

**THE NOVA SCOTIA FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision of the **IWK Health Centre** to deny access to records related to a death at the children's hospital.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE** **January 8, 2004**

**ISSUE:** Whether the decision of the IWK to deny the Applicant access to some records can be supported by **Section 19(D)**, often referred to as the "peer review" exemption.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act** (FOIPOP), dated October 1, 2003, the Applicant asked that I recommend to the IWK Health Centre (the IWK) that it reverse its decision to deny access to certain records.

*Background:*

The Applicant, the parent of a child who died at the IWK, had asked for copies of records related to the death, including:

1. Any specific incident report on the death;
2. Any report from mortality and morbidity rounds;
3. Any review of the care received by the child;

4. Any report or records provided by a named doctor, or under his direction, to the hospital;
5. All records of phone calls from the Applicant to the hospital;
6. The operation report and the discharged report prepared by the named doctor; and
7. Full particulars of a “Root Cause Analysis” if one were done.

The IWK provided the Applicant with copies of the phone call records and the operation report. It said that the records requested in number 1, 4, and 7 do not exist. The Mortality and Nursing Review forms and the minutes of the “Children’s Services Mortality Committee” meeting were denied to the Applicant. It cited the exemption found in **Section 19(D)**:

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 IWK’s submission:*

The IWK, in its representation to the Review Officer, relied on two submissions, one made to an earlier review with respect to s.19(D)(1), and the other made to a committee established to review the FOIPOP Act. In both submissions, the IWK discussed what is called “peer review,” which hospitals and physicians have described as a routine in-hospital process designed to improve patient care, and which must remain private to enable open and frank

discussions among the hospital's medical personnel. It is generally accepted that s.19(D)(1) describes "peer review."

Both submissions cited a Nova Scotia Supreme Court case surrounding a decision of the Cape Breton Hospital with respect to an internal investigation report which followed a number of suicides at the hospital. [*Foley v. Cape Breton Regional Hospital* (1996), 137 D.L.R. (4<sup>th</sup>)]. They quoted Justice MacAdam:

Communications of the facts of an incident, whether between hospital personnel or involving third parties, do not normally originate in confidence . . .

Examination and evaluation of the facts of an incident for the purpose of the education of hospital personnel and the improvement of care . . . is quite a different matter.

The IWK also argued that:

Historically, at common law, the reports used in or resulting from the various policies, procedures and processes adopted by hospitals to evaluate and improve the quality of care being provided by physicians and others in the hospital and which fall within the ambit of "peer review" have been confidential and not available to the public.

The IWK submitted that, whatever interpretation is put on the words "report," "statement," "memorandum" etc. in s.19(D)(1), "the word information at the end of that list is all encompassing and enables a hospital to refuse to disclose 'a record of any . . . information' provided that the other requirements of the Section are satisfied."

*The Applicant's submission:*

The Applicant's solicitor described s.19(D) as "a permissive paragraph" not mandatory and said that, "the Hospital may refuse to disclose peer review documents, but such refusal may be overturned by a review officer if the circumstances warrant."

The Applicant wants to see all of the records because she is not satisfied she has all the facts surrounding her child's death.

**Conclusions:**

No decision should be made on an application for access to information until a public body considers **Section 2**, which requires full accountability from public bodies. The language of this section led the Nova Scotia Court of Appeal to conclude that "the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories." [*O'Connor v. Nova Scotia*, (2001 NSSC 6)].

Reviews FI-01-76 and FI-03-44 related to this same exemption. Parts of them are relevant here, although, factually, they are markedly dissimilar from this case. (These Reviews can be found through the Review Office's website, [www.foipop.ns.ca](http://www.foipop.ns.ca), click on "Review Reports" then on "All Review Reports" to *Canadian Legal Information Institute*.)

*Analysis of s.19(D)(1):*

While *Foley* may be helpful, its use is limited because the case was heard before s.19(D) was passed as an amendment to the FOIPOP Act.

Cases related to internal hospital reports usually raise discussions about the meaning of “peer review.” However, s.19(D)(1) does not use that phrase and I see no need to revisit that definition for the purposes of this Review. Instead I intend to analyse s.19(D)(1) to determine if, in my view, the records at issue here fall under that discretionary exemption.

There are a number of constituent parts to this section which must be met in order for a hospital to successfully claim an exemption under s.19(D):

The documents in dispute must:

- be a record of information;
- that was used in the course of;
- any study, research or program carried on by or for the hospital or any committee of the hospital;
- for the purpose of education or improvement in medical care or practice.

The evidence presented by the IWK satisfies me that the documents are records of information used by a committee of IWK health care workers, for the purpose of improving medical care or practice. The only question remaining is whether the records at issue were used in a “study,” “research” or “program.” In my view, having read the denied documents, I have concluded that they were not part of a “study” or a “research” project.

The IWK offers a definition of “program” as “a course of activities or actions undertaken to achieve a certain result.” I accept this definition.

In FI-03-44, I concluded that s.19(D)(1), did not apply because the records were not part of any study, research or program. The records at issue in FI-03-44 were created by a

committee set up specifically to investigate a patient's death. The hospital itself, in that case, argued the primary purpose of the investigation was "in contemplation of litigation."

In FI-01-76, I reached the same conclusion because, in that case, the matter concerned the recruitment, hiring and dismissal of a physician and that investigating the behaviour and practices of a physician could not be described as part of an ongoing quality assurance program.

In this case, the investigation into the death of the child was done by a standing committee of designated physicians, nurses and other hospital employees. I was provided with the Terms of Reference of the "Children's Services Mortality Committee." In the words of the Terms of Reference: "this is a medical committee with nursing representation, which provides a mechanism for detailed review of events leading up to and associated with deaths occurring at the IWK, brought to the IWK, or of patients recently discharged by the IWK." The committee meets a minimum of nine times a year and special meetings are called as required.

The committee is described as "a health centre committee established for the purpose of quality assurance and specifically for the purpose of studying or evaluating the process of medical or hospital care or practice at the IWK Health Centre."

I've concluded that the committee meetings are part of a "program" established by the IWK to review medical care on a regular basis. The IWK says the program has been operating for many years.

With respect to s.2, I asked the IWK what information it provided to the Applicant at the time of her child's death to determine whether the IWK met the requirements

of that section. I am told much of the information in the records withheld was given to the Applicant, who was also offered an opportunity to sit down with one or more physicians to discuss the circumstances of the child's death.

*Blanket exemption and the use of discretion:*

Section 19(D) is a discretionary example which means that hospitals cannot establish a blanket exemption for "peer reviews." In *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124, the Court, dealing with another exemption, said that this Act does not establish class exemptions from disclosure. Hospitals must not replace the exercise of discretion with a blanket policy that "peer reviews" will not be disclosed.

Public bodies must be prepared to show the Review Officer how they used their discretion in applying discretionary exemptions. The Review Officer may recommend the disclosure of denied records if he disagrees with a public body's interpretation of an exemption.

In an earlier Review, FI-03-13, I recommended that public bodies should "develop guidelines to use when exercising their discretion providing they are not interpreted as binding rules." Suggested guidelines include:

- the general purposes of the Act;
- the nature of the record and the extent to which it is significant or sensitive to a public body;
- whether disclosing the information will increase public confidence in the public body; and
- whether there is a definite and compelling need to release the record.

Having read the denied records, I am satisfied that they meet the requirements of s.19(D), and that the hospital has exercised its discretion and that the exemption allows the hospital to withhold certain records from the Applicant.

**Recommendations:**

That the Hospital confirm in writing to the Applicant its decision to refuse access to certain records.

**Section 40** of the Act requires the IWK Health Centre 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 that decision.

**Dated** at Halifax, Nova Scotia this 8th day of January, 2004.

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Darce Fardy, Review Officer