

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 18-HIA 06

File: 18-127-6  
December 13, 2018  
Citation: 2018 NTIPC HIA 3

**BACKGROUND**

This matter arises out of a request by the Applicant for a correction to his personal health information. He is a client of the Hay River Health and Social Services Authority and suffers from chronic pain. Unfortunately, he felt that his medical care providers were not listening to him when he told them of his pain. He therefore asked for a copy of his personal health records. When he received those records, he discovered that he had been labeled as a “drug seeker” and “known narcotic abuser”. He says that he has had a number of knee surgeries, a plate and six pins in his ankle and has chronic arthritis. In his words:

I am not happy at all that I am getting discriminated and judged by the doctors, medical staff and pharmacy staff....These people DO NOT KNOW ME, my personal life style or how I live. These entries in my medical file are not true and I want it out.

He made a request to the health authority asking that certain entries in his record be removed, including several references to medical information about his partner, references to other family members, references to his alleged “drug seeking” and “doctor shopping” and a description of him being “morbidly obese”. While some minor adjustments were made to the records as a result, including removal of references to others, most of the records were not amended as requested by the Applicant. The Applicant therefore requested my office to review the decision of the authority.

**EXPLANATION FROM HAY RIVER HEALTH AND SOCIAL SERVICES**

Hay River Health and Social Services Authority (HRHSSA) referred to and relied on the letter

they sent to the Applicant outlining their decision with respect to his request for correction to his records. No additional submissions were received.

In their letter to the Applicant, they made the following observations:

**1. The use of the term "morbid obesity"**

This term appears several times in the Applicant's records and the Applicant took exception to it. HRHSSA stated that the term had a medical definition and that the Applicant's body mass index accurately put him in that category. They noted that obesity is a well-known risk factor or contributor to many medical conditions, including several for which the Applicant had sought treatment. They maintained, therefore, that reference to the Applicant's obesity was relevant to medical treatment. Notwithstanding this, the Authority agreed to change references to "morbid obesity" to reflect an obesity classification (Class I, II or III).

**2. The use of the phrases such as "insistent and eager", "doctor shopping", "story changed", "narcotic seeking behavior"**

In several instances, the Applicant's records contained the above observations by medical personnel. HRHSSA took the position that these statements constituted professional opinions and refused to remove them from the record.

**3. Third party information recorded in the Applicant's records on several occasions**

There are a number of instances in which medical personnel made written references to the Applicant's fiancé and another relative on the Applicant's medical file. These references were all removed from the Applicant's file as per the Applicant's request.

**4. Second hand opinion material**

During one visit, a notation on the Applicant's file was made, as follows:

“Consulted [AB] and apparently patient is known abuser of narcotics”

The Applicant objected to this third party opinion being on his file. HRHSSA agreed only to change the wording of this to “Consulted with [AB] and [AB] reports that apparently patient is a known abuser of narcotics” so as to “clarify the second hand nature of the information”.

#### **5. Reference to “concerns about narcotics” during a visit for ear drops**

At one point, the Applicant went to the Emergency Room to get some drops for his ears because of a severe ear ache. In the doctor’s note of the visit, the following reference was made “I note the concerns about narcotics on [the] chart”. While the Applicant felt that there was no need for the doctor to make this note because he was not seeking pain medication but drops for his ears, HRHSSA refused to remove this reference “since the presenting concern was pain” and it was “therefore appropriate for the treating physician to review” the pain history and medical file.

#### **APPLICATION OF THE *HEALTH INFORMATION ACT***

Section 119 of the *Health Information Act* provides that an individual who believes there is an error or omission in a record containing personal health information about him or her may, in writing, request the health information custodian to correct the information.

Section 120(1) requires the health information custodian to either make the requested correction and give the applicant a response in writing about the correction OR to give the applicant a response in writing that the correction requested will not be made. Where the health information custodian refuses to make a correction, the response to the applicant must include the reasons for the refusal, the provision of the Act on which the refusal is based, the title and contact information for a person who can respond to inquiries about the refusal and information about the applicant’s right to:

- a) submit a statement of disagreement to the custodian;

- b) request that the custodian attach the correction request to the record that is the subject of the correction request; and/or
- c) request a review by the Information and Privacy Commissioner.

Section 125 of the *Act* outlines circumstances in which a health information custodian may refuse to make a request correction to information. It reads as follows:

125. A health information custodian may refuse to make a requested correction to information in a record if
- (a) the applicant has not demonstrated that the record contains an error or omission;
  - (b) the information consists of a professional opinion or observation that a custodian has made in good faith;
  - (c) the record was not originally made by the custodian and the custodian does not have sufficient knowledge, expertise or authority to correct it; or
  - (d) the custodian has reasonable grounds to believe that the correction request is frivolous or vexatious, or is not made in good faith

If a health information custodian refuses to make a requested correction, sections 126 and 127 provide for a process for the Applicant's disagreement to be recorded and maintained on the health record by filing a "statement of disagreement" which must be appended to the record that is the subject of the correction request or include a cross-reference in the record to the statement.

## **DISCUSSION**

### **1. References to third parties in the Applicant's medical record**

The custodian has agreed to remove references to third parties from the Applicant's record, in

particular references to his life partner and another family member.

There will be instances in which reference to family history may be relevant to an individual's health care and health care history. In most cases, however, personal health information (or personal information) about another person or family member does not belong in a patient's file, particularly where there has been no consent from the third party. I agree with the Applicant that this information should not have been included in his medical record. The health information custodian has agreed to remove all references to the Applicant's partner and another family member and I do not, therefore, propose to comment further.

## **2. References to "morbid obesity".**

The Applicant also objects to the words "morbidly obese" in reference to him in several different places, because he feels that the words are unprofessional, rude and discriminatory on the basis of his physical appearance. However, the health information custodian argues that this is a medical term, determined on the basis of standards developed over time by the medical profession and that a designation of morbid obesity is not simply a comment on an individual's physical appearance but is instead a medical classification based on a number of measurable factors, including body mass index (BMI). Stage 3 or morbid obesity indicates a BMI of 40.0 or greater. Physicians record weight and classify stages of obesity as part of the overall health care of every individual. In this case, the health information custodian has agreed to remove the word "morbidly" and "morbid" in favour of a stage or level of obesity which will relay the necessary medical information without using the word "morbid" or "morbidly". In light of the custodian's undertaking to do this, I will not comment further on this complaint and consider it resolved.

## **3. References to drug seeking behaviours**

The health information custodian has refused to make other requested corrections, in particular, references which suggest that the Applicant abuses narcotics. In order to consider whether or not they were justified in such a refusal, it is important to consider the legislative framework provided for corrections to records containing personal health information.

There are a couple of things to note about these provisions. Firstly, the Act does not provide for a “right” to have a correction made. The only right granted by section 119 is the right to make a request for a correction to be made. There is no obligation to make the change on the part of the custodian. In fact, the legislation specifically acknowledges that there will be instances in which the requested correction will not be made.

Secondly, the information must be “in a record containing personal health information”. There is no requirement that the information fall within the definition of “personal health information”. The information in question clearly meets this requirement as all of it is contained in the Applicant’s health record as maintained by the HRHSSA.

Section 125 provides us with some assistance in determining when a health information custodian “may” refuse to make the requested correction. The first of these is section 125(a) which allows a custodian to refuse to make the correction where the applicant has not demonstrated that the record contains an error or omission.

In this case, while the Applicant is adamant that the information in his health record that suggests he abuses narcotics is false, he also admits quite freely that he suffers from chronic pain and that he has made many visits to the doctor to obtain pain medications. There is clearly a difference of opinion between him and his health care providers on how to label his reliance on pain medications. I am not a trained physician and do not have the expertise to judge the accuracy of either the custodian’s conclusions or the Applicant’s rejection of those conclusions.

In Review Report 18-118, which deals with the correction provisions in the *Access to Information and Protection of Privacy Act*, I accepted the analysis of the Alberta Information and Privacy Commissioner in Order 97-020 as follows:

It follows that if a public body and an applicant dispute a fact, the public body is justified in not correcting the applicant's personal information because the applicant has not met the burden of proving that there is an error or omission of fact. As I have said previously, the burden of proof is on an applicant to prove

that there is an error or omission in the applicant's personal information.

There is nothing definitive from which I can conclude that the information which suggests that the Applicant is a “drug seeker” is not true. What I am left with is two differing opinions and from this, I cannot say that the applicant’s opinion is the accurate one. He has not, therefore demonstrated that the record contains an error. The Custodian was, therefore, justified in refusing to make the requested correction on the basis of Section 125(a).

Under section 125(b), a health information custodian may also refuse to make a requested correction if the information consists of a professional opinion or observation that a custodian has made in good faith. In this case, various health professionals have provided an opinion that some of the applicant’s behaviours suggest that he is a “drug seeker”, which brings with it certain connotations. The Applicant says that he has a legitimate need for the medications to deal with his chronic pain and that there is nothing notorious about his various requests for pain medication.

The issue here is not whether or not the opinions noted in the Applicant’s chart suggesting that he is a “drug seeker” are accurate. The question is whether this is an opinion that a medical health professional could reasonably hold based on the information available to him or her. Once again, it is instructive to review existing jurisprudence dealing with the correction of personal information under *ATIPPA*. In particular, in Review Report 18-181 referred to above, I adopted the findings of the Office of the Information and Privacy Commissioner of Alberta in Order 97-020 as follows:

.....Since an opinion is not a "fact" in the sense that I have discussed, an opinion cannot be an error or omission of fact that can be corrected. It follows that an applicant is not able to meet the burden of proving that an opinion is an error or omission of fact.

.....

In conclusion, a public body exercises its discretion properly under section 35(1) when it does not correct subjective information such as opinions, judgments and

conclusions, as these cannot be corrected.

The various statements recorded in the Applicant's file by medical care professionals which suggest that he exhibits drug seeking behaviour are professional medical opinions. Section 125(b) allows that a health information custodian is justified in refusing to correct such statements and I am satisfied with the custodian's exercise of discretion in this case.

I therefore make no recommendations with respect to the custodian's refusal to remove the following terms and words from the Applicant's records:

drug seeker

insistent and eager

abuser of narcotics

doctor shopping

story changed

#### **4. Third party opinions**

In one instance in the Applicant's file is a notation that a named third party provided the custodian with an opinion that the Applicant was a "known abuser of narcotics". This has the appearance of being a matter of gossip rather than being based on any medical assessment or professional observation. There is nothing on the file that substantiates what that opinion is based on. This entry is different than other references in the Applicant's records which relate to his reliance on pain medication in that it comes from a third party who does not appear to be an employee or agent of the custodian. It is not "a professional opinion or observation that a custodian has made in good faith". Section 125(b) does not, therefore apply. The Applicant is still unable to "demonstrate that the record contains an error" so the custodian "may" refuse to make the requested correction pursuant to section 125(a). However, in light of the "gossipy" nature of this particular entry, and the fact that it does not really seem to add anything to the

information already in Applicant's medical history, I would strongly **recommend** that the custodian exercise its discretion and remove this statement.

#### **5. Reference to Applicant's dependency on pain medication in visit for unrelated issue**

At one point the Applicant says he went to the doctor to get some drops for an earache he was dealing with. He says he was in pain, but was not seeking pain medications during the visit, merely ear drops. There is, however, a notation on his file for this visit that makes reference to "concerns about narcotics" noted from a review of the Applicant's records. The Applicant posits that there is no reason for any mention of narcotics in relation to this visit as he did not ask for pain medication.

There is no error in the statement. There are concerns about the Applicant's use of narcotics noted on the file. The Applicant is not, therefore, able to demonstrate that the statement is not true. The custodian was, therefore, justified in refusing the correction pursuant to section 125(a). While one can question whether or not the entry was appropriate, it is an accurate statement of fact. I therefore make no recommendation with respect to this entry.

#### **6. Statement of Disagreement**

In responding to the Applicant's request for correction, HRHSA included the following statement in the letter to him:

You can submit a "statement of disagreement" setting out the reasons you disagree with the decision to refuse the correction request to the Hay River Health and Social Services Authority.

You can request the Custodian to attach the correction request to the record that is the subject matter of the correction request.

While these two statements are true, they do not provide the Applicant with all of the information he might need to follow up on his right to take further steps to address his concerns. There is nothing that explains what a “statement of disagreement” is, or that there are specific sections of the *Health Information Act* which more fully set out his rights. In fact, section 126(1) defines a “statement of disagreement” as “a statement by an applicant setting out reasons for disagreeing with a decision of a health information custodian to refuse to make a correction to information in a record that was requested in a correction request”. Nor did the custodian’s letter explain that such a “statement of disagreement” must be attached to the record that is the subject of the request or cross-referenced in the record.

In this case, had the Applicant submitted such a statement of disagreement, his concerns would be permanently recorded on his file such that any health care provider who has reason to refer to the Applicant’s medical files would be aware of the Applicant’s disagreement with the statements included so that they could make their own assessment of the situation. I therefore recommend to the Applicant that he prepare a letter repeating his concerns with respect to those items that the custodian has refused to correct, and ask that the letter be attached to each of the relevant files/records.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**