

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT H-2006-001

Saskatoon Regional Health Authority

Summary: The Applicant made an application for access to the personal health information of his late father that was in the custody of Saskatoon Regional Health Authority (“the Region”). The Commissioner found that the Applicant was not the personal representative of his father and therefore was not entitled to access. However, the Commissioner found that the Region nevertheless failed to meet the duty to assist. The Commissioner recommended that although the Region’s denial of the Applicant’s request for access was in keeping with Part V and section 56 of *The Health Information Protection Act*, the Region could nonetheless have addressed a disclosure to the Applicant of a limited portion of the health record consisting of information that relates to circumstances surrounding the death of and services recently received by the father under section 27(4)(e) of the Act. The Commissioner found that access fees do not apply to a ‘disclosure’ under section 27(4)(e) but offered commentary on the fees quoted by the Region and recommended that the Region reconsider its approach to fees for such a disclosure.

Statutes Cited: *The Health Information Protection Act*, [S.S. 1999, H-0.021] ss. 2(m), 2(t), 27(1-4), 32, 34, 35, 36, 38(1), 42(1), 47 and 56; *The Local Authority Freedom of Information and Protection of Privacy Regulations* [Chapter L-27.1 Reg 1 (effective July 1, 1993) as amended by Saskatchewan Regulations 51/94, 58/77/99, 33/2001, 7/2002, 41/2003 and 53/2004] s.5.

Authorities Cited: Saskatchewan OIPC Report 2005-002; *The Health Information Protection Regulations: Draft for Consultation*, Reg. 9.

Other Resources Cited: Saskatchewan OIPC *FOIP FOLIO*, December 2003, p.1.

I BACKGROUND

- [1] The father of the Applicant was admitted to the Royal University Hospital in Saskatoon on January 16, 2004, for treatment. The Applicant, the adult child of the father, received consent from the father to have his name and phone number added to the chart as 'next of kin', which was done by hospital officials. According to Applicant, his father's consent was witnessed by an attending nurse. The Applicant had been described as 'next of kin' on his father's chart during an earlier stay by his father in the same hospital. The father died at Royal University Hospital on February 9, 2004. The Applicant was present with other family members in the hospital when his father died.
- [2] Later on February 9, 2004, the Applicant returned to the Royal University Hospital and requested copies of the charts and records for his late father. He initially went to the 6th floor of the hospital where his late father had been treated. A woman at the desk advised him that the records had already been sent to the Health Records Department and referred him to that Department for access.
- [3] When the Applicant presented at the Health Records Department he was advised that the records had not yet arrived there. An individual in Health Records advised the Applicant that once all of the records had been delivered to the Health Records Department, she would copy them and telephone the Applicant in order that he could arrange to pick them up. The Applicant was advised that the normal charge of \$50 for 'opening the records' would not apply since the file had not yet been closed. The Applicant was advised there would be a \$0.50 per page charge for photocopying.
- [4] Several days later a representative of the Health Records Department advised the Applicant that her supervisor instructed that access would be denied unless the written consent of the Applicant's step-mother was produced, as the step-mother was the legal representative of the Applicant's late father's estate.
- [5] On June 14, 2004, the Applicant again spoke with the Health Records Department. By that time it had become clear that the step-mother would not consent to access for the Applicant. The individual the Applicant spoke with said she would consult further with her supervisor.

- [6] On June 22, 2004, the Applicant received a telephone call from the Health Records Department to advise that the supervisor was communicating with the hospital's lawyer and she would call the Applicant once she had an answer.
- [7] On June 23, 2004, the Applicant received a further telephone call from the Health Records Department to advise that the Applicant would be denied access to his late father's record unless, and until, his step-mother signed the written consent form. The Applicant was advised by the woman in the Health Records Department that there was a lawyer in Regina named Gary Dickson who might be able to help him. She provided the Applicant with the Office of the Information and Privacy Commissioner (OIPC) phone number.
- [8] By letter dated July 15, 2004, to the Office of the Information and Privacy Commissioner, the Applicant requested that the OIPC investigate the refusal of the Region to provide access to his late father's personal health information. The Applicant was advised that he must first apply in writing to the Region.
- [9] By letter dated July 31, 2004, the Applicant wrote the legal counsel for the Region "to formally request access, and copies, of the entire contents of my fathers [name of father] medical file at Royal University Hospital. This would include all his charts, health care directive, death certificate and anything else in the file". The letter proceeds to detail the verbal requests by the Applicant and his conversations with the Health Records staff.
- [9] By letter dated August 30, 2004, the legal counsel for the Region wrote to the Applicant as follows:
- Please allow me to apologize for the delay in responding to your correspondence of July 31, 2004. Unfortunately, the provisions of The Health Information Protection Act require us to obtain the consent of the next of kin in these circumstances which would be the spouse. We urge you to obtain the consent of the spouse or obtain the permission of the Privacy Commissioner who can be contacted at (306) 787-8350.
- [10] By letter dated September 3, 2004, the Applicant wrote the OIPC again and requested that (1) he obtain access to the personal health information of his late father; (2) the \$50 fee for "opening the file" be waived; and (3) the photocopying fee of \$0.50 per page be reduced to "what would be considered a reasonable fee".

[11] By letter dated September 23, 2004, the OIPC advised the legal counsel for the Region that the letter from the Applicant dated September 3, 2004, would be treated as a formal Request for Review under HIPA.

[12] By letter from the OIPC to the Applicant dated November 3, 2004, with a copy to the Region's legal counsel, the OIPC stated as follows:

We have now had the opportunity to review this matter and wanted to share our preliminary observations.

You have raised two issues:

1. Are you entitled as of right to access to the entire medical file of your late father from the Saskatoon Regional Health Authority?
2. If you are entitled to access, are the fees claimed by the Authority appropriate?

The governing law is *The Health Information Protection Act* (HIPA). A copy is available at our website, www.oipc.sk.ca. HIPA guarantees individuals a right of access to their personal health information. It does not permit others to access the personal health information of another person without consent.

There is provision however for surrogates to exercise the rights of another. This is section 56. As I understand it, you are not the "personal representative" with control of your late father's estate. A personal representative would be someone appointed by the court as Executor or Executrix or Administrator of an estate. It does not appear that the other provisions in section 56 would apply. If you think otherwise please give us particulars.

In addition to the right of access, health information trustees, such as the Authority [the Region], have the discretionary power to disclose personal health information without consent in a number of circumstances including the following:

- To the "next-of-kin" or someone with whom the subject individual has a close personal relationship if the disclosure relates to health services currently being provided to the subject individual; and the subject individual has not expressed a contrary intention to a disclosure of that type [Section 27(2)(b)]. This appears to relate only to a living person and not to a deceased person.
- If the subject individual is deceased where the information relates to circumstances surrounding the death of the person or services recently received by the subject individual and the disclosure is made to a member of the subject individual's immediate family or to anyone else with whom the subject individual had a close personal relationship and in accordance with established policies and procedures of the trustee [Section 27(4)(e)].

The Trustee [the Region] however has the discretion to make those disclosures and we would normally not intervene unless we determined that the discretion

was exercised for an inappropriate reason. Nonetheless, it may be that some information “surrounding the death” could be made available to you although there would be no authority for the entire health record to be disclosed to you. We base this on our assumption that you are a member of your late father’s “immediate family”. This would be subject to the “established policies and procedures” of the Authority.

By a copy of this correspondence I am seeking the comments and information from the Authority [the Region] on this matter.

Our initial assessment is that you have no right to the record of your late father without your mother’s [step-mother’s] written consent.

We invite any comments you have with respect to the foregoing observations.

We will deal with the fees and your comments if we determine that you are entitled to access. If you are not entitled to access and there is a proper exercise of the Authority [the Region] not to disclose information, the question of fees would be moot.

We await your comments.

II ISSUES

1. Does *The Health Information Protection Act* apply to this request for access?
2. Did the Region properly apply Part V in denying access to the Applicant?
3. Has the Region properly exercised its discretion to deny disclosure to the Applicant under section 27(2) or (4)?
4. Has the Region met its ‘duty to assist’ in its dealings with the Applicant?
5. Did the Region properly prepare the initial fee estimate?

III DISCUSSION OF THE ISSUES

1. Does *The Health Information Protection Act* apply to this request for access?

[13] For *The Health Information Protection Act* to apply, three elements must be present: (1) there must be personal health information as defined in section 2(m); (2) the personal health information must be in either the custody or the control of an organization; and (3) that organization must be a “trustee” as defined in section 2(t).

[14] In this case the OIPC is satisfied that the information in question is personal health information in that it is with respect to the physical or mental health of the Applicant’s

father, it is with respect to health service provided to the father, and is in part registration information.

- [15] The personal health information at all material times was in the custody of the Region. The OIPC approach is that when the word “custody” is used in section 2(t) it refers to physical possession. The OIPC is satisfied that at all material times, the Region had custody of the personal health information of the Applicant’s late father.
- [16] The Region is a “trustee” since it is a regional health authority as that term is used in section 2(t) of HIPA.
- [17] Since all three elements exist in this case, I find that HIPA applies to this request for access.
- [18] The authority for the OIPC’s review of the decisions of the Region can be found in section 42(1) of HIPA. That provides as follows:

42(1) A person may apply to the commissioner for a review of the matter where:

- (a) the person is not satisfied with the decision of a trustee pursuant to section 36;
- ...
- (c) the person believes that there has been a contravention of this Act.

- [19] Section 36 provides, in part, as follows:

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

- (a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;
- (b) by informing the applicant that the information does not exist or cannot be found;
- (c) by refusing the written request for access, in whole or in part, and informing the applicant:
 - (i) of the refusal and the reasons for the refusal; and
 - (ii) of the applicant’s right to request a review of the refusal pursuant to Part VI;...

2. Did the Region properly apply Part V in denying access to the Applicant?

[20] The relevant sections of HIPA are as follows:

32 Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

...

34(1) An individual may, in accordance with the regulations, make a written request for access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

(2) A written request for access must:

(a) be made to the trustee that the applicant believes has custody or control of the record containing the personal health information; and

(b) contain sufficient detail to enable the trustee to identify the personal health information requested.

(3) An applicant must prove his or her identity to the satisfaction of the trustee.

(4) The right to make an application for review pursuant to section 42 applies only to written requests for access.

...

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;

(b) by informing the applicant that the information does not exist or cannot be found;

(c) by refusing the written request for access, in whole or in part, and informing the applicant:

(i) of the refusal and the reasons for the refusal; and

(ii) of the applicant's right to request a review of the refusal pursuant to Part VI;

(d) by transferring the written request for access to another trustee if the personal health information is in the custody or control of the other trustee.

(2) A trustee that transfers a written request for access pursuant to clause (1)(d) must notify the applicant of the transfer as soon as reasonably possible, and the trustee to

whom the written request for access is transferred must respond to it within 30 days after the date of transfer.

(3) The failure of a trustee to respond to a written request for access within the period mentioned in subsection (1) or (2) is deemed to be a decision to refuse to provide access to the personal health information, unless the written request for access is transferred to another trustee pursuant to clause (1)(d).

...

47 Where a review relates to a decision to refuse an individual access to all or part of a record, the onus is on the trustee to prove that the individual has no right of access to the record or part of the record.

[21] Clearly the personal health information is that of the deceased father and not that of the Applicant. Any right of access must be founded on a combination of section 32 and the surrogate provision in section 56. The latter provides as follows:

56 Any right or power conferred on an individual by this Act may be exercised:

(a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

(b) where a personal guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;

(c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustee, the individual understands the nature of the right or power and the consequences of exercising the right or power;

(d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the trustee, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;

(e) where the individual does not have the capacity to give consent:

(i) by a person designated by the Minister of Community Resources and Employment if the individual is receiving services pursuant to *The Residential Services Act* or *The Rehabilitation Act*; or

(ii) by a person who, pursuant to *The Health Care Directives and Substitute Health Care Decision Makers Act*, is entitled to make a health care decision, as defined in that Act, on behalf of the individual; or

(f) by any person designated in writing by the individual pursuant to section 15.

[22] While the Applicant may be the son of the deceased, that does not entitle him to access the files of the deceased family member under HIPA. Although the Applicant would have had right to see certain portions of his father's health care records while he was living, once the father died, the legal status of the Applicant changed. After death, access rights pertain to the personal representative of the deceased within the meaning of section 56(a). In this case, the personal representative of the deceased is the Applicant's step-mother. Furthermore, there no written designation by the father or the step-mother within the meaning of section 56(f). As a result, the Applicant cannot assert a *right* to access his father's files. The OIPC concludes that inasmuch as it used this reasoning to deny the Applicant access, the Region's denial of access is consistent with Part V of HIPA.

3. Has the Region properly exercised its discretion to deny disclosure to the Applicant under section 27(2) or (4)?

[23] The relevant sections of HIPA are as follows:

27(1) A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

(2) A subject individual is deemed to consent to the disclosure of personal health information:

(a) for the purpose for which the information was collected by the trustee or for a purpose that is consistent with that purpose;

(b) for the purpose of arranging, assessing the need for, providing, continuing, or supporting the provision of, a service requested or required by the subject individual; or

(c) to the subject individual's next of kin or someone with whom the subject individual has a close personal relationship if:

(i) the disclosure relates to health services currently being provided to the subject individual; and

(ii) the subject individual has not expressed a contrary intention to a disclosure of that type.

(3) A trustee shall not disclose personal health information on the basis of a consent pursuant to subsection (2) unless:

(a) in the case of a trustee other than a health professional, the trustee has established policies and procedures to restrict the disclosure of personal health information to those persons who require the information to carry out a

purpose for which the information was collected or to carry out a purpose authorized pursuant to this Act; or

(b) in the case of a trustee who is a health professional, the trustee makes the disclosure in accordance with the ethical practices of the trustee's profession.

(4) A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:

...

(e) if the subject individual is deceased:

(i) where the disclosure is being made to the personal representative of the subject individual for a purpose related to the administration of the subject individual's estate; or

(ii) where the information relates to circumstances surrounding the death of the subject individual or services recently received by the subject individual, and the disclosure:

(A) is made to a member of the subject individual's immediate family or to anyone else with whom the subject individual had a close personal relationship; and

(B) is made in accordance with established policies and procedures of the trustee, or where the trustee is a health professional, made in accordance with the ethical practices of that profession;

[24] Even if the Applicant has no enforceable right of access under Part V of HIPA, it is necessary to consider the disclosure power described in section 27 of HIPA. The *discretion* to 'disclose' is clearly different than the *duty* to respond to a request for access. Disclosure pursuant to section 27 is an exercise of discretion by the trustee. In other words, the trustee *may* or *may not* disclose whereas with an access request under Part V, unless the case meets one of the six circumstances listed in section 38, access must be granted. Our office does not normally substitute our discretion for that of a trustee. However, we will make recommendations in cases where there is some basis to believe that discretionary power has been exercised for an improper purpose, or not exercised at all. In this case, we have reason to suspect that the discretionary powers allowed by section 27 were not exercised at all.

[25] Our reason for suspecting that section 27 was not duly considered by the Region is based on the fact that the Region has offered no explanation of, or reference to, its power under section 27(4)(e). In spite of our letter to the legal counsel dated November 3, 2004, there has been no indication to our office that our comments with respect to section 27(4)(e) have been addressed by the Region. The Region has provided us with no information with respect to the “*established policies and procedures of the trustee*” relevant to the question of disclosure of personal health information to family members or persons in a close personal relationship with a deceased, which is an element of section 27(4)(e), and is information that had been requested in our letter dated November 3, 2004. On the basis of the information now available to our office, we must conclude that the Region has failed to consider this provision.

[26] Given the particular circumstances of this file, I encourage the Region to specifically consider section 27(4)(e) and assess why the disclosure of limited information as contemplated by that provision could not be provided to the Applicant. On the material before me it would appear that because consent had been given to the Applicant (by his father) to access his father’s files when his father was alive, there is no reason to believe that the Applicant’s father would have revoked consent to the Applicant’s accessing the same files after his (the father’s) death. Furthermore, the Applicant applied to see the files in question on the very day of his father’s death, mere hours after he had been living. Had the Applicant asked to see or receive copies of his father’s files a few hours earlier, access would have been granted. Thus, by virtue of modest elapsed time, the Applicant’s ability to obtain information as next-of-kin under section 27(2)(c) (which did not require his father’s consent), or under section 27(1) (with the father’s consent), cannot be applied to this case. Since section 27(2)(c) and the exception in 27(1) cannot be applied to this case because of the intervening death, and because disclosure would be consistent with the expressed wishes of the deceased and consistent with the objectives of HIPA, the use of that discretionary power to disclose would be appropriate.

4. Has the Region met its 'duty to assist' in its dealings with the Applicant?

[27] The 'duty to assist' that HIPA imposes on any trustee is based on the following provision:

Duty to assist

35(1) Subject to sections 36 to 38, a trustee shall respond to a written request for access openly, accurately and completely.

(2) On the request of an applicant, a trustee shall:

(a) provide an explanation of any term, code or abbreviation used in the personal health information; or

(b) if the trustee is unable to provide an explanation in accordance with clause (a), refer the applicant to a trustee that is able to provide an explanation.

[28] I will consider separately the actions of the legal counsel for the Region and the actions of persons in the Royal University Hospital.

[29] The experience of other provinces such as Manitoba and Alberta with a similar health information law is that access to an individual's personal health information is a common problem area. In the December 2003 issue of the OIPC's E-newsletter, the *Saskatchewan FOIP FOLIO*, the following statement appears:

Compliance work [with HIPA] is more difficult in the absence of regulations. The slow pace of regulation development should not however be an excuse for trustee inactivity. Experience with privacy legislation in the health field in other jurisdiction suggests that four particular areas will pose most of the challenges and difficulties for trustee. These areas are:

- (1) Security;
- (2) **Individual access to personal health information;**
- (3) Disclosure outside of the 'circle of care';
- (4) Consent i.e. when it is required, what it consists of, how it is recorded, etc.

All trustees should be actively developing procedures in each of those areas.¹

¹ In addition to sending out each FOIP FOLIO to more than 1000 subscribers throughout Saskatchewan, all issues are archived at our website: www.oipc.sk.ca under the *Newsletters* tab.

Actions of the Region's Legal Counsel

- [30] From the letter of August 30, 2004, written by legal counsel for the Region, it appears that the Region never turned its corporate mind to section 27(4)(e). In addition, that letter purports to summarize the requirements of HIPA, but it does so inaccurately. By reason of sections 35 and 36 of HIPA, in those cases where access to personal health information is refused, the Applicant is entitled to know the specific legal authority for the trustee's decision to refuse access. I am not sure how helpful it is to any applicant to be advised that "...the provisions of *The Health Information Protection Act* require us to obtain the consent of the next of kin in these circumstances which would be the spouse." I note that no copy of the relevant excerpt from the Act was offered to the Applicant to remedy the vagueness in the letter.
- [31] It is not only unhelpful, it is also inaccurate to suggest that the Region is required by HIPA to "obtain the consent of the next of kin in these circumstances which would be a spouse". HIPA allows a surrogate to act in the place of the subject individual and lists six different circumstances. None of them refers to 'next of kin'. The phrase 'next of kin' appears only in section 27(2)(c) in connection with a deemed consent to disclosure. That provision imposes two qualifications that must both be met before there can be disclosure. One of those qualifications is the requirement that "the disclosure relates to health services currently being provided to the subject individual" (s. 27(2)(c)(i) [emphasis added]). The present tense suggests that it can relate only to a living person. The second qualification is the requirement that the "subject individual has not expressed a contrary intention to a disclosure of that type" (s. 27(2)(c)(ii)).
- [32] Section 27(4)(e) authorizes disclosure by a trustee of certain personal health information about a deceased person but refers to "a member of the subject individual's immediate family or to anyone else with whom the subject individual had a close personal relationship not 'next-of-kin'". In other words the persons to whom there can be disclosure is much broader than 'next-of-kin'.
- [33] In addition, the suggestion that the Applicant "obtain the permission of the Privacy Commissioner" implies a troubling misunderstanding of the role of the OIPC and the

review process created by HIPA. The structure of HIPA is that an aggrieved individual who is dissatisfied with the decision of a trustee is entitled to request a review of that decision from the OIPC. The trustee cannot abdicate its statutory role as a trustee and attempt to substitute the OIPC as the decision maker. Nor is the Commissioner a surrogate for HIPA-authorized decision makers such as the Applicant's step-mother.

- [34] Any trustee is responsible to provide individuals with clear and accurate information about the reason for its refusal to provide access and then to describe the right of an applicant to refer the matter to the OIPC together with contact information for that office.
- [35] For the reasons described above, the letter dated August 30, 2004, from the Region to the Applicant is deficient and fails to meet the requirements of section 36(1)(c).

Actions of the Royal University Hospital's Health Records Department

- [36] As noted earlier, individuals in the Health Records Department did a number of things that complied with the requirements of HIPA. They clearly attempted to accommodate the Applicant's request. They apparently did advise the Applicant that he could contact the OIPC and provided him with the relevant contact information. It must also be recognized that this request for access would have occurred at an early stage of the Region's HIPA training and awareness efforts. That may explain to some extent an apparent unfamiliarity with the surrogate provision in section 56, with the role of the OIPC and with the procedure for review in Part VI of HIPA.
- [37] Nonetheless, as one of the largest trustee organizations in the province, it is important that the Region should model best practices in this area. Smaller regional health authorities will look to the Saskatoon Health Region for guidance on the standards they should follow in their own communities. Also, since this is the first report from the OIPC that specifically addresses access to the records of a deceased relative, it may be useful to provide fuller commentary on the relevant provisions in HIPA.

- [38] As noted in the OIPC Report on the HIPA Draft Regulations, HIPA was enacted after an unusually long gestation period. Thus, there was opportunity for Regions to have developed and implemented comprehensive training of staff to HIPA requirements. The request in question was received some 10 months after HIPA was proclaimed.
- [39] Nonetheless, I recognize that the initial conversations between the Applicant and individuals in the Health Records Office appear to have occurred before the actual record in question came into the Health Records area from the health unit where the deceased had been treated. That likely contributed to some misunderstanding as to the right of access when it is a relative is seeking the records of a deceased person.
- [40] The Health Records Department in a regional health authority needs to ensure that all staff are trained to a clear and comfortable understanding of what HIPA requires. This should include a familiarity with Part V of HIPA and the surrogate provision in section 56 of HIPA.
- [41] The right of any individual to appeal to the OIPC is fundamental to HIPA. To comply with the transparency obligations imposed by HIPA on each trustee, trustees must be able to provide their clients with clear accessible information on the right to request a review and the contact information for the OIPC.
- [42] It appears that at no time during the first four months after the Applicant had orally requested that the record of his late father be disclosed to him, was he ever advised that he had a right to make a written request under section 34 and that that would permit him to utilize the right of review by the OIPC. It would have been helpful if the Applicant was referred to HIPA or at least to literature that would explain his rights as an individual and the obligations of the trustee.
- [43] When the current CEO of the Region assumed office in 2005, the OIPC had an opportunity to meet with her and discuss HIPA compliance efforts. The CEO communicated a commitment to improve the Region's level of access and privacy compliance. Subsequent to that meeting, the Region has consolidated access and privacy responsibility in a new senior position of Privacy Officer. This is a very positive move

and one that should translate into improved HIPA compliance. The OIPC is very encouraged by the renewed focus on access and privacy and the demonstrated improvement in HIPA compliance by the region since the summer of 2005.

5. Did the Region properly prepare the initial fee estimate?

[44] The sole fee provision in HIPA provides as follows:

39 A trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information.

[45] There is no fee prescribed in either HIPA or in the current limited Regulation. I note that Saskatchewan Health published *Draft Regulations for Consultation* in 2004. Proposed Regulation #9 would permit a trustee to charge a flat fee not to exceed \$25.00, a search and preparation fee of \$15 per every 30 minutes after the initial half hour (the first 30 minutes would be free) and a photocopy charge of \$0.25 per page.

[46] As described earlier, the Applicant is not entitled, as a matter of right, to access any, let alone all of the personal health information of his late father. The question that follows is whether the fee provision in section 38 would apply to a discretionary disclosure by the Region pursuant to section 27(4)(e).

[47] HIPA makes no explicit provision for fees charged to the recipient when personal health information is disclosed under the discretionary powers allowed in section 27, with or without the consent of the individual. Since section 39 refers to “access” and is found in Part V which deals exclusively with access of individuals to personal health information, it seems unlikely that it was the intention of the Legislative Assembly that this authority would also regulate fees charged to third parties when it discloses personal health information. Those third parties for the most part are other trustee organizations or entities such as police services, insurance companies, lawyers or courts.

[48] In this regard, I also note that the Draft Regulations published by Saskatchewan Health expressly address only fees in respect to the exercise of a right of access under Part V of HIPA. That document includes the statement: “Section 39 of HIPA allows for the

creation of a regulation to establish fees that can be charged by trustees for providing access to records containing personal health information to an individual” [emphasis added].

[49] Nonetheless, the situation addressed by section 27(4)(e) is different than the other 15 subsections in that it most closely approximates an individual seeking access to his own information. Even though section 39 does not apply to a section 27(4)(e) disclosure, I would strongly encourage the Region to ensure that any fee charged to the Applicant is consistent with the fees that would apply to a Part V access request.

[50] Given the jurisdiction of this office to provide advice and commentary to trustees, I offer the following observations:

- The photocopy charge of \$0.50 seems to be excessive. This is double the charge for photocopying permitted under *The Freedom of Information and Protection of Privacy Act* (FOIP) or *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It is also double the proposed photocopy charge in the relevant Draft Regulation.
- The \$50 fee to ‘open the file’ is problematic since it is not in any way related to the work required by a trustee to search for and obtain the record. It constitutes an “application fee”. I note that there is no application fee under the FOIP Act but that there is a \$20 application fee under the LA FOIP Act. In other words, a regional health authority when responding to an access request under LA FOIP is limited to the \$20 application fee plus additional search and preparation fee when appropriate. In the result, the \$50 fee to ‘open the file’ seems excessive.
- I would encourage the Region to review its fees and charges to ensure that they are in line with charges permitted under the FOIP and LA FOIP Act.

IV. CONCLUSION

[51] This file raises some interesting issues of first impression in the interpretation of HIPA. It reinforces the importance of health records staff in any trustee organization being very familiar with the HIPA and notably Parts V and VI. It also underscores the importance of the trustee providing applicants and prospective applicants with clear and accurate information about the right of access. Finally, it illustrates the need to consider alternative means of responding to, even if only partially, requests for information.

V. FINDINGS

[52] That *The Health Information Protection Act* applies to this request.

[53] That the Region acted properly in denying access under section 36.

[54] That the Region failed to exercise its discretion under section 27(4)(e) to consider disclosure of limited personal health information of the deceased to the Applicant.

[55] That the Region failed to meet its duty to assist the Applicant.

VI. RECOMMENDATIONS

[56] That the Saskatoon Regional Health Authority consider whether there can be disclosure of limited personal health information to the Applicant as contemplated by section 27(4)(e).

[57] That the Saskatoon Regional Health Authority continue its current focused efforts to build access and privacy capacity in the Region and to enhance HIPA compliance efforts.

[58] That special attention be paid in terms of training for all employees of the Region who deal with access to personal health information on:

1. access to the information concerning a deceased person
2. the circumstances whereby family members may be able to see personal health information of an individual.

Dated at Regina, in the Province of Saskatchewan, this 20th day of July, 2006.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan