



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-63

PROVINCIAL HEALTH SERVICES AUTHORITY

Alexander Corley
Adjudicator

July 16, 2024

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Summary: An applicant requested information about a medical program administered by the Provincial Health Services Authority (PHSA). In response, PHSA advised the applicant that it did not have responsive records in its custody or under its control and that it was not required to create responsive records under s. 6(2) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator determined that s. 6(2) of FIPPA does not require PHSA to create records containing the information requested by the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* [RSBC 1996, c 165] at s. 6(2).

INTRODUCTION

[1] An applicant requested access to information about care for transgender and gender diverse youth provided by the BC Children’s Hospital Gender Clinic (clinic).¹ The clinic forwarded the applicant’s request to the Information Access, Education, and Intake Division of the Provincial Health Services Authority (PHSA) which responded to the access request and is the public body relevant to this inquiry.

[2] PHSA advised the applicant that responding to part of the access request would require PHSA to create new records at unreasonable operational cost. As such, PHSA told the applicant that it was not required to comply with that aspect of the access request pursuant to s. 6(2) (duty to assist – creation of a record) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).²

¹ Access request dated January 15, 2021.

² For the remainder of this Order, references to sections of an enactment are references to FIPPA unless otherwise stated.

[3] Regarding the rest of the access request, PHSA provided some responsive information to the applicant but withheld the remaining information under ss. 19(1) (disclosure harmful to individual or public safety) and 22(1) (unreasonable invasion of privacy).

[4] Mediation by the Office of the Information and Privacy Commissioner (OIPC) did not resolve the issues between the parties and the applicant requested that the matter proceed to this inquiry.

Preliminary Matters

Scope of the access request and information in dispute

[5] The applicant requested access to two kinds of information about the clinic,

1. Statistical information about the “number, age, and assigned sex at birth” of youth who moved through different stages of the clinic’s treatment process between November 8, 2017, and August 25, 2021 (data points information);³ and
2. the number of “transcompetent mental health assessors” (assessors) and endocrinologists “recognized” by the clinic and the qualifications of these professionals.

[6] The applicant received the information they requested about the clinic’s endocrinologists on July 16, 2021, and the information they requested about the clinic’s assessors on March 12, 2024.⁴ Therefore, I find that the information listed under 2, above, is not in dispute in this inquiry and I will not consider it in this order.

[7] In August 2021, PHSA began treating the portions of the access request relevant to this inquiry as a request for both the data points information and: “all submitted BCCH Gender Clinic’s Referral Forms from March 01, 2020 to current date...”⁵

[8] It is clear from reviewing the material before me that this was never an accurate description of the access request.⁶ Unfortunately, this description is

³ The applicant agreed to narrow their request for the data points information to this time period on August 25, 2021. See Applicant’s email to PHSA’s Manager of Information Access, Education, and Intake (Manager): Manager’s affidavit at Exhibit F.

⁴ PHSA’s letter to applicant dated July 16, 2021, and Fact Report at para. 8; PHSA’s reply submission at para. 4(a)-(f).

⁵ Manager’s affidavit at para. 9.

⁶ See applicant’s affidavit at Exhibit A, which is an e-mail, with enclosure, wherein the applicant objected to the OIPC characterizing the access request in this way. See also e-mail from

reproduced in the OIPC Fact Report for this inquiry.⁷ This has understandably created confusion between the parties regarding the scope of the access request and the records and information at issue in this inquiry.⁸

[9] Taking account of the parties' submissions and all the material before me, I find that only the data points information is in dispute in this inquiry. Specifically, I find that after mediation of this matter concluded the applicant contacted the OIPC to clarify the scope of the records and information they consider to be in issue in this inquiry and to request amendments to the Fact Report, including removing a reference to the applicant seeking to access the referral forms.⁹ Therefore, I find that the "BCCH Gender Clinic's Referral Forms" referenced in PHSA's characterization of the access request are not themselves in dispute but are only relevant in this inquiry as a potential source of the data points information.¹⁰

[10] Finally, given my finding that only the data points information is in dispute and the fact that PHSA does not submit that ss. 19(1) or 22(1) apply to that information, I find that those sections of FIPPA are not in dispute in this inquiry, so I will not consider them further in this order.

New issue - duty to assist, s. 6(1)

[11] In their submission in this inquiry, the applicant alleges that PHSA failed in its duty under s. 6(1) to assist the applicant and to respond to their access request without delay, openly, accurately, and completely. Section 6(1) was not included as an issue in the Fact Report or the Notice of Inquiry but is a new issue raised by the applicant.

[12] Where a party has not sought prior approval from the OIPC to add a new issue to an inquiry and there are no exceptional circumstances which weigh strongly in favour of adding the issue, the OIPC will usually decline to add a new issue after commencement of an inquiry.¹¹ In this case, I find that the applicant did not seek the OIPC's prior approval to add s. 6(1) to this inquiry and that there are no exceptional circumstances which warrant me adding a new issue at this late stage. Therefore, I will not further consider s. 6(1) in this inquiry.

applicant to Manager on August 25, 2021, wherein the applicant explained the scope of their request: Manager's affidavit at Exhibit F.

⁷ See Fact Report at para. 4.

⁸ PHSA's reply submission at para. 2.

⁹ Applicant's affidavit at Exhibit A.

¹⁰ The applicant also clearly states that they have never sought the release of personal information: applicant's submission at p. 1. Having reviewed the referral form templates provided to me by the parties, it is clear to me that all information related to the clinic's patients is personal information in the format in which it would appear on a completed referral form.

¹¹ See, for example, Order F12-07, 2012 BCIPC 10 at para. 6 and Order F10-37, 2010 BCIPC 55 at para. 10.

ISSUE

[13] In this inquiry I must decide whether s. 6(2) requires PHSA to create a record containing the data points information.

[14] FIPPA is silent on the burden of proof in a hearing related to s. 6(2) matters. Past orders have found that the burden is on the public body to show that it has performed its duties and I adopt that approach here.¹²

DISCUSSION

Background

[15] PHSA is a provincial society established under the *Societies Act*¹³ which is responsible for the design and delivery of publicly funded and specialized health care services across British Columbia.¹⁴

[16] The clinic is a program made available by PHSA through BC Children's Hospital which provides healthcare and related services to transgender and gender diverse children and youth.¹⁵ Patients and their families can access the clinic's services by obtaining a referral from their family physician or another healthcare provider with whom they are connected, such as a pediatrician, psychiatrist, or nurse practitioner.¹⁶

Information in dispute

[17] The information in dispute is statistical information about care provided by the clinic between November 8, 2017, and August 25, 2021. I refer to this information as the "data points information" throughout this order. Specifically, the data points information includes the following categories of aggregate information:

- a. the number, age, and assigned sex at birth of youth referred to the clinic;
- b. the number, age, and assigned sex at birth of youth who were recommended for puberty blockers and/or hormones by [an assessor];
- c. the number, age, and assigned sex at birth of youth who were not recommended for puberty blockers and/or hormones by [an assessor];

¹² See, for example, Order F23-55, 2023 BCIPC 64 at para. 6.

¹³ SBC 2015, c 18.

¹⁴ Manager's affidavit at para. 2.

¹⁵ Affidavit of PHSA's Program Director for the clinic (Director) at para. 5.

¹⁶ Director's affidavit at para. 9.

- d. the number, age, and assigned sex at birth of youth who were seen by an endocrinologist;
- e. the number, age, and assigned sex at birth of youth for whom an endocrinologist recommended treatment with puberty blockers and/or hormones;
- f. the number, age, and assigned sex at birth of youth for whom an endocrinologist recommended against treatment with puberty blockers and/or hormones; and
- g. the number, age, and assigned sex at birth of youth who have received puberty blocking or gender-affirming treatment.¹⁷

[18] For convenience, I will refer to the categories of the data points information set out above as “item (a)” through “item (g).”

Creation of a record, s. 6(2)

[19] Where a public body does not have records responsive to an access request in its custody or under its control, s. 6(2) requires the public body to create a new record containing information responsive to the access request if:

- (a) The record can be created from a machine readable record that is in the custody or under the control of the public body using the public body’s normal computer hardware and software and technical expertise, and
- (b) Creating the record would not unreasonably interfere with the operations of the public body.

[20] For s. 6(2) to apply and require the creation of a record, both of these conditions must be satisfied.

Does PHSA already possess responsive records?

[21] Section 6(2) only applies where a public body does not already have the requested records in its custody or under its control. Therefore, the first question is whether PHSA already possesses records that are responsive to the applicant’s request for the data points information.

[22] The parties disagree about whether PHSA already has records containing the data points information in its custody or under its control. PHSA’s position, in short, is that it does not possess records containing aggregate information that would be responsive to the applicant’s request for any of items (a) through (g).

¹⁷ Access request dated January 15, 2021.

[23] The applicant accepts that PHSA does not possess records containing the data points information in the aggregate form they requested. However, the applicant says that PHSA does possess some records that may contain information that is partially responsive to the access request, such as referral forms received by the clinic and information contained in the clinic's patient booking system (booking system).¹⁸ The applicant submits that PHSA must provide them with any partially responsive information contained in these sources independent of whether s. 6(2) requires PHSA to create new records containing the rest of the data points information.

[24] For the reasons that follow, I find that PHSA does not have records in its custody or under its control which are responsive to the applicant's request for the data points information.

[25] Regarding items (b) through (g), the evidence of PHSA's Program Director responsible for overseeing the clinic (Director) is that the clinic does not maintain responsive information in the aggregate form requested by the applicant. Therefore, the Director says, responding to this part of the access request would require PHSA to create a new record which organized and tabulated discrete information contained in numerous patient charts and related materials maintained by the clinic.¹⁹ I accept the Director's evidence and find that it clearly establishes PHSA does not have records that are responsive to the request for items (b) through (g) in its custody or under its control.

[26] Regarding item (a), I find that the referral forms received by the clinic contain fields requesting that the referring healthcare provider enter the date of the referral and the date of birth and sex assigned at birth of referred patients. However, PHSA's evidence is that many referral forms received by the clinic do not have these information fields filled in. Further, the Director says that patient entries in the booking system are created based on information taken from the referral forms and that information gaps on referral forms are therefore reproduced in the booking system.²⁰

[27] Based on this, PHSA says that providing the applicant with accurate information responsive to the request for item (a) would require PHSA to cross-reference the referral forms and booking system entries with other information in the clinic's patient charts and create a new record containing information generated during the cross-referencing.²¹ I accept this explanation, which is reasonable and coherent. Further, from reviewing PHSA's evidence about what is contained in the referral forms and the booking system, I find that information

¹⁸ The applicant's submissions in this regard focus primarily on item (a).

¹⁹ Director's affidavit at paras. 21-22.

²⁰ Director's affidavit at paras. 20 and 24.

²¹ Director's affidavit at para. 24. See also PHSA Pediatric Endocrinologist's (Endocrinologist) affidavit at para. 12(a).

in these sources is linked directly to identifiable patients and healthcare providers and is not in an aggregate form that would be responsive to the access request. In light of these circumstances, I find that PHSA does not have records responsive to the request for item (a) in its custody or under its control.²²

Section 6(2)(a)

[28] Section 6(2)(a) requires me to consider the following questions:

1. Can the requested record be created from a machine readable record?
2. Is the machine readable record in the custody or under the control of the public body?
3. Can the record be created using the public body's normal computer hardware and software and technical expertise?

[29] Section 6(2)(a) does not generally require a public body to utilize specialized expertise beyond its internal capabilities,²³ or to undertake considerable manual effort to create a responsive record out of the information or other records which it does possess.²⁴ Additionally, records which are kept in paper format or otherwise contain information that cannot be readily digitized are not usually considered "machine readable" for purposes of s. 6(2)(a).²⁵

Positions of the parties, s. 6(2)(a)

[30] PHSA's position is that information responsive to the access request is not available to it in a machine readable format. Specifically, the Director's evidence is that the clinic does not independently maintain the aggregate information requested by the applicant but that this information would need to be manually collected from individual patient charts and related records such as the referral forms. Moreover, the Director says that the clinic primarily maintains its patient charts and related materials in paper format and that these records are not generally digitized.²⁶

²² The applicant also raises the existence of a presentation made by the Endocrinologist which, they say, contains some information responsive to the request for item (a) and possibly to the request for item (d). However, having reviewed the Endocrinologist's affidavit, it is clear to me that the existence of this presentation does not establish that PHSA has additional responsive records in its custody or under its control. Concerning any responsive information in the presentation itself, I find that it is already available to the applicant: Endocrinologist's affidavit at paras. 7-10 and Exhibit A.

²³ Order F17-21, 2017 BCIPC 22 at para. 18.

²⁴ Order F10-30, 2010 BCIPC 43 at paras. 15-18.

²⁵ Order 01-31, 2001 CanLII 21585 (BC IPC) at para. 11. See also Order 04-24, 2004 CanLII 45534 (BC IPC) at paras. 7-11.

²⁶ Director's affidavit at paras. 16 and 21-22. See also Endocrinologist's affidavit at para. 12.

[31] The Director explains that while the booking system is electronic and therefore may contain machine readable information, that system only contains partial information which is not responsive to the applicant's request for any of items (a) through (g). Specifically, the Director says that the booking system only contains limited information needed to schedule patient appointments, such as a patient's name and date of birth, contact information, preferred pronouns, and appointment scheduling history. Moreover, the Director says that even this limited information is often incomplete and that confirming the completeness and accuracy of responsive information in the booking system would require PHSA to cross-reference the booking system with the clinic's patient charts and other paper records.²⁷

[32] In response, the applicant argues that some of the data points information must be contained in the booking system and, therefore, in a "machine readable" format. He says that PHSA is required to create a record containing this information independent of whether it is also required to do so regarding information from the clinic's paper-based patient records.

Analysis and conclusions, s. 6(2)(a)

[33] Examining the evidence before me, I see that the clinic's booking system is maintained in an electronic format which I find contains machine readable information. I also find that the booking system and the information it contains are in PHSA's custody because the booking system is maintained by the clinic, which is a PHSA program.

[34] Turning to the other potential sources of the data points information in PHSA's custody or control, I find that they do not contain machine readable information. As noted above, paper records containing information that cannot be easily organized in a digital format are not generally considered "machine readable" for purposes of s. 6(2)(a).²⁸ In this case I find, based on the Director's evidence, that the clinic's patient charts and referral forms are maintained in paper format.²⁹ Further, I find that while these paper records are machine readable, in that they could be rendered in a digital format by, for example, scanning them into a computer, the information they contain could not be digitally catalogued, organized, or manipulated in a straightforward or automated way. Rather, I find that gathering and reviewing the information in these records and converting that information into an aggregate form responsive to the applicant's access request would require the kind of considerable manual effort which s. 6(2)(a) does not require of a public body.³⁰

²⁷ Director's affidavit at para. 20.

²⁸ Order 01-31, *supra* note 25 at para. 11. See also Order 04-24, *supra* note 25 at paras. 7-11.

²⁹ Director's affidavit at paras. 20-21.

³⁰ Order F10-30, *supra* note 24 at paras. 15-18.

[35] Examining the booking system, I find that it does not contain any information responsive to the applicant's request for items (b) through (g).³¹ Turning to the applicant's request for item (a), PHSA says, and I accept, that the booking system contains only limited information that is not fully responsive to the request for that item. In this regard, I find that the booking system contains information regarding a patient's appointment history with the clinic and, in at least some cases, the patient's date of birth or age. I also find that the booking system does not contain any information about patients' assigned sexes at birth.³²

[36] In determining whether the information in the booking system is responsive to the request for item (a) it is important to keep in mind that item (a) is a request for information about patients who were *referred* to the clinic between November 8, 2017, and August 25, 2021. Based on the evidence before me, I do not see that the booking system contains information about when patients were referred to the clinic but only contains information about when patients made appointments to visit the clinic and access its services.

[37] Appointment history information is clearly not a proxy for the patient referral information the applicant requested in item (a) because it is easy to see that some patients may have been referred to the clinic but never followed up to make an appointment and therefore their interactions with the clinic may not be captured in the booking system. Moreover, other patients may have been referred to the clinic outside the time frame responsive to the access request (i.e., before November 8, 2017) but only made an appointment after the start of that time frame; or, have been referred within that time frame but were not entered into the booking system until after August 25, 2021. Taking all of this together, I find that information about patients' appointment histories with the clinic is not responsive to the applicant's request for item (a) and the booking system therefore does not contain responsive information.

[38] Based on the above, I find that PHSA does not have machine readable records in its custody or under its control from which the records requested by the applicant could be created using PHSA's normal computer hardware and software and technical expertise. Given this conclusion, it is not necessary that I also consider s. 6(2)(b) and I decline to do so.

³¹ PHSA provides clear evidence that information responsive to the requests for items (b)-(c), (e), and (f)-(g) can only be obtained by manually reviewing the clinic's patient charts and I accept this. Regarding item (d), PHSA's evidence is that whether a patient saw an endocrinologist is not information stored in the booking system and I also accept this. See PHSA's initial submission at para. 33. See also Director's affidavit at para. 20 and Endocrinologist's affidavit at para. 12.

³² See Director's affidavit at para. 20 and Endocrinologist's affidavit at para. 12(a).

Conclusion – s. 6(2)

[39] I have found above that PHSA does not have machine readable records in its custody or under its control from which the records requested by the applicant could be created using PHSA's normal computer hardware and software and technical expertise. Therefore, I find that s. 6(2) does not require PHSA to create records responsive to the applicant's access request.

CONCLUSION

[40] For the reasons given above, under s. 58 of FIPPA, I confirm that PHSA is not required by s. 6(2) to create records responsive to the applicant's access request.

July 16, 2024

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File Nos.: F21-88241 & F21-88155