



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

Order 02-49

VANCOUVER COASTAL HEALTH AUTHORITY

Jim Sereda, Adjudicator
October 9, 2002

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Summary: Applicant requested physician's records following examination at physician's office in UBC Hospital. Records found not to be in the custody or under the control of Vancouver Coastal Health Authority.

Key Words: custody or control.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1).

Authorities Considered: B.C.: Order 02-29, [2002] B.C.I.P.C.D. No. 29.

Cases Considered: *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

1.0 INTRODUCTION

[1] On October 22, 2001, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Vancouver Hospital & Health Sciences Centre for access to medical information relating to an examination of the applicant by a physician at his UBC Hospital office.

[2] On February 20, 2002, the Health Records Department of the UBC Hospital sent the applicant a response explaining that:

...we were unable to comply with your request as we do not have any of your records in our possession. You were only seen as an outpatient through our Radiology department.

[3] On March 18, 2002, the applicant requested a review, under Part 5 of the Act, of UBC Hospital's decision. The matter did not settle during mediation by this Office, so a written inquiry was held. 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

[4] The only issue in this inquiry is whether or not the VCHA has custody or control over the records requested by the applicant for the purposes of ss. 3(1) and 4(1) of the Act. It has been established in previous orders that the burden of proof in such cases is on the public body. See, for example, Order 02-29, [2002] B.C.I.P.C.D. No. 29.

3.0 DISCUSSION

[5] **3.1 Identity of the Public Body** – A preliminary matter concerns the identity of the public body. The applicant addressed his request to the Vancouver Hospital & Health Sciences Centre. He received a response from UBC Hospital on letterhead that included the words “A Site of Vancouver Hospital & Health Sciences Centre”. This notwithstanding, the role of the public body in this inquiry has been assumed by the Vancouver Coastal Health Authority. In its initial submission, the public body explains that:

The Public Body in this application should properly be referred to as the “Vancouver Coastal Health Authority” which now owns and operates the UBC Hospital.

[6] In subsequent correspondence, counsel for the public body further states as follows:

...the ownership and operation of Vancouver General Hospital and UBC Hospital was assumed by the Vancouver Coastal Health Authority (“VCHA”). Prior to that time, VGH and UBC were essentially operating as one entity at two sites known as the Vancouver Hospital and Health Sciences Centre.

[7] An affidavit from the public body sworn by Darren Kopetsky describes his role as:

...the Director, Medical Affairs (Risk Management) and Information and Privacy Coordinator at Vancouver Coastal Health Authority, which operates the UBC Hospital.

[8] Accordingly, I have accepted on the submissions and evidence before me that the appropriate public body in this inquiry is the Vancouver Coastal Health Authority (“VCHA”).

[9] **3.2 Does VCHA Have Custody or Control?** – The applicant made no submissions concerning whether or not VCHA exercises custody or control of the records he seeks.

Licensing agreement

[10] The VCHA's submission is concise and relies heavily on the proposition that the physician whose records are at issue exercises "ownership" of the records. The physician maintains an office at UBC Hospital, where the applicant visited him. The VCHA submits that the records are "generated, maintained and owned" by the physician and that he is not an employee of the public body. VCHA states that the physician "...occupies his office pursuant to a license from the Public Body through an arrangement with the University of British Columbia." The VCHA points to a written agreement ("Agreement"), submitted with the affidavit of Darren Kopetsky, concerning Vancouver Hospital and Health Sciences Centre and the University of British Columbia. The Agreement deals with how members of the medical staff at Vancouver Hospital and Health Sciences Centre are to use office space.

[11] A difficulty arises with VCHA's reliance on the Agreement concerning the physician's status as a licensee. VCHA points to Article 3.8 of the Agreement, which contains the words: "Licensees shall maintain a complete personal record of ambulatory care patients seen in the premises. These personal records shall be the property of the Licensee." I infer VCHA's position to be that the physician is a licensee subject to the rights and obligations of the Agreement, including Article 3.8.

[12] Central to this position, it follows, is that the physician is bound by the terms of a licensing agreement involving UBC Hospital. Article 9.1 of the Agreement reads as follows:

Each Licensee shall enter into a License Agreement in the form attached as Appendix II hereto, which shall incorporate by reference all the terms and conditions of this agreement and which shall, amongst other things, identify the Premises, the term of the License and the fee payable by the Licensee under the License.

[13] VCHA submits that the physician's records are his property by the authority of a licensing agreement, but counsel for VCHA states that it "...does not have a copy of any written agreement between... [the physician] and the University of British Columbia". Counsel adds:

There is a general understanding between the Hospital and the University and I anticipate that new written agreements will be forthcoming over the next year with the new Health Authorities. None of these arrangements or licenses, oral or otherwise, change the fact that... [the physician's] records are his own.

[14] For his part, in a letter dated June 25, 2002 and submitted in evidence by VCHA, the physician submits that the records are not in the custody of VCHA and that:

It is my clear understanding that the records are my responsibility as private office records, and certainly not in the custody or control of the Vancouver Coastal Health Authority.

[15] He says that “This has always been the case...”. He says he is “...aware of the 1996 Agreement which exists between Vancouver Hospital and Health Sciences Centre (now VCHA) and the University of British Columbia...”, and he refers to the terms of Article 3.8. However, he offers no evidence of an agreement or instrument that ties him to the terms of the Agreement. For the terms of Article 3.8 to give effect to VCHA’s initial position, it is necessary for the physician to be a party to the Agreement or a party to a separate agreement incorporating its terms. There is no evidence on which I can draw such a conclusion.

[16] Therefore, under these circumstances, Article 3.8 is not a relevant factor that weighs on either side of the control issue. Paradoxically, an unintended consequence for the VCHA is to strengthen, if anything, the proposition that the VCHA does not control the records. The Agreement is eliminated as a factor that might have demonstrated any degree of control by the VCHA over the records. The VCHA argues that the Agreement does the opposite, that it establishes control in the hands of the physician alone. Irrespective of how record-keeping rights and obligations in the Agreement may be interpreted, the evidence in this inquiry does not establish that they are binding on the physician or the VCHA.

Other indicators of control

[17] With respect to factors that are relevant in determining control, the VCHA argues as follows (at p. 2 of its initial submission), citing Order No. 11-94:

... the Commissioner reviewed some of the indicators of custody and control set out in the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (“the Manual”) determined [*sic*] that where the record is not created by an officer or member of the Public Body nor created by an outside consultant for a public body nor specified in a contract as being under the control of a public body, the record is not under the custody and control of the Public Body. In addition, the Commissioner examined whether or not the Public Body had the authority to regulate the record’s use and disposition (see page 12). In the Public Body’s submission, it has no such authority nor has it relied on the Records nor does the Public Body have a contract with... [the physician] permitting copying of the Records.

[18] In *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at para. 48, the court listed indicators of control that Commissioner Loukidelis substantially expanded on in subsequent orders. I need not repeat those indicators here (See Order 02-29, paras. 15 and 18).

[19] With respect to the physician’s practice as it relates to his control over patient records, additional relevant facts are contained in his June 25, 2002 letter. He states that his secretary is a member of his staff, not an employee of VCHA, and that his patients are referred directly to him, not through the hospital or to him as part of a clinic. Darren Kopetsky also deposes that the physician does not take patients as a result of those patients having been admitted to the hospital. With respect to the hospital’s perspective on how it relates to the physician and his records, Darren Kopetsky deposes that the hospital has no

way of knowing what patients have records in the physician's office and that the hospital has never taken the position that it has a right of access to the physician's records.

[20] The salient considerations as to whether or not the records in dispute are in the custody or under the control of the VCHA are, in my view, the following:

- UBC Hospital does not have possession of the records;
- no contract specifies that the records are under the control of the VCHA;
- the physician is not an employee or contractor of the VCHA and was not functioning as such when he created the records the applicant seeks in connection with the office visit;
- the physician's patients are referred directly to him and not through UBC Hospital; and
- UBC Hospital has never asserted a right of access to the physician's records.

[21] I find that these factors establish that the VCHA does not have custody or control over the requested records for the purposes of ss. 3(1) and 4(1) of the Act.

Additional records not at issue

[22] The applicant contended in his request for review that the public body failed to produce certain records in addition to the ones he requested that the physician created. He alleges there should be additional records relating to a previous visit with a different physician and that "... UBC Hospital Radiology department should also have record's [sic] pertaining to my appointment and the radiograph requisition." These additional records referred to by the applicant did not form part of his own request to the public body. Nor was the issue raised in this inquiry. It is therefore not a matter properly before me here.

4.0 CONCLUSION

[23] For the reasons given above, I find that the Act does not apply to the requested records because they are not in the custody or under the control of the VCHA for the purposes of ss. 3(1) and 4(1). Under s. 58(3)(a) of the Act I confirm that the VCHA has complied with its duties in responding to the applicant.

October 9, 2002

ORIGINAL SIGNED BY

Jim Sereda
Adjudicator