



Hospital Appeal Board

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DECISION NO. HAB-HA-20-A003(a)

In the matter of an appeal under section 46 of the *Hospital Act*, RSBC 1996, c 200

BETWEEN:	Dr. Malvinder Hoonjan	APPELLANT
AND:	Interior Health Authority	RESPONDENT
BEFORE:	A Panel of the Hospital Appeal Board Stacy F. Robertson, Panel Chair	
DATE:	Conducted by way of written and oral submissions concluding October 8, 2021	
APPEARING:	For the Appellant: Susan Precious, Counsel For the Respondent: Alexis Kerr and Melissa Perry, Counsel	

APPLICATION FOR DOCUMENT PRODUCTION

Application

[1] By letter dated October 4, 2021, the Appellant brought an application seeking an order from the Hospital Appeal Board (the "HAB") requiring the Respondent to produce certain categories of documents and to delay the deadline for delivering expert reports. The Appellant brings this application for production pursuant to Rules 4(1) and 4(5) of the Hospital Appeal Board's Rules of Practice and Procedure (the "HAB Rules"). The Panel Chair made rulings on each of the categories of documents at a pre-hearing teleconference ("PHC") on October 8, 2021 and these are the reasons supporting those orders. There was some urgency to this application as the hearing was scheduled to commence on November 8, 2021.

History of the Document Production Issues

[2] There were three PHCs held in this matter on April 7, May 6, and June 22, 2021, where the extent of disclosure of documents and the identification of issues were raised by the Chair. There was a specific discussion raised by the Chair at the PHCs about the relevance of the issues that are now the subject matter of this application. At the PHC, the parties stated that there were no issues at that time with any document production issues. The Respondent acknowledged in its submissions on this application that the parties have not agreed on the issues central to this appeal which has complicated document disclosure. The Respondent notes that this has been the subject of discussion, but not of final resolution, at multiple PHCs. The Appellant submits that at no point did the Respondent ever

indicate that it refused to produce certain documents requested. The Respondent says that it made several rounds of disclosure and the Appellant did not raise any objections to the completeness of those disclosures. The Appellant made these document requests in a letter dated April 7, 2021. The Respondent made no objection to production of the documents requested and says, however, that it did not consent to produce those documents.

[3] The Chair is of the view that something more was required of the Respondent in these circumstances, and a clear response to the Appellant that the Respondent did not feel the documents were relevant would have brought this issue to a resolution much earlier than it ultimately did. The Respondent cannot simply make multiple productions and not deal with the issue then claim that the Appellant did not make any objection. Clearly the Appellant did not object as production was ongoing and it was reasonable for the Appellant to conclude that its requests were being dealt with by the Respondent.

[4] It is disappointing that the parties failed to deal with these production issues that were identified at the PHC and that an application one month prior to the start of the hearing was required to resolve these issues, particularly where the Respondent acknowledged that these issues were raised in several PHCs. Hopefully with the benefit of these reasons this will prevent further disclosure issues and avoid any unnecessary hearing adjournments.

Legal Principles Applicable to Document Disclosure

[5] There are several legal principles involved in this application and I will go through them and then apply them to the specific documents requested.

[6] Rule 4(1) of the HAB Rules deals with disclosure of documents as follows:

Each party is required to disclose to the other party, as soon as practicable, all documents in that party's possession or control relating to the matters in question in the appeal.

[7] The parties appear to be in agreement on the legal principles relating to disclosure of documents but disagree on the application of those principles in these circumstances.

[8] The following legal principles apply to disclosure of documents in Hospital Appeal Board cases:

1. Parties are required to disclose all documents relating to matters in question in the appeal (Rule 4(1)).
2. "matters in question" at this stage are based on the pleadings, not on whether the documents or information is ultimately admissible at the hearing, (*Kates v Interior Health Authority*, Decision No. 2015-HA-002(b) at para 5; and *Samad v Provincial Health Services Authority*, Hospital Appeal Board, July 27, 2007 at p 4 (*Samad*)).
3. The standard of relevance at this stage of a proceeding should not be too low, but neither should be too stringent (*Samad* at p 4).

4. The pleadings in an administrative proceeding should be given a large and liberal construction for the purposes of document production.
5. A document relates to a matter 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 (*Kates v Interior Health Authority*, Decision No. 2015-HA-002(b) at para 5).
6. The *Peruvian Guano* test applies, which requires disclosure of documents that may fairly lead to a line of inquiry which may either directly or indirectly enable the party to advance his own case or damage the case of his adversary (*Cie Financière du Pacifique v Peruvian Guano Ltd.* (1882), 11 Q.B.D. 55 (Eng. Q.B.), referred to in *Atlantic Waste Systems Ltd. v Canada (Attorney General)*, 2017 BCSC 19).
7. It is the responsibility of counsel to ensure that proper document disclosure to whatever standard may apply has taken place. The fact that the task may be a tremendous undertaking or other events have intervened is no excuse, and if deadlines cannot be met then appropriate applications for an extension should be sought (*Atlantic Waste Systems Ltd. v Canada (Attorney General)*, 2017 BCSC 19 at paras 99 and 146).

[9] Rule 4(5) of the HAB Rules provides the Hospital Appeal Board the discretionary authority to order further documents if a party satisfies the board that further disclosure is just and appropriate in the circumstances of the appeal. The authority provided in Rule 4(5) references "further" disclosure. This makes this exercise of discretion more expansive than the parties existing disclosure obligations in Rule 4(1). The parties already have the right to bring an application to enforce the disclosure obligations under Rule 4(1) pursuant to Rule 4(7)(d), and therefore the discretion granted in Rule 4(5) must be to order something more than the disclosure obligations in Rule 4(1) in circumstances where it is just and appropriate to do so. The term just and appropriate simply refers to a limiting factor on the discretion which must be applied reasonably.

[10] The Appellant has brought this application relying on both Rule 4(1) and 4(5) of the HAB Rules. This provides the HAB with very broad discretion to make disclosure orders in this matter.

Matters in Question in the Appeal

[11] The Respondent submitted that it was well-settled that the narrow issues to be considered on this type of appeal relate only to the specific decision of the IH Board made on September 11, 2020. This statement could not be further from the reality of the issues raised in the Appellant's Notice of Appeal. Embedded in the September 11, 2020 decision are other issues which the Appellant raised in the Notice of Appeal including:

- a. The conduct and competence of the Appellant;
- b. The relocation of the Retinal Surgical Program from RIH to KGH;
- c. The competitive search process to staff the Retinal Surgical Program at KGH; and finally
- d. The unsolicited application for privileges by the Appellant to the Retinal

Surgical Program at KGH which led to the September 11, 2020 decision of the IH Board.

The categories of documents requested by the Appellant in its April 7, 2021 letter all relate to these underlying issues.

[12] While the Respondent is correct that the appeal is triggered by the September 11, 2020 decision, ignoring the other issues raised by the Appellant in its Notice of Appeal would not account for the circumstances that the Appellant says led to the September 11, 2020 decision.

[13] The Respondent argues that on its formulation of the issues, the requested documents are not relevant to those issues. However, it is not the Respondent's role to determine relevance based on its view of the issues at the pre-hearing disclosure stage of the proceedings. Relevance is determined by the pleadings and the Respondent makes no reference to any of the pleadings in its submissions. Instead, the Respondent erroneously states that only documents relating to the September 11, 2020 decision under appeal are relevant. It is open for the Respondent to take that position at the hearing and if it did so, the hearing panel would make a ruling at that time on whether a document was relevant and admissible.

[14] It is well accepted that the breadth and depth of pre-hearing disclosure is much larger than what is ultimately admissible at a hearing. The issue of relevance at the document production stage of a HAB hearing is not determined by what decision is under appeal but what matters have been put in issue in either parties' pleadings.

[15] The Respondent acknowledges in its submissions on this application that there is no dispute that the decisions of the Respondent relating to the relocation of the program and the competitive search process are what led the Appellant to submit his unsolicited application for privileges at KGH. However, the Respondent argues that those decisions are not properly before this panel. The decisions may not be before this panel but the facts and circumstances are before this panel and the Respondent has acknowledged the nexus between the previous decisions and the decision under appeal in this proceeding. With this acknowledgement it is hard to support an argument that the documents relating to the previous decisions are not relevant at the pre-hearing document disclosure stage of this proceeding.

[16] The Respondent's position is particularly perplexing as it was the Respondent who put the Appellant's skills and quality of care concerns in issue. At paragraph 40(c)(ii) of its Response to the Notice of Appeal the Respondent pled that the September 11, 2020 decision of the IH Board should be supported because the Appellant has limited surgical skill set, unresolved care quality concerns, and concerns in respect to his professional references.

[17] It must be emphasized that at the document production stage, documents which may fairly lead to a line of inquiry which may either directly or indirectly enable a party to advance its own case or damage the case of the opposing party, as identified in the pleadings, must be produced.

[18] If a party is of the view that the pleadings are too broad or vague or totally irrelevant to the matters in issue, then that party has the responsibility to bring an

application to strike those offending portions of the pleadings or argue that the documents relating to that issue in the pleadings should not be disclosed.

Specific Categories of Requested Documents

a) Records relating to patient GS

[19] The Chair made an order at the first PHC on April 7, 2021 that the Respondent provide particulars of any specific care allegations by April 30, 2021. The Respondent provided one example of a specific care allegation and indicated at the May 6, 2021 PHC that it would provide all documents relating to that specific care allegation to the Appellant by May 13, 2021. The Respondent failed to produce all the relevant documents relating to the specific care allegation alleged by them until the Appellant filed this application with the HAB.

[20] The Appellant brought this application on October 4, 2021 and the application was heard on October 8, 2021. The Respondent provided the requested surgical record to the Appellant on October 6, 2021 and disclosed the requested PSLS event report to the Appellant on October 7, 2021. At the hearing of the application the Respondent stated that it was in the process of confirming whether there are any source documents relating to interviews conducted by Dr. S., who investigated the specific care allegation, and will disclose these to the Appellant if they exist. In addition, the Chair ordered that any documents related to training on the machinery related to the care allegation, whether before or after the procedure, are to be disclosed.

[21] The Respondent says that it did not produce these additional documents relating to the specific care allegation because it did not deem them relevant. In addition, it argues that it is only relevant for how it intends to rely on the specific care allegation which is how the Appellant responded to the specific care allegation.

[22] Herein lies the problem with the Respondent's position. The Respondent has taken an overly narrow view of document production at the pre-hearing stage of the proceedings and appears to be equating relevance with how it intends to use the documents which is not in accordance with the disclosure rules in this matter. The Appellant is entitled to full production of relevant documents and then has the right to decide how it intends to use the document to support his case or weaken the Respondent's case rather than rely on a smaller subset of documents that the Respondent intends to use to support its version of events.

[23] Proper document production in HAB matters is particularly important as the Respondent is usually in possession or the majority of relevant documents needed by the Appellant to prepare its case. Relevance at the pre-hearing disclosure phase of the proceeding is determined by the pleadings. In relation to this disclosure request, a specific order was made by the Chair, and, therefore, it does not fall on the Respondent to deem the production relevant or irrelevant. If an issue is determined to be relevant as it was by the Chair in this situation, the Respondent must produce all documents relevant to that issue, not simply what it intends to rely upon or what it says it based its decision upon. There is no reasonable excuse for this deficient production, particularly at this late stage of the proceedings.

[24] All outstanding documents relating to the specific care allegation relating to patient GS are to be disclosed as a matter of priority by **October 15, 2021**.

b) All documents, including but not limited to emails, relating to the relocation of the Retinal Program from Kamloops to Kelowna

[25] Paragraph 22 to 33 of the Notice of Appeal put in issue the relocation of the Retinal Surgical Program from RIH to KGH and the Appellant's allegation that he was led to believe that the two retinal surgeons at RIH would have their privileges transferred to KGH as part of the relocation of the Retinal Surgical Program from RIH to KGH. At the disclosure stage there is no need or utility in any argument about whether the belief was reasonable or valid, it is simply an allegation, and at the disclosure stage the allegation triggers an obligation on the Respondent to produce documents relating to that issue. The Respondent argues that the documents are not relevant to the decision under appeal. As previously stated, relevance is not determined by the decision under appeal but by the matters in issue as determined by the pleadings. This is a much broader disclosure obligation than simply narrowly construing the ultimate decision under appeal. There are often many relevant facts and circumstances that lead to an appealable decision, a fact which the Respondent acknowledges in its submissions. The Respondent did provide some additional documents under this category to the Appellant on October 7, 2021

[26] The Respondent is ordered to produce all documents, including but not limited to emails, relating to the relocation of the Retinal Program from Kamloops to Kelowna.

c) All documents relating to the search and selection of ophthalmologists for the Spring 2019 vacancies and Kelowna General Hospital

[27] Paragraphs 27 to 31 of the Notice of Appeal put in issue the competitive search process to staff the Retinal Surgical Program at KGH and the conduct of KGH medical staff relating to the Appellant at the conclusion of that process. Again, the Respondent can argue at the hearing that this issue and documents are not relevant but it cannot refuse to disclose the documents at the pre-hearing disclosure phase of the hearing.

[28] The Respondent is ordered to produce all documents relating to the search and selection of ophthalmologists for the Spring 2019 vacancies and Kelowna General Hospital.

d) All documents, including but not limited to emails, relating to Dr. Hoonjan's application for hospital privileges at KGH from January 2019 to present

[29] The Respondent is ordered to produce all documents, including but not limited to emails, relating to Dr. Hoonjan's application for hospital privileges at KGH from January 2019 to present.

e) A summary of all ophthalmology offers or appointments made at KGH to any category of medical staff at IHA since January 1, 2019, and all relevant documents relating to same, including email communications

[30] The Appellant put the previous search and selection process in issue in its Notice of Appeal and this request relates to that issue. The Respondent is ordered to produce a summary of all ophthalmology offers or appointments made at KGH to any category of medical staff at IHA since January 1, 2019, and all relevant documents relating to same, including email communications.

f) All email communications and other notes or correspondence relating to Dr. Hoonjan from the desks of Dr. H., Dr. R., Dr. B., Dr. M., Dr. E., Dr. BD., Dr. RG., and Dr. J. from January 1, 2018 to present

[31] The Respondent is making inquiries to reconfirm that all records under this category have been produced. The Respondent acknowledged in its submission that these documents relate to two issues in dispute, the needs of KGH and suitability of the Appellant.

g) All KGH and RIH minutes from January 1, 2018 to present with respect to (a) Ophthalmology Division meetings; (b) Department of Surgery meetings; (c) Local Medical Advisory Committee meetings; (d) Credentialing and Privileging Subcommittee of the Health Authority Medical Advisory Committee meetings; (e) Health Authority Medical Advisory Committee meetings; and (f) Board of Director meetings

[32] The Respondent is in the process of gathering minutes for (a) and (b). The Respondent is ordered to produce items (c) to (f) as well. This request relates to the conduct and competence allegations as well as the search and selection process.

h) All IHA Ophthalmology Division, Surgery Department and Health Authority manpower or human resource documents, including plans, since 2018; All impact or needs assessments performed by IHA in relation to KGH since 2018, including any performed in relation to the appointments in item (e)

[33] The Respondent indicated that it has requested manpower or human resource plans and all impact or needs assessments applicable to the Ophthalmology Division.

i) All documents pertaining to KGH's Division of Ophthalmology's operating room ("OR") time scheduling from January 1, 2019 to present; All documents, including emails, about OR utilizations in the Eye Care Centre from January 1, 2019 to present; All documents pertaining to OR planning, availability and utilization in the Department of Surgery at KGH from January 1, 2019 to present; All documents pertaining to OR schedules for Dr. Hoonjan, Dr. R. and Dr. H. at RIH and the Kamloops Surgical Centre for Ophthalmology

[34] These documents are relevant to the available resources at KGH which was put in issue at paragraphs 56 and 57 of the Appellant's Notice of Appeal. The Respondent will make enquiries to see what documents exist in this regard. In addition, the Respondent is ordered to produce any policy or historical analysis of

how unused surgical time from other surgical departments is allocated to other surgical divisions, particularly the Ophthalmology Division.

j) All of Dr. Hoonjan's annual privileging renewal documents at IH, including Division and Department Head comments relating to same

[35] The Respondent agrees to provide the documents requested under this category.

k) All 360 documents pertaining to Dr. Hoonjan at IH

[36] The Respondent is reconfirming whether there are any additional documents under this category beyond those that have been produced.

[37] For all outstanding documents under each of the above categories a-k, the deadline for production is **October 22, 2021**.

[38] One additional category of documents which the Appellant requested was stated as follows:

All documents, including but not limited to emails, relating to Dr. Hoonjan's application for hospital privileges at KGH from January 2019 to present.

[39] At the PHC held on October 8, 2021, counsel for the Appellant argued that certain of the documents in this category which had already been produced were over-redacted. As a result, counsel for the Appellant asked the HAB to order the production of unredacted versions of the documents.

[40] In response to the Appellant's request, counsel for the Respondent advised it had redacted the documents for irrelevant information and to protect the privacy of other individuals in the documents.

[41] At the conclusion of the October 8 PHC, I reserved my decision on the issue and ordered the Respondent to provide the unredacted documents to the HAB for my review.

[42] After reviewing those redacted documents, I ordered that the full unredacted documents be produced.

[43] As a general rule relevant documents should be produced in their entirety and any redactions should only be for privilege and that should be duly noted to the other party.

[44] In *McCaw's Drilling and Blasting Ltd. v Greenfield Construction Ltd.*, 2019 BCSC 2244 (*McCaw's*), Master Elwood noted that there is no provision in the Supreme Court Civil Rules for redacting documents or withholding parts of documents. Generally speaking, relevant documents must be produced in their entirety. The Court then referenced *North American Trust Co. v Mercer International Inc.*, (1999), 71 B.C.L.R. (3d) 72 where Mr. Justice Lowry allowed redactions to an otherwise relevant document where the redacted material was irrelevant and there was good reason why it should not have been disclosed. This has been referred to as the "good reason" test. The Court also noted that the onus is on the party seeking to uphold the redaction to adduce evidence that the material is likely irrelevant and to establish a good reason for the redaction (*McCaw's* at paras 17 and 18).

[45] In *Este v Blackburn*, 2016 BCCA 496 (*Este*), Madame Justice Newbury noted that to uphold a redaction of an otherwise discoverable document, the court must balance the need to protect privacy interests in irrelevant material on the one hand, and the need to ensure adequate discovery as a facet of the administration of justice on the other (*Este* at paras 20 and 21).

[46] The Respondent has raised the issue of privacy in relation to redaction of these documents. In my view, the statutory framework and the HAB Rules, along with the implied undertaking rule, provide sufficient protections to protect the privacy of the information and evidence at Hospital Appeal Board proceedings.

[47] The implied or deemed undertaking rule provides that documents and information that is obtained as part of a proceeding can only be used for that proceeding and cannot be used for any other purposes. The deemed undertaking rule has been found by the courts to apply to administrative proceedings in British Columbia, particularly involving discipline decisions of the Health Professions Review Board which involve similar issues to the Hospital Appeal Board (*RM v The College of Physicians and Surgeons of British Columbia and the Health Professions Review Board*, 2011 BCSC 832 at para 47). The HAB has also found that the implied undertaking rule applies to parties before it (see *Samad* at p. 4)

[48] The statutory framework and the HAB Rules further reinforce the implied undertaking rule, and provide additional protections to protect the privacy of information and evidence at Hospital Appeal Board proceedings. The HAB has found that these protections are sufficient to protect any information in a report protected by section 51 of the Evidence Act (see *Samad* at pages 2 and 4).

[49] Section 46(6) of the *Hospital Act* makes all information or evidence relating to an HAB proceeding privileged and prohibits an action against any person for production of it. In addition, Rule 12(1) of the HAB Rules specifically provides that HAB hearings are not open to the public. The combined effect of these principles and provisions provides a very high degree of protection to the privacy of information and evidence related to an HAB hearing.

[50] In conclusion, if a document is relevant, there will generally be no need to redact for privacy reasons in the context of an HAB proceeding, and the full document should be disclosed to the other party in the proceeding. With all the protections of privacy inherent in the HAB's hearing processes it would be a truly exceptional set of circumstances that would require the redaction of an otherwise producible document, however, at this time I would not want to foreclose the existence of those possible circumstances. Exceptional circumstances did not exist in this particular case and I ordered production of the unredacted documents.

Application for Extension of Time for Expert Reports

[51] The Appellant filed an expert report by Dr. A.K. on the originally scheduled deadline of October 8, 2021 but sought leave to provide supplemental expert evidence in response to yet to be produced documents. The Chair granted the Appellant leave to provide supplemental expert evidence until **October 29, 2021**.

New Deadline for Agreed Statement of Facts and Witness Will-Say Statements

[52] The Board confirms receipt of the Joint Book of Documents electronically on October 7, 2021 and by courier on October 8, 2021. Based on agreement of the parties, the Chair granted a one-week extension for the Agreed Statement of Facts and witness will-say statements until **October 15, 2021**.

“Stacy F. Robertson”

Stacy F. Robertson
Panel Chair, Hospital Appeal Board

February 15, 2022