



REFUSAL TO CONDUCT AN INQUIRY

under section 64.1 of the *Freedom of Information and Protection of Privacy Act*

Re Health PEI

February 23, 2015

An applicant requested records from Health PEI (the “Public Body”) about a specific patient. The Applicant’s request includes “incident reports from Hillsborough Hospital on [a specific date]” and “any documents, reports, memos, emails and/or findings of an internal review that followed” [underline emphasis in original request]. The Public Body provided the Applicant partial access to 24 pages of records and refused to disclose about 200 other pages, including many duplications.

The Public Body withheld personal information it felt would be an unreasonable invasion of personal privacy under section 15 of the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”). The Applicant raised no concern about the Public Body withholding this personal information. As for the rest of the information the Public Body withheld - the majority - the Public Body claims that it is quality improvement information. This class of information is not mentioned in the *FOIPP Act*, but is broadly defined in the *Health Services Act* at clause 26(g), as follows:

26. (g) “quality improvement information” means information in any form that is communicated for the purpose of, or created in the course of, carrying out a quality improvement activity, but does not include
 - (i) information contained in a record, such as a hospital chart or a medical record, that is maintained for the purpose of providing health services to an individual,
 - (ii) facts contained in a record of an incident involving the provision of health services to an individual,

- (iii) the fact that a quality improvement committee met or conducted a quality improvement activity,
- (iv) the terms of reference of a quality improvement committee, or
- (v) an accreditation report issued by Accreditation Canada.

Section 30 of the *Health Services Act* (the “notwithstanding clause”) says that despite the *FOIPP Act*, no person has a right of access to quality improvement information. It says:

- 30. Notwithstanding the *Freedom of Information and Protection of Privacy Act*, no person has a right of access to quality improvement information, regardless of whether it includes personal information about the person.

The Public Body may disclose quality improvement information (subject to its protection of privacy obligations), but no one can compel it to disclose this information. I reviewed the responsive records and confirm that the information withheld by the Public Body has some personal information, and the rest of it – the majority – is quality improvement information.

The Applicant requested that I review the decision of the Public Body to withhold the quality improvement information and consider section 30 of the *FOIPP Act*. Section 30 of the *FOIPP Act* says a public body must disclose information about a risk of significant harm to the environment, health or safety, or if disclosure is clearly in the public interest. This clause is sometimes called the “public interest override” clause. It says, in part:

- 30. (1) 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, to any person or to an applicant
 - (a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant; or
 - (b) information the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.

The Applicant argues that the public interest override provision in the *FOIPP Act* applies and may supercede the notwithstanding clause in the *Health Services Act* in certain matters of public interest. This is not an accurate statement of the law. The plain reading of the notwithstanding clause in the *Health Services Act* is that it prevails over the *FOIPP Act*.

Not every request for a review proceeds to an inquiry. Section 64.1 of the *FOIPP Act* gives the Commissioner the discretion to refuse to conduct an inquiry if the subject matter has been dealt with in an order of the Commissioner, or if the circumstances warrant.

An objective reading of the notwithstanding provision in the *Health Services Act* is that the Legislature intended the right of access to information, as set out in the *FOIPP Act*, not include the right of access to quality improvement information. Beyond ensuring that the records at issue are quality improvement information, which I herein confirm, I do not have the jurisdiction under the *FOIPP Act* to review the Public Body's decision to withhold quality improvement information from the Applicant.

Because the law is clear, the circumstances warrant that I not conduct an inquiry. Pursuant to section 64.1 of the *FOIPP Act*, I refuse to conduct an inquiry.

Maria C. MacDonald
Information and Privacy Commissioner

Postscript re Judicial Review: Under section 62 of the FOIPP Act, upon receiving a request for review I am to advise all parties of the review procedures. When I perform adjudicative functions, my decisions may be reviewed by the Court on judicial review.