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May 4, 2011

Tom Closson
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Dear Tom,

We have answered all salient issues raised by you in our correspondence and in our original submission to the committee. As, is undoubtedly obvious to the members of the committee, we do not agree that discussions of quality care in Ontario hospitals should be shielded from public scrutiny. Quality improvement is not simply an internal matter.

To respond to the only new point, as you know the Broader Public Sector Accountability Act extended FIPPA to cover hospitals, which we supported in our submission to the Standing Committee on Social Policy. The attempted (and failed) amendment to restrict access to information in hospitals was introduced while the bill was in hearings, and as such we did not have an opportunity to respond to it then.

Though we appreciate the opportunity to respond openly to your claims, we continue to be surprised by the tone of your letters. We remain open to any respectful dialogue. In the meantime we continue to advocate that the government withdraw Section 15, the hospital secrecy clause.

We favour advancing a full public discussion on the issue of quality and quality improvement in our public hospitals.

Natalie

Natalie Mehra
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Tom Closson's letter preceding this response>

Correspondence received by email from Tom Closson, President and CEO of the Ontario Hospital Association, May 4, 2011

Natalie,

Thank you for your note. I will address a few of the major issues with your response. Please note that in the interests of time and full disclosure, I have copied the Members of the Standing Committee on Finance and Economic Affairs on this response.

1. With respect to the protection of quality of care information in other jurisdictions, I am surprised that the Ontario Health Coalition has not done sufficient research to know that this class of information is in fact protected in other provinces, the UK and Australia, or that it is better protected in those places than it would be in Ontario should the proposed amendment in Schedule 15 be approved.

The proposed amendment would bring Ontario in line with what is happening elsewhere with respect to FIPPA and quality of care. That is all.

2. Regarding your issues with the hearings process, this is an issue you should direct to legislators. However, I would remind you though that the public hearings on the 2011 Ontario Budget were not the first time this issue was considered. In fact, these and other issues were the subject of debate between October and December 2010 (Bill 122, the Broader Public Sector Accountability Act). There were public hearings on these issues at that time, which your organization actually participated in. The OHA addressed this issue directly; your organization chose to talk primarily about extending FIPPA to long-term care homes. You can click on this link http://tinyurl.com/3qqqssh to view the Hansard of those proceedings.

3. With respect to the Quality of Care Information Protection Act (QCIPA), your submission correctly notes that QCIPA applies to discussions of specific incidents, and not to general discussions of quality. Surely your organization believes that discussions about how to improve quality in hospitals should happen on a daily basis, and not necessarily be tied to specific critical incidents.

The proposed amendment included in Schedule 15 is completely consistent with what independent patient safety experts tell us is necessary to ensure these kinds of discussions happen. You may wish this were otherwise, but we believe that public policy and legislation should accurately reflect both expert advice and the reality of how humans work and interact with each other.

Further, QCIPA limits the sharing of lessons learned from specific incidents within and between hospitals, and even prevents the timely disclosure of the results of the investigation to patients. We believe that there must be better ways to proceed than this; the proposed amendment in Schedule 15 would create one.

4. The proposed amendment in Schedule 15 is not a "blanket exclusion," as you call it; it is a limited, targeted exemption. This is not a distinction without a difference. Because it is an exemption, Ontarians will have recourse to appeal to the Information and Privacy Commissioner (IPC) any decision made by a hospital they disagree with. The IPC's job is to act in the public interest and, in my experience, she does. If you don't like the way that FIPPA is structured, that is your prerogative, but I would ask you to stop pretending that this proposed amendment is something that it is not.

Continued>

I appreciate your response, and I hope that you find this additional clarity helpful. However, I must ask you to exercise caution when discussing this issue. Facts and precision must be key elements of this important issue; sadly, both have been absent from too much of this discussion, in part because of the tactics and rhetoric of your group. Remember: this isn't about who gets what piece of paper; it's about whether Ontario's legal and policy frameworks properly support the quality improvement efforts that are very much needed in our hospitals and health care system. I encourage you to keep this in mind as we go forward.

Please feel free to contact me should you have any questions.

Tom

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Email exchange that preceded this email from Tom Closson>

May 3, 2011

To: OHC Members and Contacts
From: Natalie Mehra, Director

We received a very critical letter from the Ontario Hospital Association President Tom Closson today defending the hospital secrecy clause inserted by the government into the budget bill. We issued a press release giving background on this issue Friday here: http://www.web.net/~ohc/mediareleasesecrecy042911.pdf

For those who have not been following, the government quietly inserted a clause into the budget bill that thwarts public access to information in hospitals. The clause, lobbied for by the Ontario Hospital Association and an insurance company, undermines the government's own legislation, passed last fall, to improve public access to hospital information. After hearing from the OHC and about a dozen organizations opposed to the hospital secrecy clause, the government made a proposed amendment to the clause that does not substantively change anything. The bill, including the secrecy clause, is in front of the Legislative Committee on Finance and Economic Affairs and will be voted on this Thursday.

Since Tom Closson's letter has been distributed by the OHA publicly to government MPPs and hospital executives, I am obliged to distribute our response, below.

*Please note: Tom Closson's letter is in **black**. Our response is inserted into the original letter after each of his main points, in blue.*

Hello Tom:

I have inserted our response to each of your points in the text of your letter pasted below. I have coloured our responses blue to distinguish them from your text.

I appreciate the opportunity to respond to each of your claims before the members of the committee. As noted below, we are happy to discuss this issue and the issues you have raised regarding QCIPA, and any specific proposals that the OHA would like to make.

However, we cannot support the blanket exemption as proposed in the government's original and proposed amended version of Schedule 15. Further, we cannot support the lack of proper consultation process to date by the MOHLTC and the inclusion of this Schedule in a budget bill. We have fully explained this position in our submission to the Standing Committee on Finance and Economic Affairs.

Mr. Closson, the Ontario Health Coalition has legitimate concern and we are far from alone in raising it. Groups such as the Canadian Civil Liberties Association, the Ontario Nurses' Association and the Registered Nurses' Association, patient advocacy groups, unions and others have all expressed similar misgivings. Our concerns should be considered respectfully.

Regards,
Natalie

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Ms. Mehra,
On behalf of the Ontario Hospital Association (OHA), I am writing to rebut the grossly inaccurate claims made by your organization in its submission to the Ontario Legislature's Standing Committee on Finance and Economic Affairs (SCFEA) regarding Bill 173, the
Better Tomorrow for Ontario Act (Budget Measures), 2011, specifically, Schedule 15.
As you know, Schedule 15 proposes an amendment to the Freedom of Information and Protection of Privacy Act (FIPPA), which would exempt certain classes of quality care information from public disclosure and align Ontario with other jurisdictions in Canada, as well as the United Kingdom and Australia, with respect to the treatment of quality of care information.

We first saw that you were making this claim on your website at the very end of last week. I have since contacted stakeholders and experts in several provinces and in the UK. I am waiting for their response. We have not had time to test this claim and will not be given time prior to the vote on the amended language tomorrow. This is part of the problem we have with the process. Aside from the inappropriate inclusion of this schedule in a budget measures bill, an appropriate consultation process, properly conducted by the Minsitry of Health, would allow for disparate interests to see and evaluate the "evidence" of others. Given the complexity of the issue, we question whether access to hospital information between multiple jurisdictions can be accurately captured in one sentence.

Your submission suggests that these classes of quality of care information are already fully protected from disclosure by the Quality of Care Information Protection Act (QCIPA). This is simply untrue.... The majority of efforts to enhance the safety of patient care lie outside the QCIPA process....As you are no doubt aware, due to the restrictions on the way information can be used and disclosed, QCIPA is not widely used.... I would have thought that an organization which suggests that it speaks for patients would want such information and lessons learned shared widely. As you also know, QCIPA prevents the timely disclosure of the results of the investigation to patients....for this reason many hospitals have chosen not to use QCIPA to review all of their adverse events. Because of QCIPA's restrictions, the majority of quality of care activities at most hospitals take place outside of the QCIPA process and would therefore be subject to FIPPA.

Our submission quotes from the government's own summary of QCIPA. It is correct. If you are now raising problems with QCIPA, we are willing to discuss these with you and in a proper consultation process in which all stakeholders are included and are treated equally. Schedule 15 --unduly broad exemption of quality of care information from public scrutiny -- is not an appropriate solution. Here is the actual wording of our submission:

"4. Certain quality of care information was already fully excluded from Freedom of Information legislation

The argument that public access to quality information would stifle open discussion in hospitals is false. Hospitals are already totally exempted from sharing certain quality of care information under, the Quality of Care Information Protection Act (QCIPA). There is no public interest rationale for extending hospitals' ability to shield information from public scrutiny even further.

When the amendments to FIPPA were made to bring hospitals under the legislation, the Quality of Care Information Protection Act (QCIPA) was amended to provide that the Freedom of Information and Protection of Privacy Act (FIPPA) does not apply to "quality of care information" under QCIPA. This is an exclusion from FIPPA, which means that an access request under FIPPA cannot be made for any records of quality of care information.

According to the Ministry of Health's QCIPA Overview:
- *"QCIPA is designed to encourage health professionals to share information and hold open discussions to improve patient care, without fear that the information will be used against them."*
- *"QCIPA does this by providing that information prepared by or for a Quality of Care committee designated under the Act is shielded from disclosure in legal proceedings and from most other types of disclosures, with appropriate exceptions."*

Hospitals use QCIPA committees to discuss specific medical errors and incidents in private.

Furthermore, information pertaining to patients' health records is not covered by FIPPA. It is covered under the Personal Health Information Protection Act (PHIPA). This issue has no bearing on personal health information."

To be clear: even if the proposed amendment under Schedule 15 were approved, hospitals would still be required to share a great deal of information about outcomes with the public. (For example, over 50 indicators on quality and patient safety are available on public websites like myhospitalcare.ca.) Schedule 15 would simply provide added assurance to health care professionals participating in discussions related to quality of care that the information they are giving in confidence would be protected.

Information released by the Ontario Hospital Association on your website myhospitalcare.ca is controlled by you. You decide what quality of care indicators you want to disclose, you have chosen the process by which you make your decisions, and the site does not include specific information in which we and others are interested. The public understood that when FIPPA was extended to cover hospitals, it meant that the public would have greater access to information than what you have chosen to disclose and everyone would have a chance to ask their questions.

Under the amended version of Schedule 15, the language has been changed to state that a hospital head may refuse to disclose information that a hospital deems to be confidential -- and even information that a hospital head retroactively deems to have been intended to be confidential -- re. quality of care produced by or for a committee. Quality is not defined and nor is committee. The amended language does not substantively change the blanket exemption to which so many of us objected in the original iteration.

As the Canadian Civil Liberties Association notes, "The language of the amendment is so broad that it could render much important information about the quality of patient care unavailable to the public."

The issue is that the public access to quality of care information in hospitals should not only be at the discretion of the hospital CEO.

Further, I remind you that the proposed amendment in Schedule 15 is an exemption, not an exclusion. This is an important distinction, because Ontario's Information and Privacy Commissioner maintains the ability to review a hospital's decision to grant access requests and make remedial orders when deemed appropriate.

As explained in our submission, this is too high a bar. Using the process under FIPPA is difficult, even for the Ontario Health Coalition, let alone for patients and individuals. The legislation is complex. Every stage is subject to timelines that have to be met. It requires documentation, appeals and it takes a great deal of time. The only groups in this equation who have lawyers will be the hospitals, not the patients and public interest groups. The lawyers know how to maximize the delays in releasing the information. At every stage access to resources and expertise are unequal.

What Schedule 15 does, in both its original and amended form, is reverse the onus of proof for access to information. It requires patients and public interest groups to navigate a lengthy, complex and very difficult process of FOI appeals to eventually (likely a year or more later) appeal finally to the Information and Privacy Commissioner to prove public interest in their request for information. This is not balanced. If hospitals want specific information excluded, they should propose a specific exemption. Due attention should be paid to make sure that in exempting some information, hospitals do not overreach and exempt a wide array of quality of care information. This should be subject to a proper consultation process that includes all stakeholders equally.

Further, the inclusion of this clause sends a message to hospitals that blanket denial of quality of care information is acceptable. If passed, hospitals could routinely deny access to information knowing that the FIPPA process is insurmountable by many.

I would also argue that in the absence of the protections proposed in Schedule 15, hospitals and their staff will have little recourse but to use the protections offered by QCIPA for any and all quality improvement discussions. This means that, if the SCFEA were to follow your recommendations and reject Schedule 15, the net result would be less

information being made available to patients and the public, and that information about lessons learned could not be shared within or between hospitals. We don't believe that is an appropriate outcome, but it appears to be the one you are advocating for.

If I understand it, here is a summary of your claim: if we do not accept a loophole allowing blanket exclusion of information on quality of care for or by a committee that a hospital CEO wants to keep confidential, hospitals will shut down the sharing of most or all quality of care information including best practices on quality of care, and we are to blame for that decision? This is a logical fallacy and a contortion. Hospitals can and should respond to calls for more public access to information with more openness.

Again, we are willing to discuss any specific proposals re. problems you are seeing with QCIPA and the interaction of various proposals with you. But perhaps more importantly, we believe that the government should institute a consultation process, with the proper time and regard for the diverse voices and interests involved, to come to the right decision about how to balance privacy and access in the public interest. Schedule 15 does not, neither in its original nor in the amended version, achieve this.

In our view, the proposed amendment included in Schedule 15 of Bill 173 is in the public interest.

Ontario hospitals unequivocally support openness and transparency and continuous quality improvements. I strongly encourage your organization to revisit its conclusions and recommendations as set out in your submission to the SCFEA in light of the foregoing information. On an issue as important as Ontarians' health and safety, the "facts optional" approach your organization has taken to date is simply irresponsible. Ontarians deserve better.
Sincerely, Tom Closson, President and CEO

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