Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER HO-14

Complaint HA13-108

London Health Sciences Centre

March 6, 2015

Summary: The complaint arises from a fee of $117 charged by the London Health Sciences Centre to a lawyer for copies of his client's records of personal health information. The complaint asserts that the fee paid exceeds the amount that the London Health Sciences Centre was entitled to charge under the *Personal Health Information Protection Act* (the *Act)*. In response, the Office of the Information and Privacy Commissioner/Ontario opened a complaint file to determine if the fee was in compliance with the *Act.*

The London Health Sciences Centre submitted that the request was for "disclosure" under section 35(2) of the *Act,* and therefore it could charge more than would be permitted in response to a request for "access" under section 54(11) of the *Act*. The lawyer for the complainant submitted that this was a request for "access" falling squarely within the fee framework previously accepted by this Office. This order concludes that it is not necessary for me to determine whether the request by the lawyer for copies of his client's records of personal health information is a request for "access" or a request for "disclosure" under the *Act* because, in either event, the issue for determination is whether the fee charged amounts to "reasonable cost recovery" as that term is used in sections 54(11) and 35(2) of the *Act*. This order determines that the phrase "reasonable cost recovery" should be given a consistent interpretation throughout the *Act*. Therefore, this order finds that the fee charged by the London Health Sciences Centre exceeds "reasonable cost recovery" and orders that it be reduced.

Statutes considered: *Personal Health Information Protection Act, 2004*, ss. 2, 3, 4, 35(2) and 54(11); *Public Hospitals Act* ss. 1, 3, 4 and 32.1.

Orders Considered: Order HO-009.

Cases Considered: R. v. Clark, [2005] 1 S.C.R. 6; R. v. J.H., 2002 CanLII 41069; R v. Zeolkowski, [1989] 1 S.C.R. 1378; Re Rizzo & Rizzo Shoes Limited [1998] 1 S.C.R. 27; and Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385.

BACKGROUND:

[1] A request was made to the London Health Sciences Centre under the *Personal Health Information Protection Act, 2004* (the *Act*) by a lawyer for copies of his client's records of personal health information from January 1, 2006 to August 26, 2013. In making the request, the lawyer provided the London Health Sciences Centre with a document entitled *"Authorization to Release Personal Information"* (the Authorization) signed by his client. In the Authorization, his client (the complainant) directed and instructed the London Health Sciences Centre to release to his lawyer "any and all information which they may require in connection with my physical condition and clinical records." In his correspondence requesting the records of personal health information, the lawyer for the complainant referenced this office's Order HO-009 (discussed below), enclosed a cheque for $30 representing the "reasonable cost recovery charge for providing these personal medical records" and promised to pay further reasonable copying charges.

[2] The London Health Sciences Centre responded to the request by acknowledging receipt of the request and issuing an invoice. The invoice charged $200 for responsive records in paper format, and credited the complainant's lawyer for the $30 already paid, for a total amount due of $170.

[3] The complainant's lawyer filed a complaint with this office, stating that the fee exceeded the amount that the London Health Sciences Centre was entitled to charge under the *Act* and was contrary to the findings made in Order HO-009.

[4] The London Health Sciences Centre subsequently reduced the fee to $117. It issued a revised invoice which clarified that the fee related to 112 pages of records of personal health information in paper format. The lawyer paid the fee and copies of the records were provided to the complainant without prejudice to the right of the complainant's lawyer to pursue this complaint.

CONDUCT OF THE REVIEW:

[5] Following unsuccessful attempts at mediation, this complaint was moved to the review stage of the complaint process where an adjudicator conducts a review under the *Act*. I began the review by issuing a Notice of Review, asking the London Health Sciences Centre to submit its representations addressing the facts and issues set out in the Notice of Review.

[6] After reviewing the representations from the London Health Sciences Centre, I then issued a Notice of Review to the complainant's lawyer, asking him to submit

representations addressing the facts and issues set out in the Notice of Review and to respond to the representations of the London Health Sciences Centre, a copy of which was enclosed.

ISSUES AND SUMMARY OF CONCLUSIONS:

A. Are the records at issue "records" of "personal health information" as defined in sections 2 and 4 of the *Act*?

B. Is the London Health Sciences Centre a "health information custodian" as defined in section 3(1) of the *Act*?

C. Is the request by the lawyer for copies of his client's records of personal health information a request for "access" or a request for "disclosure" under the *Act*?

D. Does the fee of $117 exceed "reasonable cost recovery" as that term is used in the *Act*? If the answer is yes, what would qualify as "reasonable cost recovery" in this case?

[7] I conclude below that:

A. The records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*.

B. The person who operates the London Health Sciences Centre is a health information custodian as defined in paragraph 4(i) of section 3(1) of the *Act*.

C. It is not necessary for me to determine whether the request by the lawyer for copies of his client's records of personal health information is a request for "access" or a request for "disclosure" under the *Act* because, in either event, the issue for determination is whether the fee charged amounts to "reasonable cost recovery." I conclude that "reasonable cost recovery" should be given a consistent interpretation throughout the *Act*.

D. The fee of $117 exceeds "reasonable cost recovery" as that term is used in the *Act*. I find that "reasonable cost recovery" in this case is $53.

DISCUSSION:

Issue A: Are the records at issue "records" of "personal health information" as defined in sections 2 and 4 of the *Act*?

[8] Section 2 of the *Act* defines a record as:

> …a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record.

[9] Section 4(1) of the *Act* states:

> In this *Act*,
>
> > "personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,
> >
> > > (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
> > >
> > > (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,
> > >
> > > (c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,
> > >
> > > (d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,
> > >
> > > (e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,
> > >
> > > (f) is the individual's health number, or
> > >
> > > (g) identifies an individual's substitute decision-maker. [Emphasis added]

[10] Identifying information is defined in section 4(2) of the *Act* as information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be used, either alone or with other information, to identify an individual.

[11] Neither party to this review disputes that the records at issue in this review are records of personal health information. I agree.

[12] The complainant's lawyer requested records "touching on [the complainant's] care and treatment." The Authorization directed and instructed the London Health Sciences Centre to provide the complainant's lawyer with:

> …all information which they may require in connection with [the complainant's] physical condition and clinical records, including but not limited to all x-rays, clinical notes, treatment plans, charts and diagrams, hospital records, medical reports, reports on diagnostic tests, medical opinions, other health provider notes…

[13] The records at issue contain identifying information about the complainant and the information contained in the records relates to the physical or mental health of the complainant and relates to the provision of health care to the complainant. As a result, I find that the records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*.

Issue B: Is the London Health Sciences Centre a "health information custodian" as defined in section 3(1) of the *Act*?

[14] The term "health information custodian" is defined in section 3(1) of the *Act*, which reads in part as follows:

> In this *Act*,
>
> "health information custodian", subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any:
>
> […]
>
> 4. A person who operates one of the following facilities, programs or services:
>
> i. A hospital within the meaning of the *Public Hospitals Act*, a private hospital within the meaning of the *Private Hospitals Act*, a psychiatric facility within the meaning of the *Mental Health Act* or an independent health facility within the meaning of the *Independent Health Facilities Act*.

[…]

[15] Section 1 of the *Public Hospitals Act* defines "hospital" as follows:

> "hospital" means any institution, building or other premises or place that is established for the purposes of the treatment of patients and that is approved under this Act as a public hospital;

[16] Section 4(2) of the *Public Hospitals Act* empowers the Minister of Health and Long-Term Care (the Minister) to approve the operation or use of an institution, building or other premises or place as a hospital. Section 4(2) of the *Public Hospitals Act* provides:

> No institution, building or other premises or place shall be operated or used for the purposes of a hospital unless the Minister has approved the operation or use of the premises or place for that purpose.

[17] Neither party to this review disputes that the London Health Sciences Centre is a health information custodian within the meaning of the *Act*.

[18] Pursuant to section 32.1(2) of the *Public Hospitals Act,* "[t]he Minister shall maintain a list of hospitals and their classifications and grades." The London Health Sciences Centre is included on the list of general hospitals under the *Public Hospitals Act* maintained on the website of the Ministry of Health and Long-Term Care.[1]

[19] I find that the London Health Sciences Centre is a "hospital within the meaning of the *Public Hospitals Act*" and that the person who operates the London Health Sciences Centre is a heath information custodian within the meaning of paragraph 4(i) of section 3(1) of the *Act*.

Issue C: Is the request by the lawyer for copies of his client's records of personal health information a request for "access" or a request for "disclosure" under the *Act*?

[20] The parties disagree on whether the request made by the lawyer for copies of the records of personal health information of his client, the complainant, is a request for "access" or a request for "disclosure" under the *Act*.

[21] The London Health Sciences Centre argues that the request is a request for "disclosure." The Centre submits that a lawyer making a request for records of personal health information on behalf of a client is not a substitute decision-maker within the

[1] http://www.health.gov.on.ca/en/common/system/services/hosp/
and
http://www.health.gov.on.ca/en/common/system/services/hosp/southwest.aspx#london

meaning of the *Act*. Therefore, it argues, the request was not a request for "access" but rather a request for "disclosure."

[22] The complainant's lawyer argues that the request for copies of the records of personal health information relating to his client, the complainant, is a request for "access" and not a request for "disclosure." While the complainant's lawyer concurs with the London Health Sciences Centre that a lawyer acting on behalf of a client is not a substitute decision-maker within the meaning of the *Act*, he asserts that a lawyer is a representative or agent who is acting solely for and on behalf of his or her client, the individual to whom the records of personal health information relate, to enable the client to obtain his or her records for the use and benefit of the client and not the use and benefit of the lawyer. Therefore, he submits that the request in this complaint is for "access" and not "disclosure."

[23] Having considered the parties' representations on all issues, I conclude that it is not necessary for me to determine whether the request by the lawyer for copies of his client's records of personal health information is a request for "access" or a request for "disclosure" under the *Act*. Whether it is "access" or "disclosure" under the *Act*, the same fee framework applies. A health information custodian is prohibited from charging a fee that exceeds the amount of reasonable cost recovery.

[24] Section 35(2) of the *Act* governs the fee a health information custodian is permitted to charge to *disclose* personal health information. It states:

> When disclosing personal health information, a health information custodian shall not charge fees to a person that exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed. [Emphasis added]

[25] Similarly, sections 54(10) and (11) of the *Act* govern the fee that a health information custodian is permitted to charge for *access* to records of personal health information. Those sections state:

> (10) A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part or provides a copy of it to an individual under clause (1)(a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.
>
> (11) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed. [Emphasis added]

[26] Sections 35(2) and 54(11) both state that the fee shall not "exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is

prescribed." No regulations prescribe the amount of the fee that may be charged by a health information custodian when disclosing records of personal health information under section 35(2) of the *Act* or providing access to records of personal health information under section 54(11) of the *Act*. In the absence of such a regulation, the issue under both section 35(2) and section 54(11) of the *Act* is whether the fee exceeds the amount of "reasonable cost recovery."

[27] The Notice of Review issued to the parties asked them to submit representations on how the prohibition on charging fees that "exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed" in section 35(2) of the *Act,* compares to the prohibition on charging fees that "exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed" in section 54(11) of the *Act*. In response, the London Health Sciences Centre stated:

> In this case the fees charged were within the reasonable cost recovery range.

[28] The Notice of Review also asked for representations in response to the following question: "[i]f the amount of the fee charged differs depending on whether the request was made directly by the individual to whom the personal health information relates or by any other person, explain how the actions required to respond to the request, the amount of time spent undertaking each action and the other costs incurred to respond to the request would differ?" The London Health Sciences Centre responded:

> Disclosure requests are typically larger, more complicated and take a longer time to complete. Access fees are sometimes waived on a compassionate basis. Legal aid cases are completed at a reduced rate.

[29] For the reasons that follow, I reject differentiating between "reasonable cost recovery" for disclosure pursuant to section 35(2) of the *Act* and "reasonable cost recovery" for access pursuant to section 54(11) of the *Act*.

[30] The modern rule of statutory interpretation, as articulated by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) and adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Limited,* [1998] 1 S.C.R. 27 at para. 21, provides:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[31] In reading the words "reasonable cost recovery" in their entire context, harmoniously with the scheme and object of the *Act* and the intention of the legislature,

the presumption of consistent expression should be considered. Professor Sullivan explains the presumption of consistent expression as follows:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation.
>
> […]
>
> The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

[32] In fact, the Supreme Court of Canada acknowledged in *R* v. *Zeolkowski*, [1989] 1 S.C.R. 1378 at 1387 that "giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."

[33] In dealing with the presumption of consistent expression, the Supreme Court of Canada in *Thomson* v. *Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at 400- 401 held that "[u]nless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act." In other words, consistency of expression is a presumption that may be rebutted by the context in which an expression is used. In my view, the context does not rebut the presumption of consistent expression in the circumstances of this complaint. In fact, for the two reasons that follow, the context supports the conclusion that "reasonable cost recovery" has the same meaning for both access and disclosure.

[34] First, sections 35(2) and 54(11) of the *Act* relate to the same subject matter. Both sections establish the fees that a health information custodian is permitted to charge for releasing or making records of personal health information available under the *Act*.[2] Both sections also state that the fee charged shall not exceed "reasonable cost recovery" if no amount is prescribed. Therefore, there is similarity in the contexts in which the words or expression prohibiting the charging of fees that exceed the amount of "reasonable cost recovery" are used. As stated by the Supreme Court of Canada in *R.* v. *Clark*, [2005] 1 S.C.R. 6 at para. 51, the legislature "could not have intended that identical words should have different meanings in…related provisions of the very same enactment." This is further supported by the Ontario Court of Appeal in *R.* v. *J.H.*, 2002 CanLII 41069 at para 44., which held (quoting Ruth Sullivan, *Driedger On the Construction of Statutes*, 3rd ed. (Toronto: Butterworths: 1994) at 164) that the

[2] The phrase "reasonable cost recovery" also appears in section 60(2)(e) of the *Act*. Section 60(2)(e) permits the Commissioner to "copy any books, records or documents" as part of a review upon paying a "reasonable cost recovery fee that the health information custodian or person being reviewed may charge."

presumption of consistent expression applies particularly "where the provisions in which the repeated words appear are close together or otherwise related."

[35] Second, interpreting "reasonable cost recovery" in the same manner under both sections 35(2) and 54(11) of the *Act* avoids results that are inconsistent with a plain reading of the *Act*. It would create an absurd result to permit different amounts to be charged as "reasonable cost recovery" pursuant to sections 35(2) and 54(11) of the *Act,* in circumstances where the actual costs incurred by the health information custodian to process a request are the same. If the representations of the London Health Sciences Centre were to be accepted, namely that a request by a third party with the consent of the individual is a request for "disclosure," why should it be permitted to charge $117 as "reasonable cost recovery" under section 35(2) of the *Act* when it could only charge $53 as "reasonable cost recovery" under section 54(11) based on the framework for "access" adopted in Order HO-009? In both cases, the costs incurred by the London Health Sciences Centre to process the request would be the same. If the Centre was allowed to charge more simply because the request did not come from the individual directly, third parties would simply ask individuals (or their substitute decision-makers) to request access themselves, rather than sign consent forms to be submitted to health information custodians by third parties. Divergent "reasonable cost recovery" schemes could create financial incentives regarding how records are requested and produced – adding a layer of complexity that is neither necessary nor desirable in the broader context of the *Act.* Divergent "reasonable cost recovery" schemes would also create needless and unproductive disputes between parties as to what the "reasonable cost recovery" should be for one type of person as compared to another type of person.

[36] I conclude that the phrase "reasonable cost recovery" has the same meaning in sections 35(2) and 54(11). As a result, it is not necessary for me to determine whether the request at issue is properly considered a request for "access" or a request for "disclosure" under the *Act*. In the next issue, I address whether the $117 fee charged by the London Health Sciences Centre exceeds "reasonable cost recovery."

Issue D: Does the fee of $117.00 exceed "reasonable cost recovery" as that term is used in the *Act*? If the answer is yes, what would qualify as "reasonable cost recovery" in this case?

[37] As noted above, both sections 35(2) and 54(11) of the *Act* prohibit a health information custodian from charging a fee that exceeds "the prescribed amount" or the "amount of reasonable cost recovery." Given the absence of a regulation prescribing the amount of the fee that may be charged, this office has the authority pursuant to Part VI of the *Act* to conduct a review to determine whether the fee charged exceeds "the amount of reasonable cost recovery" within the meaning of the *Act*.

[38] In Order HO-009, this office previously considered what is meant by "reasonable cost recovery" under section 54(11) of the *Act*.

[39] The Notice of Review issued in this case asked the parties to submit representations on the meaning of the phrase "reasonable cost recovery" in sections 35(2) and 54(11) of the *Act* and on the application of Order HO-009 to the circumstances of this complaint.

REPRESENTATIONS

The London Health Sciences Centre

[40] The London Health Sciences Centre did not record the time spent responding to the request for records of personal health information at issue in this review.

[41] The London Health Sciences Centre asserts that it has conducted a "true costs recovery" exercise and that the fee charged for 112 pages of records did not exceed "reasonable cost recovery" because the $117 fee "is within our true cost recovery model." Based upon that exercise, it has determined that reasonable cost recovery fees are as follows:

1-50 pages:	$30
51-100:	$60
101-200 pages:	$120
201-300 pages:	$180
301+ pages:	$300

[42] The London Health Sciences Centre further supports its $117 fee by reference to a previous unrelated request from another party for 114 pages of records that was included in its "true cost recovery" exercise. According to the London Health Sciences Centre, the time to complete that previous request was more than 2 hours, made up as follows:

25 minutes for Opening and logging request
15 minutes for retrieving the chart
20 minutes of photocopying
70 minutes for completing request, including processing & counting pages
Total minutes; 2 hours, 10 minutes

[43] The London Health Sciences Centre calculated its "true cost" of responding to that request to be $106.04:

$76.55 Total HIM professional salary (including benefits)
$18.61 Supply costs
$10.88 Mail costs

[44] In respect of the application of Order HO-009, while the London Health Sciences Centre asserts that Order HO-009 does not apply to the circumstances of this

complaint, it does state that the fee charged was "in compliance" with Order HO-009.

[45] As noted above, the London Health Sciences Centre also addressed why the amount of the fee differs depending on whether the request was made directly by the individual to whom the personal health information relates or by any other person. In its submissions, the London Health Sciences Centre stated that: "Disclosure requests are typically larger, more complicated and take a longer time to complete."

The Complainant

[46] The complainant's lawyer submits that the fee of $117 exceeds "reasonable cost recovery." The complainant's lawyer states:

> … if the hospital was to follow the "reasonable cost recovery" amounts originally ordered in decision HO-009 in November 2010, then the cost based on a $30.00 search and copy fee and $0.25 copying per page would amount to $58.00. The hospital wishes to charge double that amount - $117.00 – and this is certainly not reasonable cost recovery.

[47] As set out below, in applying the fee schedule in Order HO-009 to the request in this case, I calculate a fee owing of $53 for 112 pages.

ANALYSIS AND FINDINGS

[48] The expression "reasonable cost recovery" is not defined in the *Act*. In interpreting the meaning of the words "reasonable cost recovery" in the *Act*, I will again apply the modern rule of statutory interpretation that has been set out previously in this order.

[49] Applying the modern rule, I find that "reasonable cost recovery," as that phrase appears in the *Act,* was not intended to represent full cost recovery. In Order HO-009, I previously considered whether "reasonable cost recovery" as presented in section 54(11) means "total or actual costs":

> Turning to the grammatical and ordinary sense of the words used, I note that the *Act* does not use the words "actual cost recovery" or "full cost recovery" but rather the words "reasonable cost recovery." In my opinion, a plain and ordinary reading of the words "reasonable cost recovery" in section 54(11) of the *Act*, having regard to their entire context, including the context of the scheme and stated purposes of the *Act*, suggests an intention that Custodians be entitled to recover something less than the actual or full costs associated with providing individuals access to their records of personal health information.

[50] I acknowledge that the circumstances in Order HO-009 concerned an individual seeking access to her own records of personal health information. That said, it is critical to reiterate the finding in Order HO-009 that the words "reasonable cost recovery" are to be read "in their entire context." As noted above, it would create an absurd result to permit different amounts to be charged as "reasonable cost recovery" pursuant to sections 35(2) and 54(11) of the *Act*.

[51] The plain and ordinary meaning of "reasonable cost recovery" supports my finding that this phrase does not mean full cost recovery. The costs that can be charged by a health information custodian are explicitly limited to those which are "reasonable." If the Legislature had intended that health information custodians should be able to charge for all of their actual costs, the *Act* could have clearly said so. It does not.

[52] The use of the word "reasonable" to describe cost recovery also suggests that costs should not be excessive. Health information custodians should be encouraged to develop file systems and train their agents in a manner that facilitates the efficient processing of requests for, or disclosures of, records of personal health information. Interpreting the *Act* as permitting a custodian to charge for its costs associated with the processing of a request, whether or not those costs are reasonable, would provide little incentive for it to become efficient in how it handles and processes these requests for records of personal health information.

[53] The purposes of the *Act* also do not support the London Health Sciences Centre's claim that "reasonable cost recovery" should reflect the "true costs" of responding to a request for records of personal health information. Full cost recovery may erect a barrier to individuals requesting their own records of personal health information or others who request records of personal health information on their behalf. As noted in Order HO-009, such barriers would be inconsistent with one of the purposes of the legislation*,* as set out in section 1(b) of the *Act:* "to provide a right of access to personal health information, about themselves…."

[54] In my view, the fee charged by the London Health Sciences Centre in this case is not "reasonable." The London Health Sciences Centre has purportedly charged for its "true costs," which I understand to mean the full costs of responding to the request for the complainant's records. As I stated above, I find that the *Act* does not permit "full cost recovery."

[55] Moreover, the amount of the fee charged by the London Health Sciences Centre is not justified. It has provided no evidence as to how long it took to process the request in this case. Instead, it seeks to justify the $117 fee by referencing an unrelated request from another party for a similar number of pages of records.

[56] Even accepting that this was the actual time taken in the exercise conducted by the London Health Sciences Centre, I find these times excessive, considering the relatively modest nature and breadth of tasks required. I conclude that the fee

calculated on the basis of this "true cost" recovery exercise does not amount to reasonable cost recovery.

[57] In its representations, the London Health Sciences Centre raised statements purportedly made by staff from this office clarifying that a request to release a record of personal health information to a third party would be a request for disclosure and not a request for access.[3] For the reasons already outlined, it is not necessary for me to decide whether such a request is a request for "access" or "disclosure" or to address these purported facts. I note that although Order HO-009 was decided in the context of an access request, it is my view that the Order is fully applicable to both access and disclosure requests.

[58] After reviewing several proposed fee schemes, this office concluded in Order HO-009 that the regulation proposed by the Minister on March 11, 2006 in *The Ontario Gazette*, which prescribed the maximum amount of fees that a health information custodian could charge an individual for access to records of personal health information under the *Act*, "provides the best framework for determining 'the amount of reasonable cost recovery' as set out in section 54(11) of the *Act*." I confirm that decision again regarding reasonable cost recovery, for both access and disclosure.

[59] For the purposes of certainty, I will reproduce the fee framework adopted in Order HO-009, with necessary modifications, to make clear that this framework addresses requests for both access and disclosure:

> For the purposes of subsections 35(2) and 54(11) of the *Act*, the amount of the fee that may be charged shall not exceed $30 for any or all of the following:
>
> 1. Receipt and clarification, if necessary, of a request for a record.
>
> 2. Providing an estimate of the fee that will be payable under subsection 54(10) of the *Act* in connection with the request.
>
> 3. Locating and retrieving the record.
>
> 4. Review of the contents of the record for not more than 15 minutes by the health information custodian or an agent of the custodian to determine if the record contains personal health information to which access or disclosure may or shall be refused.

[3] In any event, as an administrative decision maker, I am not bound by the principle of *stare decisis* – *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 at para. 129 (Ont. C.A.).

5. Preparation of a response letter.

6. Preparation of the record for photocopying, printing or electronic transmission.

7. Photocopying the record to a maximum of the first 20 pages or printing the record, if it is stored in electronic form, to a maximum of the first 20 pages, excluding the printing of photographs from photographs stored in electronic form.

8. Packaging of the photocopied or printed copy of the record for shipping or faxing.

9. If the record is stored in electronic form, electronically transmitting a copy of the electronic record instead of printing a copy of the record and shipping or faxing the printed copy.

10. The cost of faxing a copy of the record to a fax number in Ontario or mailing a copy of the record by ordinary mail to an address in Canada.

11. Supervising examination of the original record for not more than 15 minutes.

In addition to the fee charged above, fees for the services set out in Column 1 of the Table below shall not, for the purposes of subsections 35(2) and 54(11) of the *Act*, exceed the amounts set out opposite the service in Column 2 of the Table below.

ITEM	COLUMN 1	COLUMN 2
1.	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages
2.	For making and providing a paper copy of a record from microfilm or microfiche	50 cents per page
3.	For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form	$10
4.	For making and providing a microfiche copy of a record stored on microfiche	50 cents per sheet

5.	For making and providing a copy of a microfilm of a record stored on microfilm that is,	
	i. 16 mm	$25 per reel
	ii. 35 mm	$32 per reel
6.	For printing a photograph from a negative or from a photograph stored in electronic form, per print,	
	i. measuring 4" x 5"	$ 10
	ii. measuring 5" x 7"	$ 13
	iii. measuring 8" x 10"	$ 19
	iv. measuring 11" x 14"	$ 26
	v. measuring 18" x 20"	$ 32
7.	For making and providing a copy of a 35 mm slide	$ 2
8.	For making and providing a copy of an audio cassette	$ 5
9..	For making and providing a copy of a ¼", ½" or 8 mm video cassette,	
	i. that is one hour or less in length	$ 20
	ii. that is more than one hour but not more than two hours in length	$ 25
10.	For making and providing a copy of a ¾" video cassette,	
	i. that is not more than 30 minutes in length	$ 18
	ii. that is more than 30 minutes but not more than one hour in length	$ 23
11.	For producing a record stored on medical film, including x-ray, CT and MRI films	$5 per film
12.	For the review by a health information custodian or an agent of the custodian of the contents of a record to determine if the record contains personal health information to which access or disclosure may or shall be refused	$45 for every 15 minutes after the first 15 minutes
13.	For supervising examination of original records	$6.75 for every 15 minutes

[60] In response to the London Health Sciences Centre's claim that requests for disclosure are "typically large, more complicated, and take a longer time to complete," I note that the above fee framework permits a health information custodian to charge additional amounts for other activities beyond those encompassed in the $30 set fee where requests for records of personal health information are more complex or are more voluminous records. For example, the cost recovery framework allows additional costs to be charged where the records requested are more than twenty pages (at a rate 25 cents per page). As a result, a request for 1000 pages of records could result in a fee of $275.

[61] In applying the above framework to the records at issue in this review, I find that the London Health Sciences Centre is entitled to charge a $53 fee. The amount is calculated as follows: $30 for processing the request and photocopying/printing the record to a maximum of the first 20 pages and the sum of $0.25 per page for the remainder.

SUMMARY OF FINDINGS:

1. The records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*.

2. The person who operates the London Health Sciences Centre is a health information custodian as defined in paragraph 4(i) of section 3(1) of the *Act*.

3. It is not necessary in the circumstances of this complaint for me to determine whether the request by the lawyer for copies of his client's records of personal health information is a request for access or a request for disclosure under the *Act*.

4. The fee of $117 exceeds "reasonable cost recovery" as that term is used in the *Act*.

ORDER:

I do not uphold the fee of $117 and order the London Health Sciences Centre to reduce the fee to $53. I order the London Health Sciences Centre to refund $64 to the complainant's lawyer.

Original Signed By: March 6, 2015
Brian Beamish
Commissioner