NBRIOR- 2009-03

IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)(b) OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3

Between: **X., Y.**
the Petitioner

And:

Board of Directors
Regional Health Authority B,
The Appropriate Minister

RECOMMENDATION

I. FACTS

1. Under the authority of the *Right to Information Act* ("the Act"),[1] the Petitioner submitted a right to information request dated February 17, 2009 to Regional Health Authority B ("RHA B"), wherein the Petitioner requested access as follows:

> Please provide us with a copy of all reports prepared by Gamma-Dynacare Medical Laboratories in Ottawa concerning the reexamination of 24000 cases diagnosed by Dr. Rajgopal Menon at the Miramichi Regional Hospital between 1995 and February 2007.

[1] *Right to Information Act*, S.N.B. 1978, c. R-10.3.

2. The Petitioner is the legal representative of a number of individuals in a class action lawsuit against RHA B and Dr. Menon.

3. The Vice Chair of the Board of Directors of RHA B provided a response dated March 18, 2009, refusing disclosure to the records pursuant to subsections 6(a) and 6(b) of the Act, advising the Petitioner as follows:

> Pursuant to Sub-Section 6(a) and 6(b) of the Act we consider the Gamma DynaCare reports to be exempted from disclosure on the basis that they disclose information the confidentiality of which is protected by law included but not limited to the *Regional Health Authorities Act* and Regulations there under and the *Privacy Act* [sic], and that they contain personal information of patients. These reports therefore will not be disclosed to you.

4. In a petition dated April 1, 2009, the Petitioner requested a review of RHA B's decision to refuse to disclose the responsive records.

II. BACKGROUND

5. The context of the Petitioner's request has been the subject of substantial media coverage. Dr. Menon had worked as a pathologist at the Miramichi Regional Hospital for several years when a number of complaints about the quality of his work resulted in an investigation of his practice by the College of Physicians and Surgeons of New Brunswick, and a review of all of the pathology work conducted by Dr. Menon at the Miramichi Regional Hospital from 1995 to 1997 as ordered by the then Minister of Health, Michael Murphy.

6. In our review of this case, RHA B informed my staff that 23,080 patient files were identified for review and 21,280 of these cases were referred to an organization called Gamma-Dynacare Medical Laboratories in Ottawa. Gamma Dynacare Medical Laboratories reviewed the slides of each of the cases and prepared addendum reports which were added to Dr. Menon's original reports in the patient health records held by RHA B.

7. On September 9, 2008, Dr. Menon formally requested copies of the completed Gamma-Dynacare Medical Laboratories reports from RHA B under the Act.

8. The President and CEO of RHA B replied on October 10, 2008, refusing disclosure of the records under subsections 6(a) and (b) of the Act on the grounds that the reports are information the confidentiality of which is protected by law and that they contain personal information of patients.

9. As a result of RHA B's refusal to disclose the requested information, Dr. Menon then referred the matter on October 28, 2008 to the Court of Queen's Bench of New Brunswick under subsection 7(1)(a) of the Act.

10. Based on additional information presented at the hearing of this matter relating to another independent review of some of his cases, Dr. Menon reformulated his request to include only copies of the reports of Gamma-Dynacare Medical Laboratories and reviews done in which discrepancies or misdiagnoses were said to have occurred, which amounted to approximately 5,267 tests.[2]

11. The Court rendered its decision on Dr. Menon's modified request on January 13, 2009, finding as follows:

> Dr. Menon however, does not require any patient identifiers. Such information is not necessary in any examination or analysis of the many reports completed in the review of his work. The confidentiality of the patients or persons involved, and there are many, can therefore be respected if patient identifiers are removed from any of the matters that would be disclosed. With the redaction of such information such reports will be, as I understand it, anonymous. Editing to remove the identify [sic] of the persons involved and providing Dr. Menon with copies of such edited reports would satisfy his requirements.[3]

12. The Court further provided:

> Editing to remove all personal identifiers from such records prior to giving the information to Dr. Menon *will as a consequence not violate section 6 of the Right to Information Act*.[4] (emphasis added)

13. Following this analysis, the Court ordered the RHA to disclose the requested records, subject to revisions to remove personal information as follows:

> After carefully reviewing this request, it is therefore my conclusion that the order that is appropriate in the present situation is to direct the respondent to give and provide edited copies of the records requested subject to the removal of all personal information or identifiers from such records prior to disclosure. In making the information available to Dr. Menon in this fashion, privacy rights of individuals will be respected and the right to information in such a sensitive and significant situation as this will be accomplished.[5]

III. APPLICABLE LEGISLATION

14. The relevant provisions of the *Right to Information Act* are as follows:

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[2] *Menon v. Regional Health Authority B*, 2009 NBQB 005 (unreported), at para. 4.
[3] *Ibid*., at para. 34.
[4] *Ibid*., at para. 42.
[5] *Ibid*., at para. 43.

1 In this Act

"identifiable individual" means an individual who can be identified by the contents of information because the information

(a) includes the individual's name,
(b) makes the individual's identity obvious, or
(c) is likely in the circumstances to be combined with other information that includes the individual's name or makes the individual's identity obvious;

"personal information" means information about an identifiable individual;

2 Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any department to which this Act applies.

2.1 Without limiting section 2, subject to this Act, every individual is entitled to request and receive information about himself or herself.

3(2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.

4(2) Where a portion of a document contains some information that is information referred to in section 6, and that portion is severable, that portion of the document shall be deleted and the request with respect to the remaining portion of the document shall be granted.

6 There is no right to information under this Act where its release

(a) would disclose information the confidentiality of which is protected by law;
(b) would reveal personal information concerning another person;

15. In support of its claim that the requested information is confidential by law under 6(a) of the Act, RHA B relies on section 65 of the *Regional Health Authorities Act*,[6] which provides:

65. No person shall disclose information relating to the health services provided to, or the medical condition of, an individual, without the consent of the individual, except:

[6] *Regional Health Authorities Act*, S.N.B. 2002, c. R-5.05.

(a) for the purposes of the administration and enforcement of this Act and the regulations,
(b) as required by law, or
(c) as authorized by the regulations.

16. The applicable regulations are Regulation 2002-27 of the *Regional Health Authorities Act*, where section 24 incorporates Regulation 92-84 under the *Hospitals Act*. Section 21 of Regulation 92-84 sets out specific situations for the release of a patient's health record as follows:

> 21. A clinical record of a patient shall be kept confidential except under the following circumstances where a copy of the record may be disclosed by the chief executive officer or a person designated by the chief executive officer:
>
> (a) upon the written request of a chief executive officer of another regional health authority when required for the care, diagnosis or treatment of the patient;
> (b) upon the oral request of the patient's medical practitioner or oral and maxillofacial surgeon who is a member of the medical staff of the regional health authority;
> (b.1) upon the oral request of a nurse practitioner who is attending the patient and who is an employee of the regional health authority;
> (c) upon the written request of the patient's medical practitioner or oral and maxillofacial surgeon who is not on the medical staff of the regional health authority; unless an emergency situation exists in which case an oral request is sufficient;
> (c.1) upon the written request of the patient's nurse practitioner who is not an employee of the regional health authority, unless an emergency situation exists in which case an oral request is sufficient;
> (d) to any person, including the patient, upon the written request of the patient;
> (e) in the event of death or incapacity of the patient, upon a written request signed by the next of kin or legal representative of the patient;
> (f) for scientific research that has been approved by the board of directors, for teaching purposes by the medical staff of the regional health authority or for the review of the professional work in a hospital facility operated by the regional health authority;
> (g) upon the order of a court of competent jurisdiction;
> (h) upon the direction of the Minister;
> (i) upon the written request of a person designated by the Minister;
> (j) upon the written request of a representative of the Workers' Compensation Board with respect to cases for which that Board is responsible; or
> (k) upon the written request of the Department of National Defense or Department of Veterans Affairs with respect to a patient who is a member of the Armed Forces of Canada or who is otherwise eligible to receive services from either department.

IV. ANALYSIS

17. The Petitioner's request for copies of the Gamma-Dynacare Medical Laboratories' reports is the same as Dr. Menon's previous request of September 2008, to which RHA B has provided the same response as it did Dr. Menon's initial request for full access to all records under review, claiming the 6(a) and (b) exemptions under the Act.

18. However, as discussed above, the Court of Queen's Bench's consideration of Dr. Menon's narrowed request resulted in the Court ordering RHA B to disclose the appropriately anonymized responsive records. The Court did not address the question of the other non-anonymized records as they were no longer the subject of Dr. Menon's request.

19. In light of this background, the responsive records to the Petitioner's request fall into two categories: the anonymized review cases as a result of the Court's decision in Dr. Menon's prior request, and the non-anonymized remaining cases. In RHA B's process of identifying all relevant responsive records and determining its response to the Petitioner's request, it is my opinion that both sets of records must be separately contemplated and reviewed to determine whether some information could be released to the Petitioner.

20. It is my opinion that RHA B's refusal to disclose any information based on the 6(a) and (b) exemption provisions was based on a strict interpretation of both the wording of the request and the exemption provisions of the Act and that in formulating its response, RHA B did not fully consider the purpose or other applicable provisions of the Act.

21. Section 2 of the Act provides that "every person is entitled to request and receive information relating to the public business of the Province…" In considering the purpose of the Act, the Court of Queen's Bench has determined:

> The basic policy or philosophy of the Act is directed to disclosure, not secrecy. Disclosure may be denied only if the information falls clearly within one or more of the excepting paragraphs of section 6.[7]

22. Further, subsection 4(2) provides that where a document contains information that can be exempted under the provisions of section 6 and where such information is severable, "that portion of the document shall be deleted and the request with respect to the remaining portion of the document shall be granted."

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[7] *Re: Daigle*, [1980] 30 N.B.R. (2d) 209 (NBQB), at para. 13.

23. With these provisions of the Act in mind, I will now proceed with the analysis of the two sets of responsive records.

A. ANONYMIZED RECORDS

24. As my staff was granted access to the anonymized records in the conduct of the review of this matter, I can confirm that these records remain under the care and control of RHA B and are thus to be considered as responsive records to the Petitioner's request.

25. Given the Court of Queen's Bench's finding that the release of these particular review records with all personal information and identifiers removed would not constitute a violation of section 6 of the Act, the issue is whether the Petitioner's request can be distinguished with regards to these records in order to support RHA B's claim of this information being exempted under subsections 6(a) and (b) of the Act.

26. As RHA B has already severed all personal information and identifiers for this set of records, it is impossible for me to find that RHA B properly applied the 6(b) exemption to these records in its response to the Petitioner's request. Further, RHA B's reliance on the 6(a) exemption is entirely founded on the records being patients' health records which contain identifiable information that is protected from disclosure under the various provisions of the *Regional Health Authorities Act* and associated regulations the *Hospitals Act*.

27. With regards to the set of anonymized records, RHA's claim that the exemption provisions under subsections 6(a) and (b) apply to these records must fail.

28. Thus, the sole distinguishing factor between Dr. Menon's and the Petitioner's respective requests with regards to these particular records is the identity of the requestor, which, for the reasons set out below, I do not find to be relevant to this analysis.

29. While the Court of Queen's Bench decision mentions in *obiter* that "it only seems fair that he [Dr. Menon] have the opportunity to review the findings of those who question his work or say that he erred,"[8] the Court's decision was not based on a finding that Dr. Menon had a specific right of access based on his identity as the individual whose work was under scrutiny.

30. While the Act provides a right of access to one's own personal information under section 2.1, Dr. Menon's request was not framed in this context, nor did the Court consider his request in this context.

[8] *Ibid*., at para. 19.

31. The Act does not specify that the identity of the requestor or the reasons for requesting the information as relevant factors to be considered in the determination of whether information is eligible for release beyond the right to access one's own personal information as per section 2.1.

32. The Court referred to the purpose of the Act as set out in section 2, emphasizing that the Act provides "*every person* with a general right of access to information relating to the public business of the Province and any activity or function carried on or performed by any department to which the *Right to Information Act applies*."[9] (emphasis added)

33. It is thus my finding that the analysis in the present case does not change with the identity of the Petitioner as Dr. Menon's request for the same information was not framed as a request for his own personal information. The Court's finding that the release of the anonymized records to Dr. Menon would not constitute a violation of section 6 of the Act, and reading this in conjunction with section 2, I conclude that the release of the anonymized records to any person would not constitute a violation of section 6 of the Act.

34. Further, subsection 4(2), as discussed above, provides that where information exempted from release under the provisions of section 6 can be severed, the responsive records are to be redacted in accordance with the appropriate exemption provisions and the remaining unsevered portion be provided to the individual making the request.

35. Subsection 4(2) creates a positive duty for public bodies to consider, in determining whether to withhold information under the relevant provision(s) of section 6, whether the claimed exemption provisions apply to the entire document or only to certain pieces and types of information contained within responsive records. Subsection 4(2) creates a further positive duty for public bodies to appropriately sever exemption-claimed information and to disclose the remaining unsevered portions.

36. I find that the positive duties as set out in subsection 4(2) apply to all requests for information where a public body determines that one or more of the exemption provisions of section 6 apply to a responsive record. With respect to the responsive anonymized records, RHA B's duty to sever the portions of the records that contain personal information has already been met in preparing the records in accordance with the court order in the Menon case and that all RHA B need do to complete its obligations under subsection 4(2) with respect to these records is to release copies to the Petitioner.

37. While the Court did not specifically cite subsection 4(2) in its analysis of Dr. Menon's case, the Court's finding is in keeping with the obligations as set out in the provision.

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[9] *Ibid.* at para. 22.

38. As the Court's decision in Dr. Menon's case has already determined that the release of the anonymized review cases would not constitute a violation of section 6 of the Act, I hereby adopt the Court's reasoning with respect to these records and recommend that copies of such records be provided to the Petitioner.

B. NON-ANONYMIZED RECORDS

39. Regarding the non-anonymized records, RHA B holds these records in their original form in its computerized patient record database for records from 1999 forward and in paper storage surplus for records prior to 1999.

40. These records, in their original form, clearly identify the names of the patients, dates of birth, test results, diagnoses, etc. The complete records in their current form contain large amounts of highly sensitive personal information, the confidentiality of which is protected by law in accordance with subsections 6(a) and (b) of the Act.

41. However, as discussed above with regards to the set of previously anonymized records as the Court had ordered to be released in Dr. Menon's case, it is possible to sever the personal information and identifiers from the responsive records and to create a set of anonymized records. I find that the obligations under subsection 4(2) apply to the set of non-anonymized records.

42. Recognizing the considerable amount of time and resources that would be required to complete this task, I recommend at this time that RHA B contact the Petitioner directly to determine if he wishes to proceed with the request in light of the above findings, and if so, that RHA B provide the Petitioner with an estimate of the costs of reproducing, anonymizing and copying the records and timeframe for completion, and to accordingly disclose the subsequently anonymized records to the Petitioner in due course. This is consistent with the Court's decision on production costs in the Menon decision, and given the number of records involved in this request, I do not find it unreasonable to follow the Court's reasoning on this point.

43. Finally, I note that my recommendations in this matter are in keeping with other Canadian jurisdictions' findings into similar situations. In 2007, the Information and Privacy Commissioner of Newfoundland and Labrador reviewed a request for access to the results tests conducted by Eastern Regional Integrated Health Authority for 866 cancer patients and to the results of the subsequent retests for those patients conducted by Mount Sinai Hospital.[10] Eastern Health refused to release the test results on the basis that the records contained the personal information of patients and was therefore prohibited from disclosure under subsection 30(1) of the *Access to*

[10] Newfoundland and Labrador OIPC Report 2007-004 (2007).

Information and Protection of Privacy Act.[11] As a result, the Commissioner recommended that the records be disclosed with all identifying information severed.

44. Recognizing that the findings of other jurisdictions are not binding, I find that they are nevertheless instructive and thus offer the following comments. The request in the Newfoundland recommendation specifically provided that the applicant was not seeking personal or identifying information of individual patients; however, I do not find that the recommendation is distinguishable on this ground. As discussed above, subsection 4(2) of the Act creates an obligation on public bodies to sever exempted information and to release the remaining non-exempted information contained in a record where applicable, thus placing the onus on the public body to consider this in processing right to information requests, rather than on the requester to specifically request that any personal information or identifiers be severed prior to disclosure.

45. This is in keeping with subsection 3(2) of the Act, which provides that the individual making the application for information need only specify the documents containing the requested information or the subject-matter of the requested information "with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document." There is no obligation on the requester under the Act to pre-identify possible exemptable information and to accordingly request that any such information be severed prior to the disclosure of the requested information.

V. RECOMMENDATIONS

46. I hold in this case, for the reasons stated above, that the 6(a) and (b) exemptions invoked by RHA B do not apply to the set of previously redacted records produced as a result of the Menon case, and under the authority of subsection 10(2)(a) of the Act, I hereby recommend that RHA B provide copies of this set of records to the Petitioner.

47. As for the remaining non-anonymized responsive records, I further recommend that RHA B proceed to consult with the Petitioner to determine if he wishes to continue with a request for the other set of records and, if so, to determine an estimate of the reproduction, anonymizing and copying costs and timeframe for the completion of this task, and to proceed to disclose copies of such records to the Petitioner in due course.

48. With regards to the above recommendation, I reserve at this time the right to review RHA B's decision regarding estimated costs if the

[11] *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1.

Petitioner chooses to refer the matter to this office under the authority of subsection 7(1)(b) of the Act.

Dated at Fredericton, this th day of October 2009.

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Bernard Richard, Ombudsman