medical records of your mother as the rights granted to you under the Personal Directive are no longer valid since your mother is deceased. Even if the records are required for the administration of the estate, you are not entitled to the entire medical record. You have received a copy of the Discharge Summary which is sufficient documentation for the administration of the estate.

[para 6] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter.

[para 7] Following this process, the Applicant requested an inquiry regarding the Custodian's response.

[para 8] The Commissioner delegated her authority to conduct the inquiry to me.

[para 9] In its initial submissions, the Custodian stated:

Having had opportunity to review the file in this matter held by Information and Privacy it appears the issues at inquiry arose from the March 16, 2016 reply by that office to deny access to the records referenced in items #4 and #5 of [the Applicant's] access request of February 29, 2016. (These are attached as Attachments 1 and 2 respectively).

[The Applicant's] request was for all records pertaining to [his mother] between July 2, 2014 and July 2, 2015 written by or within the possession of personnel listed in the request. Item # 4 identified records being held between these dates written by [an employee named in item 4 of the Applicant's access request] including charting notes between September 01 to 08, 2014. Item # 5 requested the records including charting notes written by [a doctor named in item 5 of the Applicant's access request] between September 12 to 15, 2014.

On July 28, 2016 [the Applicant] made an access request to Health Information Management ("HIM") located at South Health Campus (Attachment 3). The authority for this release was a court order. This request was for all records relating to [the Applicant's mother] from July 2, 2014 to July 2, 2015 and listed personnel who may have records. Both [the employee named in item #4] and [the doctor named in item 5] were listed as individuals who were involved in the care of [the Applicant's mother].

On August 25, 2016 HIM replied disclosing the "Entire health record (paper & electronic) from Inpatient Admission July 2, 2014-July 2, 2015" a total of 17,476 pages (Attachment 4). The HIM "Request Follow Up Record" states that: "we will provide all documentation maintained in the custody of Health Information Management but are unable to provide any administrative notes" (Attachment 5).

It has been confirmed with HIM that a copy of the entire chart for [the Applicant's mother] would have included all the nurses and treatment notes charted. Given that the records in items# 4 and #5 were to include charting notes it is submitted that these notes have been released to [the Applicant] as part of the July 28, 2016 access request rendering the issues at inquiry moot.

[para 10] The Custodian then provided submissions to the effect that the inquiry was moot, on the basis that it had already provided the responsive records. However, it then argued:

Regarding the denial of access pertaining to the access request of February 29, 2016 (incorrectly dated as March 20, 2016 in AHS' letter of March 16, 2016) AHS explained the denial of access to items 4 and 5:

"... the right of access granted under the *Health Information Act* can only be exercised by the personal representative of a deceased person in relation to the administration of the deceased individual's estate. It is our understanding that you do not require the records for the administration of your late mother's estate and as such you are not entitled to your late mother's medical records. Assuming without conceding that the records are required for the administration of the estate, you are not entitled to the entire medical record. You have received a copy of the Discharge Summary which is sufficient documentation for the administration of the estate."

Ontario Order M0-2137 summarized when requests have been found to "relate to the administration of an estate" where records are:

1. sought to assist in prosecuting a civil claim brought on behalf of the estate for damages that would be recoverable by the estate rather than the surviving family members;
2. required in order to defend a claim against the estate;
3. relevant to determining whether the estate should receive benefits under a life insurance policy;
4. relevant to the deceased financial situation and allegations of fraud or theft of the deceased's property. (Attachment 8)

At the time of the request to Information and Privacy the Applicant did provide AHS with a copy of his mother's will, which confirmed he was the personal representative, he did not at that time provide sufficient evidence on how the information he requested was necessary for the administration of his mother's estate.

In Ontario Order M-1075, the Assistant Commissioner made the following comments about the meaning of "relates to the administration of the individual's estate":

The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the Act, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

In order to give effect to these rights, I believe that the phrase "related to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate." (Attachment 9)

Given the limited amount of evidence Information and Privacy was presented with at the time of the February 29, 2016 access request it is submitted that it interpreted section 104(d) correctly.

[para 11] Once I reviewed the Custodian's submissions, I asked the Applicant whether it was the case that he had received information responsive to items 4 and 5 of his access request, as the Custodian suggested.

[para 12] In response to my question, the Applicant answered:

This correspondence relates to your letter requesting clarification. On page 1 you indicate that it is your understanding that the Custodian, Alberta Health Services (AHS) provided all records in accordance with a Court Order. It is further stated it appears that AHS has provided access under the Health Information Act (HIA). AHS did provide records as instructed in a Judicial Order under the authority of the Fatal Accident Acts of Alberta; however, there is redaction and information missing in the charting notes when [the employee whose records are the subject of item 4] and [the Doctor who is the subject of item 5] provided care to my mother. In previous disclosure I also note that charting notes authored by [the employee whose records are the subject of item 4] contained information relating to another patient which is concerning.

AHS states records were previously provided to my legal representative. This is correct; however, this documentation did not provide the information which is the subject of my request. Furthermore, AHS Privacy Counsel, [...] indicated in previous correspondence that I did not receive full disclosure since "they were not required[.]" How can information be withheld by a representative of the Custodian when the release of this information was directed by a Court of Queen's Bench Justice?

I am seeking information relating to specific events and have not been provided this information in its entirety rather selective information.

In prior correspondence [counsel for AHS] indicates that I received a Discharge Report which is sufficient information to deal with my mother's estate. To the contrary [I] have sought and received legal advice. The release of this medical information is required and may forward a legal remedy for damages that would be recoverable on behalf of the estate.

I am requesting that your office request that AHS provide a complete file and all documentation regarding points #4, #5, as well as information as previously requested that coincides with documented care relating to [my mother] while at the South Health Campus. This information should not be selective nor redacted and disclosure would be complete.

[para 13] Although provided the opportunity to do so, the Custodian made no further submissions.

II. ISSUES

Issue A: Is the Applicant entitled to exercise the right or power of a deceased individual to make an access request pursuant to section 104 of the HIA?

Issue B: If yes, is the Applicant entitled to the records referenced in items #4 and #5 of the Custodian's response letter by reference to section 7 of the HIA?

III. DISCUSSION OF ISSUES

Issue A: Is the Applicant entitled to exercise the right or power of a deceased individual to make an access request pursuant to section 104 of the HIA?

[para 14] Section 104(1)(d) of the HIA sets out the circumstances in which the rights conferred on an individual under the HIA may be exercised by someone else. It states:

104(1) Any right or power conferred on an individual by this Act may be exercised

(d) if the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate [...]

[para 15] The Applicant is the administrator of his mother's estate. He may therefore exercise his mother's right of access under section 7 of the HIA if doing so relates to the administration of his mother's estate.

[para 16] The Applicant has now made it clear that he is seeking the records in order to decide whether to pursue an action in damages on behalf of the estate. As noted above, the Custodian disputes whether the Applicant is entitled to make a request for his mother's health information, and if so, whether the information is being requested in order to administer the estate.

[para 17] In Order MO-2137, to which the Custodian drew my attention, an adjudicator of the Office of the Information and Privacy Commissioner of Ontario held:

In order to satisfy this part of the test, the requester must demonstrate that the request “relates to the administration of the estate”. To meet this requirement, the requester must demonstrate that he/she is seeking access to the records for the purpose of administering the estate [Order MO-1315; *Adams v. Ontario (Information and Privacy Commissioner)*].

Requests have been found to “relate to the administration of the estate” where the records are:

- sought to assist in prosecuting a civil claim brought on behalf of the estate for damages that would be recoverable by the estate rather than the surviving family members [MO-1803, MO-2042]
- required in order to defend a claim against the estate [Order M-919]
- relevant to determining whether the estate should receive benefits under a life insurance policy [Order MO-1315]
- relevant to the deceased financial situation and allegations of fraud or theft of the deceased’s property [Order MO-1301]

Requests have been found *not* to “relate to the administration of the estate” where the records are:

- sought to support a civil claim by family members under the *Family Law Act*, where any damages would be paid to the family members and not to the estate [Order MO-1256]
- sought for personal reasons, for example, where the requester “wishes to bring some closure to . . . tragic events” [Order MO-1563]

The appellants state that as the deceased’s personal representatives it is their “obligation to ensure that all financial records can be reconciled.” The appellants state that they are seeking a “proper accounting to the estate” regarding “services paid for and received” by the deceased at the facility.

The appellants also state that they “may wish to prosecute a claim” against the deceased’s “healthcare providers” for damages resulting from injuries or harm incurred by her prior to her death. In regard to this possible action, the appellants emphasize that this would not be a claim for wrongful death but rather a “possible malpractice suit.” The appellants also submit that a review of the medical file would permit them to “determine whether or not the proper medical care was provided given the language barriers and possible lack of communication.” The appellants submit that the records at issue would provide sufficient information to determine whether or not a medical malpractice suit should be pursued.

[...]

Following and expanding on the reasoning of Adjudicator Liang in Order MO-1525, in my view, where there is some reasonable basis for considering a record or records relevant to a determination of whether the estate should undertake litigation, the requester is entitled to have access to them under section 54(a) in order to make his/her own determination on their possible significance to such a claim.

The appellants in this case have asserted allegations of wrongdoing against the deceased's "healthcare providers" and they are contemplating a tort claim on behalf of the deceased's estate in regard to these allegations. Clearly, they are now looking for evidence to support their allegations and, in their view, the information at issue may be relevant to a determination of whether or not the estate will ultimately proceed with such a claim. In my view, the application of the section does not depend on the relative importance of the records to the allegations being asserted on behalf of the estate, since the extent of their importance can only be determined upon a review of them by the appellants, in their capacities as estate executrices, possibly with the assistance of their legal counsel. Finally, the claim contemplated by the appellants is one that they are entitled to pursue, at law, as plaintiffs. I am satisfied that the records sought are potentially relevant to a determination of whether or not the estate will proceed with such a claim.

Therefore, based on all of the evidence before me, I find that the appellants' request for access is "related to the administration" of the deceased's estate and that the appellants have met the requirements of section 54(a). Accordingly, the appellants are entitled to have the same access to the information in the records as the deceased would have had.

[para 18] In Order MO-2137, the office of the Information and Privacy Commissioner of Ontario held that the phrase "relates to the administration of the individual's estate" includes activities such as reviewing records for the purposes of determining whether to pursue litigation on behalf of an estate. I agree with its analysis.

[para 19] I turn now to the question of whether section 104 of the HIA authorizes the Applicant to make an access request for his deceased mother's health information.

[para 20] While the Custodian questioned in its submissions whether the Applicant was entitled to make an access request for his deceased mother's health information, it also appeared to acknowledge that the Applicant was in fact entitled to do so, given the following statement in its response: "You have received a copy of the Discharge Summary which is sufficient documentation for the administration of the estate". If the Custodian considered that the Applicant was not entitled to make a request for his mother's health information or obtain it, its purpose in providing a discharge summary to the Applicant is inexplicable.

[para 21] In any event, a copy of the Applicant's mother's will is before me. The will names the Applicant as the executor of her will and authorizes the Applicant as administrator of his mother's estate.

[para 22] The Applicant is clear in his submissions that he requires the records to determine whether a legal action should be brought on behalf of his mother's estate. Order MO-2137, on which the Custodian relies, and with which I agree, is clear that an applicant, such as the Applicant, who is the executor of his mother's will, is entitled to make an access request for his mother's health information in order to determine whether the estate will proceed with a claim. I find accordingly that the Applicant is entitled, as the executor of his mother's will, to make an access request for his mother's health information under section 104 of the HIA.

[para 23] The Custodian appears to take the position that its decision to deny access to the Applicant was appropriate, given the information available to it at the time. I am unable to accept this argument. It was open to the Custodian to request that the Applicant provide the necessary authorization to establish that he was acting on behalf of his mother's estate. In my view, it was *necessary* for the Custodian to ask the Applicant for his authorization to administer the estate in order to process the access request reasonably under the HIA; however, for whatever reason, it elected not to do so. A requestor, such as the Applicant, is not necessarily in a position to know what authority a custodian requires before it may act under the HIA, particularly in circumstances where the requestor has experienced a loss. By not informing the Applicant of the information required by the Custodian, the Custodian may have failed in its duty to assist the Applicant.

[para 24] I do not interpret section 104 as authorizing a custodian to step into the shoes of an executor so as to assess, on a record-by-record basis, which particular records he or she needs, once an executor has established he or she is an executor and indicated the request *relates* to the administration of the estate. Section 104 confers the rights or powers of a deceased person on an executor provided *the exercise of the right or power* relates to the administration of the estate. Once the executor of a will has established that *making the access request* – the exercise of a right in this case – *relates* to the administration of the estate, the executor may exercise the right. A custodian may then withhold health information from the executor only if it would be authorized to withhold the information from the testator under section 11 of the HIA.

[para 25] In addition, where litigation is being contemplated, a custodian's questions as to how requested records relate to the litigation could require the executor to disclose privileged communications and litigation strategies to the custodian, who may be the respondent in the litigation. In my view, while section 104 contains implicit authority for a custodian to ask whether an individual is acting in the capacity of an executor of a will and administering an estate, it does not contain authority to require a requestor to divulge privileged communications in order to obtain individual records that are the subject of the access request.

[para 26] In addition, where litigation is being contemplated, a custodian's questions as to how particular records relate to the litigation may require the executor to divulge privileged communications and litigation strategies to the custodian, who may be the respondent in the litigation. In my view, while section 104 contains implicit authority for a custodian to ask whether an individual is acting in the capacity of an executor of a will and administering an estate, it does not contain authority to require a requestor to disclose privileged communications in order to obtain all the records that are the subject of the access request.

[para 27] To conclude, I find that the Applicant was entitled under section 104 to make an access request under section 7 for his deceased mother's health information. I find that the Custodian was not entitled to refuse to provide the requested information on the basis that it considered particular records to be unrelated to the administration of the Applicant's mother's estate.

Is the issue for inquiry moot?

[para 28] I am also unable to find, on the evidence before me, that the issue in this inquiry is moot. While the Custodian argues that it probably provided the information listed in items 4 and 5, the Applicant states that it did not. To support his position, the Applicant submitted a note from a “Health Information Request Follow Up Record” prepared by an employee of the Custodian. This note is dated July 28, 2016 and states:

Spoke to [the Applicant] at length today regarding the request. Points discussed were: he was informed that we will provide all documentation maintained in the custody of Health Information Management, but are unable to provide any administrative notes from any other source. He was given [an employee of the Custodian’s] office number to inquire about obtaining any notes from administrators;

Regarding the fee estimate, he stated that the lawyer told him to “get everything” in spite of the fact that [the Applicant] has previously received a portion of the records and that he is aware of the cost of this [...]

The Custodian also relies on this note as evidence to support its position that it probably provided information responsive to items 4 and 5 to the Applicant.

[para 29] The foregoing note indicates that the Applicant has received only a *portion* of the records, rather than all the records. In addition, the note indicates that such things as administrative notes were excluded from Custodian’s response. Items 4 and 5 of the access request are for notes. While it is possible that the author of the Health Information Record Follow Up Request note was not referring to items 4 and 5 as notes to which the author did not have access (the author refers to administrative notes), given that the author indicates that the Applicant had received only a portion of the requested records previously, I am unable to conclude from the evidence that the Applicant has received information responsive to items 4 and 5. In addition, the Custodian’s refusal to provide information responsive to items 4 and 5 of the access request, but to provide only the discharge summary, also argues against finding that the Custodian provided records responsive to items 4 and 5. Finally, the Applicant’s assertion that the records he requested were redacted and missing information also supports finding that he was not provided the records.

[para 30] As there is evidence before me indicating that the Custodian may not have provided records responsive to items 4 and 5 to the Applicant, I find that the issue for this inquiry is not moot. I must direct the Custodian to search for records responsive to items 4 and 5 and to provide them in a response to the Applicant, unless an exception set out in section 11 of the HIA applies to the information. If the Custodian is unable to locate responsive records, it should document the search it conducted with reference to the factors set out in Order F2007-029.

[para 31] In the interest of ensuring that the Applicant’s rights under the HIA are adjudicated in a timelier manner, I have decided to retain jurisdiction over this matter. If the Applicant is dissatisfied with the Custodian’s search for records responsive to items 4

and 5 or its response to him regarding these records, once the Custodian responds, he may request review of the new response and I will schedule an inquiry in relation to the new response.

V. ORDER

[para 32] I make this order under section 80 of the Act.

[para 33] I order the Custodian to conduct a search for records responsive to items 4 and 5 of the Applicant's access request and to respond to this portion of the Applicant's access request. If the Custodian is unable to locate responsive records, it must document the search it conducted by addressing the points set out in Order F2007-029. The Custodian is not precluded from relying on section 11 of the HIA to withhold records, if it considers this provision to apply.

[para 34] I order the Custodian to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator