July 2, 2009

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2009-008

REPORT A-2009-008

Western Regional Integrated Health Authority

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* ("*ATIPPA*") for access to the draft and final versions of a report on surgical services in the western region, which was commissioned by the Western Regional Integrated Health Authority ("Western Health") in 2007 (the "Surgical Services Reports"). Western Health granted access to a portion of the Surgical Services Reports and severed other portions citing section 20(1)(a) (policy advice or recommendations) and section 30 (disclosure of personal information) of the *ATIPPA*. With respect to section 30, Western Health severed portions of the information on the grounds that the events described in the Surgical Services Reports "took place in small communities and were unique to the time and place." With respect to both Surgical Services Reports, the Commissioner found that some information had been appropriately severed under section 30. Certain other portions of the severed information were recommended for release because the information: i) was not personal information within the meaning of section 2(o) of the *ATIPPA*; ii) related to the positions and/or functions of third parties as employees or members of a public body pursuant to section 30(2)(f); or iii) was the opinion or view of the author of the Surgical Services Reports pursuant to section 30(2)(h). With respect to section 20, in the context of the Draft Surgical Services Report the Commissioner found that some information had been appropriately severed. However, a portion of the severed information was factual information pursuant to section 20(2)(a), and other severed information did not reveal advice or recommendations. Therefore, it was found that this information could not be withheld under section 20(1)(a). In the context of the Final Surgical Services Report, the Commissioner found that section 20(1)(a) could not be used to withhold any information as the Final Surgical Services Report was a "final report" in accordance with section 20(2)(f). The Commissioner recommended the release of the entire Final Surgical Services Report with the exception of the information protected from disclosure by section 30.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, ss. 2(e), 2(o), 2(t), 20(1)(a), 20(2)(a), 20(2)(f), 30(1), 30(2)(f), 30(2)(g) and 30(2)(h) and *Regional Health Authorities Act,* S.N.L. 2006, c.R-7.1.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-005, 2006-001, 2006-011, 2007-006, 2007-008, 2007-015, and A-2009-005; Ontario OIPC Order PO-2028; Alberta OIPC Order 97-007; British Columbia OIPC Orders 01-01, 00-27 and F08-03; *Doctors Nova Scotia v. Nova Scotia (Department of Health*), 2005 NSSC 244 (N.S. S.C.) (CanLII); *Doctors Nova Scotia v. Nova Scotia (Department of Health*), 2006 NSCA 59 (N.S. C.A.) (CanLII).

Other Resources Cited:

Concise Oxford English Dictionary, 10th Edition, Revised, New York: Oxford University Press (2002);

Government of British Columbia Freedom of Information and Protection of Privacy Policy and Procedures Manual, available at: http://www.cio.gov.bc.ca/services/privacy/manual/default.asp;

Memorandum of Agreement between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2002-2005, available at: http://www.nlma.nl.ca/documents/agreements_negotiations/agreement_negotiation_1.pdf

Memorandum of Agreement between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2005-2009, available at: http://www.nlma.nf.ca/documents/agreements_negotiations/agreement_negotiation_3.pdf

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request to the Western Regional Integrated Health Authority ("Western Health") which was received on 2 September 2008 in which he sought the disclosure of records as follows:

> *The reports on surgical services in the western region commissioned by Western Health in 2007. These reports were prepared by an independent consultant,* [*name*]*. It is my understanding there were two reports submitted – a "draft" report in or around June 2007, and a "final" report in or around February 2008. Request includes both reports.*

[2] By correspondence dated 2 October 2008 Western Health advised the Applicant that access to the requested records had been granted in part. Portions of the information had been severed pursuant to section 20(1)(a) (policy advice or recommendations) and/or section 30 (disclosure of personal information) of the *ATIPPA*.

[3] In a Request for Review dated 14 October 2008 and received in this Office on 15 October 2008 the Applicant asked that this Office review the records to determine whether Western Health had appropriately applied section 20(1)(a) and section 30(1). The Applicant further indicated that he believed Western Health had applied an overly-broad interpretation of section 30(1).

[4] During informal resolution attempts Western Health released some additional information to the Applicant. Further informal resolution efforts were unsuccessful. By letters dated 27 March 2009 both the Applicant and Western Health were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the *ATIPPA*. The Applicant declined to make a submission. Western Health provided a two-page letter in support of its position.

II WESTERN HEALTH'S SUBMISSION

[5] In its submission Western Health makes the following three points in support of its reliance on section 30:

- *The names of physicians had been redacted in a previous access to information request that was received by another public body where Western Health was consulted as a third party. Furthermore, the majority of these physicians are fee for service who would not appear to fall under section 30(2)(f) of the ATIPPA.*
- *References to* [*physicians' titles*] *have been redacted as revealing these would identify the individual doctor.*
- *We are concerned that revealing the additional personal information might identify* [*groups of individuals*] *and circumstances of the case.*

[6] With respect to section 20 Western Health submits:

- *The information that has been redacted from both reports constitutes policy advice or recommendations that we are not in a position to release at this point in time. As previously stated, the policy advice that we are continuing to redact has not been approved, declined, announced, and/or implemented by Western Health.*
- *The release of this information and the ensuing scrutiny would harm the deliberative process that needs to occur.*
- *We do not agree that section 20(2)(f) applies in this particular case in relation to the February 2008 report.*

Please note that policy advice that has been approved, declined, announced, and/or implemented has been released to the Applicant.

III DISCUSSION

[7] The issues to be decided are as follows:

1. Whether section 30 of the *ATIPPA* is applicable to any information in the responsive records; and

2. Whether section 20(1)(a) of the *ATIPPA* is applicable to any information in the responsive records.

[8] For clarity I will refer to the report prepared in or around June 2007 as the "Draft Surgical Services Report" and to the report prepared in or around February 2008 as the "Final Surgical Services Report." Collectively the reports will be referred to as the "Surgical Services Reports."

1. Is section 30 of the *ATIPPA* applicable to any information in the responsive record?

[9] It should first be noted that any determinations made in respect of section 30 and the Draft Surgical Services Report also apply to the Final Surgical Services Report.

[10] Section 30 of the *ATIPPA* deals with the disclosure of personal information as follows:

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *(2) Subsection (1) does not apply where*
>
> *(a) the applicant is the individual to whom the information relates;*
>
> *(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*
>
> *(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
>
> *(d) an Act or regulation of the province or Canada authorizes the disclosure;*
>
> *(e) the disclosure is for a research or statistical purpose and is in accordance with section 41 ;*
>
> *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*

> *(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
>
> *(h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;*
>
> *(i) public access to the information is provided under the Financial Administration Act ;*
>
> *(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;*
>
> *(k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or*
>
> *(l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including*
>
> > *(i) personal information that is supplied in support of the application for the benefit, or*
> >
> > *(ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.*

[11] Section 2(o) of the *ATIPPA* provides the definition of "personal information" as follows:

> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, address or telephone number,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
> >
> > *(iv) an identifying number, symbol or other particular assigned to the individual,*

> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
>
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
>
> *(viii) the opinions of a person about the individual, and*
>
> *(ix) the individual's personal views or opinions;*

[12] In Report 2006-001, my predecessor discussed the operation of section 30(1) and section 30(2). At paragraph 34 he indicated that once it has been determined that information fits the definition of personal information, the information is excepted from disclosure pursuant to section 30(1) unless it is exempted by section 30(2). If the personal information falls within a subsection of section 30(2), it cannot be withheld under section 30(1).

[13] Section 2(o) is anchored in the concept of the "identifiable individual." In this respect, in Report 2007-008, my predecessor stated at paragraph 43:

> *[43] My review of the cited decisions from the Courts and Commissioners across Canada leads me to adopt the following principles regarding when recorded information is about an "identifiable individual" within the definition of "personal information" in section 2(o) of the ATIPPA:*
>
> > *1. A record contains information about an identifiable individual when there is a reasonable expectation that the information in the record by itself, or in combination with information from sources otherwise available, can lead to an identification of the individual involved;*
> >
> > *2. One factor to be taken into account in determining whether there is a reasonable expectation of identifying the individual is the number of people in the group to which the individual belongs and to which the information relates;*
> >
> > *3. There must be a connection, link, or nexus between the information and the specific individual to be identified in order to have an identifiable individual; and*

> *4. There must be more than a possibility that the information could identify the individual, that is, there must be more than speculation or conjecture that the information may identify the individual; there must be evidence provided that establishes a probability that the individual will be identifiable from the information available.*

[14] The nature of the Surgical Services Reports requires reference to a great deal of personal information and, accordingly, there is a great deal of personal information contained in the Surgical Services Reports. Generally, Western Health has appropriately severed this information, however, the concern of Western Health that *"*revealing additional personal information might identify [groups of individuals] and circumstances of the case" has led Western Health to sever more information than it should have.

[15] Western Health's concern appears to be based, whether intentionally or not, on the four principles enumerated above and the theory of the "mosaic effect." My predecessor briefly discussed the mosaic effect in Report 2007-006 where he stated at paragraph 43:

> […] *Some Commissioners have spoken of a "mosaic" effect, whereby information can be gathered in seemingly innocuous pieces, and later put together to reveal the personal information of others. When an Applicant is already starting with the names of the four individuals, and the number of individuals is so small, the risk of disclosure of personal information is unacceptable.*

[16] In Order 01-01 the British Columbia Information and Privacy Commissioner made the following comments in relation to the mosaic effect at paragraphs 40-45:

> *[40] Again, there is evidence before me of a reasonable expectation that the disputed information could be used to identify abortion service providers. This is an example of what is often called the 'mosaic effect'. The term describes the result where seemingly innocuous information is linked with other (already available) information, thus yielding information that is not innocuous and, in the access to information context, is excepted from disclosure under the Act. The fact that, according to the applicant, the number of "practitioners" involved in abortion services in British Columbia has been published does not mean the information in dispute here – which relates to a single, arguably unique institution – could not be used to identify individuals through the mosaic effect.*
>
> *[41] The mosaic concept is usually encountered in intelligence and law enforcement contexts. In United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409*

> *U.S. 1063 (S.C.), for example, the U.S. Court of Appeals said (at p. 1318) that, due to the*
>
> > *… mosaic-like nature of intelligence gathering … what may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in context.*
>
> *[42] The mosaic effect is also encountered in access to information access cases. In Ternette v. Canada (Solicitor General), [1991] F.C.J. No. 1168, an individual had, under the Privacy Act of Canada, applied for access to his own personal information. At para. 45, the Federal Court of Appeal described the mosaic effect as what happens when*
>
> > *… one takes seemingly unrelated pieces of information, which may not be particularly sensitive individually, and compares them with each other to develop a more comprehensive picture.*
>
> *[43] More recently, in Ruby v. Canada (Solicitor General), 2000 CanLII 17145 (F.C.A.), [2000] 3 F.C. 589, the Federal Court of Appeal referred, at para. 85, to the expert evidence before the Court which described the mosaic effect as a process "whereby seemingly unrelated pieces of information could be compared with each other to develop a more comprehensive picture resulting in disclosure of" exempt information. Both Ternette and Ruby, while they are information access cases under the federal Privacy Act, relate to security and intelligence matters.*
>
> *[44] Closer to home, my predecessor found that the mosaic effect applied in Order No. 81-1996, where he found that "disclosure of one piece of the puzzle may disclose everything."* […]
>
> *[45]* […] *As for the mosaic effect generally, a public body will be able to invoke it only where the evidence it has adduced establishes that it applies. Cases in which the mosaic effect applies will be the exception and not the norm.*

[17] Clearly, in certain circumstances, information can be pieced together such that, as a whole, the information leads to the identification of the individual to whom the information pertains. Where this occurs, that information must be excepted from disclosure.

[18] I do not mean to suggest that every piece of innocuous information about times, places and events should be categorically severed in case they might collectively reveal personal information. Rather, the record must be examined as a whole to determine whether it is probable that an individual may be

identified through the disclosure of such information. Where information, either on its own or coupled with additional information, does not point to an "identifiable individual" within the meaning of section 2(o), then that information cannot be withheld under section 30(1).

[19] Based upon the large amount of personal information contained in the Surgical Services Reports and the assertion of Western Health that the Surgical Services Reports describe events which "took place in small communities and were unique to the time and place," Western Health is essentially arguing that it may be possible that "seemingly unrelated pieces of information which may not be particularly sensitive individually" could be grouped together to form "a more comprehensive picture" and thereby identify individuals.

[20] The Surgical Services Reports relate to surgical services in the western region. According to its website, Western Health operates two hospitals, four health centres and three long-term care centres. It serves over 80,000 people. The large number of people involved with surgical services in a population of over 80,000 significantly decreases the reasonable expectation of identifying an individual from a collection of innocuous information.

[21] Some of the information which Western Health has redacted on this basis is generic in nature; it is as likely to apply to a large number of individuals, both patients and staff, involved in surgical services within Western Health as it is to apply to one individual. There is no link between this information and a specific individual. Identifying an individual from this information is nothing more than a distant possibility, if that. Western Health has provided no evidence of the probability of identifying an individual through the release of this information.

[22] Therefore, certain portions of the severed information do not constitute personal information, either separately or collectively. In those cases section 30(1) does not apply and there is no need for me to examine section 30(2). Consequently, additional information can be released without encountering "a reasonable expectation that the information […] can lead to an identification of the individual involved" as discussed in Report 2007-008 and reiterated above.

[23] Western Health has also claimed that references to physicians' names and titles should be redacted, lest the individual doctor be identified. Western Health has indicated that this information has been severed in past access requests. Additionally, Western Health has suggested that the status of certain physicians as "fee for service" would remove the information relating to these individuals from the application of section 30(2)(f).

[24] I am not able to comment on the actions taken by Western Health or any other public body with respect to past access requests, outside of those which have come to my Office for review. Of those matters which have come before this Office, each request is analyzed on its facts and different fact scenarios may produce different results each of which is, nevertheless, consistent with the *ATIPPA*. Additionally, in certain circumstances which have come before this Office, applicants have consented to the redaction of physicians' names and titles, but such a redaction is not required under the *ATIPPA.* The actions of another public body in a matter in which this Office was not asked to participate has no effect on the present Review.

[25] Western Health is correct in stating that revealing the name and titles of physicians would reveal the identity of those individuals – a person's name and employment status is clearly personal information in accordance with sections 2(o)(i) and 2(o)(viii). Consequently, I must now look to section 30(2) to determine if any subsections apply.

[26] Section 30(2)(f) of the *ATIPPA* states:

> *30. (2) Subsection (1) does not apply where*
>
> […]
>
> *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*

[27] Section 2(e) of the *ATIPPA* provides the definition of "employee" as follows:

> *(e) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;*

[28] Salaried physicians are clearly employees and section 30(2)(f) would apply to any information relating to the positions, functions and remuneration of those individuals.

[29] The issue of whether fee for service physicians are employees was raised in Report 2006-001. There, the Third Party attempted to distinguish between salaried and fee for service physicians for the purposes of sections 30(2)(f) and 30(2)(g). My predecessor found it unnecessary for his purposes to make such a distinction and went on to find that the agreement between the physicians and the Government of Newfoundland and Labrador was a contract as contemplated by section 30(2)(g) (financial or other details of a contract to supply goods or services to a public body.) My predecessor based his findings on the decision of the Nova Scotia Supreme Court in *Doctors Nova Scotia v. Nova Scotia (Department of Health*), 2005 NSSC 244 (CanLII) which made an identical finding based on a provision of the Nova Scotia legislation which in all material aspects is equivalent to section 30(2)(g). This decision was, however, overturned by the Nova Scotia Court of Appeal in *Doctors Nova Scotia v. Nova Scotia (Department of Health*), 2006 NSCA 59 (CanLII) which found that the contract was not of the type contemplated by the Nova Scotia equivalent to section 30(2)(g). Nevertheless, despite this decision and while section 30(2)(g) has no direct application to the present Review, my predecessor's comments in Report 2006-001 will help to facilitate the discussion of section 30(2)(f). At paragraph 45 he stated:

> *[45] Having reviewed this relevant case, the MOA between the Newfoundland and Labrador Medical Association and the Government of Newfoundland and Labrador and the Arbitration Award, I accept the argument of the Department. While I agree that the responsive records meet the definition of "personal information," I accept that the agreement between physicians and government is a contract as contemplated by section 30(2)(g).* ***It is true that the physician is administering medical services to the patient, but the reimbursement for those services comes directly from government in accordance with a detailed agreement, to which both parties are signatories. The patient is not involved in the reimbursement process and, for the most part, is never aware of the amount of the reimbursement or the conditions under which it is paid.*** *I would also note that the information being requested would not identify any individual patient. In my opinion, MCP billings reflect a contractual service provided to the Department of Health*

> *and Community Services.* ***Clearly, the agreement to pay physicians under the MCP program facilitates the provision of medical services to the citizens of this Province through the use of public funds.***
>
> [Emphasis Added]

[30] At paragraph 36 my predecessor quotes from the "MOA" to which he referred:

> *[36] With respect to the supply of goods or services, the Department referenced Article 10.01 of the MOA:*
>
> > *Physicians commit to provide, in accordance with the negotiated payment schedule/salary rate, the insured services which have been traditionally funded through MCP and which the public might reasonably expect to be available, subject to resources and skill limitations.*

[31] The MOA referred to by my predecessor was updated and re-executed for the period of 2005-2009. Article 10.01 and the other general provisions remain the same as does the general layout. Most changes relate to the earlier arbitration award, and have no effect on this analysis. Both the current MOA and the MOA referred to by my predecessor provide separate discussions of salaried and fee for service physicians, however, Article 10.01 is part of the "General Considerations" Section which appears to apply to both salaried and fee for service physicians.

[32] As stated earlier, the conclusion drawn by my predecessor was based on a decision of the Nova Scotia Supreme Court which was later overturned by the Court of Appeal which found that the relevant agreement was not a contract to supply services to a public body, rather the services were being provided by the physicians to patients. Fortunately, I am not tasked with determining the application of section 30(2)(g) and, consequently, the ultimate conclusion from the Nova Scotia Court of Appeal has no direct bearing in the present circumstance. **Indirectly, the conclusion from the Court of Appeal can be used to distinguish between services supplied "to a public body" and services performed "for the public body" in accordance with section 2(e). This distinction, which I will now further emphasize, is crucial to the understanding and interpretation of section 30(2)(f) and the analysis of the nature of the employment of fee for service physicians.**

[33] The *Concise Oxford English Dictionary*, 10th Edition, defines "to" and "for" as including:

> ***for*** *• prep.* ***1*** *in favour of.* ***2.*** *affecting or with regard to.* ***3*** *on behalf of or to the benefit of.* […] ***8*** *in exchange for.* ***>*** *charged as (a price).* […].
>
> ***to*** *• prep.* […] ***2*** *identifying the person or thing affected.* ***3*** *identifying a particular relationship between one person or thing and another.* […].

[34] As noted in the comments of my predecessor and acknowledged by the MOA, physicians perform their services in return for reimbursement from the Government of Newfoundland and Labrador. The Western Regional Integrated Health Authority is a statutory creation, created under the *Regional Health Authorities Act,* S.N.L. 2006, c. R-7.1 and pursuant to section 6(4) of that Act is an agent of the Crown. Consequently, Western Health is an agent of the Government of Newfoundland and Labrador and while Western Health may contend that it is the body responsible for paying physicians, both salaried and fee for service, its ability to make such payments comes from the Government of Newfoundland and Labrador.

[35] The physicians provide insured services **to** patients. That is, it is the patient who is affected by the services. However, the physicians commit to provide these services **for** Western Health and, in turn, the Government of Newfoundland and Labrador. The services are being performed in a set manner with regard to and as a result of the aforementioned MOA. The services are being performed "in accordance with the negotiated payment schedule/salary rate." Physicians, even fee for service physicians who are also covered by the MOA, perform their services in favour of, on the behalf of and to the benefit of Western Health and the Government of Newfoundland and Labrador in exchange for payment. Put simply, physicians perform their services for Western Health and the Government of Newfoundland and Labrador.

[36] As a result, the definition of "employee" as provided in section 2(e) clearly contemplates both salaried and fee for service employees. While I appreciate that this may be a more expansive definition than is provided in other legislation – contractors are often surprised to learn that they are employees for the purpose of *ATIPPA* – this is the definition which I must apply in dealing with *ATIPPA*. In summary,

the physicians, whether salaried or fee for service, are defined under the *ATIPPA* as employees of Western Health and, therefore, the Government of Newfoundland and Labrador. Their names and titles constitute information regarding their positions or functions as employees of Western Health or the Government of Newfoundland and Labrador in accordance with section 30(2)(f) and must be disclosed.

[37] I believe it is also important to note that Western Health has already released the names of certain physicians and other Western Health employees. Western Health has provided no evidence to explain why certain names have been redacted and others released. As discussed above, section 30(1) sets out a mandatory prohibition against the disclosure of personal information unless it is exempted by section 30(2). Consequently, the decision of Western Health to release the name of certain physicians was either based upon a subsection of section 30(2), likely 30(2)(f), or it was done in error based upon Western Health's interpretation of *ATIPPA.* Regardless, Western Health should now be consistent in the application of *ATIPPA* to similar pieces of information.

[38] Based on all of the above, I have concluded that all of the physicians' names and titles which have been withheld from the Applicant are personal information as defined by section 2(o) of the *ATIPPA*. I have further concluded that this information constitutes information about a third party's position and functions as an employee of a public body and, by the operation of section 30(2)(f), should be disclosed.

[39] Finally, although not addressed in its submission, Western Health has redacted further information from both Surgical Services Reports citing section 30. In my opinion, certain portions of this information are properly characterized as "the opinions or views of a third party given in the course of performing services for a public body" in accordance with section 30(2)(h) and should be disclosed.

[40] The author of the Surgical Services Reports clearly acknowledges that the Surgical Services Reports were prepared for the management of Western Health, at the request of the Medical Director of Western Health. The author is neither the Applicant nor Western Health and is, therefore, a third party and the preparation of the Surgical Services Reports is a service performed for Western Health. As indicated above, there is a great deal of personal information contained in the Surgical Services Reports. Where the

author's opinions or views do not relate to an identifiable individual, the information is caught by section 30(2)(h) and should be disclosed.

2. Is section 20(1)(a) of the *ATIPPA* applicable to any information in the responsive record?

[41] Different considerations apply in respect of section 20 and its application to each Surgical Services Report. Consequently, I will discuss the Surgical Services Reports separately.

[42] Section 20 of the *ATIPPA* provides as follows:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice or recommendations developed by or for a public body or a minister; or*
>
> […]
>
> *(2) The head of a public body shall not refuse to disclose under subsection (1)*
>
> *(a) a factual material;*
>
> […]
>
> *(f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;*

[43] As noted in several previous Reports, section 20(1) is discretionary. It permits, but does not require, a public body to refuse access to a record. If the record in question falls within the exceptions set out in section 20(1)(a) or (b), the exercise of discretion to withhold the record is within the authority of the public body. If the record does not fall within the exceptions or falls within a subsection of section 20(2) release of the record will be recommended by this Office in accordance with the *ATIPPA*.

[44] Western Health has claimed an exception under section 20(1)(a).

The Draft Surgical Services Report

[45] In Order 00-27, the Information and Privacy Commissioner of British Columbia dealt with the application of section 13 from the British Columbia legislation, which in all material aspects is equivalent to section 20 of the *ATIPPA,* in relation to draft documents. I considered and quoted from this decision in Report 2008-002 at paragraph 19 as follows:

> *It is immaterial for the purposes of s. 13(1) that a record is, in some sense, a draft. If the record contains information that qualifies as advice or recommendations, its status as a draft or final document does not matter. But the fact that a record is only a draft, in some sense, does not mean that all of the record can be withheld under s. 13(1). The usual principles apply and a public body can withhold only those parts of the draft that actually are advice or recommendations within the meaning of the section.*

[46] In this instance, the fact that the Draft Surgical Services Report is labeled "DRAFT" does not, by itself, mean that the information contained therein is advice or recommendations. Only the paragraphs actually setting out advice or recommendations can be withheld.

[47] In all instances I agree with the severing of information pursuant to section 20(1)(a) in the Draft Surgical Services Report. This information is advice and recommendations and may be severed. However, section 20(1)(a) is discretionary and Western Health should give consideration to the other recommendations contained in this Report in deciding whether to continue to sever this information.

The Final Surgical Services Report

[48] The same considerations also apply to the information contained in and redacted from the Final Surgical Services Report. Section 20(2)(f) also applies to the Final Surgical Services Report. Section 20(2)(f) provides for the release of a "final report […] on the performance or efficiency of a public body or on any of its programs or policies."

[49] Neither my predecessor nor I have yet had the opportunity to comment on the meaning of the phrase "final report" as contained in section 20(2)(f). However, the British Columbia Information and Privacy Commissioner made the following comment in Investigation Report F08-03 at paragraph 21:

> *[21] In summary, the Ministry's position is that the Ministry's head decided that s. 13(1) applied because all of the changes resulting from the broader SAIP review were not yet complete and because the program area took the position that the SAIP Report was a draft report. This led to the understandable* ***if ultimately incorrect*** *conclusion that the SAIP Report itself was not "final".*
>
> [Emphasis added]

[50] In Report 2006-011, my predecessor did offer some comments in relation to draft reports. At paragraphs 12 and 27, my predecessor stated:

> *[12] Relying on the ordinary meaning of the term "draft" in this context, one would conclude that a final version is still forthcoming. Labeling a document as a draft clearly means that it has not yet become final, in anticipation of possible revisions and/or approval by an individual or group of individuals. I take issue with the assertion that the record in this case is a draft report. Of particular interest is the fact that the cover page of the document clearly identifies it as a "Final Report…" I simply do not accept that a document expressly identified as a final report is in fact a draft report. In addition, there is no reference whatsoever within the material that this is a draft document.* ***The fact that a report may identify the need for further studies and additional testing does not render that report a draft****. It simply concludes that more analysis is necessary, which in turn may lead to another report. There is no indication that the initial report will be amended in any way as a result of future analyses and reporting.*
>
> […]
>
> *[27]* […] *I have also rejected the Town's claim that the report is in draft form, particularly in light of the report being identified on its cover as a "Final Report."* ***To identify a document as a draft simply because it recommends further testing misinterprets the concept of "draft." Moreover, even if a document is in draft form, it does not necessarily invite the protection of section 20(1).*** *The only exception to this would be draft legislation or regulations which is specifically protected under section 20(1)(b). I find, therefore, that section 20(1) does not apply to the record being requested by the Applicant.*
>
> [Emphasis Added]

[51] In this case, Western Health has explained that it is withholding information pursuant to section 20(1)(a) because the alleged advice has not been approved, declined, announced, and/or implemented by Western Health and, therefore, it is not in a position to release this information at this point in time. Western Health maintains that the Final Surgical Services Report cannot truly be considered final for this reason. Western Health further asserts that the release of this information would "harm the deliberative process that needs to occur."

[52] I am guided by the above-noted comments of my predecessor and the British Columbia Commissioner in my finding as to whether the Final Surgical Services Report is a "final report" in accordance with s.20(2)(f) of the *ATIPPA*. I believe that the failure to approve or a decision not to approve, decline, announce, or implement advice and/or recommendations does not lend itself to the conclusion that a report is not a final report. If this were accurate, one would only have to refuse to implement one aspect of a report or indicate that a decision is still pending regarding such implementation in order to avoid indefinitely the application of section 20(2)(f). Furthermore, it is also my opinion that the decision of the author to label the June 2007 report "DRAFT" is suggestive of the nature of the other report as the word "DRAFT" has been removed from the title line of that report.

[53] Finally, the phrase "performance or efficiency of a public body or on any of its programs or policies" is not defined in the *ATIPPA* and, again, neither my predecessor nor I have had the opportunity to interpret the phrase. The Government of British Columbia Freedom of Information and Protection of Privacy Policy and Procedures Manual does provide some useful commentary. With respect to section 13(2)(g) of the British Columbia legislation, which in all material aspects is equivalent to section 20(2)(f) of the *ATIPPA*, the Manual describes "performance or efficiency" as follows:

> […] *the management, administration, operations, conduct, functioning or effectiveness of the public body, its programs or its policies. This phrase relates to the management of finances, assets and personnel, and the delivery of services of the public body. It also pertains to the effectiveness of the public body's programs and policies in completing those tasks.*

[54] Both Surgical Services Reports are labeled "Report to the Management of Western Health on Some Aspects of Surgical Services." The opening sentences of both Surgical Services Reports are the same and have been released to the Applicant. The sentence indicates that the author was retained by Western Health to investigate and report on matters of surgical care in the western region.

[55] A report on aspects of services performed and/or offered by a public body, clearly relates to the operations of a public body, its related programs, and the delivery of those services. Therefore, with respect to the entirety of the information which has been severed from the Final Surgical Services Report pursuant to s.20(1)(a) of the *ATIPPA*, I would disagree that any of this information should be severed. It is my opinion that the Final Surgical Services Report is a "final report…on the performance or efficiency of a public body or on any of its programs or policies" as contemplated in s.20(2)(f) of the *ATIPPA*.

V CONCLUSION

Section 30 (disclosure of personal information)

[56] With respect to section 30 and both Surgical Services Reports, I have found that a great deal of the information redacted by Western Health is personal information and is appropriately severed. On the other hand, I have found that:

i. Portions of the records can be released without encountering "a reasonable expectation that the information […] can lead to an identification of the individual involved." In relation to pages hand-numbered 2 and 3 of the Draft Surgical Services Report and 14 and 16 of the Final Surgical Services Report, additional information on these pages, which has been highlighted in blue, should be released;

ii. The names and titles of physicians are personal information as defined by section 2(o) of the *ATIPPA* but this information constitutes information about a third

party's position and functions "as an officer, employee or member of a public body" and, by the operation of section 30(2)(f), is not protected by section 30(1) and should be disclosed. In relation to pages hand-numbered 2, 4, 7, and 10 of the Draft Surgical Services Report and 14, 16, 19, and 22 of the Final Surgical Services Report, the names, positions and functions highlighted in blue should be released;

and

iii. The opinions and views of the author of the Surgical Services Reports are personal information as defined in section 2(o) of the *ATIPPA*, however, where this information is not in respect of another individual, this information was given in the course of "performing services for a public body" in accordance with section 30(2)(h) and should be disclosed. In relation to pages hand-numbered 7 of the Draft Surgical Services Report and 19 of the Final Surgical Services Report, additional information, highlighted in blue, should be released.

Section 20(1)(a) (policy advice or recommendations)

[57] I have found that Western Health is entitled to rely on section 20(1)(a) to withhold information from the Draft Surgical Services Report, however, Western Health should consider the other recommendations of this Report in its exercise of discretion before doing so.

[58] With respect to the Final Surgical Services Report, I have found that it is a "final report" as contemplated by section 20(2)(f) and, therefore, all of the information withheld by Western Health pursuant to section 20(1)(a) in the Final Surgical Services Report should be released. This information has been highlighted in blue on pages 17, 20-21 and 23.

VI RECOMMENDATIONS

[59] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that Western Health release to the Applicant all of the information that has been highlighted in blue on a copy of the responsive record that has been provided to Western Health along with this Report. Information which is highlighted in green on the copy of the responsive record which has been provided to Western Health along with this Report constitutes information which Western Health has appropriately severed.

[60] Under authority of section 50 of the *ATIPPA* I direct the head of Western Health to write to this Office and to the Applicant within fifteen days after receiving this Report to indicate its final decision with respect to this Report.

[61] Please note that within thirty days of receiving a decision of Western Health under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[62] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of July, 2009.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador