



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report AH-2012-001

July 17, 2012

### Eastern Health

**Summary:**

The Complainant sought access to a copy of a diagnostic test he had undergone at a local hospital, consisting of a single page. Eastern Health, in accordance with its fee schedule, informed the Complainant that a copy of the record would cost \$50.00 plus tax. The Complainant felt that this fee was unreasonable and complained to this Office. Under section 57 of the *Personal Health Information Act*, a custodian is permitted to charge a “reasonable fee”. The Commissioner found that the \$50.00 fee to provide individuals with their own personal health information was unreasonable and recommended that individuals be charged a maximum fee of \$25.00 for requests of up to 50 pages, which fee would include various tasks associated with searching for and providing access to the requested information. After the first 50 pages, the Commissioner recommended a photocopy fee of no more than \$0.25 per page. The Commissioner also strongly recommended that personal health information be provided to individuals free of charge at the point of care, except where the requested information is not easily located or voluminous in nature. Further, the Commissioner recommended that the fee be waived or substantially reduced in all cases where it truly represents a barrier to access.

**Statutes Cited:**

*Personal Health Information Act*, S.N.L. 2008, c. P-7.01, sections 57; 66(3)  
Alberta Regulation 70/2001, section 10; New Brunswick Regulation 2010-112 sections 10- 13.

**Authorities Cited:**

Ontario Order HO-009; Alberta Order H2005-002.

## I BACKGROUND

[1] On September 1, 2011 the Complainant requested from Eastern Health a copy of a diagnostic test that he had undergone at a local hospital. The record in question consisted of one page. Eastern Health charged a “standard search fee” of \$50.00, plus 13% tax for a total of \$56.50. The Complainant felt this amount was not reasonable and filed a complaint with this Office, in which he requested an investigation into the amount of the fee. As a Regional Health Authority, Eastern Health is a Custodian under the *Personal Health Information Act (PHIA)* pursuant to s. 4(1)(a).

[2] This investigation is pursuant to paragraph 66(3) of *PHIA* which states that:

*66(3). Where an individual believes on reasonable grounds that a custodian has contravened or is about to contravene a provision of this Act or the regulations in respect of his or her personal health information or the personal health information of another, he or she may file a complaint with the commissioner.*

[3] With respect to fees, *PHIA* states as follows:

*57. (1) A custodian may charge a reasonable fee for providing a copy of a record in response to a request for access and the fee shall not exceed the maximum fee set by the minister.*

[4] Section 57(1) says that the fee must be “reasonable.” Any fee which is not reasonable would be a contravention of *PHIA*, therefore the purpose of this investigation and Report is to assess the reasonableness of the fee charged in this case and to make recommendations to assist Eastern Health in determining a reasonable fee for access to an individual’s personal health information. My conclusions and recommendations should also be considered relevant to other Regional Health Authorities, and to the extent that they are applicable, to other custodians as well. It is important to note that only the standard search fee for “patient/executor/next of kin” as set out in Eastern Health’s fee schedule is under review, and any recommendations made will only be with respect to this specific category of fee.

## II CUSTODIAN’S SUBMISSION

[5] In response to the complaint, the Custodian informed this Office that in its sites in and around the City of St. John’s, Eastern Health processed 21,841 requests for personal health information in

2010-2011. Eastern Health indicated that this volume of requests makes it impractical to assess the time and effort expended to respond to each individual request, and thus charge a request-specific fee. Instead, they have adopted a flat fee that represents the time and effort it takes to respond to the average request. Eastern Health also explained the decentralized filing system of health records. Paper health records are stored at various locations throughout the region, and electronic files are stored in one of four instances of Meditech (the electronic medical records system currently used in the province by Regional Health Authorities). Further, older records are stored on microfiche, and community health records are also stored separately, both in paper format and electronically in a system that is managed provincially (not Meditech). A request for personal health records could potentially require that all these locations and systems be searched, and the fee is designed to recover some of the costs involved in searching for and copying the requested records. The Custodian also stated that despite the increasing complexity and scope of requests, the fee has remained unchanged for many years and is on par with fees charged by other Canadian hospitals.

- [6] At a meeting with staff from this Office, officials from Eastern Health advised that of the 21,841 requests for information received by Eastern Health last year, many were from doctors for the purpose of patient care. There is no fee charged to doctors who request health records for the purpose of patient care. The next largest group of requesters was lawyers and insurance companies. There is a separate fee charged for requests of this nature. Individuals requesting their own personal health information comprised a relatively small group. The Custodian again stressed that the flat fee was imposed as a way to keep things simple, and charging a request-based fee would just be too complicated, given the diverse, decentralized and complicated system that may have to be searched. The Custodian also stressed that personal health records are provided to family doctors free of charge, and patients can then access their personal health information through the family doctor. Further, individuals can also view their records, at Eastern Health's offices, free of charge for one hour. The Custodian also indicated that the fee can be waived on compassionate grounds, given the circumstances of the case. There is no written policy on fee waiver for compassionate grounds, however. Typically in such cases the information is simply provided to the family doctor free of charge on the understanding that the patient should be able to access the information through that route.

[7] Prior to this Report being issued, Eastern Health advised this Office that it has amended its fee schedule so that patient/executor/next of kin requests for personal health information will now cost \$30.00 for up to 25 pages, \$50.00 for 25 – 100 pages, a copy fee of \$0.50 per page for more than 100 pages, and additional cost for copying done outside the facility.

### III APPLICANT'S SUBMISSION

[8] In his complaint to this Office the Applicant indicated that he felt the fee was too high and referenced the fee schedule set out under the *Access the Information and Protection of Privacy Act*.

### IV DISCUSSION

[9] Under *PHIA*, a custodian is permitted to charge a “reasonable fee” for access to personal health information. Section 57 states as follows:

*57. (1) A custodian may charge a reasonable fee for providing a copy of a record in response to a request for access and the fee shall not exceed the maximum fee set by the minister.*

*(2) A custodian may waive all or part of a fee referred to in subsection (1).*

[10] The Minister of Health and Community Services has not established a fee schedule or set any maximum fee, so in order to inform my opinion regarding what constitutes a “reasonable” fee, I have looked to other Canadian jurisdictions to determine what fees are charged for access to one’s own personal health information. In Ontario Order HO-009, a regulation that had been proposed by the Legislature but never adopted was accepted by the Commissioner’s Office. The regulation proposed a fee not to exceed \$30.00 for a list of enumerated tasks related to providing access to personal health information. The fee includes all of the following tasks:

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.*

The proposed regulation also sets out additional specific fees for other services that may be requested, and this was also accepted by the Ontario Assistant Commissioner.

[11] In coming to his conclusion, the Assistant Commissioner for Ontario focused on the importance of the right to access personal health information. While the Ontario legislation uses the term “reasonable cost recovery”, the comments contained in Order HO-009 about the importance of this right are very persuasive, and applicable to the case at hand. In that case, the Assistant Commissioner for Ontario made the following statements:

*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.*

...

*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.*

[12] I have quoted this Order at length because, as noted above, although the Assistant Commissioner for Ontario is making a determination with respect to the meaning of "reasonable cost recovery", his comments and observations with respect to the importance of the right to access personal health information are quite applicable to the issue at hand. In determining what constitutes a "reasonable" fee to access personal health information under *PHIA*, one cannot ignore the importance of the right, and the reasons for which the right exists.

[13] In Alberta, the *Health Information Act Regulation* (Alberta Regulation 70/2001) states:

*Fees for health information*

*10(1) An applicant who makes a request for access to a record containing health information may be required to pay a basic fee of \$25 for performing one or more of the following steps to produce a copy of the information:*

- (a) receiving and clarifying the request;*
- (b) obtaining consent if necessary;*
- (c) locating and retrieving the records;*
- (d) preparing the record for copying, including removing staples and paper clips;*
- (e) preparing a response letter;*

(f) *packaging copies for shipping or faxing, or both;*

(g) *postage and faxing costs;*

(h) *photocopying a record.*

(2) *Processing of a request will not commence until the basic fee has been paid, if applicable.*

(3) *In addition to the basic fee, additional fees in accordance with the Schedule may be charged for producing a copy of a record.*

Again, there is a separate, itemized fee schedule for other services above and beyond those listed.

[14] The Information and Privacy Commissioner of Alberta, in Order H2005-002, considered a custodian's argument regarding the time spent processing the request for access and reviewing the records, which formed the basis of its claim to a \$40.00 "professional fee" (in addition to the basic fee of \$25.00 as set out above). The \$40.00 fee was the subject of the complaint. The Commissioner stated as follows:

*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]

[15] In Manitoba's *Personal Health Information Act*, the term "reasonable fee" is used. The Winnipeg Health Authority (which is the largest health authority in the province), charges a fee of \$25.00 for all requests, plus a copying charge of \$0.25 per page or \$0.75 per microfilm. This fee can be waived in circumstances of financial hardship. The Manitoba Ombudsman (who has oversight of the Manitoba's personal health legislation) has found this to be acceptable.

[16] In New Brunswick, the term used is "fair and reasonable fee". There, the *General Regulation - Personal Health Information Privacy and Access Act* (New Brunswick Regulation 2010-112) states that a search and preparation fee can be charged by custodians if the custodian estimates that search and preparation related to the individual's request to examine or receive a copy of the individual's



personal health information will exceed 2 hours. For each half-hour beyond the first 2 hours of search and preparation the cost is \$15.00. There are additional fees for photocopies (\$0.25 per page for regular copies), and computer programming and data processing (where necessary). There is no charge for mailing information to the individual, however the costs of courier delivery can be charged to the individual. Fees can be waived in cases of financial hardship.

[17] Contrary to the Ontario personal health legislation, *PHIA* does not address the concept of cost recovery at all. Presumably, had the legislature wanted this to be a consideration in the charging of fees, they could have used language similar to that used in the Ontario legislation. However, as a practical matter, I realize that this is a relevant consideration for custodians, and should therefore be a factor in my determination of what constitutes a “reasonable” fee. That being said, it is by no means the determinative factor.

[18] Eastern Health has argued that given the realities of the record storage system in the province, a complicated structure for figuring out the appropriate fee for each request would be quite onerous. The flat fee currently imposed was designed to keep things simple. However, in cases like the one at hand where the request is for one page, a flat fee will often seem disproportionate to the magnitude of the request, and could also act as a barrier to accessing one’s own personal health information. Similarly, as Ontario’s Assistant Commissioner said in Order HO-009, “[a]n unfairly high fee in one case is not counterbalanced by a lower fee in another, albeit more complicated, request.” While it may all “come out in the wash” as far as a custodian is concerned, this is not reasonable from the perspective of the individual requester. The flat fee may be more convenient for the custodian, and that is a consideration, but convenience is not a determinative factor in my assessment of what is “reasonable”.

## V CONCLUSION

[19] In determining a “reasonable fee”, I must consider all the factors – cost recovery, administrative convenience, but most significantly, the importance of the reasons that gave rise to the legislative entrenchment of the right of access to personal health information, and the effect that fees could have on the exercise of that right by individuals. I am very much persuaded by the comments set out

in Ontario Order HO-009, and given all of the above noted considerations it is my opinion that the standard search fee of \$50.00 plus tax charged to patients/executor/next of kin is inappropriate and unreasonable.

[20] In my opinion, a reasonable standard total fee would be \$25.00 for all of the following tasks:

1. Receipt and clarification, if necessary, of a request for a record.
2. Locating and retrieving the record.
3. 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.
4. Preparation of a response letter to the individual.
5. Preparation of the record for photocopying, printing or electronic transmission.
6. Photocopying the record to a maximum of the first 50 pages or printing the record, if it is stored in electronic form, to a maximum of the first 50 pages, excluding the printing of photographs from photographs stored in electronic form.
7. Packaging of the photocopied or printed copy of the record for shipping or faxing.
8. 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.
9. The cost of faxing a copy of the record to a fax number within the province or mailing a copy of the record by ordinary mail to an address in Canada.

[21] After the first 50 pages, a fee of \$0.25 per page for photocopies may be charged. Fees for requests that require the use of specialized equipment or resources can be assessed outside of these recommendations if circumstances warrant.

[22] This fee structure reduces the amount payable by individuals (thus alleviating most concerns about fees being a barrier to access), yet still allows for some measure of administrative convenience, as the tasks involved in responding to most requests are addressed. Further, it allows for additional copying fees to be charged where voluminous records are requested, and also allows for additional fees where specialized resources or equipment must be used. This cost can be assessed as the case arises. Likewise, if a situation arises wherein the fee associated with accessing one's personal health

information is truly a barrier to access, I would strongly encourage any custodian to waive the fee, as permitted by section 57(2).

[23] Unless the Minister of Health and Community Services decides to set a maximum fee as referenced in section 57(1), I would consider the conclusions of this report to represent a recommended guideline constituting a maximum reasonable fee to be charged by custodians to an individual, executor or next of kin. Custodians may, of course, set a lower fee or charge no fee at all. This report should not be read as interfering with or contradicting any current practice by a custodian whereby no fee or a lesser fee than I have recommended is currently in place.

[24] Likewise, if patients make small requests for personal health information (i.e. test results) at the point of care and such information is readily available at the touch a button, I would strongly encourage custodians to immediately provide this information to patients free of charge (instead of having them make a formal request to the custodian). As there is no search or preparation time involved in such a request, it seems to me that the “reasonable fee” contemplated by section 57(1) would not apply.

## VI RECOMMENDATIONS

[25] I recommend that Eastern Health amend its fee schedule as set out above.

[26] Recognizing that other Custodians may also look to this Report for guidance with respect to fees, I also recommend that at the point of care, individuals should be provided with their personal health information free of charge, except perhaps in exceptional circumstances where voluminous records have been requested or the records are difficult to find, thus resulting in significant search time. I further recommend that in all cases where the recommended maximum fee as set out above represents a true barrier to access that the fee be waived.

[27] Under the authority of section 74(1) of *PHIA*, I direct the Custodian to write to this Office and the Complainant within 15 days of receiving this Report to advise of its decision regarding the recommendations in this Report.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17<sup>th</sup> day of July 2012.

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

