REPORT **FI-04-67**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the **CAPITAL HEALTH DISTRICT** to deny access to records showing a breakdown of incidents reported and the reasons for them.

REVIEW OFFICER: Darce Fardy

REPORT DATE: March 24, 2005

ISSUE: Whether records showing a breakdown of incidents reported by category are exempt from disclosure under Section **19D(1)** of the *FOIPOP* Act.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated November 5, 2004, The Applicant asked me to recommend to the **CAPITAL HEALTH DISTRICT** that it reverse its decision to deny access to records showing a breakdown of incident reports.

The Applicant had asked Capital Health for access to records "with respect to the Transitional Care Unit 4A and 4B for 2003 and 2004 at the Queen Elizabeth II Health Science Centre." Specifically he wanted:

1. A breakdown of the number of incident reports and the major reasons for them;

2. A copy of any occupational health and safety inspection reports;

3. A copy of any infection control reports;

4. A copy of any air quality reports; and

5. A copy of any other reports about the physical condition of Unit 4A and 4B;

Capital Health provided the Applicant with an infection control report and an accident prevention summary. He was told there were no reports on air quality or the physical condition of the Unit.

The Applicant was denied access to the incident reports because, in Capital Health's view, they were exempt from disclosure under Section **19D(1)** of *FOIPOP*:

> **Certain hospital records**
>
> 19D(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 acting 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 practice.

Capital Health submission:

The submission noted that in an earlier Review, FI-04-50, I parsed s.19D(1) to highlight the necessity for all the parts to be met for this exemption to stand.

The record 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.

Capital Health believes the incident reports to be a record of information, the source of which is the occurrence reporting system, "which represents an ongoing program of quality assurance for which all Capital Health employees are responsible."

> In terms of the 'program' of quality assurance, the Department of Risk Management and Legal Services reviews completed occurrence report forms, and forwards summary reports (such as the Requested Information, for example) to appropriate committees for the purpose of quality assurance under procedures 3.1 and 4.1 of the *Capital Health Administrative Policy and Procedure: Occurrence Reporting,* CH 100-035 . . .
>
> Such information is used by various committees at Capital Health for the primacy purpose of quality assurance; namely to record incidents that occur on various units with a view of studying and attempting to minimize the same . . . It is submitted that both the information contained in the actual occurrent reports provided to Risk Management and Legal Services *as well as* summary information generated by Risk Management and Legal Services from these forms and provided to various Capital Health committees is always intended to be confidential.

Capital Health's submission goes on to say that "the reasoning used to apply the exemption provided in Section 19D(1) of the Act is applicable to this situation insofar as a failure to protect even summary information regarding internal investigations such as occurrence reporting, will discourage 'free and frank' discussions among staff about events that occur on various units. Such reporting is essential for a quality management/risk management program within a healthcare institution."

Capital Health cited a report for Health Canada in which the authors wrote that legislation change that would "enhance reporting of errors and near-misses and should be encouraged and supported" (*Patient Study and Healthcare Error in the Canadian Health Care System,* Baker and Norton, 2004) Capital Health believes s.19D(1) accomplished this.

> (w)e submit that disclosing the Requested Information to the Applicant would more than likely prevent staff on these particular units (and likely other units as well) from reporting actual or potentially harmful situations that could be prevented in the future.

> We therefore submit that the harm created by the disclosure . . . outweighs the public's right to know the details of the findings of this reporting program.
>
> Prior to the development of occurrence reporting for the purposes of internal investigation, fear of disclosure of such information meant that health professionals were reluctant to be involved in quality assurance activities.

The Applicant's submission:

The Applicant addresses the main purposes of FOIPOP found in Section 2 of FOIPOP: to ensure that public bodies are fully accountable to the public; and to provide for the disclosure of all government information with necessary exemptions, that are limited and specific. "Furthermore," he added, "Section 5(2) establishes the right of an applicant to any information that can be reasonably severed."

The Applicant believes public bodies must provide information unless it can be clearly justified by the public body as to why it should not be disclosed. Like Capital Health, he also referred to my Review FI-03-50, in which I cited the Nova Scotia Court of Appeal - *Chesal* - in which the Judge concluded that the *FOIPOP* Act does not contain a class exemption. The Applicant quoted a conclusion I reach from *Chesal* that "(h)ospitals must not replace the exercise of discretion with a blanket policy that 'peer reviews' will not be disclosed." (*Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124)

The Applicant said health care workers do not usually consider incident reports as records that arise out of study, research or some program that would be used for the purpose of education or improvement in medical care practice. "They are usually records of specific problematic incidents which are completed on an infrequent basis by one or more health care workers . . . to document the problems they encountered at a specific time and place."

The Applicant also says he isn't looking for "details of specific incidents or information on the actions or inactions of specific health care providers." He is asking for a count of the number of incident reports and a summary of the major reasons for them.

The Applicant made a second submission having been provided with a copy of the submission of Capital Health, with its concurrence. He said the information he is looking for "is an example of what Capital Health would call an operational measure about which many examples can be found in its "Operational Measures Indicators Report - January 2005" which can be found on Capital Health's website.

The Applicant believes Capital Health should have given him reasons why the exemption could be used to deny his request. He cited *McCormack v. Nova Scotia (Attorney General)* (1993) N.S.J 625 in which Justice Edwards said that " . . . Mere recital of the words of the relevant action is not enough." (Capital Health provided those reasons in its submission to the Review Officer and agreed to share those reasons with the Applicant.)

Conclusions:

Background

The Application follows a newspaper report about a complaint over overcrowding in 4A and 4B and the reaction of Capital Health.

The Applicant's reference to Section 2 results from views found in *O'Connor v. Nova Scotia* (2001) NSCA 132, in which Justice Saunders says in (para 58) that it is important "to bear in mind those features that make the Act unique." Those features are addressed in para 56, where the Judge notes that "the *FOIPOP* Act of Nova Scotia is the only statute in Canada declaring as its purpose an obligation to ensure that public bodies are fully accountable and to provide for the disclosure of all government information 'subject to necessary exemptions that a limited and specific.'

> I 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 other provinces and territories. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision making, and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

Although *O'Connor* involves a department of Government, Justice Saunders' comments should, no doubt, apply to all local public bodies and municipalities as well.

I agree with the Applicant that it is incumbent on Capital Health to consider Justice Saunders' description of Section 2 in using its discretion.

In an earlier Review - FI-03-13 - I recommended that public bodies "develop guidelines to use when exercising their discretion provided they are not interpreted as binding rules." I proposed they consider:

- the general purposes of the Act (s.2);
- 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.

Capital Health did not indicate whether it used this process. In FI-03-50 I concluded that "(n)o decision should be made on an application for access to information until a public body considers Section 2."

From its submission, it is clear that Capital Health's reason for denying the record is that staff will no longer report on "harmful situations" if this occurrence report is disclosed. I have read Capital Health's policy on the reporting of unusual occurrences which it brought to my attention. The first paragraph reminds all staff that they "are responsible for reporting unusual occurrences and adhering to the practice and principles of risk management." Later in the policy, under "procedure" all staff are again reminded of their responsibility for documenting and reporting unusual occurrences.

It is reasonable to conclude that no staff member can be excused from this responsibility and cannot be free to ignore it without consequence.

Although it is noted in the policy that "(o)ccurrence reporting information, statistical data and summary reports are confidential" this does not mean the information is not subject to FOIPOP. A policy does not override the requirements of FOIPOP.

O'Connor, cited above, said, with respect to the labelling of records as "confidential" or "secret," that "(t)he description or heading attached to the document will not be determinative" and "(t)here is no shortcut to inspecting the information for what it really is and then conducting the required analysis."

Whatever the merits of Capital Health's submission, an adverse reaction to disclosure of records by the health care workers is not a factor found in s.19D(1). It may be reasonable for Capital Health to consider this in the use of its discretion, but, as noted above, there are other factors to consider as well.

Although FOIPOP was amended to include s.19D after *Foley v. Cape Breton Regional Hospital* was heard, the words of Justice MacAdam may be pertinent in this case;

> 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. (*Foley v. Cape Breton Regional Hospital* (1996), 137 D.L.R. 4th*)*

The records at issue contain no examination or evaluation of the facts.

The disputed record itself does not contain specific details of the occurrences. The records contain a brief description of the "occurrence" and the number of each record, in the years 2003 and 2004. They contain no names or other details. In fact it is difficult to understand why disclosing the occurrence reports would be any more provocative than disclosing the "Accident

Prevention Summary" or the "Overview of Infectious Control Activities" in 4A and 4B, which were provided to the Applicant and which contain statistics on "abuse," "potential harm," and "near miss." These would certainly be found to be "unusual occurrences."

The operational measures indicators report, referred to by the Applicant and found on Capital Health's website, includes records on matters including *Number of Emergency Patients Leaving without bearing seen by a Physician, Elective Surgery - Cancellation Rates.* I agree with the Applicant that this and other information found in operational measures report appear no more contentious than the record being denied.

I agree with Capital Health that the incident reports contain the first four constituent parts of s.19D(1). However, in my view, a reasonable person would not conclude that a statistical occurrence report, absent of details beyond a brief description of the occurrences, was "used for the purpose of education or improvement in medical care practice."

The same conclusion may not be reached if the occurrence reports contained details, such as views, opinions and actions taken, which would provide management committees with information that could be used to educate staff and improve medical practice within the hospital.

Recommendations:

- That the Capital Health District provide the Applicant with a copy of the occurrence report.

Section 40 of the Act requires Capital Health 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. If a written decision is not received within 30 days, Capital Health is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 24th day of March, 2005.

Darce Fardy, Review Officer