Hospital Appeal Board

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DECISION NO. 2015-HA-002(b)

In the matter of an appeal under section 46 of the *Hospital Act*, R.S.B.C. 1996, c. 200

BETWEEN:	Dr. David Kates	**APPELLANT**
AND:	Interior Health Authority	**RESPONDENT**
BEFORE:	A Panel of the Hospital Appeal Board Cheryl L. Vickers, Panel Chair	
DATE:	Conducted by way of written submissions concluding on July 14, 2016	
APPEARING:	For the Appellant:	Susan Precious, Counsel
	For the Respondent:	Penny A. Washington, Counsel

DECISION ON APPLICATIONS FOR DOCUMENT DISCLOSURE AND PARTICULARS

I. INTRODUCTION

[1] The Appellant appeals from the July 6, 2015 decision of the Board of Directors of the Interior Health Authority (IHA) that he should not be granted privileges with the IHA. The appeal is scheduled for a four week hearing commencing October 24, 2016.

[2] These are preliminary applications brought by the Appellant for the production of documents and particulars by July 31, 2016, and by the Respondent, IHA, for the production of documents by July 31, 2016. I heard both applications by way of written submissions.

[3] With some exceptions, IHA does not dispute the relevance of most of the Appellant's requests but submits it will not be able to produce the requested documents and particulars until the end of August 2016. The Appellant submits this delay is inordinate and prejudicial.

[4] The IHA's request for documents is contested both on the grounds of relevance and on the basis that it would not be just and appropriate to order production in the circumstances.

II. LEGAL FRAMEWORK

[5] Rule 4(1) of the Hospital Appeal Board (HAB) Rules provides that each party is required to disclose to the other party documents in that party's possession or control "relating to the matters in question in the appeal". A document may be said to relate to the matters in question if it contains information that may directly or indirectly enable either party to advance their case or undermine the other party's case (*Samad v. Provincial Health Services Authority*, Hospital Appeal Board, July 27, 2007). The standard for relevance at this stage of a proceeding "should not be too low, but neither should it be too stringent" (*Samad*, *supra*). The question at this stage is whether the requested documents relate to matters in question in the appeal, which matters are determinable with reference to the pleadings (*Samad*, *supra*).

[6] Additionally, Rule 4(5) provides that the Board may, on application, order a party to disclose "further documents in relation to an appeal if a party satisfies the Board that further disclosure is just and appropriate in the circumstances of the appeal."

[7] The HAB may, therefore, order the disclosure of documents relating to the matters in question in the appeal as determinable with reference to the pleadings and may order further disclosure of documents in relation to an appeal if satisfied that further disclosure is just and appropriate in the circumstances.

[8] Neither party provided submissions as to whether there is a difference between documents "relating to matters in question in the appeal" that must be disclosed under section 4(1) and documents "in relation to an appeal" that the HAB may order be disclosed under section 4(5) if satisfied that it is "just and appropriate in the circumstances". For the purpose of this application, I am proceeding on the basis that there is not a difference in the relevance threshold for the production of documents under Rules 4(1) and 4(5). The HAB's discretion to order "further disclosure" under Rule 4(5) is invoked where parties disagree that documents are relevant in the sense that they relate to matters in question in the appeal, or take the view that even though requested documents may relate to matters in the appeal, there are other reasons why it would not be just and appropriate that they be disclosed in the circumstances. In any event, in an application for production of documents the HAB must determine both that the requested documents may be relevant in the sense that they relate to matters in question in the appeal and be satisfied that it is just and appropriate in the circumstances that they be produced.

[9] When considering whether requested documents relate to matters in question in an appeal, the HAB must not lose sight of the central issue in an appeal. In this case, the central issue to be determined at the hearing on the merits of the appeal is whether the Appellant should be granted a permit to practice in IHA's facilities considering all of the requirements set out in the Bylaws and in the particular circumstances of this case. In determining whether it is just and

appropriate to order the disclosure of documents relating to matters in question in an appeal, the HAB should not be too quick to shut down potentially relevant lines of inquiry that may help a party advance their case or respond to the case of the other party, but at the same time be careful not to open the scope of the hearing too broadly thereby losing sight of the central issue in the appeal.

III. BACKGROUND

[10] The Appellant is a nephrologist who was appointed to the active medical staff in the Department of Nephrology at Kelowna General Hospital (KGH) in 1996. For 16 years, the Appellant was annually reappointed to the medical staff of KGH, and by letter dated July 25, 2012, he was re-appointed to the KGH medical staff with active privileges for the period July 1, 2012 to June 30, 2013.

[11] In May, 2011, the IHA brought to the Appellant's attention complaints it had received from staff respecting not responding to pages or attending to patients, and with respect to inappropriate communications with staff. The conduct complained of is alleged to have occurred between October 2010 and May 2011. In June 2011, the IHA provided the Appellant with a letter of expectations.

[12] Throughout the summer of 2012 other issues were raised and the Appellant was asked to respond to new allegations. During this time, the Appellant experienced a number of personal and work stressors and some medical issues. A number of the allegations against the Appellant are in dispute.

[13] On September 19, 2012, the Appellant took a leave of absence from KGH. Dr. E and SB sent a memo to IHA staff informing them of the Appellant's leave of absence. On September 27, 2012, the Appellant raised medical issues and the possibility of an assessment during a meeting with IHA. On the advice of his health care professionals, the Appellant took a medical leave of absence from his entire practice (both hospital and office) in mid-October 2012. IHA extended the leave of absence for an additional 12 months beyond the 12 month period allowed for in the IHA's Medical Staff Bylaws (the Bylaws).

[14] The Appellant underwent treatment, and in November 2013 he requested that he return to active privileges and proposed a graduated return to practice plan. The IHA did not support the proposal. On June 24, 2014 the Health Authority Medical Advisory Committee (HAMAC) passed a motion recommending the IHA Board of Directors extend the Appellant's leave of absence to September 19, 2014 and recommending that after that date he be given no further consideration to extend his leave of absence and that his privileges be considered lapsed.

[15] On September 18, 2014, the Appellant advised IHA that the College of Physicians and Surgeons had cleared him for a gradual return to practice, provided a completed Application for Review and Reappointment to Medical Staff, and formally requested accommodation of his disabilities. In December 2014, IHA confirmed a HAMAC hearing would be required. The HAMAC hearing took place in April 2015. On April 28, 2015, HAMAC recommended to the IHA Board that the Appellant not be reappointed to medical staff anywhere within the IHA. On July 6, 2015, the Board advised it had approved the HAMAC recommendation. It is that decision that gives rise to this appeal.

[16] The Appellant has also filed a complaint to the British Columbia Human Rights Tribunal alleging discrimination in employment. The HAB has determined it will exercise its discretion to apply the Human Rights Code if, on the evidence, it determines that the Human Rights Code in fact applies (*Kates v. Interior Health Authority*, Decision No. 2015-HA-002(a), May 12, 2015).

IV. THE APPELLANT'S APPLICATION

[17] The Appellant seeks production of documents relating to his leave of absence and request to return to work; the human resource requirements of IHA's facilities and programs and the needs of the population served by IHA; IHA's allegations relating to the Appellant's ability to provide patient care at an appropriate level and ability to communicate and work with colleagues and staff in a cooperative and professional manner; human rights policies; and reports covered by section 51 of the *Evidence Act* ("section 51 reports"). The Appellant seeks particulars respecting IHA's patient care and conduct concerns.

[18] With some exceptions, IHA does not dispute the relevance of the documents requested, but anticipates that due to the number of individuals involved, staffing issues, and the age of the documents that it will not be able to produce relevant and non-privileged documents in the various categories requested until the end of August. The Appellant takes issue with this time line and with IHA limiting production to those documents it considers relevant and non-privileged.

[19] Dealing first with the concern about determining relevancy and privilege as it relates to all of the document requests, a party's obligation to produce documents only arises to the extent they are relevant in the sense that they relate to matters in question in the appeal. Where I order the production of documents it is because, in my view, they are relevant in that they relate to an issue in the appeal and because I am satisfied it is just and appropriate that the documents be produced. If a document fits the description of documents ordered to be produced, its relevance for the purpose of pre-hearing disclosure has been determined. Parties may still dispute a document's admissibility at the hearing.

[20] A party may claim privilege over relevant documents ordered to be produced. If IHA claims any documents falling into any of the descriptions of documents ordered to be produced are privileged, it must nevertheless identify those documents, claim the privilege, and identify the basis for that claim. If any issues arise from a claim of privilege, I will hear from the parties and make a determination as to whether any particular documents must be disclosed.

A. Document Requests

[21] I will deal with each category of requests as described in the Application.

1. The Appellant's leave of absence and request to return to work

[22] The Appellant seeks:

A. All documents, including but not limited to emails, relating to the Appellant's leave of absence and requests to return to work.

B. All documents, including but not limited to emails, relating to the September 27, 2012 meeting [between himself and IHA].

C. All email communications and other notes or correspondence relating to the Appellant from the desks of Drs. H, E, M, Mi, Er, O, S, and from PJ, TP, and SB.

[23] IHA is prepared to disclose all relevant documents within its possession or control with respect to these requests. With respect to the request in "A" above, counsel for IHA suggests most of this correspondence was to or from legal counsel and that IHA is reviewing its files to see whether any additional documents exist. In response, counsel for the Appellant says there has been uncertainty in the past about what has been produced and requests all documents be produced.

[24] With respect to the request at "C" above, IHA says it is prepared to disclose relevant non-privileged records and is endeavouring to collect them. Counsel for the Appellant queries what IHA might consider to be irrelevant within this category.

[25] As the documents are described in "A", "B", and "C" above, I am satisfied they relate to matters in issue in the appeal and should be disclosed and produced where there is no claim of privilege. It should be unnecessary, however, to produce documents in this category that are correspondence between counsel.

[26] IHA does not oppose production of the documents requested, and I am satisfied that it is just and appropriate to produce the documents described in "A", "B" and "C" above.

[27] IHA has made submissions respecting the timing for production, which I will deal with once I have dealt with all of the categories of documents requested.

2. The human resource requirements of IHA's facilities and programs and the needs of the population served by IHA

[28] The Appellant seeks:

D. All minutes from June 2012 to present with respect to the following:

i. KGH divisional renal meetings;

ii. KGH renal morbidity and mortality rounds;

iii. KGH division of medicine meetings;

iv. KGH renal multi-disciplinary meetings;

v. KGH MAC meetings;

vi. Any KGH extra-ordinary staff meetings that pertain to the Appellant;

vii. IHA nephrologist teleconferences;

viii. IHA regional renal operating and/or steering committee meetings; and

ix. IHA regional renal retreats, or other extra-ordinary meetings (collectively, Meeting Minutes).

E. HAMAC Meeting Minutes or Board of Directors Meeting Minutes that pertain to the Appellant, including with respect to paragraphs 31 and 37 of IHA's Reply to the Notice of Appeal.

F. All IHA Renal Program, Division, Department and Health Authority manpower or resource documents, including plans, since 2012, and including any updates to the 2012 KGH Renal Program Nephrology HR Plan.

G. A summary of all nephrology appointments and lengths of such appointments made to any category of medical staff, including locums, at IHA since 2012, and all relevant documents relating to same, including email communications.

H. All impact or needs assessments performed by IHA since July 2012, including any performed in relation to the appointments in item "G".

I. The total number of nephrologists, including which among those are FTEs, who have worked at the KGH hospital and clinic, since 2012.

[29] IHA is prepared to provide any documents in the categories above that are relevant to the human resource requirements of the renal program within IHA's facilities and programs and the need for renal services within the community that are within IHA's possession and control and are not privileged. IHA does not agree to provide documents relevant to the human resource requirements of IHA's facilities and programs and the needs of the population served by IHA generally as it says many of IHA's human resource needs and many of the needs of the population served by IHA are not relevant to the issue of the Appellant's privileges as a nephrologist. In response, counsel for the Appellant refers to the Board's decision defining the scope of issues in this appeal, in particular the following paragraph quoting from the Bylaws, to argue that resources of the Health Authority and needs served by the Health Authority are relevant, and not just those of specific divisions or programs:

> [25] On appeal from a decision respecting privileges, whether following a first time application, on an annual review or in circumstances where privileges have been revoked, the HAB must place itself in the shoes of the original board and consider terms of appointment and criteria for membership set out in the Bylaws. In accordance with Bylaw 3.1.5, appointments to medical staff are dependent on the "human resource requirements of the facilities and programs operated by the **Health Authority**", the needs of the population served by the **Health Authority**, and "the ability of **Health Authority's** resources to accommodate the appointment". In accordance with Bylaw 3.2.2, applicants must, among other criteria, "demonstrate the ability to provide patient care at an appropriate level of quality and efficiency" and "demonstrate the ability to communicate and work with colleagues and staff in a cooperative and professional manner". [Underlining and bolding added]

[30] In highlighting the excerpt from Bylaw 3.1.5, the words "facilities and programs" are overlooked. The issue is this appeal is whether the Appellant should

be granted a permit to practice at IHA's facilities considering all of the requirements set out in the Bylaws and in the particular circumstances of this case. The Appellant seeks to be appointed or re-appointed as a nephrologist. It is the human resource requirements of the facilities and programs operated by the Health Authority and the needs of the population served by the Health Authority with respect to nephrology services, that are relevant to the question of whether an individual should be granted privileges as a nephrologist.

[31] Counsel for the Appellant submits expansion of other services within the Health Authority can affect nephrologic services, but does not explain how or why. If the Appellant wishes to pursue a request for manpower or human resource documents beyond the requirements of the renal program and Department of Nephrology within IHA's facilities and programs, I will require more information. If the Appellant pursues this request, he may make further submissions and IHA may respond.

[32] The other criteria in Bylaw 3.1.5 is "the ability of Health Authority's resources to accommodate the appointment." To the extent this is a reference to financial resources, as opposed to human resources, I accept that it applies to the Health Authority generally.

[33] IHA submits the minutes relating to renal morbidity and mortality rounds are not likely to be relevant, but does not explain why. Counsel for IHA submits they are relevant to IHA's patient care allegations, but does not explain how minutes of renal mortality and morbidity rounds after September 19, 2012, when the Appellant went on leave, are relevant to the allegations against the Appellant. I do not have enough information to make a determination on this request. The Appellant is at liberty to provide further information in support of the relevance of this request if he wishes to pursue it, and the Respondent may reply.

[34] Other than item ii), I find that the documents set out in "D" relate to matters in question in the appeal.

[35] I find the documents at "E", "G", "H" and "I" relate to matters in question in the appeal.

[36] With respect to the documents at item "F", I assume the request relates to manpower or human resource documents (as opposed to financial resource documents) given counsel's category label for this request. I find that the manpower or human resource documents for the IHA Renal Program and Department of Nephrology, including plans since 2012, and including any updates to the 2012 KGH Renal Program Nephrology HR Plan, relate to matters in question in the appeal, but have insufficient information with respect to the balance of the request.

3. IHA allegations relating to the Appellant's ability to provide patient care at an appropriate level of quality and efficiency and the Appellant's ability to communicate and work with colleagues and staff in a cooperative and professional manner

[37] The Appellant seeks:

J. All documents related to patient care and communication/professionalism complaints and/or allegations made against the Appellant (including production of all notes of investigations, interviews and communications relating to same).

K. All documents related to patient care particulars which are outlined in Ms. Washington's letter dated February 9, 2016, including all IHA correspondence and full medical records for the patients referred to in allegation #6 (Bopfinger) and #7 (visitor request refusal).

[38] IHA does not dispute the relevancy of these requested documents and I find they relate to matters in question in the appeal. I find it is just and appropriate that the documents in "J" and "K" be produced.

4. Human Rights Policies

[39] The Appellant seeks:

L. All IHA human rights policies from 2010 to present.

[40] IHA takes no issue with this request. I find the requested documents relate to matters in issue in the appeal and that it is just and appropriate they be produced.

5. Section 51 reports

[41] The Appellant seeks:

M. Disclosure of all section 51 reports that relate to the Appellant.

[42] IHA takes no issue with this request. I find the requested documents relate to matters in issue in the appeal and that it is just and appropriate they be produced.

B. Timing for Production of Documents

[43] The Appellant seeks production by July 31, 2016, which I note is a Sunday. The next day that is not a holiday is August 2, 2016. IHA anticipates being able to produce the relevant non-privileged documents in this category by the end of August 2016. Counsel submits there are a number of individuals potentially involved in the emails related to requests "A" to "C", some of whom are no longer employed by IHA. Counsel submits other individuals have been on leave or vacation, as are administrative staff integral in organizing the retrieval of records. Counsel submits the collection process has been challenging due to the age of the records and IHA has engaged the assistance of technical support.

[44] In response, counsel for the Appellant notes that: the Appellant has been seeking to return to KGH since November 2013; an additional formal request to return was made in September 2014; it has been over a year since the hearing before the IHA Board of Directors; and it has been ten months since the Appellant filed his Notice of Appeal on September 16, 2015. Counsel submits the IHA has not disclosed a single document since that time despite requests for disclosure and

assurances that IHA was "gathering these documents". Counsel submits this is an inordinate delay that is prejudicial to the Appellant.

[45] I agree the end of August, within two months of the beginning of the hearing on the merits of this appeal, causes unfairness to the Appellant's ability to adequately prepare for the hearing. I accept that the document requests are voluminous and that IHA faces challenges in gathering the documents. But IHA has been aware of these requests for some time and has indicated it was gathering the documents. While I am not prepared to order the documents be produced by the end of July as requested by the Appellant, neither am I prepared to allow IHA until the end of August to complete the gathering process. IHA must produce the documents by August 15, 2016.

C. Requests for Particulars

1. Patient Care Concerns

[46] In a letter dated February 9, 2016, counsel for IHA provided particulars of eight patient care issues it intends to raise in this appeal. Counsel's letter says, "In addition to these cases involving direct patient care concerns, IHA may refer to additional cases [at the hearing] before the HAB where the nature of the Appellant's conduct may have had an impact on patient care." Counsel for the Appellant submits this statement is inconsistent with IHA's commitment at a pre-hearing conference in January 2016 to provide full particulars of any patient care concerns it intends to raise at the appeal, and inconsistent with basic principles of fairness. The Appellant seeks confirmation that there are no further patient care allegations. Alternatively, if there are further patient care issues, the Appellant seeks disclosure of particulars for these issues.

[47] Counsel for IHA says it is currently searching for and reviewing additional documents in response to the Appellant's request for documents, and if after this review it decides to rely on any additional patient care issues during the hearing of the appeal, it will provide particulars when it provides the additional documents. In response, counsel for the Appellant submits it is not acceptable for IHA to continue to take the position that it may in future raise other patient care issues.

[48] The Appellant is entitled to full notice of IHA's case to allow him to properly respond. If there are additional patient care allegations that IHA intends to raise at the hearing, the Appellant must know well in advance. IHA's suggestion that it can provide any remaining disclosure of particulars by August 31, 2016 is too close to the hearing. The parties have been preparing for the hearing of this appeal for months and I do not accept that IHA requires another whole month to provide particulars if there are other patient care allegations that it intends to raise. Counsel for IHA committed to provide particulars of patient care concerns at the pre-hearing conference in January of this year, and did provide particulars, with the caveat noted, on February 9, 2016. IHA must either confirm there are no additional patient care issues, or provide particulars of any additional patient care issues beyond those mentioned in counsel's letter of February 9, 2016, no later than August 2, 2016.

[49] The Appellant seeks further particulars with respect to allegation 5 in counsel for IHA's letter of February 9, 2016. The particulars with respect to this allegation allege "almost one month later the Appellant left two unanswered pages over 45 minutes for critically low calcium for the same patient". The Appellant seeks full particulars with respect to this allegation including specific dates and times of the alleged pages, who made the pages, and all relevant documents including any specific chart references. Counsel for IHA says it has already provided particulars with respect to this allegation. Counsel for the Appellant disagrees. If the particulars respecting the allegation of two missed pages "almost one month later" have not been provided, IHA must do so no later than August 2, 2016. If they have been provided with respect to this allegation, IHA should reference the document and date providing same for the Appellant's counsel or resend it.

2. Conduct Concerns

[50] The Appellant seeks particulars of pre-2011 conduct that is in issue. Counsel for IHA submits that conduct and professionalism allegations are particularized in the Reply and particulars of February 9, 2016. IHA Counsel reserves the right to refer to any of these conduct and professionalism issues, including those that were before HAMAC, or that are referenced in the record before HAMAC. IHA Counsel submits it would be duplicative and unnecessary to require IHA to summarize the issues that are already contained in the record before HAMAC and any other additional documents that have been or will be disclosed pursuant to this application. In response, counsel for the Appellant submits vague assertions to "issues before HAMAC" is wholly insufficient notice of specific conduct and professionalism issues IHA intends to rely on.

[51] I have reviewed the IHA's Reply to the Notice of Appeal. It does not provide particulars of specific conduct concerns, but rather references at paragraph 15 "a number of concerns raised about the Appellant's practice", and at paragraph 16 "numerous concerns raised with respect to both [the Appellant's] conduct and the quality of care he provided to patients". At paragraph 17, the Reply references documentation of specific concerns brought to Dr. K and provides a summary of the general nature of these concerns without specifics. At paragraph 18, the Reply references Dr. O's report noting some conduct issues, and provides information as to the nature of the concerns but without specifics. I assume both the documentation referred to in paragraph 17 and the report referred to in paragraph 18 have been disclosed to the Appellant.

[52] I do not have the entire record that was before HAMAC before me on this application so am not able to assess the level of detail in that record with respect to specific conduct or professionalism concerns. I agree that to the extent the HAMAC record may contain information about specific conduct concerns, it is not necessary that those concerns be summarized again. To the extent either the record before HAMAC does not disclose specific conduct concerns or the documentation referred to in paragraph 17 and 18 of the Reply does not identify specific allegations, the Appellant is entitled to know the specifics of the allegations.

[53] The topic of conduct prior to June 2011 was raised at the pre-hearing teleconference of January 27, 2016. Counsel for the Appellant's letter of January 27, 2016 indicates:

> [The Appellant] disagrees with respect to the general relevancy of pre-2011 conduct. [The Appellant] requires that specific conduct prior to 2011 that IHA alleges is relevant be particularized as soon as possible before he can take a final position on the scope of the issue. Irrespective, [the Appellant] does not agree to hearsay evidence and will require IHA to identify and produce any witnesses that need to be called.

[54] The Executive Director for the HAB's letter of February 3, 2016 summarizing the discussion at the pre-hearing conference notes that counsel for the Respondent agreed to confirm for the Appellant which specific allegations are at issue with respect to both standard of care and previous conduct.

[55] If IHA intends to raise concerns at the hearing of this appeal respecting the Appellant's conduct or professionalism arising prior to June 2011, to the extent those concerns are not already particularized in the record before HAMAC, the letter of February 9, 2016, or in other documents already produced to the Appellant, they must be disclosed and particularized by August 2, 2016.

V. THE IHA's APPLICATION

[56] The IHA requests an order that:

a) the Appellant be required to produce to the Respondent and to the Hospital Appeal Board the clinical records of Dr. M with respect to his treatment of the Appellant,

b) the Appellant be required to produce to the Respondent and to the Hospital Appeal Board a record of the Appellant's MSP billings between January 1, 1998 and September 19, 2012, or consent for IHA to obtain same, and

c) that the documents be produced no later than July 31, 2016.

a) Clinical Records of Dr. M

[57] The Appellant has produced a number of medical reports including from: Acumen Assessments LLC dated October 21, 2013 (the First Acumen Report) and January 10, 2014 (the Second Acumen Report), Dr. AS dated December 19, 2014 (the AS Report), and Dr. SK dated February 19, 2015 (the SK Report). These reports make reference to the Appellant having been treated by Dr. M and, in some cases, make recommendations with respect to his continuing treatment by Dr. M.

[58] The Appellant's Notice of Appeal alleges at paragraph 21:

> Reports from medical experts including Acumen Assessments, [Dr. R B], [Dr. SK], and [Dr. AS] provide a direct link between the allegations made by IH and [the Appellant's] medical conditions

> combined with personal and situational stressors. The expert evidence also confirms that because of his extensive treatment and therapy, disruptive or inappropriate behavior is unlikely to be a future issue if [the Appellant] is allowed to return to KGH.

[59] IHA submits that the Appellant has put his medical condition in issue and that the clinical records of Dr. M are, therefore, relevant. Further, IHA refers to an opinion it obtained from Dr. RO dated March 30, 2015 (the RO Report) referencing the fact that Dr. M's records were not available and casting doubt on various conclusions of the other professionals.

[60] Counsel for the Appellant objects to the introduction of the RO Report on this preliminary motion. Counsel submits the Appellant will object to its admission at the HAB hearing and requests leave to make full written submissions with respect to the qualification of Dr. RO as an expert and the admissibility of his report if the HAB intends to admit Dr. RO's report on this preliminary motion.

[61] I have not admitted the RO Report as evidence in this preliminary motion for the purpose of considering his opinions on any of the issues in the appeal. I understand, however, that the RO Report was part of the record before HAMAC. As such, it may be referenced for the purpose of this preliminary motion respecting the potential relevancy of documents. The Appellant will have the opportunity to object to the RO Report being marked as an exhibit in this appeal at the hearing. I make no findings at this stage of the proceeding as to the RO Report's admissibility as expert evidence going to matters in issue in the merits of the appeal.

[62] While the RO Report may be referenced as part of the record before HAMAC in this preliminary application for production of documents, I do not find it necessary to rely on IHA's reference to that report to determine whether Dr. M's records "relate to matters in question in the appeal."

1. Do Dr. M's clinical records "relate to matters in question in the appeal"?

[63] The Appellant has put his medical condition in issue with his pleading that there is a direct link between the allegations made by the IHA and his medical conditions combined with personal and situational stressors, and that as a result of his treatment and therapy disruptive or inappropriate behavior is not likely to be an issue if he returns to KGH. The expert evidence he intends to rely on refers to his treatment by Dr. M. The First and Second Acumen Reports recommend continuing treatment with Dr. M and recommend the proposed return to work plan be discussed with Dr. M.

[64] Further, the Appellant has brought a Human Rights complaint and the HAB has indicated it will consider human rights issues in this appeal if it finds on the evidence that the *Human Rights Code* applies. The Appellant alleges he has been discriminated against in employment on the basis of a disability and that the IHA has failed in its duty to accommodate. The IHA disputes that the Appellant had a disability and disputes that any alleged disability accounts for past behavior and quality of care issues. It disputes that it discriminated against the Appellant that the alleged patient care issues are related to a disability, and that its decision not to re-instate the Appellant was connected to a disability.

[65] The British Columbia Human Rights Tribunal orders the production of clinical records when the medical condition of a complainant is put in issue (see: *Desai v. Strata Plan VR 123*, 2005 BCHRT 149 and *Dove v. GVRD and other (No. 5)*, 2006 BCHRT 582).

[66] Counsel for IHA provides three reasons for the production of Dr. M's records specifically addressed by counsel for the Appellant. The first reason is that the majority of the IHA's patient care concerns arose between 2010 and 2012 during the time the Appellant was being treated by Dr. M and, as such, Dr. M's records "may shed some light" on the Appellant's medical condition during the relevant time frame. In response, counsel for the Appellant submits Dr. M's records will not provide information about the period of time prior to November 2012 as Dr. M does not have clinical records that pre-date November 14, 2012. Counsel submits further that the submission that counseling records "may shed some light" is purely speculative and relies on the following passage from a 2014 decision of the Workers' Compensation Appeal Tribunal ("WCAT") (*WCAT-2014-01879 (Re)*, 2014 CanLII 42698) declining a request for further medical records relating to a diagnosis as being too speculative:

> The employer argues that the diagnosis is unreliable as the psychiatrist was unaware of the worker's full past medical history. I disagree. The psychiatrist is a medical expert, who interviewed the worker and noted the worker's past medical history, including "severe" depression. I find the psychiatrist's opinion and diagnosis to be reliable and place significant weight on it. The employer appears to be suggesting that there is other existing medical evidence to be obtained that is relevant to the issue before me. I find this to be speculative. To request further medical records under the circumstances before me would amount to a fishing expedition.

[67] A full reading of this decision, however, reveals that the adjudicator had asked the worker to identify other treating physicians, and subsequently directed the medical records of a physician be obtained and disclosed to the employer. The employer submitted the medical records "suggested there were other treating physicians". The worker confirmed he could not remember all the physicians he had seen and consented to a printout being obtained from the Medical Services Plan, but submitted this should only be undertaken where its benefit, proportionality, and relevance outweighed the costs. The adjudicator determined that for the purposes of addressing a Board Policy requiring a mental disorder be diagnosed in accordance with the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, that the evidence before her was sufficient and that in the circumstances of that case requesting further, and apparently not specifically identified medical records, would amount to a fishing expedition.

[68] The circumstances of this case including the nature of the inquiry, the statutory framework, and the applicable Rules are entirely different and I do not consider this decision of WCAT persuasive authority for not requiring the production of the specifically identified clinical records relating to an issue in this appeal. Given the Human Rights issues raised in this case, I find the authorities of the Human Rights Tribunal requiring the production of medical records when a complainant's medical condition is in issue much more persuasive.

[69] If records do not exist prior to November 2012, it is unlikely they can shed any light on the Appellant's condition prior to then, but they may shed some light on the issue of the Appellant's condition going forward and the potential for disruptive or inappropriate behavior to reoccur. I accept that the records, to the extent they do exist, relate to a matter in issue in the appeal.

[70] The second reason is that the IHA and the HAB should have access to any of Dr. M's records that were relied on by the Appellant's experts. Counsel for the Appellant says the only record of Dr. M's relied on by any of the Appellant's experts is Dr. M's September 11, 2013 letter to Ms. J, which has already been produced. Counsel for IHA questions that the Appellant's experts did not have any other records of Dr. M's given the reference in the various reports to Dr. M's treatment of the Appellant, and a more specific statement respecting that treatment in the Second Acumen Report.

[71] It is not clear to me from my review of the reports provided that any of the Appellant's experts had access to Dr. M's records other than the letter to Ms. J specifically referenced in the First Acumen Report. The reports simply indicate that the Appellant had been treated by Dr. M but do not appear to rely on any specific records from Dr. M in providing their respective opinions. Even in the more specific reference in the Second Acumen Report to the Appellant's work with Dr. M, it is not evident that the description of this work is derived from Dr. M's records or from the Appellant's characterization of this treatment related in interviews with the author. I, therefore, do not accede to this reason for requiring production of Dr. M's records. In addition, by letter dated July 19, 2016, counsel for the Appellant advises that they confirmed with Acumen that they did not receive any clinical records of Dr. M other than the one letter already referenced.

[72] The third reason provided by counsel for IHA is that the nature and course of Dr. M's regular treatment of the Appellant is relevant and the records may contain information relevant to his return to work. Counsel for the Appellant responds that further information with respect to the nature and course of Dr. M's regular treatment of the Appellant is not necessary, nor is production of Dr. M's records likely to provide any additional relevant information with respect to the nature and course of treatment than information already provided. In light of the opinions of the Appellant's experts respecting the Appellant's future ability to manage stressful situations while also recommending the Appellant continue with Dr. Mo and discuss the return to work plan with Dr. Mo, Dr. M's records may provide additional relevant information respecting the likelihood of disruptive or inappropriate behavior going forward if the Appellant is reinstated.

[73] I find that the clinical records of Dr. M "relate to an issue in the appeal", specifically, the link between IHA's allegations of inappropriate behavior and the Appellant's condition, and the likelihood of ongoing difficulties if he is reinstated. They also relate to the issue of whether the Appellant had a disability.

2. Is it just and appropriate in the circumstances to order production?

[74] The Appellant submits production of records should only be made where records are likely to be directly relevant and probative to the matters at issue.

However, the Appellant has put his condition in issue both as an explanation for past behavior and in support of his assertion that disruptive or inappropriate behavior is unlikely to be a future issue if he is allowed to return to KGH. I have found that Dr. M's records are likely relevant to those issues.

[75] Counsel for the Appellant submits that production of records would constitute a significant invasion of the Appellant's privacy as well as the privacy of third parties including the Appellant's family members, and accordingly production of Dr. M's records is not justified. I accept that production of clinical records constitutes a significant invasion of privacy. However, in the circumstances of this case, where the Appellant has put both his past and ongoing medical condition in issue, and in light of IHA's expressed concerns about the Appellant's conduct, behavior, and patient care, disclosure of clinical records that may be relevant to the assessment of the Appellant's ability to return to the hospital environment outweighs concerns over invasion of the Appellant's privacy. I find it is just and appropriate in the circumstances of this appeal that Dr. M's clinical records, subject to the conditions set out below, be produced.

[76] The issues in this appeal do not warrant the invasion of privacy of third persons including members of the Appellant's family. To the extent Dr. M's clinical records contain references and personal information about third parties including members of the Appellant's family, that information may be redacted. Additionally, IHA must treat the records in accordance with its duty to maintain confidence over them.

b) MSP Billing Records

[77] IHA requests billing records between January 1, 1998 and September 19, 2012. It says they are relevant to the issues in the appeal. Counsel argues that the Appellant, through his own submissions and in the medical opinions referencing overwork and situational stressors, has put the question of volume of work in issue. Counsel says the MSP records will indicate work volume in his practice and should be produced.

[78] Counsel for the Appellant submits the IHA has not demonstrated how the production of over 14 years of billing records is just and appropriate, that the task is monumental and the relevance is questionable. Counsel submits further that billing records are not an accurate tool to assess whether a physician is overworked because they do not reveal many key aspects of workload including administrative work, committees, pilot projects, research and development, teaching, attending patient and family conferences, and the lack of resources an administrative support.

1. Do the Appellant's MSP billings between January 1, 1998 and September 19, 2012 "relate to matters in question in the appeal"?

[79] Counsel for IHA submits the billing records relate to a matter in question in the appeal, namely, "the Appellant's claims of stress [due] to overwork". The Appellant through the references to the various medical reports certainly raises work issues as contributing factors to the allegations made by IHA. However, most of the Appellant's experts do not reference "overwork" but reference "dysfunction in

the workplace", "stressed work environment" or "systemic issues in the Department" as contributing to the Appellant's difficulties, as well as the Appellant's character trait to over extend himself. Only the S report places some emphasis on "overwork" as a contributing factor. The reports focus more on the combination of medical conditions as being significant contributors to the Appellant's impairment and difficulties and none attribute "overwork" as the sole or primary factor leading to the IHA's allegations.

[80] The Appellant's pleading, reproduced earlier, does not link "overwork" to the IHA's allegations, but "medical conditions combined with personal and situational stressors".

[81] IHA submits the MSP records will indicate work volume, but I accept the submissions of the Appellant that they will likely be of limited to no utility in this regard because they will not reveal key aspects of workload beyond billable activity. Further, the billing records will not speak to other "work stressors" or the alleged "dysfunction in the workplace".

[82] With respect to IHA's allegations respecting the Appellant's failure to respond to pages in a timely manner or at all, the billing records will not provide information relevant to when pages were made, received or responded to, although they will provide information as to whether the Appellant was engaged in billable activities on the days where he is alleged to have not responded to pages. However, I accept counsel for the Appellant's submission that, with some limited exceptions, billing records will generally not indicate the time of day when a consult or patient service takes place, the time spent on the service or the complexity of the work.

[83] Most of the allegations made by IHA relate to the 2010-2012 period. The MSP billings between 1998 and 2010 are not relevant to these concerns. There are a limited number of allegations relating to the period between 2010 and 2012. It is not clear how billing records for the entire period requested will assist in determining whether the allegations occurred where they are disputed or, where they are not disputed, whether they are relevant to the issue of whether the Appellant should be granted privileges going forward considering all of the requirements in the Bylaws.

[84] Counsel for IHA submits the billing information is relevant to the manner in which the Appellant arranged his practice. How the Appellant arranged his practice, while it may or may not have contributed to stress in his life, is not the primary issue in this appeal. The primary issue is whether the Appellant should be granted privileges going forward. As stress is alleged to be a factor contributing to the Appellant's past behavior, the key issue will be to determine whether the Appellant will be able to better manage stress in the future so as to avoid concerns about his conduct and behavior going forward. How he previously arranged his practice will not assist with this issue.

[85] I find that the billing records for the time frame requested only marginally relate to matters in issue in this appeal.

2. Is it just and appropriate to order production of the billing records from 1998 to 2012?

[86] I find the IHA's request for 14 years of MSP billings is casting the net too broadly and that it would not be just and appropriate to order their disclosure given the volume of records requested and their limited utility to provide information that relates to matters in question in the appeal. I decline to order production of the MSP billing records requested. If the IHA wishes to pursue a request for records that is limited to the days on which they have specific concerns about the Appellant's conduct, they are at liberty to make that application and the Appellant may respond.

c) Timing of Production

[87] IHA seeks production by July 31, 2016. Given my ruling above and to maintain fairness between the parties I order production by the same date as that ordered for the production of IHA documents, namely August 15, 2016.

VI. ORDER

[88] The Hospital Appeal Board orders:

1. IHA Production of Documents

The IHA must produce to the Appellant copies of the following documents by **Monday, August 15, 2016**:

A. All documents, including but not limited to emails, relating to the Appellant's leave of absence and requests to return to work.

B. All documents, including but not limited to emails, relating to the September 27, 2012 meeting.

C. All email communications and other notes or correspondence relating to the Appellant from the desks of Drs. H, E, M, Mi, Er, O, S, and from PJ, TP, and SB.

D. All minutes from June 2012 to present with respect to the following:

a) KGH divisional renal meetings;

b) KGH division of medicine meetings;

c) KGH renal multi-disciplinary meetings;

d) KGH MAC meetings;

e) Any KGH extra-ordinary staff meetings that pertain to the Appellant;

f) IHA nephrologist teleconferences;

g) IHA regional renal operating and/or steering committee meetings; and

h) IHA regional renal retreats, or other extra-ordinary meetings.

E. HAMAC Meeting Minutes of Board of Directors Meeting Minutes that pertain to the Appellant, including with respect to paragraphs 31 and 37 of IHA's Reply to the Notice of Appeal.

F. All IHA Renal Program and Nephrology Department manpower or human resource documents, including plans since 2012, and including any updates to the 2012 KGH Renal Program Nephrology HR Plan.

G. A summary of all nephrology appointments and lengths of such appointments made to any category of medical staff, including locums, at IHA since 2012, and all relevant documents relating to same, including email communications.

H. All impact or needs assessments performed by IHA since July 2012, including any performed in relation to the appointments in item "G".

I. The total number of nephrologists, including which among those are FTEs, who have worked at the KGH hospital and clinic, since 2012.

J. All documents related to patient care and communication/professionalism complaints and/or allegations made against the Appellant (including production of all notes of investigations, interviews and communications relating to same).

K. All documents related to patient care particulars which are outlined in Ms. Washington's letter dated February 9, 2016, including all IHA correspondence and full medical records for the patients referred to in allegation #6 and #7 (visitor request refusal).

L. All IHA human rights policies from 2010 to present.

M. All section 51 reports that relate to the Appellant.

2. IHA Production of Particulars

The IHA must either confirm there are no additional patient care issues, or provide particulars of any additional patient care issues beyond those mentioned in counsel's letter of February 9, 2016, no later than **Tuesday, August 2, 2016.**

If it has not already done so, the IHA must produce to the Appellant particulars respecting the allegation at 5 in counsel's letter of February 9, 2016 of two missed pages "almost one month later", no later than **Tuesday, August 2, 2016**. If these particulars have been provided, the IHA must identify the document in which they were provided and resend a copy to the Appellant by the same date.

If the IHA intends to raise concerns at the hearing respecting the Appellant's conduct or professionalism arising prior to June 2011, to the extent those

concerns are not already particularized in the record before HAMAC, the letter of February 9, 2016, or in other documents already produced to the Appellant, the IHA must produce to the Appellant particulars of those allegations no later than **Tuesday, August 2, 2016.**

3. The Appellant's Production of Documents

The Appellant must produce to the IHA the clinical records of Dr. M with respect to his treatment by Dr. M by **Monday, August 15, 2016**. To the extent Dr. M's clinical records contain references and personal information about third parties including members of the Appellant's family, that information may be redacted. The IHA must treat the records in accordance with its duty to maintain confidence over them.

"Cheryl Vickers"

Cheryl L. Vickers, Panel Chair
Hospital Appeal Board

July 20, 2016