Capital Health

IWK Health Centre

May 7, 2003

Peter O'Brien, Chair
Freedom of Information and Protection of Privacy Advisory Committee
PO Box 7
4th Floor, 5151 Terminal Road
Halifax, NS B3J 2L6

Dear Sir:

Submissions on the *Freedom of Information and Protection of Privacy* ("FOIPOP") *Act*

I am the Director of Risk Management and Legal Services for the Capital District Health Authority ("Capital Health"). In addition to presenting the views of Capital Health, we have been asked this week by the IWK Health Centre (the "IWK") to represent its views before the FOIPOP Committee as well. Therefore, further to your correspondence of May 2, 2003, please accept this letter as Capital Health and the IWK's joint written submissions concerning your review of the FOIPOP Act.

As you are aware, the Act applies to "public bodies". As a result of certain amendments to the legislation in 1999, "public bodies" now explicitly includes any agency, association, board, commission, corporation, office, society or other body designated as a "hospital" under the *Hospitals Act*. This covers both Capital Health and the IWK. As public bodies subject to the legislation, Capital Health and the IWK welcome the opportunity to speak to our experience under the FOIPOP Act.

In addition to these written submissions, I will be making an oral presentation to the Committee on Thursday, May 8, 2003 at 2 p.m.

OUTLINE OF SUBMISSIONS

Our submissions will focus on the following five points:

- The role of Capital Health and the IWK and the purpose of the FOIPOP legislation;

- Our experience with the Act generally;
- Our position regarding the freedom of information provisions of the legislation;
- Our position regarding the privacy of personal information and the current legislative regime, both provincially and federally; and
- Our recommendations regarding possible changes to the legislation and how it is administered.

CAPITAL HEALTH, THE IWK AND THE PURPOSE OF THE FOIPOP ACT

Capital Health

Capital Health exists within the largest integrated academic health district in Atlantic Canada. Capital Health provides core health services to 395,000 residents, roughly 40% of the population of the Nova Scotia. It also provides tertiary and quaternary acute care services to residents of Atlantic Canada. Specialized adult health services are provided to a referral population from the rest of the province of approximately 550,000 and to residents of New Brunswick and Prince Edward Island. Capital Health employs approximately 8,500 people.

Capital Health is responsible for seven community health boards in Halifax Regional Municipality and the western portion of Hants County in Nova Scotia (the "Capital District"). Capital Health is also responsible for nine facilities and various other health and health research programs in the Capital District, including: Addiction Prevention and Treatment Services, the Capital District Mental Health Program; Centre for Clinical Research; Cobequid Community Health Centre; Community Health; Dartmouth General Hospital; East Coast Forensic Hospital; Eastern Shore Memorial Hospital; Hants Community Hospital; Home Support Central; the Nova Scotia Hospital; Musquodoboit Valley Memorial Hospital; Public Health Services; Twin Oaks Memorial Hospital; and the QEII Health Sciences Centre.

The IWK

The IWK is separate from Capital Health and provides care to children, youth, women and families in Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and beyond. In 2001/2002, 4,512 infants were born at the IWK. It is a tertiary care centre with 173 active medical and dental staff who are experts in a wide range of specialities, including paediatrics, surgery, psychiatry, dentistry, laboratory medicine, diagnostic imaging, anaesthesia, obstetrics, gynaecology and family medicine. The IWK also provides the Women's Health Program, which includes such services as gynaecology inpatient and operative care and ambulatory clinics. The IWK is also an active in research into disorders and disease affecting children and women, and for the services concerning child and adolescent mental health. It has more than 2,400 staff and over 750 volunteers.

Capital Health, the IWK and FOIPOP

Section 2 of the FOIPOP Act requires that public bodies strike a balance between public accountability and protection of personal information. Capital Health and the IWK also must maintain this balance in our own operations. Part of the Capital Health mission statement (and part of the guiding principles of the IWK strategic plan) is public accountability - we are responsible for services that are patient/client-centred and responsive to our communities, and for effective management of resources. To achieve this goal, we must be open and honest in what we do and the services we provide. We support the purpose of the current FOIPOP legislation for the simple reason that it articulates our own philosophies within our respective health care centres.

Of course, Capital Health and the IWK are subject to other common law and statutory duties to our patients. For example, Capital Health's primary mandate under the *Health Authorities Act* is to govern and manage the delivery of health services in the Capital District. Under common law and the *Hospitals Act*, both the IWK and Capital Health are required to maintain the confidentiality of patient information. While we strive to be more accountable as publicly funded institutions, we must continue to be allowed to fulfil our primary duty of providing quality health care services to the public and protecting patient information. Therefore, legislation such as the FOIPOP Act should impose as few administrative and financial burdens as possible on entities such as health care centres and regional health authorities.

OUR EXPERIENCE WITH THE ACT GENERALLY

Capital Health's experience with the FOIPOP Act has been brief. Since the creation of Capital Health in 2001, we have received less than 15 FOIPOP applications. In that same period, the IWK received approximately nine applications. A summary of the types of applications submitted to Capital Health and the IWK will be provided to the Committee on Thursday. Of FOIPOP applications to Capital Health and the IWK, by and far a majority of these requests were *freedom of information*, as opposed to *personal information*, requests. Most were quite broad in scope and each of these applications required an extraordinary amount of staff time and resources to respond.

Fees and Costs

A common theme in the written submissions to the Committee to date has been the fees charged by public bodies to applicants under the Act. Where appropriate, we have waived application and processing fees for applicants. In other cases, we have charged the prescribed fees. In our experience, even with the recent increase in application and processing fees, such fees do not cover the labour and other costs required to comply with the legislation.

There are other hidden costs for public bodies as well. For example, when an applicant makes a request for review of one of our decisions to the Review Officer pursuant to section 32 of the

Act, the public body must make representations to the Review Officer. We have no ability to recoup the substantial costs of making oral and/or written submissions to the Review Officer, not even when the Review Officer decides in favour of the public body. As another example, the notification of third parties that is required at various stages under the Act can be time consuming and expensive. These are but two examples of how FOIPOP applications can consume significant human and financial resources.

We are relatively new in our history with the FOIPOP legislation. We expect that as the public is better educated about inclusion of hospitals under the Act, the number and scope of FOIPOP requests to Capital Health and the IWK will grow. In turn, there will likely be further appeals to the Review Officer, to which Capital Health and/or the IWK will have to respond. In a health care system that is already strapped for financial resources, the inability to adequately cost recover is significant. The more FOIPOP requests, the more staff time and financial resources will be taken away from primary health care responsibilities.

We submit that the present regime provides the proper balance in allowing the public body the discretion to waiver of fees, while allowing some ability for the public body to recoup costs. We oppose any decreases in application and processing fees, but support the continued discretion of public bodies to waive fees where appropriate. In terms of recommended changes to the legislation, Capital Health and the IWK would like the ability to recoup costs at other stages of review under the Act as well.

Statutory Exclusions, Decisions and Review

We note that there are many occasions where applicants make requests that (by the nature of the requests) would constitute an outright refusal by the public body. For example, a third party's personal information is clearly excluded from disclosure under section 27 the Act. In theory, therefore, a FOIPOP request for this type of information should be relatively easy for the public body to respond to.

However, given the uncertainty of the review process and the ease with which applicants may seek reviews, public bodies such as Capital Health and the IWK feel compelled to provide detailed decisions for *all* requests, even for requests that are clearly excluded under the Act. We do this because of the possibility of review and the precedent setting nature of the decisions of the Review Officer. In certain cases, such as those where the request is for information that is clearly excluded from disclosure by the legislation, we feel that having to render detailed decisions is an unnecessary use of our staff time and resources.

As stated previously, section 32 allows an applicant to seek a review of a decision made by a public body. Such review is made to the Review Officer who, under section 37 of the Act, can conduct reviews in private or in public and request oral or written submissions from the parties. Both Capital Health and the IWK are of the view that it is a further waste of taxpayer resources to subject requests that are clearly excluded under the Act to the full review process.

In our view, the exclusions in the Act are clear and certain decisions refusing disclosure should not have to be subject to the full review process every time an applicant makes a request for

review. We regularly copy the Review Office on correspondence to applicants. We suggest that the Act be amended to provide for "expedited review" by Review Office staff, similar to the concept of applications for "leave" in court. This would allow Review Office staff to quickly review our decisions and reject requests for review that are clearly without merit, thus saving the public body time and resources in responding to unproductive reviews.

Investigatory Powers of Review Officer

In his submissions to the Committee, Mr. Fardy recommends that the Review Officer be given the power, where there are reasonable grounds, to investigate and audit public bodies to ensure compliance under the Act. As we understand the Act, a Review Officer's role is to respond to requests for review. In our view, the current powers of a Review Officer under the Act are appropriate and sufficient. Additional "pro-active" powers of investigation and audit, while appropriate in larger jurisdictions (i.e., Ontario or federal) are unnecessary in a jurisdiction as small as Nova Scotia.

The Review Office Generally

With respect to the policies and procedures employed by the Review Office, both the IWK and Capital Health would like to see greater clarity in the application of these policies. For example, in one case, the Review Office took the position that the IWK had to comply with a policy regarding how a public body may make submissions to the Review Office. The IWK was previously unaware of this policy and questioned the ability of the Review Office require it to comply with something that was not legislation and not an order under the Act. In the end, the IWK was not required to comply with the policy, but this scenario highlights possible inconsistencies in the manner in which the Review Office deals with public bodies.

In our view, if the Review Office is to employ certain policies or practices in the conduct of its affairs, more effort should be made to make the public aware of these policies or practices. Alternatively, such policies or practices could be enacted as subordinate legislation, thus giving the public notice of their existence.

On a more positive note, both Capital Health and the IWK have found the Review Office very accommodating in our requests for extensions of time to respond under the Act. Our experience with the Review Office mediators has also been very constructive and we support the ability of the Review Office to provide alternative dispute resolution mechanisms for such disputes.

Other interactions with the Review Office have been quite positive as well. The staff at the Review Office regularly e-mails the decisions of the Review Officer to staff at both the IWK and Capital Health. This allows us to keep abreast of developments in this area and we support the continued access to the written decisions of the Review Officer.

FREEDOM OF INFORMATION

Peer Review

Under our respective legislation, both Capital Health and the IWK are each run by boards of directors who are charged with administration, management, general direction and control of the affairs of each of Capital Health and the IWK. Regional health authority and health centre boards are comprised of individuals from across the regions and communities, with a wide variety of backgrounds. As such, our board members rely heavily on the expertise of medical staff in rendering decisions. Therefore, peer review plays a fundamental role in the daily administration of health care operations.

The peer review process is not only vital to the betterment of patient care but also the advancement of clinical research in our facilities and the university. As stated previously, Capital Health and the IWK exist within the largest integrated academic health district in Atlantic Canada. Both institutions are closely tied to Dalhousie University and are the primary centres for clinical research in the region. Peer review is a part in the clinical research process as well.

Open and frank discussion during the peer review process is necessary for such process to function effectively. The Nova Scotia Supreme Court has commented on the issue of privilege and peer review in the context of the FOIPOP Act. In *Re Freedom of Information and Protection of Privacy Act* (1996), 137 D.L.R. (4th) 410 (appended for your ease in reference), the court examined whether comments of physicians from the Cape Breton Regional Hospital in an investigative report regarding suicides at the institution should be disclosed. In refusing to disclose the physicians' comments, Justice MacAdam held at page 433 of the decision:

> Communications of the facts of an incident, whether between hospital personnel or involving third parties, do not normally originate in confidence. It cannot conceivably be said it is in the public interest that such facts should be concealed from a litigant who alleges that he has been injured as a result of that incident.
>
> Examination and evaluation of the facts of an incident for the purpose of the education of hospital personnel and the improvement of care, practice and services of a hospital is quite a different matter. This function includes peer review, criticisms, matters of opinion, and recommendations for changes. Most of these things will originate in the expectation that they will be held in confidence. The confidentiality is necessary to ensure free and frank discussion, expression of opinion and recommendations for changes without the fear that such expression will be used for the benefit of a private litigant.

This finding was reflected in the 1999 amendments to the Act adding section 19D, which provides, in part as follows:

> **19D (1)** The head of a local public body that is a hospital may refuse to disclose to an applicant a record of any report, statement, memorandum, recommendation, document or information that is used in the course of, or arising out of, any study, research or

> program carried on by or for the local public body or any committee of the local public body for the purpose of education or improvement in medical care or practice.

Capital Health and the IWK support the inclusion of section 19D in the Act. Any proposed changes to the Act with respect to freedom of information should continue to protect the peer review process in the context of medical care, practice and research.

Confidentiality of Patient Records

Capital Health and the IWK are required by subsection 71(1) of the *Hospitals Act* to maintain the confidence of all "records and particulars of a hospital concerning a person or patient in the hospital or a person or patient formerly in the hospital". This section is given paramountcy over any conflicting provisions of the FOIPOP Act, pursuant to subsection 4(2) of the FOIPOP Act. Likewise, section 20 of the FOIPOP Act provides that a public body may refuse to disclose information regarding "medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation" of a third party.

Capital Health and the IWK strongly support the current safeguards in the legislation protecting patient records. Any proposed changes to the Act should continue to give paramountcy to the *Hospitals Act* with respect to the confidence of patient records and should continue to generally protect from disclosure personal health information of third parties.

Solicitor-Client Privilege

Among other powers, section 38 of the Act provides that the Review Officer may "require to be produced and examine any record that is in the custody or under the control of the public body". Such power is "notwithstanding any other Act or any privilege that is available at law". Capital We have had occasion to discuss the issue of solicitor-client privilege with the Review Office and our concerns regarding providing copies of such privileged documents to Review Office staff for review.

In one case, Review Office staff actually agreed to come to IWK premises to review documents over which we claimed solicitor-client privilege, rather than have us forward copies of such documents to the Review Office. We note the flexibility with which staff responded to our concerns. While such privileges may be overwritten by section 38 of the Act, in our view, the Review Office should not be able to require reproduction of such documents. When such documents cannot be reviewed in person by Review Office staff on the public body premises, the public body can bring such documents down, in person, to the Review Office. This allows the Review Office to fulfil its mandate without unnecessarily jeopardizing the privilege claimed in the circumstances.

PROTECTION OF PRIVACY

Personal Health Information

We note that Mr. Fardy in his submissions advocated for a separate piece of legislation dealing with "personal health information". A number of other provinces have undertaken such initiatives in recent years.

Health information is increasingly processed and stored in electronic form. The Department of Health is presently moving to standardize the computer systems used by regional health authorities in Nova Scotia. As health information collection and retention becomes more centralized within the provincial health care system, we will need a broader scope of protection for personal health information than is presently provided under either the FOIPOP Act or the *Hospitals Act*. A personal health information protection regime will also require oversight by a person that has expertise and experience in dealing with personal health information.

Capital Health and the IWK concur with the need to take a closer look at the issue of protection of personal health information, and request that any proposed changes involving separate legislation for personal health information include the IWK, Capital Health and other regional health authorities in the consultation process.

Federal Legislation

Capital Health is currently reviewing its policies and procedures to ensure that we are fully in compliance with the *Personal Information and Protection of Electronic Documents Act* (Canada) ("PIPEDA"). We note that there appears to be no movement in Nova Scotia to bring forward "substantially similar legislation" of its own, in advance of the January 1, 2004 deadline, when PIPEDA is scheduled to apply to provincial undertakings.

We submit that any proposed changes to the privacy aspects of the FOIPOP legislation take into account PIPEDA, with the view of perhaps giving Nova Scotia greater control over the regulation of personal privacy in the province, through the "substantially similar" exemption provided for in the federal legislation.

SUMMARY OF RECOMMENDATIONS

In summary, Capital Health and the IWK make the following recommendations regarding any proposed changes to the FOIPOP Act:

- **Minimal burdens on the health care system.** The legislation should impose as few administrative and financial burdens as possible on health care facilities and regional health authorities, so as not to interfere with the provision of health care services.

- **Fees maintained.** Application and processing fees under the Act should not be reduced.

- **Discretion to waive fees maintained.** Public bodies should continue to be allowed discretion to waive fees where appropriate.

- **Ability to recoup other costs.** A public body should have the ability to recoup costs at other stages of review under the Act, particularly if decisions are in the public body's favour.

- **Review Officer's power sufficient.** The current powers of a Review Officer under the Act are appropriate and sufficient. Additional "pro-active" powers of investigation and audit are unnecessary in a jurisdiction as small as Nova Scotia.

- **Expedited review.** The Act should be amended to provide for "expedited review" by Review Office staff, similar to the concept of applications for "leave" in court. This would allow Review Office staff to quickly review decisions of public bodies and reject requests for review that are clearly without merit.

- **Continued flexibility in granting extensions of time.** The Review Office should continue to be allowed the flexibility and discretion to grant extensions of time to respond.

- **Increased support for alternative dispute resolution mechanisms.** The Review Office should be provided with greater support to allow staff the ability to offer alternative dispute resolution mechanisms.

- **Continued access to written decisions of the Review Officer.** The public and public bodies should continue to have access to written decisions of the Review Officer.

- **Greater awareness of Review Office policies and procedures.** More effort should be made to make the public aware of Review Office policies and practices. Alternatively, such policies and practices could be enacted as subordinate legislation, thus giving the public notice of their existence.

- **Preserve confidentiality of peer review in medical context.** Capital Health and the IWK support the inclusion of section 19D in the Act. Any proposed changes to the Act with respect to freedom of information should continue to protect the peer review process in the context of medical care, practice and research.

- **Preserve confidentiality of patient records.** Capital Health and the IWK strongly support the current safeguards in the legislation protecting patient records. Any proposed changes to the Act should continue to give paramountcy to the *Hospitals Act* with respect to the confidence of patient records and should continue to generally protect from disclosure personal health information of third parties.

- **Reproduction of privileged documents for the Review Office.** The Review Office should not be able to require reproduction of privileged documents. Any documents over which a public body claims privilege should only be viewed in person by Review Office staff.

- **Personal health information legislation.** Capital Health and the IWK concur with the need to take a closer look at this issue, and requests that any proposed changes involving separate legislation for personal health information include major health centres and the regional health authorities in the consultation process.

- **Federal privacy legislation.** Capital Health and the IWK submit that any proposed changes to the privacy aspects of the legislation take into account PIPEDA, with the view of perhaps creating "substantially similar legislation" to PIPEDA.

Capital Health and the IWK thank the Committee for the opportunity to make submissions on this important issue. If you have any questions or concerns in advance of my oral presentation to the Committee on Thursday afternoon, please contact me.

Respectfully submitted,

Nancy Milford

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