REPORT **FI-03-44**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **CAPITAL DISTRICT HEALTH AUTHORITY** to deny access to a copy of a review of the circumstances surrounding a patient's death.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **September 3, 2003**

ISSUE: Can a review of the circumstances of a patient's death, said to have been initiated "in contemplation of litigation" be described as a "peer review" and denied under both s.16 and s.19(D)?

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated July 2, 2003, the Applicant asked that I recommend to the Capital District Health Authority that it reverse its decision to deny her a copy of a review of her husband's death during surgery at the Queen Elizabeth Health Sciences Centre (the Hospital).

Background:

The Applicant and the Hospital do not always agree on the particulars of the events, but both parties agree that in January 2003 the Applicant asked for a review of the circumstances surrounding her husband's death at the Hospital. The family was led to believe that the Hospital agreed and, later, that it was being done. When it checked with the Hospital in

March on the progress of the review the family learned the review had not started because someone "dropped the ball."

On Match 25, 2003, according to the Hospital, "Capital Health was instructed by its solicitor to undertake an investigation into the circumstances surrounding (the patient's) medical problems and his death as it was determined that litigation was highly probable given the concerns expressed by the . . . family."

When the review was completed and passed to the Capital Health solicitor on April 12, the family asked for a copy of it. The Hospital refused and told the Review Officer it had made it clear to the family it would receive a verbal summary of its results, but not a copy of the review.

The family was told a copy of the review was denied because it was exempt from disclosure in accordance with two exemptions under the **Act: Sections 16** and **19(D)**:

Solicitor-client privilege:

16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

Certain hospital records

19(D)(1) The head of a local public body that is a hospital may refuse to disclose to an applicant a record of any report, statement, memorandum, recommendation, document or information that is used in the course of, or arising out of, any study, research or program carried on by or for the local public body or any committee of the local public body for the purpose of education or improvement in medical care or practice.

The Hospital's decision:

In response to her application for a copy of the review, the Hospital told the Applicant that she could not be provided with the review because "the review was initiated at the request of the lawyers for the Capital District who wanted to know what happened in your husband's case. The review was conducted by independent medical specialists who are qualified to complete such a 'peer review'. The results of the review will assist with improving our existing systems."

The Hospital's submission to the Review:

In its submission the Hospital, in addition to s.19(D) and s.16, introduced the mandatory exemptions found in **Section 20** of the **Act** which protects against "an unreasonable invasion of the personal privacy of a third party." This exemption was not cited in the decision letter to the Applicant.

Section 20(3)

Among the definitions of "personal information" found in s.3(1) is "anyone else's opinions about the individual." S.20(3) lists the kinds of personal information which, if disclosed, would constitute an unreasonable invasion of the personal privacy of an individual. Subsection 20(3)(g) was specifically cited by the Hospital: It is an unreasonable invasion of personal privacy to disclose personal evaluations of an individual. The Hospital said the review contains such evaluations. It also explained the genesis of internal reviews, or "peer reviews":

> "An internal review is only undertaken at Capital Health after an assessment is completed by the Department of Risk Management and Legal Services in consultation with external legal counsel and a determination is made, reviewing all pertinent facts, that there is

> an opportunity for Capital Health to make improvements in medical care or practice."

Section16

In its arguments with respect to solicitor-client privilege, the Hospital said that the review was done at the request of Capital Health's solicitor "in contemplation of litigation" and "with a view to litigation." It said the solicitor, given the concerns of the deceased's family, and "despite repeated attempts by Capital Health to inform the family of these facts," believed there was a high probability of litigation.

Section 19(D):

With respect to s.19(D), known as the "peer review" clause, the Hospital says such reviews are "vital to the betterment of patient care" and must be kept confidential to ensure that physicians participating are able to engage in "free and frank" discussions.

It cites the Nova Scotia Supreme Court in *Re Freedom of Information and Protection of Privacy Act* (1996), 137 D.L.R. (4th) which heard an appeal a decision of the Cape Breton Hospital to disclose an investigative report regarding suicides at the hospital. The appeal was filed by physicians who participated in the investigation, for which they were interviewed.

> "Communications of the facts of an incident, whether between hospital personnel or involving third parties, do not normally originate in confidence. It cannot conceivably be said it is in the public interest that such facts should be concealed from a litigant who alleges that he has been injured as a result of that incident."

> "Examination and evaluation of the facts of an incident for the purpose of the education of hospital personnel and the improvement of care, practice and services of a hospital is quite a

> different matter. This function includes peer review, criticisms, matters of opinion, and recommendations for changes. Most of these things will originate in the expectation that they will be held in confidence. The confidentiality is necessary to ensure free and frank discussion, expression of opinion and recommendations for changes without the fear that such expression will be used for the benefit of a private litigant."

The Hospital believes that providing the Applicant with a summary of the key findings of the review fulfills its obligations to provide "enough information to allow (the Applicant) to be assured of a high quality of care at the hospital."

The Applicant's submission:

The Applicant made a written and oral submission to the review. In the oral submission the Applicant dealt at length with the experiences of her family while her husband was receiving health care. However, the Applicant also explained why she believed that her request for an "out of province" review was going to be granted. She said the reason she checked on the review three months after asking for it was because she was told it could take that long to complete. She confirmed that the Hospital had told her that someone "had dropped the ball."

The Applicant also said that what she was told during the January 5 meeting with a hospital physician and the patient representative was not confirmed in the verbal summary she received.

With reference to s.19(D), the Applicant claims the review was not performed, to use the words of that exemption, "in the course of a study being carried on by a hospital." She believes the review was carried out at the request of her family after the Hospital had told her that a review was a possible option.

With respect to s.16, the Applicant says the solicitor would not normally be aware of her husband's death and would not have become involved if the patient's family had not approached the Hospital for answers.

Conclusions:

For this Review I will be relying on, as did the Hospital, the *Cape Breton Hospital* case and my earlier Reviews, *FI-97-36*, *FI-01-76*, and *FI-03-09*

In *Cape Breton*, the N.S. Supreme Court ordered the disclosure of the report into the investigation to the families of the deceased. [This case was heard before this **Act** was amended to add s.19(D)].

Section 20(3)(g):

I agree that portions of the report which include evaluations of the work of the physicians are exempt from disclosure.

Section 19(D)

It is notable that the Hospital is denying access to this report under both solicitor-client privilege (s.16) and "peer review" privilege (s.19(D)) although they appear to contradict. While the Hospital claims the report is denied under s.16 because it was initiated "in contemplation of litigation," it also claims that the report was prepared "for the purpose of education or improvement in medical care or practice." The Hospital's decision raises an important question: What was the predominant reason for the decision to investigate and report

on the death of the Applicant's husband . . . to prepare for litigation or to educate and improve medical care?

I will sideline that question while considering first whether the report can be defined as a "peer review."

In previous Reviews I have supported the opinion of health care specialists and others that "peer reviews"are an essential part of a hospital's process to ensure the appropriate delivery of medical services and to allow for the examination of physicians' performance by their peers. However, a peer review record must meet the requirements spelled out clearly in s.19(D). The record must have been used

- in the course of or arising out of
- any study, research or program carried on by or for the hospital
- for the purpose of education or improvement in medical care or practice.

The physicians who appealed the decision of the Cape Breton Hospital provided Justice MacAdam, in the 1996 case cited above, with definitions of "peer review" which he used to assist him reach his conclusions. The definitions include:

- Peer review is an educational tool;
- Per review is a process whereby colleagues sit down and discuss topics of interest;
- Peer review is a process during which physicians look at the delivering of medical services and examine the performance of the physicians as well as themselves;
- Peer review is both ongoing in hospitals and is an important part of quality management and assurance; and

- Peer review is a critical analysis and evaluation of performance and decisions by other persons with similar professional expertise and background.

In Review Report, *FI-01-76*, I noted that the Nova Scotia Medical Society described peer review as part of a hospital's programs and procedures relating to standards and quality assurance necessary to maintain and improve medical care. I interpret these definitions to mean that peer reviews may be triggered by complaints but usually are not.

The definitions appear to contradict the statement made by the Hospital in its submission to this Review that an internal review (which the Hospital describes as a "peer review") is only undertaken after an assessment is completed by Capital Health's Department of Risk Management and Legal Services. In other words the Hospital appears to be saying that peer reviewing is not an ongoing practice in the Hospital but can only be triggered by the Risk Management Department.

In my Review, *FI-97-36*, I examined a decision of the QEII Hospital to deny access to an "internal peer review" related to a physician's actions and the death of a patient. In that particular case I concluded that s.20, a mandatory personal privacy exemption, supported the decision to deny access.

However, the QEII later appointed an "External Review Team" which widely distributed its final report, as well as its recommendations. There was no attempt to claim "peer review" privilege. The Review Team's first recommendation was a caution to the hospital:

> "Publicly funded largely self regulating institutions must guard against the public perception of deliberate attempts to conceal information inappropriately. Beyond the constraints of patient confidentiality and legally protected information, full disclosure

> of extraordinary events and institutional processes is in the best interests of the institution and the public."

In the Cape Breton case, Justice MacAdam said "(i)t is a mistake to attempt to label the report of the authors simply or solely a 'peer review'. Its origins were the suicides of three persons." In this case the Hospital has said, in support of citing solicitor-client privilege, that the origin of the report at issue here was the death of the Applicant's husband.

Justice MacAdam's views on the applicability of privilege in a hospital setting were endorsed in another Nova Scotia Supreme Court case, *MacKenzie v. Kutcher & Samland*, 2003 NSSC 076. Justice Boudreau noted that Justice MacAdam

> "... commented on the distinction between investigations of particular incidents which are or become the subject of litigation as opposed to information gathered by a review committee for the purpose of studying and evaluating hospital care and practice for improvement purposes. In doing so he emphasized the inherent difference in such reviews and the importance of fostering of these relations and reviews for the community."

The Saskatchewan Court of Appeal also recognized the distinction between the records of a hospital disclosing the facts relating to care as opposed to the examination and evaluation of the facts for the purpose of both education and the improvement of health care in a hospital (*Kerr vs. Saskatchewan (Minister of Health)* [1994] 7 W.W.R. 153).

I have concluded that the report at issue is not the result of a "peer review" because it was initiated in contemplation of litigation. The report reaches conclusions but makes no recommendations for improvement in medical care or practice.

Section 16*:*

A landmark decision of the Court of Appeal of Ontario addressed "litigation privilege." In *General Accident Insurance v. Chrusz* (1999), 45 O.R.(3d) 321, the Court adopted a test which requires that the "dominant purpose" for the creation of the record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege. In *Solicitor-Client Privilege in Canadian Law*, Manes and Silver, page 93, the authors say the "dominant purpose" test "really consists of three elements, each of which must be met":

I. "It must have been produced with contemplated litigation in mind. The document cannot have existed before and merely obtained to provide to a solicitor";

II. "The document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation"; and

III. There must be "a reasonable contemplation of litigation."

"Thus," according to Manes and Silver, "there must be more than a vague or general apprehension of litigation." The authors cited *Varga v. Huyer* (1989), 37 C.P.C. (2d) 197, where the Court, dealing with a vehicle accident, rejected the proposition that a mere occurrence of a motor vehicle accident raises the prospect of litigation. For the purposes of this Review, it is fair to say the death of the applicant's husband is not enough to provoke contemplation of litigation. The Applicant may be satisfied by obtaining a copy of the Hospital's report.

I've seen no evidence that there was a reasonable expectation of litigation when the solicitor for Capital Health asked for the review of the death of the Applicant's husband.

Having concluded that this report at issue here is not a "peer review" because it was initiated, predominantly "in contemplation of litigation" and that it could not be denied under solicitor-client privilege because at the time it was initiated there could be no "reasonable" expectation of litigation, I have considered whether severing would be appropriate.

According to Manes and Silver, on page 132:

> "A privileged communication does not lose its privilege merely because it contains matters of fact which are not privileged. In this situation, the matters of fact can be severed from the privileged communication . . . "

Justice MacAdam said "(c)ommunications of the facts of an incident whether between hospital personnel or involving third parties, do not normally originate in confidence."

Part of the report contains factual information and another part contains evaluations.

Recommendations:

That the QE II Health Sciences Centre disclose to the Applicant

- the six page factual report, pages 4 to 9 inclusive, with all personal names severed;
- a written summary of the evaluative part of the report, pages 10 to 12 inclusive, as complete as possible to provide the Applicant with a clear explanation, including some word-for-word extracts, of the reasoning behind the conclusions that were reached and;
- a copy of the conclusions on page 13.

Section 40 of the Act requires the Capital District Health Authority to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of the decision.

Dated at Halifax, Nova Scotia this 3rd day of September, 2003.

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Darce Fardy, Review Officer