FILE NO. – 2002/067

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] IN RELATION TO INFORMATION REQUESTED FROM REGINA QU'APPELLE HEALTH REGION

[1] [redacted] (the "Applicant") forwarded an Access to Information Request Form dated November 9, 2002 with what is now the Regina Qu'Appelle Health Region (the "Respondent") wherein he stated as follows:

> "Please provide all reports, notices, alerts, or other memoranda prepared by or for the authority on mishaps or medical misadventures including, but not limited to, any cases involving surgeries from August 1, 2002 to November 1, 2002.
>
> As well, please provide all material held by the authority relating to policies and procedures for when instances of mishap or medical misadventure take place."

[2] By letter dated December 12, 2002 the Respondent replied as follows:

> "Your application for access under *The Local Authority Freedom of Information and Protection of Privacy Act* was received by this office on December 2, 2002.
>
> Your first request that the Authority "provide all reports, notices, alerts, or other memoranda prepared by or for the authority on mishaps or medical misadventures including, but not limited to, any cases involving surgeries from August 1, 2002 to November 1, 2002" has been denied
>
> - on grounds of patient confidentiality;
> - under Section 14(1) of the Act, in that the release could "be injurious to the local authority in the conduct of existing or anticipated legal proceedings;
> - under Section 16(1)(b) of the Act in that the records could reasonably be expected to disclose "consultations or deliberations involving officers or employees of the local authority;" and
> - under Section 21 of the Act relating to solicitor-client privilege.

Your second request that the Authority "provide all material held by the authority relating to policies and procedures for when instances of mishap or medical misadventure take place" has been granted. I wish to inform you that the response time of 30 days has been extended by 30 days to January 30, 2003. This extension has been applied under terms of Section 12(1)(b) of the Act, "where consultations that are necessary to comply with the application cannot reasonably be completed within the original period."

If you wish to request a review of the decision to deny your first request or the 30-day delay in meeting your second request, you may do so within one year of this notice. To do so, please complete a "Request for Review" form, which is available at the same location where you applied for access. Your request should be sent to the Saskatchewan Information and Privacy Commissioner at 208 – 2208 Scarth Street, Regina, Saskatchewan, S4P 2J6.

In addition, if you do not receive a response to the second request for access contained in your application by January 30, 2003, you may also file a complaint with the Commissioner using the same procedure outlined above.

Please contact me at 766-5230 should you wish to discuss this matter further.

Sincerely,

Roy A. Derrick
Executive Director, Public Affairs"

[3] The Applicant then forwarded to me a Request for Review dated December 17, 2002 as a result of which I wrote the following letter dated December 19, 2002 to the Respondent:

"December 19, 2002

Regina Qu'Appelle Health Region
2180 – 23rd Avenue
Regina, Saskatchewan
S4S 0A5

Attention: Mr. Roy A. Derrick
Executive Director, Public Affairs

Dear Mr. Derrick:

RE: [redacted] and Regina Qu'Appelle Health Region

File References: F 2002/067 RPR

I am in receipt of a Request for Review from [redacted] in respect to your denial of access to him of certain documentation and in this regard I enclose herewith the yellow copy of his Request for Review form.

Pursuant to the provisions of *The Local Authority Freedom of Information and Protection of Privacy Act* I hereby inform you of my intention to conduct a review.

I will wish to examine the record that contains the documentation that is the subject of the access request. If this document is not too voluminous, I would request that you copy it and forward it to me.

If the documents are too numerous for this to be practical, please advise me and I will arrange to attend at your office to examine the documents.

In your reply, if you wish to expand upon the grounds relied upon by your department for declining to produce the documentation I would be pleased to receive these representations.

I shall await to hear from you in this connection.

Yours truly,

Richard P. Rendek, Q.C.
Acting Freedom of Information
and Privacy Commissioner
Province of Saskatchewan"

[4] The Respondent replied to my letter by letter dated January 22, 2003 which reads as follows:

"This is in response to your letter of December 19, 2002, regarding your file reference F 2002/067 RPR.

You have requested an opportunity to see the documentation that is the subject of [redacted] access request. Because of the size of the record and the nature of the documentation, it would be best if you could review it at our offices. To arrange for a mutually convenient date and time for this review, please contact Ms Pamela Heinrichs, Risk Manager, Regina Qu'Appelle Health Region. Her telephone number is 766-4812.

> In your letter you invite expansion on the ground relied upon by the Region for declining to produce the documents requested by [redacted]. Section 35.1 of *The Saskatchewan Evidence Act* provides us with an additional basis upon which to refuse production of the information requested. In brief, this section provides that quality review information is privileged. Confidential Occurrence Reports are the first step in the quality review process and are, therefore, privileged. This section of *The Saskatchewan Evidence Act* is expressly contemplated as a ground upon which to withhold production and I refer you to section 16(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* in this regard. In addition to the protection afforded by section 35.1, additional protection can be found in section 58 of *The Regional Health Services Act*, which deals with the privileged nature of critical incident information."

[5] By letter dated February 10, 2003 I forwarded a copy of the Respondent's letter to the Applicant and advised him that I would be pleased to receive any further submissions that he might wish to make with respect to this matter as a result of which, I received his fax of February 27, 2003 which reads as follows:

> "Thank you for your letter dated February 10, 2003 and for a copy of the letter dated January 22, 2003 from the Regina Qu'Appelle Health Region. I'm sorry it's taken me a few days to respond. I was seconded to other duties at CBC that kept me from dealing with my usual job.
>
> First, I refer to section 8 of the Saskatchewan Freedom of Information and Protection of Privacy Act, which is reproduced for your convenience:
>
> *'Where a record contains information to which an applicant is refused access, the head* ***shall give as much access to as much of the record as can reasonably be severed*** *without disclosing the information to which the applicant is refused access.'* (emphasis added)
>
> I also refer to section 2(1) of the federal Access to Information Act:
>
> *The purpose of this act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that* ***government information should be available to the public, that necessary exemptions to the right of access should be limited and specific*** *and that decisions on the*

> *disclosure of government information should be reviewed independently of government.* (emphasis added)
>
> It's clear that governments intended to have information laws that make disclosure the norm, and non-disclosure the exception. I reproduce a quote from a November 29, 1993 decision of the Saskatchewan Court of Appeal, which states the principle clearly:
>
> *The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these* ***limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective*** *of the Act.* (emphasis added).
>
> Mr. Roy Derrick continues to deny access to every part of the records I've requested. The district and the health department have each stated publicly that patient safety is of utmost importance. If that's the case, they have little to fear from public scrutiny of their actions.
>
> Thank you for giving me the opportunity to respond."

[6] On February 10, 2003 I attended at the Respondent's offices at the Regina General Hospital to conduct my review of the requested records at which time I examined a sampling of the reports dealing with the mishaps or medical misadventures at the Regina General Hospital. Basically these documents consisted of:

1. Confidential Occurrence Reports which deal with the facts and type of each incident. These reports are dealt with and given to the Risk Management department of the hospital for consideration by the hospital's Quality Assurance Committee.

2. Multidisciplinary Case Report dealing with the cases considered by the Medical Quality Management Committee. This report consists of a chronology of the events of the incident with recommendations for improving the medical care based on the incident.

3. Minutes of the Medical Quality Management Committee meetings which detail the cases considered and possible recommendations for improvement of the medical procedures and practices in the future.

4. Memorandum to be completed for the Medical Quality Management Committee outlining the facts and disposition of each incident.

5. Medical Quality Management Committee Follow-Up Report which provides details on the progress to date of implementing the recommendation.

[7] The Health Region has given the following reasons for refusing to disclose these documents.

Section 35.1 of *The Saskatchewan Evidence Act*

[8] Section 16(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* states the following:

> "(3) A head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 35.1 of *The Saskatchewan Evidence Act*, that, pursuant to that section, is not admissible as evidence in any legal proceeding."

Section 35.1 of *The Saskatchewan Evidence Act* states, in part, the following:

> "(1)(b) "committee" means a committee designated as a quality assurance committee by the board of governors or the bylaws of a hospital to examine and evaluate on an ongoing basis the provision of care and services to patients in the hospital for the purpose of:
>
> (i) educating persons who provide health care; or
>
> (ii) improving the care, practice or services provided to patients by the hospital;
>
> . . .
>
> (2) Subject to subsection (4), a witness in any legal proceeding, whether a party to it or not:
>
> (a) is not liable to be asked and is not permitted to answer any question or to make any statement with respect to any proceeding before a committee; and
>
> (b) is not liable to be asked to produce and is not permitted to produce any report, statement, memorandum,

recommendation, document, information, data or record that is:

(i) prepared exclusively for the use of or made by; or

(ii) used exclusively in the course of, or arising out of, any investigation, study or program carried on by a committee.

(3) Subject to subsection (4), no report, statement, memorandum, recommendation, document, information, data or record mentioned in clause 2(b) is admissible as evidence in any legal proceeding.

(4) The privileges in subsections (2) and (3) do not apply:

(a) with respect to medical and hospital records that are:

(i) prepared for the purpose of providing care and treatment to a patient in a hospital;

(ii) prepared as a result of an incident in a hospital, unless the facts relating to that incident are also fully recorded on a record described in subclause (i); or

(iii) required by law to be kept by the board of governors.
. . ."

[9] It is clear to me upon review of the sample documents that all were prepared exclusively for the purpose of the quality improvement and assurance duties of the Medical Quality Management Committee of the Health Region and are covered by section 35.1(3). The committee and the documents produced for its consideration all relate to improving the quality of the health care in the Region's hospitals and to assist in educating medical professionals. The documents are therefore exempt from disclosure pursuant to section 16(3) of *The Local Authority Freedom of Information and Protection of Privacy Act.*.

Personal information

[10] The Occurrence Reports and specific references in the other reports and committee minutes should also be exempt from disclosure as personal information. Section 23(1)(c) of the Local Authority act defines personal information as including:

> "(c) information that relates to health care that has been received by the individual or to the health history of the individual."

[11] The treatment received by the patient in each incident is an integral part of these reports and minutes. That treatment is clearly part of the "health history" of the individual and should therefore be exempt as personal information pursuant to section 28(1).

Documents Injurious to Legal Proceedings

[12] The Health Region is also relying on section 14(1)(d) of the Local Authority act which provides:

> "(1) A head may refuse to give access to a record, the release of which could:
>
> (d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;"

[13] *The Saskatchewan Evidence Act* provisions make this exemption irrelevant because they clearly indicate that this type of record is not admissible as evidence in any legal proceeding and therefore the documents cannot really be injurious to any legal proceedings. However, had the Health Region not had the protection of the *Evidence Act*, there would be an argument that these documents could be exempt under section 14(1)(d).

Consultations or Deliberations

[14] The Health Region has also argued that the documents are exempt as "consultations or deliberations involving officers or employees" of the Health Region pursuant to section 16(1)(b). This section is clearly broad enough to deny access to the committee minutes.

Solicitor-Client Privilege

[15] Another exemption that the Health Region has claimed is solicitor-client privilege under section 21 of the Local Authority act. I find that this exemption does not apply.

[16] There is no definition of "solicitor-client privilege" in the Local Authority act. The courts however have followed the definition formulated by the Exchequer Court in *Susan Hosiery Ltd. v. Minister of National Revenue* [1969] 2 Ex. C.R. 27, as follows:

> "(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and
>
> (b) all papers and materials created or obtained specifically for the lawyer's "brief" for litigation, whether existing or contemplated are privileged."

[17] In this case, the documents created by and for the quality assurance committee were not communications with the Health Region's lawyer nor were they to be included in the lawyer's brief. The documents would therefore not be exempt under section 21.

Section 58 of *The Regional Health Services Act*

[18] The final exemption that the Health Region has relied on is section 58 of *The Health Regional Health Services Act*. This relates to the duty of the Health Region to prepare reports for critical incidents. However, as of the February 21, 2003 edition of the Saskatchewan Gazette, this section has not yet been proclaimed and therefore does not provide any protection to the Health Region.

[19] The Applicant has argued that non-disclosure should be the exception and has referred me to the statement of Mr. Justice Tallis in *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* (1993), 116 Sask. R. 36 at 41 (C.A.). I believe that I have followed the approach enunciated by Mr. Justice Tallis as, although the Act has a philosophy of full disclosure, in

this case the specific, limited exemption of section 35.1 of *The Saskatchewan Evidence Act* is clearly applicable and must be used to deny disclosure to the documents in their entirety.

[20] By reasons set out above, I would recommend that the Respondent to continue to deny access to the Applicant to the records in question.

[21] Dated at Regina, in the Province of Saskatchewan, this 28th day of February, 2003.

RICHARD P. RENDEK, Q.C.
Acting Commissioner of Information
and Privacy for Saskatchewan