



**BY FAX**

November 19, 2002

To the parties:

**Inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* (“Act”) – Ann Rees (“applicant”) – College of Pharmacists of British Columbia (“College”) – Ministry of Health Services (“Ministry”) – OIPC File No. 14385**

**A. INTRODUCTION**

Part B of this letter contains my preliminary decision on the issue of which public body has custody or control of the record requested by the applicant. The Ministry was not at first joined as a party in this inquiry because the applicant’s access request and request for review were made, for entirely understandable reasons, in relation to the College alone. At the inquiry stage, the College denied that it had custody or control of the requested records and alleged that the applicant should have made her access request to the Ministry. Because of this, on September 18, 2002, I gave notice of this inquiry to the Ministry. At that time, I asked for submissions from the Ministry on the issue of custody or control raised by the College and on the status of any relevant agreement, or delegation under the Act, between the Ministry and the College. As a result, I received submissions from the Ministry, the College and the applicant on October 9, 16 and 29, 2002.

In light of the following preliminary decision on custody and control, and the Ministry’s indication that it agrees with the fee estimate given by the College, I will be asking the applicant to make a *pro forma* request to the Ministry that is the same as the revised access request she made to the College on October 29, 2001. I also propose to join the Ministry as a party to this inquiry respecting the balance of the issues raised, *i.e.*, further issues relating to s. 6(2) (creation of a record) and s. 75 (reducing or excusing the estimated fee).

I will ask for submissions on those issues before rendering my decision on them. I then intend to issue an order that incorporates the following preliminary decision on custody and control with my decision on other issues in this inquiry. If any of the parties has significant concerns about the practicality or fairness of my proceeding in this way, they may communicate any objections to me, in writing, within 14 days of the date of this letter. I will carefully consider any such objections.

## **B. PRELIMINARY DECISION ON CUSTODY OR CONTROL**

### **1.0 INTRODUCTION**

[1] The applicant, a staff reporter with *The Province* newspaper, has made several access to information requests, under the *Freedom of Information and Protection of Privacy Act* (“Act”), over the past number of years for information about prescription patterns for various psychiatric drugs. She made her previous requests to the College of Pharmacists of British Columbia (“College”), a public body under the Act. It responded, in the past, by disclosing responsive records without fee. Using information obtained through these requests, the applicant has written extensively on the prescription of a variety of psychiatric drugs in British Columbia, notably for children and youth. Her articles on this topic have won journalism awards and recognition.

[2] On March 28, 2001, the applicant made an access request to the College for prescription data relating to prescriptions for stimulants and anti-depressants for each local health area in British Columbia in calendar 2000. The College initially refused access, citing s. 6(2) of the Act. In its May 4, 2001 response, the College explained as follows:

The College of Pharmacists of BC has custody and control over access to the information contained in the PharmaNet database, but the information does not exist as a record in the College office. While Section 6(2) requires a public body to create a record from an existing machine readable record, the public body is not required to do so if it cannot be done using its normal computer hardware and software and technical expertise. In addition, the creation of a record is not required if the process unreasonably interferes with the operations of the public body.

The creation of the records using the PharmaNet database cannot be done using our normal computer hardware and software. Additional technical expertise is also required for the record to be created. If a record is created, our staff are required to conduct a line-by-line review to ensure that the resulting records do not and cannot result in the identification of individual patients. This process unreasonably interferes with our normal operations.

While we previously created similar records for you, we are finding that the scope and frequency of the requests from various sources is having a negative impact on our normal operations. I regret that we are unable to assist you.

[3] The applicant requested a review, under Part 5 of the Act, of the College’s response. After some back and forth between the applicant and the College, both of their positions shifted. The applicant narrowed her access request and the College provided a fee estimate for processing the revised request. The applicant’s October 29, 2001 revised request changed the relevant period from the year 2000 to the preceding 12 months, beginning “on the last current month available when the request is processed” or beginning from the date of the revised request. The revised request reads, in relevant part, as follows:

I am requesting the information by year of birth and gender of each individual PHN [Personal Health Number]. My detailed requests are as follows:

- 1) Sedative/Hypnotic Benzodiazepine Drugs (PTC CODE 28:24:08) – Total number of individual PHNs for all ages by year of birth and gender for each local health area who received at least one prescription for PTC 28:24:08 drugs during the 12 month period.
- 2) Anti-depressant Drugs (PTC CODE 28:16:04) – Total number of PHNs for all ages by year of birth and gender for each local health area who received at least one prescription for PTC 28:16:04 drugs during the 12-month period.
- 3) Combined (PTC 28:24:08 and/or PTC 28:16:04) – Total number of PHNs for all ages by year of birth and gender for each local health area who received at least one prescription for either PTC 28:24:08 or PTC 28:16:04 during the 12 month period.

Please note that I am dropping my request for information on stimulant drugs and anti-psychotic drugs.

[4] In a November 17, 2001 e-mail to the applicant, the College said it had “received a cost estimate” for the applicant’s request. The estimate included \$750 that the College would charge, together with \$5,375.63 for charges that the Ministry of Health Services (“Ministry”) said it would levy for its work in providing access. The College clarified this estimate in a December 28, 2001 letter to the applicant. That letter broke the estimate down as follows:

The portion of the fee generated by our College is comprised of the following components:

Management staff time	18 hours	\$648.00
Administrative staff time	4 hours	90.00
Materials (CD, paper)		12.00
<b>Total CPBC fee</b>		<b>\$750.00</b>

The portion of the fee generated by the Ministry of Health Managed Operations section is comprised of the following components:

Review Requirements	7 hours	
Analysis and design	10 hours	
Code and test (unit, unit integration)	29 hours	
Closure	2 hours	
<b>Total Hours</b>		<b>48 hours</b>
Effort estimate of 48 hours @\$110		\$5280.00
System time estimate is 127.5 sec @\$0.75 per CPU sec		95.63
<b>Total Hours</b>		<b>\$5375.63</b>

[5] In that letter, the College also said it was “not prepared to waive the MoH estimated proportion of \$5,375.63, should the Ministry of Health charge our College for this amount.”

[6] By a letter dated November 19, 2001, the applicant requested a review, under Part 5 of the Act, of the fee estimate. Her request for review said that the \$5,375.63 Ministry fee was “both excessive and deliberately prohibitive” and that the applicant wished to object to the fee assessment “under ss. 25 and 75” of the Act. Her request for review went on to contend that there

... is no question that this is an area of significant public interest, yet that interest is has [*sic*] been entirely ignored by the Ministry of Health, which has failed to consider either Section 25 or 75 in this request.

[7] The applicant also specifically referred to s. 75(b) of the Act and her contention that the PharmaNet database has proved to be, in the past, “an important source of public information” respecting the prescribing practices of doctors. It is also clear from the applicant’s request for review that she took issue with the amount of the fee estimate.

## 2.0 ISSUE

[8] The College generated a fee estimate and declined to waive the part of it that related to Ministry charges. This caused the applicant to seek a review of the fee estimate and the decision not to waive most of it. Despite this focus on the fee – which is reflected in the Notice of Written Inquiry that my office issued to the parties – the College resurrected the issue of custody or control in its initial submission. At pp. 1 and 2 of its initial submission, the College said this about custody and control:

The College is unable to produce the information requested because the records the Applicant seeks cannot be created from machine readable records in the custody or control of the College, using its normal hardware and software and technical expertise. The College must secure the co-operation of the Ministry of Health as described in the Affidavits of Linda Lytle and Melva Peters. The Ministry has agreed that its subcontractor, IBM Managed Operations, will write a software program to detect and extract the requested data but only if the College agrees to pay the costs to write a program and extract the data [*sic*]. The fee estimate from the Ministry is \$7,627.50.

...

It is the College’s submission that in the circumstances of this case the College is not required to produce the documents at all. However, it will do so as long as the fees charged by the Ministry will be recovered. It is submitted that in this circumstance, given that the College has no obligation to produce this record at all but has achieved an agreement with the Ministry, the Commissioner does not have jurisdiction to make an Order regarding the fees pursuant to Section 58(3)(c).

[9] It went on to say the following at pp. 3 and 4:

Pursuant to an agreement with the Ministry, the College reviews and assesses applications for data from the Pharmanet database pursuant to PPOD and FOI from applicants like [the applicant]. The Ministry of Health is responsible for all aspects of the database operation, including its funding, computer hardware, computer software, technical, clerical and administrative support. The College has no capability to access and retrieve the data which is the subject of this Inquiry.

...

In every case in which the Applicant has requested information, including this one, the College has co-operated and, together with the Ministry of Health, has provided her with the requested information. However, at no time has the College been obligated to provide the information pursuant to FOI or PPOD, because the information has never been a record that the College can create from a machine readable record in its custody or control using its normal computer hardware and software and technical expertise. ...

[10] The Ministry had not, to that point, been a party to the inquiry. I gave it notice of this inquiry and asked that it provide me with submissions on the issue of custody and control raised by the College and on the status of any relevant agreement, or delegation under the Act, between the Ministry and the College. The Ministry has responded by saying that it has custody of the information requested by the applicant, it does not have control over it for the purposes of the Act, and it agrees with the College's position on the estimated fee (para. 42, Ministry's submission). The Ministry's submission went on to say the following:

44. IBM Canada Ltd. is entitled under its contract with the Ministry to be compensated by the Ministry for the work that must be done in order to create the record requested by the Applicant (the Ministry confirms the amount referred to by the College in its submissions).
45. The Ministry agrees with the submissions on the College concerning the "public interest" issue. The Ministry further agrees that the Applicant should bear the costs charged by the College in this case. The Ministry submits that this is an appropriate case for the applicant to bear the charge that has been levied.

[11] Section 5(1)(c) of the Act requires an access request to be submitted to the public body the applicant believes has custody or control of the requested record. Section 6(1) requires a public body to make every reasonable effort to assist an applicant and to respond without delay openly, accurately and completely. Section 8(1) also requires a public body to give reasons in a response to an access request if access is being refused in whole or in part.

[12] As I have already noted, the College's first response, to the wider form of the access request, was to refuse access under s. 6(2). The College did not, however, invoke s. 6(2) on the ground that it did not have custody or control over the relevant machine readable record. The College claimed that s. 6(2) applies on the basis that the requested record could not be created from the machine readable record using the College's normal

computer hardware and software and technical expertise, and that creating the record would unreasonably interfere with the College's operations. The College's second response – to the applicant's narrowed request – indicated, however, that the College could and would give access for a fee. It gave a fee estimate and said it was not prepared to waive the amount of the fee that was attributable to Ministry charges. The College did not direct the applicant to the Ministry as the more appropriate public body to deal with her access request.

[13] I can understand why the applicant made her access request to the College. It had responded before to similar requests by the applicant. I also consider it was appropriate for the applicant's requests for review to identify the College. It had responded to similar requests in the past without raising any issue of custody or control and it had responded to the narrowed version of the applicant's request by providing a fee estimate. The College is now arguing, of course, that it does not have custody or control, after all, of the machine readable record needed to create the requested record. The College says the applicant has been barking up the wrong tree all along, the right tree being the Ministry. The Ministry, for its part, maintains that the College was and is the only right tree. As counsel for the College expressed herself in correspondence to this Office:

Regrettably it has transpired that there is a strong difference of opinion between the College of Pharmacists and the Ministry of Health regarding the issue of control over the PharmaNet database, and interpretation of the applicable legislation.

[14] One thing is clear. The applicant deserves to know to which public body or bodies she should direct her access request. She also deserves, in this inquiry, a resolution to any other issues that stand in the way of the expeditious processing of her narrowed request.

### 3.0 DISCUSSION

[15] **3.1 Description of PharmaNet** – PharmaNet is a computerized network established and operated under the *Pharmacists, Pharmacy Operations and Drug Scheduling Act* (“PPODSA”) and regulations under PPODSA. Any pharmacist who prescribes drugs to a patient through a community pharmacy, or through a hospital pharmacy to an out-patient, must enter certain information in PharmaNet.

[16] PharmaNet is comprised of two systems. One, the Drug Information System (“DIS”), contains patient record information that includes each resident's personal health number, all drugs dispensed, reported drug allergies, reported clinical conditions, name, address and date of birth. The second system, the Pharmacare Central Information System (“PCIS”) contains patient claims and adjudication rules databases. PharmaNet also contains drug information such as drug monographs and drug utilization evaluation information.

[17] Each community pharmacy in British Columbia is linked to the central PharmaNet computer and database. The computer hardware and software that make up the PharmaNet system are located in Victoria, within Ministry premises. IBM Canada Ltd. (“IBM”) maintains the PharmaNet system under a contract with the Ministry,

including by providing services relating to management of PharmaNet facilities and programming resources. The Ministry says IBM has sub-contracted government employees to run the PharmaNet system on a day-to-day basis.

[18] **3.2 The Parties' Positions** – It is convenient to summarize the parties' evidence and submissions before addressing the merits of the custody or control issue.

*Ministry's Position*

[19] The Ministry says it “clearly has custody of the information” the applicant seeks, but does not have control of that information for the purposes of the Act (paras. 20 and 22, Ministry submission). It acknowledges that s. 37(2) of PPODSA makes the Ministry responsible for managing PharmaNet. That section provides that, subject to s. 38(1) of PPODSA, the Minister of Health Services (“Minister”) is “responsible for managing PharmaNet”. Section 38(1) requires the College’s governing council to

... by bylaw, establish a committee consisting of not more than 10 persons appointed by the council to manage, in accordance with this Act and the bylaws, disclosure of information from that portion of the PharmaNet database that contains patient record information and general drug information.

[20] Such a committee, known as the PharmaNet Committee, has been established by College bylaw.

[21] The Ministry says s. 37(2) of PPODSA requires it to manage the PharmaNet system’s hardware and software and the operation of the system generally. The Ministry also acknowledges, at para. 22 of its submission, that it is responsible for managing the PharmaNet’s system hardware and software, as well as the “configuration and operation of all routers, modems, circuits, firewalls and gateways”. This is why, it says, it “has possession and, thus custody, of the information that needs to be culled in order to create the record” the applicant is seeking.

[22] The Ministry’s position on custody is not as clear as it might be. At paras. 22 and 37 of its submission, it acknowledges that it has “custody” of the records from which information would have to be “culled” to create the records the applicant seeks. But it also seems to suggest that its custody of the records is not enough or is maybe not the kind of custody the Act contemplates. Certainly, if the Ministry was acknowledging that it has “custody” within the meaning of ss. 3(1) and 4(1) of the Act, that would be the end of the matter. It is not necessary that a public body have both custody and control of records, since both those provisions (and s. 6(2)) contemplate custody “or” control being sufficient.

[23] The Ministry goes on to argue that it does not have control of the requested information in light of the following circumstances:

- Ministry staff did not create the information. It was entered into PharmaNet by pharmacists around British Columbia.

- The Ministry does not have a right to possession of the requested information within the meaning of the Act. It only has possession, and therefore physical custody, of the information in order to discharge its statutory responsibilities under PPODSA.
- The College has the power, under s. 39 of PPODSA, to regulate “disclosure” of patient record information. That power should be interpreted to include the authority to regulate its use, including for the purpose of creating records under s. 6(2) of the Act in order to respond to the applicant’s access request. The Ministry does not have any authority to use the information for that purpose.
- Section 39(4)(a) of PPODSA requires the PharmaNet Committee to disclose to the Minister patient record information for the purposes of “reviewing the use and prescription of drugs and devices” or investigating the abuse or misuse of drugs or devices. This provision should be interpreted to mean that the Ministry does not have a legal right to gain access to the requested information, since PPODSA does not expressly authorize that access for the purposes of responding to the applicant’s access request.
- The Ministry has not relied on the information that the applicant has requested. (I note here that this assertion by counsel is not supported by any evidence from the Ministry’s witness.)
- The information covered by the applicant’s request has not been integrated with any other Ministry records or information.

[24] I asked the Ministry to provide details about any agreement between the College and the Ministry regarding the processing of access requests under the Act. The Ministry says there is “no formal agreement in place”, but that the Ministry and College “have agreed that requests by individuals for access to his or her patient record information on PharmaNet should be handled by the College” (para. 38, Ministry’s submission). The Ministry relies on the affidavit of Nerys Hughes, Director of Operations and Systems, Pharmacare, in support of this submission. Her affidavit appends a service agreement between the College and the Ministry, under which the College provides certain PharmaNet-related services. (None of those services, I will note here, addresses the situation at hand.) The Ministry has also confirmed that its head, for the purposes of the Act, has not made a delegation, under s. 66(1) of the Act, to the College or any of its officials respecting any or all of the duties, powers and functions of the Ministry’s head under the Act.

### ***College’s Position***

[25] I have already quoted the portions of the College’s initial submission that address the custody or control issue. In its further submission, which responded to the Ministry’s submission, the College says the PPODSA provisions dealing with access to DIS information supplement, but do not replace or oust, access rights under the Act. The College argues that the legislative history of PPODSA supports this perspective. It notes that s. 36.3 of PPODSA, which was enacted in 1995 and repealed in 1997, used to explicitly make the College a public body with respect to “information and records relating to PharmaNet.” Repeal of this provision supports the view, the College says, that

it is no longer the kind of PharmaNet gatekeeper the Ministry contends it is. Other factors that the College cites can be summarized as follows:

- Section 37(1) of PPODSA authorizes the Minister, not the College, to establish PharmaNet, while s. 37(2) makes the Minister responsible for managing PharmaNet subject only to s. 38(1) of PPODSA.
- Section 38(1) of PPODSA requires the College's council to establish the PharmaNet Committee for the purpose of managing the disclosure, under PPODSA, of patient record information. This provision has to be read in conjunction with s. 39 of PPODSA, which requires the PharmaNet Committee to give the Minister certain patient record information in certain circumstances.
- Read together, these provisions establish that the PharmaNet Committee's authority to manage or disclose data in PharmaNet is limited, while the Minister has the overall power to manage the PharmaNet system subject only to the PharmaNet Committee's limited authority.
- The supposedly limited purposes for which the Minister is entitled, under s. 39 of PPODSA, to have access to patient record information do not support the Ministry's case that it does not have control under the Act. Section 39 of PPODSA simply regulates circumstances in which the Minister can obtain patient record information from PharmaNet for use within the Ministry, but that does not mean the Ministry is not generally responsible for managing PharmaNet or access requests under the Act.
- The service agreement between the College and the Ministry does not oblige the College to handle access requests under the Act that relate to PharmaNet.
- Although the College has some authority, under PPODSA, to regulate the use that pharmacists and the PharmaNet Committee may make, or allow, of PharmaNet data, the College's authority is limited to professional practice issues. The College does not rely on PharmaNet data to carry out its mandate and data in PharmaNet are not integrated with any other records held by the College. Nor is the information contained in PharmaNet created by or on behalf of the College.

### ***Applicant's Position***

[26] The applicant says the College has control under the Act, generally for the reasons that the Ministry has given. The applicant also notes that the College's past conduct, in responding to access requests relating to PharmaNet made by the applicant (and presumably others), supports the view that the College has control. The applicant also says, however, that even if both the College and the Ministry have control for the purposes of the Act, the applicant's rights should not suffer as a result.

[27] As for the College's past conduct in responding to earlier requests made by the applicant, the applicant notes that the College granted "express public interest fee waivers" in 1997 and 1999, while the College did not charge any fee for similar requests in 2000, "presumably on the same basis."

[28] **3.3 Who Has Custody or Control?** – Section 4(1) of the Act creates a right of access to “any record in the custody or under the control of a public body”. The word “record” is defined in Schedule 1 of the Act to include

... books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

[29] The applicant’s access request calls for the generation of the requested record from electronically recorded or stored information. This is where s. 6(2) of the Act comes in. That section requires the head of a public body to create a record for an applicant if (among other things) the record “can be created from a machine readable record in the custody or under the control of the public body”. In this case, there is no issue that a machine readable record exists from which the record requested by the applicant can be created. Similar records have been created in order to respond to the applicant’s earlier, and similar, requests to the College for PharmaNet information. Recalling that, under PPODSA, the Ministry is charged with the general management of PharmaNet and the College (through the PharmaNet Committee) is charged with disclosure of information from the part of the PharmaNet database containing patient record information, it also seems uncontroversial that the *information* in the requested record, which is recorded and stored electronically as part of the PharmaNet database, is in some form and degree held by or accessible to both the Ministry and the College.

[30] As I see it, the custody or control issue in this case turns on whether the machine readable record from which the requested record can be created is in the custody or control of one or both of these public bodies. The answer to this question will not, of course, answer further issues in this inquiry, such as whether the record can be created using the public body’s normal computer software or hardware or technical expertise, whether creating the record would unreasonably interfere with the operations of the public body or whether the fee estimate should be reduced or excused. Those issues are not resolved in this preliminary decision.

[31] As the Ministry notes, in Order 02-29, [2002] B.C.I.P.C.D. No. 29, I again agreed with the approach to custody or control that my predecessor took in Order No. 11-1994, [1994] B.C.I.P.C.D. No. 14, and that L. Smith J. took in *Greater Vancouver Mental Health Services Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.). At para. 18 of Order 02-29, I affirmed that the following non-exhaustive list of indicators of control will be useful in deciding the control issue:

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
- Does the institution have a right to possession of the record?
- Does the content of the record relate to the institution's mandate and functions?
- Does the institution have the authority to regulate the record's use?
- To what extent has the record been relied upon by the institution?
- How closely is the record integrated with other records held by the institution?
- Does the institution have the authority to dispose of the record?

[32] I will first address whether the Ministry has custody or control of a machine readable record from which the requested record can be created.

***Does the Ministry have custody or control of a machine readable record?***

[33] As I noted earlier, the Ministry acknowledges that it “clearly has custody”, but also appears to suggest it does not have “custody” within the meaning of the Act. It says, for example, that its right to possession of the recorded information is merely physical and then is only for the purpose of discharging its duties under PPODSA. The Ministry's possession of the records is very different from the kind of possession in issue in Order 02-30, [2002] B.C.I.P.C.D. No. 30, where the public body only had physical possession of the records for the purpose of performing services, under contract, for a non-profit foundation. As I noted in Order 02-30, at paras. 21-23, physical possession of records will usually not suffice to establish custody or control within the meaning of the Act. Some legal responsibility for the records (including their protection) and some right to deal with them will be necessary. Also see Ontario Order P-239, [1991] O.I.P.C. No. 33, and *British Columbia (Minister of Small Business, Tourism and Culture v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 1494 (S.C.).

[34] Nothing in the PharmaNet statutory framework or the other circumstances of this case supports the view that the Ministry only has *de facto* possession of the recorded information of a kind that is not “custody” within the meaning of the Act. The Ministry has a statutory mandate and duty to maintain and operate the PharmaNet system. It is the Ministry, not the College or another body, that has custody of the system's components, including the recorded information it contains, for the purpose of carrying out the Ministry's statutory duties under PPODSA. The Ministry also has the technical ability to make changes to PharmaNet in order to create records that respond to access requests and presumably for other purposes. The material before me indicates the College has in the past relied on the Ministry to perform the technical actions necessary to create records from the PharmaNet database, and in machine readable form, in order to respond to the applicant's earlier requests and that it would have to do so in this case as well.

[35] The Ministry has a legal responsibility – in this case statutory – for the PharmaNet records, including their safekeeping. It is by no means merely a service provider, for the College or anyone else, respecting PharmaNet. I am satisfied that the Ministry has

“custody” of records comprising the PharmaNet database, such that someone in the applicant’s position could make an access request directly to the Ministry for the record sought by the applicant.

[36] Turning to control, I do not accept the Ministry’s contention that its allegedly limited ability to require the College to disclose information to the Ministry, under PPODSA, supports the view that the Ministry does not have control of the machine readable record from which the requested record would be created. First, even accepting the premise of the Ministry’s argument, I note that s. 39(4)(a) of PPODSA allows the Ministry to compel the PharmaNet Committee to disclose patient record information to the Ministry for the purpose of “reviewing the use and prescription of drugs” or the abuse or misuse of drugs. Judged against the applicant’s access request, it seems to me that, relying on s. 39(4)(a), the Ministry could require the PharmaNet Committee to disclose information necessary for the Ministry to respond to the applicant’s request.

[37] More directly, however, I have decided that, for reasons similar to those given regarding “custody”, the Ministry has “control” of the machine readable record in question. Even if one sets aside the above point about the Ministry’s right to compel disclosure of PharmaNet information, the fact is that PPODSA does not override the Act. As I noted earlier, the Ministry, under its PPODSA mandate and duty, operates and maintains the PharmaNet system. It is therefore lawfully (and technically) able to make changes to the system for the purposes of responding to access requests, including by creating records. In the absence of any override in PPODSA, providing that the Act does not apply, I do not see how the Ministry’s limited right of access to PharmaNet information establishes that it has no control over the records containing that information. Similarly, the College’s authority, under PPODSA, to regulate disclosure of patient record information does not establish that the Ministry has no control, under the Act, over records relevant to the applicant’s request.

[38] As I noted above, the Ministry says it has not relied on the recorded information the applicant seeks, but it has not provided evidence to support this assertion. In any event, this is only one of the criteria that may be relevant, in a given case, to the control issue. It is by no means determinative and, in the absence of any concrete evidence to support the Ministry’s claim, I am not prepared to give it more than minimal weight.

[39] The same goes for the Ministry’s argument that PharmaNet records have not been integrated with other Ministry records or information. Again, the Ministry did not back up this point with evidence and the point is only one consideration. I note, as well, that PPODSA itself contemplates the Ministry having the right to obtain PharmaNet information for purposes related to the Ministry’s functions and also that information in PharmaNet is relevant to some of the Ministry’s operations.

***Does the College have custody or control of a machine readable record?***

[40] It is, of course, possible for a record, including a machine readable record, to be in the custody or under the control of more than one public body. I will now address whether the College also has custody or control of a machine readable record from which the record requested by the applicant can be created.

[41] The relevant question is whether the PharmaNet database, in the form that is available to and used by the College, is machine readable. This is a different question from whether the College has, as contemplated by s. 6(2), the computer hardware and software and technical expertise to actually create the requested record. It could be, for example, that the College has custody or control of the required machine readable record, but its normal computer hardware and software and technical expertise would not enable it to create the requested record. Conversely, the College could have the computer hardware and software and technical expertise to create the record, but not have custody or control of the machine readable record from which to generate the requested record.

[42] The College plainly asserts that it does not have custody or control under the Act of a machine-readable record from which the requested record can be generated. The College's supporting evidence, however, is conflated with the issue of whether the College has the normal computer hardware and software and technical expertise to create the requested record. An example of this is found in paras. 8 and 9 of the affidavit of Lynda Lytle, sworn on April 10, 2002:

... the data [the applicant] requests cannot be accessed by the College readily because it is not in a machine readable record that is in the College's custody or control and is not available using the College's normal computer hardware, software programs or technical expertise. A particular software program to respond to the request and extract the data must be developed by an outside party who requires payment for this service.

In this case and on previous occasions, the College has been able to provide the Applicant with the data she requested only in cooperation with the Ministry. On each occasion in the past the Ministry agreed to develop a specific program and did not require the College to reimburse it for the expense it incurred to develop the software and extract the data. However, in the current request, the Ministry has advised me that the College must agree to reimburse it for its costs or it will not write a software program and extract the requested data.

[43] If the College must use an "outside party" – in this case IBM, as the Ministry's contractor for PharmaNet system maintenance and management services – to develop software to create the requested record, that factor goes to the issue of expertise, not custody or control of a machine readable record. It does not establish or refute custody or control of the necessary machine readable record. Similarly, the College's reliance on the Ministry's cooperation to develop and run software required to create a record does not foreclose the College's custody or control of the machine readable record involved.

[44] There is some evidence that might be construed as indicating that the form and extent of the PharmaNet database made available to the College by the Ministry has been insufficient to enable the College to create the requested record even it did have the necessary hardware, software and technical expertise. Para. 8 of the affidavit of Melva Peters, sworn on April 10, 2002, reads as follows:

In this case, as previously, the College must obtain the cooperation of the Ministry to develop a software program that will extract the data. The Ministry has contracted with IBM, Managed Operations to operate and maintain the Pharmanet

System, including data extraction. A programmer from IBM Managed Operations writes a program to extract the particular data that [the applicant] has requested. The data in her previous requests and in the current request is not available to the College in any of the College's existing software programs or within the College's computer hardware programs. This data is kept in the System as part of the database that retains information about patient records and can only be retrieved through the efforts of IBM, Managed Operations pursuant to its contract with the Ministry.

[45] On balance, however, I consider that the above statements about data not being available to the College do not speak to an inherent limitation on the machine-readability of the form of the data that has been made available to the College by the Ministry. Rather, understood in the context of the passage as a whole, they relate to the need for hardware and software to create the requested record from the data. In any event, working relationships between the Ministry (including its contractor), the College and the PharmaNet Committee do not supercede powers, duties and functions provided for by PPODSA.

[46] Turning to PPODSA, as I have already noted, s. 37(2) provides that, subject to s. 38(1), the Minister is responsible for managing PharmaNet. Section 38(1) confers authority on the PharmaNet Committee "to manage, in accordance with this Act and the bylaws, disclosure of information from that portion of the PharmaNet database that contains patient record information and general drug information". As I see it, the contemplated "portion of the PharmaNet database containing patient record information and general drug information" is machine readable data from the system managed by the Ministry.

[47] Under s. 38(5), the PharmaNet Committee is expected to be able to disclose patient record information for research purposes "without disclosing the names and addresses of the patients and the practitioners". The only reasonable interpretation to attach to s. 37(1) and s. 38(5) is that the "portion of the PharmaNet database" that is managed by the PharmaNet Committee is intended to be in machine readable form. It is clear enough that the PharmaNet Committee manages a portion of a database, which is by definition an electronic means of holding information. If the PharmaNet Committee is to withhold selected patient identifying information from that database on a scale required for statistical analysis by medical researchers using disclosed non-identifiable data, as is contemplated by s. 38(5), then the portion of the database it manages is intended to be machine readable.

#### **4.0 CONCLUSION**

[48] I am satisfied that the Ministry has both custody and control, and the College has control, of the machine readable record from which the record the applicant has requested can be created.

[49] As I noted above, the parties have 14 days after delivery of this preliminary decision to make any representations about the manner in which I propose to proceed respecting the other issues raised in this inquiry. Further steps in this matter will include the applicant making the *pro forma* access request to the Ministry mentioned above, in

the introduction. In this case, the Ministry and the College disagree where responsibility lies between them for responding to an access request for the record that has been sought by the applicant. As well, further issues relating to the creation of the record and the amount of the fee estimate appear to involve services that have been intertwined between the two public bodies. In these circumstances, it seems to me to be only sensible to get to the bottom of all the issues in this inquiry with both public bodies being fully and fairly heard and answerable on whatever findings and disposition I might make.

Yours sincerely,

**ORIGINAL SIGNED BY**

David Loukidelis  
Information and Privacy Commissioner  
for British Columbia

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