Information
and Privacy
Commissioner
of Ontario

ORDER HO-009

October 2010

NATURE OF THE COMPLAINT:

The complainant made a written request to Dr. Joachim W. Berndt (Dr. Berndt) under the *Personal Health Information Protection Act* (the *Act*) for access to 34 pages of psychological therapy notes. Dr. Berndt agreed to provide the complainant with access to the records on the condition that she pay a fee of $125.00, which he calculated using the Ontario Medical Association's *Physician's Guide to Third Party and Other Uninsured Services* (the OMA *Guide*.)

The complainant filed a complaint with this office regarding the amount of the fee. Subsequently, she wrote to Dr. Berndt and requested that the fee be waived based on her limited financial resources. Dr. Berndt denied the request for a fee waiver and stated that in arriving at the fee, he took into account the complainant's circumstances. The complainant then advised this office that she also wanted to file a complaint regarding the denial of the fee waiver.

CONDUCT OF THE REVIEW:

Following unsuccessful attempts at mediation, the file was moved to the review stage of the complaint process where an adjudicator conducts a review under the *Act*. I began my review by issuing a Notice of Review to Dr. Berndt that invited him to submit representations on the facts and issues set out in the notice. I received representations from Dr. Berndt's counsel. Any reference to Dr. Berndt that follows in this order shall also be considered a reference to his counsel, as may be appropriate.

After reviewing the representations of Dr. Berndt, I decided to notify the Ontario Medical Association (OMA), the professional association for the province's physicians, and invite it to submit representations since, in my view, it had an interest in the issues in this review. For the same reason, I also decided to notify the Ontario Hospital Association (OHA), the provincial association of hospitals, and invite it to submit representations. Both the OMA and the OHA were provided with a copy of the representations of Dr. Berndt. I subsequently received representations from both organizations.

I then issued a Notice of Review to the complainant inviting her to submit representations addressing the facts and issues set out in the notice and to respond to the representations of Dr. Berndt, the OMA and the OHA, copies of which were enclosed with the notice. I received representations from the complainant. Following my review of the complainant's representations, I decided that no further representations were required.

ISSUES ARISING FROM THE REVIEW:

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

B. Is Dr. Berndt a "health information custodian" as defined in section 3(1) of the *Act*?

C. Does the fee for access of $125.00 exceed "reasonable cost recovery" as that term is used in section 54(11) of the *Act*? If the answer is yes, what would qualify as "reasonable cost recovery" in the circumstances of this review?

D. Is the complainant entitled to a fee waiver pursuant to section 54(12) of the *Act*?

I conclude below that the records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*, that Dr. Berndt is a health information custodian as defined in section 3(1) of the *Act* and that the fee for access to the complainant's records of personal health information exceeds "reasonable cost recovery" under section 54(11) of the *Act*. I also find that, in the circumstances of this case, a fee of $33.50 represents the amount of "reasonable cost recovery." Finally, I find that Dr. Berndt did not err in refusing to grant the fee waiver.

DISCUSSION:

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

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.

Section 4(1) of the *Act* states, in part:

> 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,

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.

There is no dispute in this complaint regarding the nature of the information contained in the records requested by the complainant. The requested records are clinical notes prepared by Dr. Berndt and according to Dr. Berndt, relate to "treatment" provided by him to the complainant. I am therefore satisfied that the records contain identifying information about the complainant and that 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 by Dr. Berndt.

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 Dr. Berndt a "health information custodian" as defined in section 3(1) of the *Act*?

The *Act* provides an individual with the right of access to records of "personal health information" about the individual that are in the custody or under the control of a "health information custodian." The term "health information custodian" (Custodian) is defined in section 3 of the *Act*, which reads, in part:

> 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:
>
> > 1. A health care practitioner or a person who operates a group practice of health care practitioners.

A "health care practitioner" is a term defined in section 2 of the *Act,* which reads in part as follows:

> "health care practitioner" means,
>
> > (a) a person who is a member within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care,

"Health care" is also defined in section 2. The relevant portions of that section read:

> "health care" means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,
>
> > (a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,

Section 1(1) of the *Regulated Health Professions Act, 1991* includes the following definitions of "member" and "college":

> In this *Act*,
>
> "College" means the College of a health profession or group of health professions established or continued under a health profession *Act*;
>
> …
>
> "member" means a member of a College;

In Dr. Berndt's representations, he states that he is a physician in private practice in Ontario and that he is regulated by the College of Physicians and Surgeons of Ontario. The complainant states that she was a patient of Dr. Berndt and the requested records in the possession of Dr. Berndt relate to "counseling" services provided by him. Neither of the parties disputes the claim that Dr. Berndt is a "health care practitioner." Nor do the parties dispute the claim that Dr. Berndt is a Custodian.

Applying the definitions, and in view of the position taken by the parties, I find that Dr. Berndt was at the material time a "health care practitioner" and therefore a Custodian within the meaning of the *Act* as he is a member of the College of Physicians and Surgeons of Ontario, he provided health care to the complainant and he has custody or control of the records of personal health information as a result of or in connection with the provision of health care to the complainant.

Issue C: Does the fee for access of $125.00 exceed "reasonable cost recovery" as that term is used in section 54(11) of the *Act*? If the answer is yes, what would qualify as "reasonable cost recovery" in the circumstances of this review?

Sections 54(10) and (11) of the *Act* set out the statutory entitlement of a Custodian to charge a fee 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.

The *Act* therefore permits a Custodian to charge fees for access to records of personal health information that do not exceed "the prescribed amount" or the "amount of reasonable cost recovery." On March 11, 2006, the Minister of Health and Long-Term Care (the Minister) published a notice of a proposed regulation in *The Ontario Gazette*, which among other things, prescribed the maximum amount of the fees that a Custodian could charge an individual in

providing access to records of personal health information and invited interested parties to comment on them. However, no regulation relating to fees was subsequently adopted.

Given the absence of a regulation prescribing the amount of the fees, this office has the authority pursuant to Part VI of the *Act* to conduct a review to determine whether the fee in the present review exceeds "the amount of reasonable cost recovery" pursuant to section 54(11) of the *Act*.

Representations

The Notice of Review issued to the parties invited them to submit representations on the meaning of the phrase "reasonable cost recovery." In particular, they were invited to comment on which of the following fee schemes represents the best framework for determining "reasonable cost recovery": the proposed fee regulation under the *Act*, the fee regulation under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) or the OMA *Guide*.

Dr. Berndt

Dr. Berndt claims that the fee of $125.00 amounts to "reasonable cost recovery" and that the fee claimed is substantially less than the actual costs incurred by his office in responding to the request for access.

In particular, Dr. Berndt submits:

> Guidance as to the interpretation of the phrase "reasonable cost recovery" can be obtained from the decision of *Commercial Alcohols Inc. v. Bruce Power, L.P.*, 2006 Can LII 2183 (ON S. C.). In that case, the court was faced with a dispute over the interpretation of the phrase "reasonable cost recovery" and held that it meant that the supplier was entitled to recover its actual costs and actual costs may fluctuate over time.
>
> Dr. Berndt's hourly rate covers his overhead and provides him with income beyond the overhead. The $125.00 fee only includes $16.30 of his hourly time which is far less than the 50 hours spent dealing with [the complainant's] requests.
>
> There is no allegation nor evidence that the records are public in nature nor necessary for [the complainant's] health. The records relate to treatment provided some time ago, not recently.

With respect to the possible application of the fee schemes in *FIPPA* (and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act* or *MFIPPA*), Dr. Berndt states:

> The two schemes mentioned in the Notice of [Review] were developed for the government's provision of records. The government is not a for-profit entity. The

production of records contemplated are public records. By contrast, Dr. Berndt is in private practice. Dr. Berndt has significant overhead (ex. office facilities, office equipment, staff, professional association fees, professional continuing education costs, etc…) and he has to pay himself through the difference between his income and overhead. This is a very different situation than a not-for-profit and public entity cost schedule.

Dr. Berndt calculated the fee charged to the complainant, which he submits amounts to reasonable cost recovery, by applying the OMA *Guide* and by charging an additional amount of $16.30 for "dealing with [the complainant's] requests." He submits:

> The 2009 Ontario Medical Association fee guideline would recommend a fee of $108.87 based on the number of pages in the chart and the type of treatment provided (i.e. mental health). Mental health treatment charts require additional care in provision of copies of the charts given the many concerns that can arise out of the disclosure of the record even to the patient. The calculation on the OMA recommended schedule of $108.87 includes a $50.29 charge for the first five pages of medical records and $2.02 thereafter which, given the number of pages in the chart, totals $108.87.
>
> To provide the copy of the records, Dr. Berndt's staff had to deal with [the complainant's] written, telephone call and in person requests which were complicated by her mixed requests for copies, review and changes to the chart. Dr. Berndt also had to deal with each of those requests and personally review the chart applying his professional judgment before it was copied. Dr. Berndt estimates that the total time spent was 50 hours.
>
> …
>
> The fee of $125 for provision of a copy of the records of personal health information to [the complainant] amounts to substantially less than Dr. Berndt's actual costs in these circumstances.

Dr. Berndt also states that the fee is consistent with the "Medical Records" policy of the College of Physicians and Surgeons of Ontario. In particular, he states:

> The College of Physicians and Surgeons of Ontario, the regulating College, has a policy entitled Medical Records which sets out expectations regarding the provision of a copy of medical records to patients. The College does not set out any expectations with respect to fees to be charged but makes the following comments:
>
> - "The physician may charge the patient a reasonable fee to reflect the cost of the materials used, the time required to prepare the material and the direct cost of sending the material"

- "Fulfilling such a request is an uninsured service and reasonable attempts may be made on the part of the physician to collect the fee."

- Physicians "can obtain the Third Party Billing Protocol from the OMA for advice about what fees are recommended."

…

The OMA Third Party Billing Protocol recommends that physicians charge an amount per page to recover the typical costs of staff time and photocopy expense. The protocol speaks to physicians charging an hourly rate for services outside of the normal expectations of any given service.

The Ontario Medical Association (OMA)

In its representations, the OMA states that it negotiates fees with the Ministry of Health and Long-Term Care (the Ministry) for health services covered by the Ontario Health Insurance Plan (OHIP) on behalf of the medical profession. The OMA submits:

> Fees for services not covered by OHIP ("uninsured services") are billed directly to the patient by the physician. It is professional misconduct for a physician to bill a fee that (1) is excessive in relation to the services performed, or (2) is in excess of the fee set out in the Schedule of Fees published by the OMA without informing the patient in advance.
>
> Each year, the OMA publishes the *Physician's Guide to Third Party and Other Uninsured Services*. This *Guide* provides OMA members with guidance on uninsured and third party services, suggested fees, relevant policies and interpretation of relevant regulations applying to such services. However, this *Guide* is not mandatory and physicians can use their discretion to decide how much they wish to bill for uninsured and third party services depending upon the complexity of the particular services provided.
>
> The Guide sets rates for uninsured and third party services using an "average" complexity methodology. That is, the prices are set for services of an average complexity recognizing that some services will be more complex and some will be less complex, but if a physician consistently charges the suggested fee for a service, on average the payment to him or her should be appropriate. The average pricing methodology is intended to save both the physician and the public the inconvenience and expense of calculating individual fees for each service depending upon its complexity.

As noted previously, this complaint relates to a request by the complainant for access to her records of personal health information. However, the OMA's representations address the fees associated with the *transfer* of medical records at the request of a patient. This is also reflected

in Part 4 of the OMA *Guide* which is entitled "Recommended Charges for the Transfer of Medical Records."

I note that the OMA *Guide,* referred to by the OMA and Dr. Berndt in their representations, is silent on the issue of fees in relation to a direct access request made by the patient. Despite this reference to the "transfer" of medical records at the request of the patient, I understand the OMA's position to be that, in relation to a request for access by an individual under section 52 of the *Act*, the OMA *Guide* relating to fees for the transfer of records amounts to reasonable cost recovery as that term is used in section 54(11).

The OMA states:

> According to the 2010 OMA *Guide*, the suggested fee charges for transfer of medical records, which *includes* the physician's review of the medical record to determine whether it is appropriate to release all of its contents to the requestor and making the copies of the medical records, is $39.45 for pages 1-5 and $1.55 per page thereafter when the transfer of record occurs at the request of the patient because the care of the patient is being transferred at the request of the patient or the patient's representative. The physician has to review the following aspects of the medical record:
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> 1) whether the disclosure of the information contained therein could cause harm to the patient;
>
> 2) whether the requestor has limited his or her consent to a release of only portions of the medical record, in which case the physician must remove those portions for which no consent is granted (see s. 20(2) of [the *Act*];
>
> 3) whether the information is accurate; presented in a clear and coherent form; and relevant for the purpose of the requested transfer; and
>
> 4) whether there are any pending medical issues that should be brought to the requestor's attention.
>
> If the patient's medical record includes services of a psychiatric nature, the physician must be extremely diligent when reviewing the type of information that is transferred; this would require above average time on the part of the physician. The suggested fee for the transfer of such records is $52.80 for pages 1-5 and $2.15 per page thereafter.

The OMA also submits that the recommended fees as set out in the OMA *Guide* are in compliance with section 54(11) of the *Act* because they are reasonable in relation to the services performed and they are consistent with those recommended by medical associations in other provinces. More particularly, it states that:

- the process of transferring a record of personal health information "typically" requires that the entire record be reviewed which can only be done by the physician and which can take "a considerable amount of time";

- the suggested fee also takes into account the costs of staff time spent photocopying, the cost of materials and delivery;

- the review time by the physician is a function of his or her "fiduciary duty" to patients;

- the review time is necessary to ensure that disclosure would not pose a risk to patients or another person, to protect the identity of other individuals and to ensure that the portions of the record for which consent has not been given are not transferred; and

- section 52(1)(e) of the *Act*, which sets out exemptions to the right of access, recognizes these obligations by allowing the physician to withhold some information.

With respect to the use of the fee scheme in the *FIPPA*, the legislation that governs access to general records and records of personal information in the custody or control of provincial institutions, to interpret the term "reasonable cost recovery" in section 54(11) of the *Act*, the OMA states:

> The *FIPPA* fee calculation scheme only compensates for photocopying costs - it does not include compensation for the time a physician must take to review the file and to remove information that should not be released to the requestor.

The OMA's representations do not specifically address the use of the fee scheme set out in the proposed regulation published by the Minister on March 11, 2006, to interpret the term "reasonable cost recovery" in section 54(11) of the *Act*.

Ontario Hospital Association (OHA)

The OHA submitted representations in which it states that it does not support "a regulated structure for access fees under [the *Act*]." It proposes that "reasonable cost recovery" should remain a discretionary practice that permits hospitals to charge for costs incurred through a system of a flat fee for access. It interprets section 54(11) of the *Act* to permit recovery of all costs associated with information retrieval, including labour and administrative costs.

The OHA states that it has not published guidelines in relating to fees for access to records. It submits that the discretionary system, which is applied in most hospitals, is "reflective of costs associated with records management and labour" and provides "an opportunity for a hospital to consider the specific nature and complexity of the requests it receives." It states, for example, that a hospital that charges an access fee of $140 has included within that fee a reasonable amount to recover the costs of any clinical and support staff review that may be required to satisfy the request for access.

With respect to the fee structure under *FIPPA*, the OHA states that patients with lengthy or involved records may be financially disadvantaged in instances where the request may require a lengthy review of the record prior to release. It also states that the administration of a scheme, other than a flat rate scheme, would affect the timeliness with which records are provided and unduly burdens Custodians with increased costs associated with the record retrieval process.

The OHA states that using the proposed regulation under the *Act* would make it very difficult to provide an estimate of the fee as required by section 54(10) of the *Act* since many of the associated costs cannot be accurately determined until they have been incurred as, for example, where the record is in multiple forms and where portions are offsite and located in a records management facility. The OHA adds that where work is completed and the patient is unable to pay the fee, the request for access may be abandoned and the costs for the review and copying of the record cannot be recovered. However, it adds that where a patient is unable to pay an access fee due to financial hardship, hospitals "often waive the access fee or reduce it significantly."

Attached to the OHA representations is a copy of its submission to the Ministry regarding the proposed fee regulation. In its submission to the Ministry on the proposed regulation, it states:

- The proposed regulation imposes administrative burdens on a time sensitive process.
- The proposed regulation is unnecessary in view of the small numbers of complaints made to this office regarding fees.
- Hospitals should be entitled to recover costs for retrieval of records from another location and the proposed regulation does not include an amount for this type of cost.
- It is difficult to provide accurate fee estimates when there are as many unknown variables as there will be under the proposed regulation.
- Custodians should be able to independently set a "cost recovery process."

With respect to this particular complaint, the OHA states that the physician's fee represents "a fair, reduced and knowable (in advance) cost." The OHA states:

> [T]he imposition of a regulation would remove the discretion of these medical professionals to assign costs on a basis of understanding of patients' needs, situation and ability to pay. Moreover, a regulation would likely have resulted in higher costs to the patient who may not anticipate or appreciate the resources that are sometimes required for records recovery procedures.

The Complainant

The complainant submits that Dr. Berndt initially denied her access to her records of personal health information and told her that patients were not entitled to access this information. She adds that it was only after she mentioned the *Act* to Dr. Berndt that he took her request seriously.

Applying the proposed regulations under the *Act*, the complainant states that the fee should be $30 for the first 20 pages and 25 cents per page thereafter, for a total of $33.50. She also appears to state that, in light of what she views as Dr. Berndt's failure to comply with the *Act*, even the proposed regulations would not constitute "reasonable cost recovery."

With respect to Dr. Berndt's claim that he is in private practice, she points out that he earns an income through an OHIP-funded system and is also accountable to a "government body" namely, this office. The balance of the complainant's representations relate to her request for a fee waiver, which I will address later in this order.

Findings and Analysis

The expression "reasonable cost recovery" is not defined in the *Act*. Therefore, in interpreting the meaning of "reasonable cost recovery" in section 54(11) of the *Act*, I will apply the modern rule of statutory interpretation, articulated by Ruth Sullivan in *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pp. 1 and 3:

> … [I]n the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:
>
> > 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.

Consequently, in the discussion that follows, I will consider the grammatical and ordinary sense of the words "reasonable cost recovery" in section 54(11) of the *Act* while having regard to the scheme of the *Act*, its objects and the intention of the Legislature.

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.

The term "reasonable cost recovery" in section 54(11) of the *Act* must be read in its immediate context. Section 54(11) appears in Part V of the *Act* entitled "Access to Records of Personal Health Information and Correction." Section 52 provides an individual with the right to access a record of personal health information about the individual in the custody or control of a Custodian, subject to limited and specific exclusions and exemptions. Specifically, section 52(1) of the *Act* states, in part, as follows:

> Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless, …

It must also be read in the context of the purposes of the *Act*. Section 64 of the *Legislation Act, 2006* is particularly relevant in this context. It states:

> 64(1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

The purposes of the *Act* are set out in section 1. This section provides, in part, as follows:

> The purposes of this *Act* are,
>
> …
>
> (b) to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions set out in this *Act*;

Read together, section 52(1) and section 1(b) of the *Act* reflect a legislative intention to ensure that records of personal health information are available to the individuals to whom the records relate, subject only to limited and specific exclusions and exemptions. As a result, in my opinion, any interpretation of section 54(11) of the *Act* that has the effect of imposing barriers or impediments on the right of an individual to access his or her records of personal health information would be inconsistent with the purposes of the *Act*.

The term "reasonable cost recovery" in section 54(11) of the *Act* should also be interpreted in light of the importance of the right of access. The right of access to one's own records of personal information, including records of personal health information, is a cornerstone of fair information practices and a fundamental tenet of all privacy legislation.

The right of an individual to access his or her records of personal health information is essential to the exercise of other statutory and common law rights, including the right of an individual to determine for himself or herself what shall or shall not be done with his or her own body; the right of an individual to "informational self-determination," that is, the right of an individual to control the collection, use or disclosure of his or her personal health information; and the right of an individual to require the correction or amendment of personal health information about themselves.

The right of access to one's records of personal health information is also vital in ensuring the continuity of care, for example, where an individual has decided to seek health care from another health care provider, and in ensuring the proper functioning of the relationship with his or her health care provider, including ensuring that the health care provider is fulfilling his or her fiduciary duty to act with utmost good faith and loyalty to the individual.

The Supreme Court of Canada has acknowledged the vital interest that individuals have in the information contained in their records of personal health information. In *McInerney v. MacDonald,* [1992] 2 S.C.R. 138, Justice La Forest, writing for the court, stated:

> [A]t least in part, medical records contain information about the patient revealed by the patient, and information that is acquired and recorded on behalf of the patient. Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient.
>
> …
>
> In sum, an individual may decide to make personal information available to others to obtain certain benefits such as medical advice and treatment. Nevertheless, as stated in the report of the *Task Force on Privacy and Computers* (1972), at p. 14, he or she has a "basic and continuing interest in what happens to this information, and in controlling access to it".

As a result, the Supreme Court of Canada concluded that individuals have the right to access their records of personal health information and health care providers have a corresponding duty, arising from the fiduciary relationship of trust and confidence between the health care provider and his or her patient, to grant such access. Justice La Forest explained:

> The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records. As discussed earlier, information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue.
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> …
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> The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it.

In recognizing this right, the Supreme Court of Canada identified several reasons why the ability of individuals to access their records of personal health information is of such importance in modern society. In particular, La Forest J. stated:

> Medical records are also used for an increasing number of purposes. This point is well made by A. F. Westin, *Computers, Health Records, and Citizen Rights* (1976), at p. 27:

> As to medical records, when these were in fact used only by the physician or the hospital, it may have been only curiosity when patients asked to know their contents. But now that medical records are widely shared with health insurance companies, government payers, law enforcement agencies, welfare departments, schools, researchers, credit grantors, and employers, it is often crucial for the patient to know what is being recorded, and to correct inaccuracies that may affect education, career advancement or government benefits.

He further stated:

> [O]ne of the duties arising from the doctor-patient relationship is the duty of the doctor to act with utmost good faith and loyalty. If the patient is denied access to his or her records, it may not be possible for the patient to establish that this duty has been fulfilled. As I see it, it is important that the patient have access to the records for the very purposes for which it is sought to withhold the documents, namely, to ensure the proper functioning of the doctor-patient relationship and to protect the well-being of the patient.
>
> …
>
> Disclosure is all the more important in our day when individuals are seeking more information about themselves. It serves to reinforce the faith of the individual in his or her treatment. The ability of a doctor to provide effective treatment is closely related to the level of trust in the relationship.

Having regard to the importance of an individual's right of access to his or her records of personal health information, once again it is my opinion that any interpretation of the term "reasonable cost recovery" in section 54(11) of the *Act* that has the effect of imposing a financial barrier or has the effect of acting as a deterrent to an individual exercising his or her right of access to records of personal health information must be avoided.

This interpretation is supported by previous orders of this office in appeals of the fees charged by provincial and municipal government institutions for access to records under *FIPPA* and *MFIPPA*.

For example, in Order MO-2154, an appeal of a fee decision under *MFIPPA* involving the issue of whether the provisions in section 45 of *MFIPPA* and section 6 and 6.1 of Regulation 823 that permit an institution to charge fees for "computer costs" entitled the institution to claim the capital costs of a new computer, Adjudicator Higgins stated:

> Section 45 clearly contemplates a "user pay" principle, and provides for waiver of fees in certain instances, but in my view, against the backdrop of section 1 of the *Act*, an interpretation of section 45 of the *Act* and sections 6 and 6.1 of Regulation 823 that creates a financial barrier or a deterrent to access by requiring a requester to pay an institution's invoiced capital costs for equipment it will retain after the

request is completed would be inconsistent with the overall legislative intent as reflected in section 1.

In my opinion, while the provisions in *FIPPA* and *MFIPPA* do not refer to "reasonable cost recovery" and regulations have been made under both Acts prescribing the amount of the fees that may be charged by an institution in providing access to records, the approach to the interpretation of the fee provisions in Order MO-2154 is equally applicable to the interpretation of section 54(11) of the *Act*. This is due to the remedial nature and the commonality of the stated purposes as between *FIPPA* and *MFIPPA* and the *Act*. The purposes of *FIPPA* and *MFIPPA*, as set out in section 1 of the respective statutes, are substantially similar. For example, section 1 of *MFIPPA* provides as follows:

> 1. The purposes of this *Act* are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

A similar approach was taken by the Information and Privacy Commissioner of Alberta, Commissioner Frank Work, in Order H2005-002, which dealt with a request for access to records in the custody and control of a pharmacy under the Alberta *Health Information Act* (*HIA*). The pharmacy in question prepared a fee estimate in which it included a claim of $25.00 for the records in accordance with section 10(1) of the Regulation under the *HIA*, which provides that an applicant who makes a request for access to a record containing health information may be required to pay a basic fee of $25.00 for certain activities involved in producing a copy of the information. The pharmacy also charged $40.00 for "professional fee(s)." The applicant filed a complaint relating to this additional charge.

Commissioner Work considered the pharmacy's argument regarding the time spent processing the request for access and reviewing the records, which formed the basis of the pharmacy's claim to the "professional fee." In rejecting the pharmacy's claim, the Commissioner stated:

> What is the rationale for the restrictions on the fee that can be charged by custodians under the *Act*? Fee estimates arise under *HIA* in the context of access requests. *In my view, the reason these fee limits exist is to avoid creating an inordinate cost impediment or barrier that becomes an obstacle for individuals seeking access to their own health information. Although custodians have custody and control over the physical records that contain health information, it is the individuals*

themselves who have the fundamental right to the information – it is their own health information. [Emphasis added.]

I have found little other guidance as to the meaning of "reasonable cost recovery" in the privacy and access to information legislation in other jurisdictions in Canada.

In Saskatchewan, section 39 of *The Health Information Protection Act*, permits a "trustee" to charge "a *reasonable fee* not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information." The Saskatchewan Legislature has not passed any regulations prescribing the maximum amount of the fees that can be charged. Section 10 of the Manitoba *Personal Health Information Act* also states that a "trustee may charge a *reasonable fee* … but the fee must not exceed the amount provided for in the regulations." However, regulations relating to the fees for access have also not yet been passed in that province.

Report H-2006-001 issued by the Saskatchewan Information and Privacy Commissioner is of some guidance here. It involved a request for access to the personal health information of the applicant's late father to the Saskatchewan Regional Health Authority (the Region). Commissioner Gary Dickson found that the applicant was not the personal representative of his father and, therefore, was not entitled to access. However, he offered advice and commentary to the Region regarding the fees that it had claimed.

The initial fee estimate sent to the applicant included a claim to $0.50 per page for photocopying and a $50.00 fee to "open the file." Applying the "reasonable standard set out in section 39(2)," Commissioner Dickson found that the $0.50 per page to photocopy the record was excessive. In doing so, he noted that it was double the amount allowed for photocopying under Saskatchewan's *Freedom of Information and Protection of Privacy Act* (*FOIP*), which governs provincial institutions in that province, and under the *Local Authority Freedom of Information and Protection of Privacy Act* (*LA FOIP*), which governs municipal institutions and regional health authorities. Commissioner Dickson also stated the $50.00 fee to open the file was excessive as it was $30.00 more than the regional health authority would be entitled to charge as an initial fee when responding to an access request under *LA FOIP*. In conclusion, Commissioner Dickson stated that the Region should review its fees and charges to ensure that they are in line with the charges permitted under the *FOIP* and *LA FOIP*.

In my view, the decision in *Commercial Alcohols Inc. v. Bruce Power, L.P.* [2006] O.J. No. 322 (On. S. C.), upheld by the Court of Appeal at [2006] O.J. No. 3637 and referred to by Dr. Berndt in his representations, is of little guidance. The circumstances before the court in that case are not analogous to the circumstances of this complaint. That case considered the interpretation of the words "full reasonable cost recovery" as used in a commercial contract. The court's interpretation of the words "full reasonable cost recovery" was based on principles of interpretation of contracts and had regard to the surrounding circumstances of the contractual and commercial relationship. These considerations do not apply in an exercise of statutory interpretation of legislation relating to access to an individual's records of personal health information. In my view, the interpretation of "reasonable cost recovery" in the *Act* must not be determined on the basis of the principles relating to the interpretation of contracts.

This view is supported by the decision of the Supreme Court of Canada in *McInerney v. MacDonald*. While the majority of the Ontario Court of Appeal in *McInerney* based the individual's right to access his or her records of personal health information on an implied contractual term, the Supreme Court of Canada on the other hand stated:

> While it may be possible to pursue the contractual route in the civil law system, I do not find it particularly helpful in the common law context. Accordingly, I am not entirely comfortable with the approach taken by the Court of Appeal.

The Supreme Court of Canada held that the right of an individual to examine and request a copy of his or her records of personal health information arises from the fiduciary nature of the relationship between the health care provider and his or her patient.

For these reasons, I reject the argument of Dr. Berndt that the *Commercial Alcohols Inc.* decision supports his position that "reasonable cost recovery" gives Custodians the right to charge a fee to recover their "actual costs" or "total costs" associated with providing individuals with access to their records of personal health information.

With respect to Dr. Berndt's position that he had no evidence before him suggesting that the records were necessary for the complainant's health, it must be emphasized that the reason precipitating an individual's request for access is irrelevant. An individual has a right of access to his or her records of personal health information regardless of the reason for which the access is requested and the amount of the fee that may be charged by a health information custodian in making the record of personal health information available or providing a copy of the record to the individual is not dependent on the reason for the request.

Adopting the approach taken by this office in MO-2154 and the approach taken by the Information and Privacy Commissioner of Alberta in Order H2005-002, and on reading the words "reasonable cost recovery" in section 54(11) of the *Act* in their entire context and in their grammatical and ordinary sense having regard to the scheme and stated purposes of the *Act*, and having regard to the importance of the right of access to one's records of personal health information, I find that section 54(11) does not contemplate the recovery of the total or actual costs associated with responding to a request for access. In my opinion, section 54(11) of the *Act* must be interpreted so as to avoid creating a financial barrier or impediment to access.

OMA and OHA Representations

The OHA and the OMA have suggested that the "flat rate" and "average complexity" cost recovery models are appropriate benchmarks for determining "reasonable cost recovery". With respect, I find that both approaches to charging fees for individuals requesting access to their records of personal health information will often not represent "reasonable cost recovery" within the meaning of section 54(11) of the *Act*. Where a limited number of records are at issue, such as the case currently under consideration, the charging of a flat rate, or using an average complexity costing model, will result in the requesting individual being charged a fee that is out of proportion to the records at issue. Most importantly, such a fee would represent a barrier

or impediment to an individual exercising the right of access to his or her records of personal health information and would be inconsistent with the legislative intent of the *Act*.

Similarly, where there are limited or no applicable exclusions or exemptions from the right of access with the result that no severances are required, such as the case currently under consideration, the charging of a flat rate or using an average complexity costing model will result in the requesting individual being charged a fee that exceeds "reasonable cost recovery."

The OHA states that determining what constitutes "reasonable cost recovery" other than through a "flat rate" or "average complexity" cost recovery model, prejudices those with voluminous records of personal health information or records for which exclusions or exemptions from the right of access may be applicable. However, this ignores the fact that the approach favoured by the OHA will often result in prejudice, at times significant, to individuals with smaller, more straightforward, records. It also ignores the fact that, pursuant to section 54(12) of the *Act*, a Custodian can grant a fee waiver in circumstances where it is fair and equitable to do so. Finally, the OHA's position that a "regulated" scheme is not desirable is contrary to the access mechanism established by the *Act*. Although the OHA takes the position that custodians should be able to independently establish a cost recovery process, the *Act* explicitly provides a system of oversight of fees that are charged, including a review of those decisions by this office. In any event, the OHA's submissions regarding a "regulated fee structure" do not address the issue before me, which is the meaning of the phrase "reasonable cost recovery" as used in section 54(11).

Even if I accept the OHA's suggestion that the flat rate or average complexity system of cost recovery would be "reflective of costs associated with records management and labour" when examined from a global perspective, in my view, the *Act* should be interpreted so that each request for access to records of personal health information is assessed on its own merits. An individual seeking access to his or her records of personal health information should not be required to subsidize the cost associated with another individual accessing his or her records of personal health information.

Nor do I agree with the OHA's position that its approach provides "an opportunity for a hospital to consider the *specific nature and complexity of the requests it receives*." In fact, this approach does the opposite. In the current case, the fee charged by Dr. Berndt does not take into account the limited number of records of personal health information at issue and the absence of any exclusions or exemptions from the right of access, resulting in a fee that exceeds "reasonable cost recovery."

While the flat rate or average complexity scheme may be an administrative convenience, in my view, the cost recovery scheme established by the *Act* is not designed for the convenience and ease of Custodians. Nor is the meaning of "reasonable cost recovery" in section 54(11) of the *Act* to be determined from the perspective of the totality of requests received by a Custodian. An unfairly high fee in one case is not counterbalanced by a lower fee in another, albeit more complicated, request. Rather, the purpose of a "reasonable cost recovery" scheme is to ensure that, in each *individual* case, a fee is set that reflects the specific and unique realities of that case.

The OMA and OHA have also submitted that the fees in the OMA *Guide* represent "reasonable cost recovery" because they are consistent with the fees recommended by the College of Physicians and Surgeons of Ontario as well as medical associations in other provinces. I do not find this argument persuasive. The OMA and the OHA fee schemes were in place at the time that the *Act* was proclaimed in force in 2004. It was open to the Legislature to prescribe a fee scheme under the *Act* that was consistent with those two schemes and it chose not to do so. Similarly, the *Act* could have sanctioned a fee scheme approved either by colleges of health professions or professional associations. Again, this approach was not taken.

Finally, the OHA submits that administering a scheme where fees are determined on a case-by-case basis will affect the timeliness of responding to access requests, will render it difficult to provide an estimate of the fee as required by section 54(10) of the *Act* and will unduly burden custodians with increased costs. Again, with respect, I disagree. This office has a long and successful history with public sector institutions that are routinely required to respond to voluminous and complex requests under *FIPPA* and *MFIPPA*. Under those statutes, a process has been developed for responding to such requests by reviewing a representative sample of responsive records and, based on this review, providing requesters with a fee estimate. While the final fee may not be calculated until all the records are retrieved and copied, this process of providing an estimate allows the requester to decide whether or not to proceed with the request without putting the institution to the work of retrieving and copying all the responsive records. This process also reduces the possibility that any costs associated with the retrieval of records will be unrecoverable in the event that an access request is abandoned by the requester.

FIPPA and MFIPPA

The public sector access and privacy acts, *FIPPA* and *MFIPPA*, provide that individuals may request access to two categories of records from public sector institutions: records of personal information and "general" records. General records are those that deal with administrative, operational, financial and other matters relating to the operation of the institution. Regulations under those statutes establish a different fee structure depending on whether an individual requests access to their own personal information or to general records. When responding to a request for personal information, for example, an institution may not charge for preparing records for disclosure; which would include, for example, the time spent severing records. On the other hand, institutions may charge for preparing general records for disclosure. As such, the public sector acts do not represent a "reasonable cost recovery" scheme when records of personal information are at issue.

Under the *Act*, Custodians are only required to provide access to records of personal health information and there is no right of access to what might be considered general records. What constitutes "reasonable cost recovery" must therefore be understood within this distinct legislative context. In other words, the term "reasonable cost recovery" in section 54(11) of the *Act* is used only in relation to access to one's own records of personal health information.

If the structures in *FIPPA* and *MFIPPA* were to be adopted in the interpretation of section 54(11) of the *Act*, a Custodian would not be permitted to charge a fee to review the records to determine

whether there are any applicable exclusions or exemptions from the right of access. This, in my view, would not represent "reasonable cost recovery" for Custodians since it overlooks the fact that Custodians must, in certain cases, exercise professional judgement in the determination of whether a record or part of a record of personal health information is exempt or excluded from the right of access under the *Act*. For example, the Custodian must exercise his or her professional judgement in relation to the potential application of the exemption in sections 52(1)(e)(i), which permits the Custodian to refuse access if granting the access could reasonably be expected to "result in a risk of serious harm to the *treatment* or *recovery* of the individual or a risk of serious bodily harm to the individual."

I acknowledge that not every request for access to records of personal health information will require the same level of scrutiny. However, there will be requests where an assessment of the impact on "treatment" or "recovery" of an individual that engages the exercise of professional judgment on the part of a health care provider will be required.

As a result, the fact that the fee schemes set out in *FIPPA* and *MFIPPA* do not permit recovery for the costs associated with reviewing and severing records that contain personal information makes it inappropriate to adopt in the interpretation of section 54(11) of the *Act*.

Proposed Regulations

As previously stated, the Minister published a proposed regulation which, among other things, prescribed the maximum amount of fees that a Custodian may charge an individual in providing access to records of personal health information under the *Act*. Although circulated publicly, these regulations were not adopted.

The proposed regulation, which was published in 2006, states in part:

> Fees for access to records
>
> **25.1** (1) For the purposes of subsection 54 (11) of the *Act*, the amount of the fee that may be charged to an individual 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 may be refused.

5. Preparation of a response letter to the individual.

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 the individual's examination of the original record for not more than 15 minutes.

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

10. The Regulation is amended by adding the following Table:

TABLE 1

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 may be refused	$45 for every 15 minutes after the first 15 minutes
13.	For supervising an individual's examination of original records	$6.75 for every 15 minutes

In my view, the fees set out in the proposed regulation accord much more closely with "reasonable cost recovery" as used in section 54(11) of the *Act* than the other schemes that have been discussed in this Order.

The proposed regulation permits a Custodian to charge an initial set amount for photocopying or printing the record to a maximum of the first 20 pages plus an amount for making and providing photocopies of every additional page after those 20 pages.

Although superficially similar in structure to the OMA *Guide*, there are significant differences. For example, the initial amount payable under the proposed regulation is tangibly less than that which is payable under the OMA *Guide*. Under the proposed regulation, a Custodian may charge $30 for photocopying or printing the first 20 pages, while under the OMA *Guide* the recommended fee is $39.45 for the first 5 pages, or $52.50 in the case of records that include, using the language in the OMA *Guide*, "services of a psychiatric nature."

In addition, the proposed regulation permits a Custodian to charge 25 cents per page for every page after the first 20 pages. Under the OMA *Guide*, the recommended fee is $1.55 per page after the first 5 pages, or $2.15 per page for records that include services of a psychiatric nature.

In addition, the proposed regulation, unlike the OMA *Guide*, does not draw a distinction between categories of records; e.g. records relating to "services of a psychiatric nature." In my view, this is appropriate. The fees charged by a Custodian for access should not be based on the category of the record, but on the length of the record and the likelihood of whether any exclusions or exemptions from the right of access may be applicable. Simply because a record may relate to psychiatric or mental health services does not necessarily mean that those records will require a greater level of scrutiny.

Another key distinguishing feature is that the set fee of $30 allowed for under the proposed regulation includes not only the cost of photocopying or printing to a maximum of the first 20 pages, but also one, more or all of the following:

- Receipt and clarification, if necessary, of a request for a record;
- Providing a fee estimate;
- Locating and retrieving the record;
- Reviewing the contents of the record for not more than 15 minutes to determine if the record contains personal health information to which access may be refused;
- Preparing a response letter to the individual;
- Preparing the record for photocopying, printing or electronic transmission;
- Packaging of the photocopied or printed copy of the record for shipping or faxing;
- Electronically transmitting a copy of the electronic record instead of printing a copy of the record and shipping or faxing the printed copy;
- 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; and
- Supervising the individual's examination of the original record for not more than 15 minutes.

The proposed regulation also permits a Custodian to charge additional amounts for other activities beyond those encompassed in the $30 set fee. For example, after the first 15 minutes, a Custodian may charge for reviewing the records for severances and for supervising the individual's examination of the original records.

In conclusion, I have reviewed a number of fee schemes to determine which most closely represents "reasonable cost recovery" within the meaning of section 54(11) of the *Act*, including the proposed regulation under the *Act*, the regulations made under *FIPPA* and *MFIPPA,* the OMA *Guide* and the discretionary flat fee recommended by the OHA. For the reasons set out above, I have concluded that the fee scheme set out in the proposed regulation 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*.

In my opinion, the $125 fee charged by Dr. Berndt in this complaint and the OMA *Guide* fee of $115.15, exceed "reasonable cost recovery." In arriving at this conclusion, I have carefully considered the following material circumstances:

- The total of 34 pages of records of personal health information at issue here is modest.

- Dr. Berndt states that he spent 50 hours responding to the request and that a portion of this time related to his review of the records and "applying professional judgment." However, he has not provided any evidence about the total time spent reviewing the records as distinct from the time spent responding to the request for access. In any event, reviewing the limited number of records to determine if access could be refused would have required only a fraction of the 50 hours claimed.

- Dr. Berndt has granted access to the records in full and, therefore, he was not required to spend any time severing information from the records.

- Other than the time for processing the request and responding to the complainant's communications, the costs incurred by Dr. Berndt in relation to this access request primarily relate to photocopying charges.

In applying the fees in the proposed regulation under the *Act* to the records at issue in this review, Dr. Berndt is entitled to charge $33.50 calculated as follows: $30.00 for photocopying the record to a maximum of the first 20 pages and the sum of 25 cents per page for the pages that follow.

I do not accept that Dr. Berndt was required to spend 50 hours in reviewing the records and, in my view, it is reasonable to limit Dr. Berndt to 15 minutes to review the 34 pages of records to determine if they contain personal health information to which access may be refused. Under the proposed regulations, the initial set fee of $30 includes not only photocopying or printing to a maximum of the first 20 pages but the costs associated with reviewing the contents of the record for not more than 15 minutes. Adopting the same approach here, the 15 minutes of review time that I have found to be reasonable is compensated for in the initial charge of $30.

Consequently, I find that the fee charged by Dr. Berndt was not in compliance with section 54(11) of the *Act* and that a fee of $33.50 qualifies as "reasonable cost recovery." I now turn to consider the complainant's request for a waiver of the fee.

Issue D: Is the complainant entitled to a fee waiver pursuant to section 54(12) of the *Act*?

As noted above, the complainant sought and was denied a waiver pursuant to section 54(12) of the *Act* of the fee charged by Dr. Berndt for providing the complainant with access to the requested records of personal health information. She is seeking a review of that decision and claims that the waiver should be granted on the basis of financial hardship.

Section 54(12) states:

> (12) A health information custodian mentioned in subsection (10) may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so.

The complainant's request for a fee waiver is based on financial hardship. I have carefully reviewed the complainant's representations and the supporting documentation that she provided to me regarding her income and expenses. The complainant receives a government disability pension and resides in government subsidized housing with another person with whom she shares expenses. However, in addition to her regular monthly expenses she also has a student loan debt payment.

With respect to the question of whether it would be fair and equitable to waive the fee, the complainant states:

- Dr. Berndt's initial response was that she was not entitled to access her records and she was required to make repeated demands for access before Dr. Berndt would respond to her request.

- She is living off government income support which provides her with a modest sum for all of her living expenses.

Dr. Berndt did not submit any representations that speak directly to the fee waiver issue. However, he did state that he only charged for a small portion of the time spent in processing the access request and, in doing so, took into account the financial circumstances of the complainant. He also states that he did not receive any evidence from the complainant about her ability to pay the fee.

I have found above that the fee for access to the complainant's records of personal health information should be reduced to $33.50. Having considered the representations submitted, and in view of my findings regarding the appropriate fee, I am not persuaded that Dr. Berndt erred in determining not to waive the fee pursuant to section 54(12) of the *Act*.

SUMMARY OF FINDINGS:

I have made the following findings in this review:

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

2. Dr. Berndt is a health information custodian as defined in section 3(1) of the *Act*.

3. The fee charged by Dr. Berndt for access to the complainant's records of personal health information exceeds "reasonable cost recovery" under section 54(11) of the *Act*.

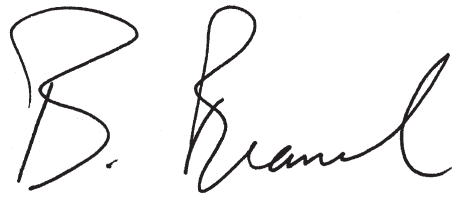
4. Dr. Berndt is entitled to charge a fee of $33.50 for the complainant to access her records of personal health information, which represents the amount of "reasonable cost recovery" within the meaning of section 54(11) of the *Act*.

5. Dr. Berndt did not err in determining not to waive the fee pursuant to section 54(12) of the *Act*.

ORDER:

1. I do not uphold the fee of $125 and order Dr. Berndt to reduce the fee to $33.50.

2. I uphold Dr. Berndt's denial of the fee waiver.



October 13, 2010

Brian Beamish
Assistant Commissioner (Access)

Date

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