

INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

Investigation Report Concerning an Occupational Health & Safety Nurse's Access of Health Information via Alberta Netcare

April 14, 2009

Caritas Health Group & Capital Health

Investigation Report H2009-IR-003 & F2009-IR-001

(Investigations H1846, H2266 & F4266)

I Introduction

[1] On October 22, 2007, the Information and Privacy Commissioner (the Commissioner) received a complaint from an employee (the Complainant) that her employer breached her privacy. The Complainant is a nurse employed by the Caritas Health Group (Caritas). She says the Occupational Health and Safety (OH&S) office at the Grey Nuns Hospital (GNH) told her they had accessed her electronic health record (Alberta Netcare or Netcare)¹ in search of laboratory results to determine her immunization status for the purpose of employment. The GNH is a facility operated by Caritas.

[2] Review of audit logs² confirmed that the Complainant's health information was accessed via Alberta Netcare by a staff member of the Caritas OH&S office. Investigation Report H2008-IR-001, released by the Commissioner on May 15, 2008, describes Netcare and found that a disclosure occurs by the health services provider who made health information available via Netcare when another health services provider accesses that health information.³ A disclosure therefore occurred by the custodian who made the records available via Netcare that were accessed in this case. Privacy impact assessments⁴ (PIAs) submitted to and accepted by our office; demonstrate that Capital Health made the Complainant's immunization records available through Netcare. As such, on September 25, 2008, the Commissioner authorized an additional investigation to examine the disclosure made by Capital Health.

¹ Alberta Netcare is an integrated clinical health information system intended to provide a shared view of a patient's health record in a secure environment and to be a clinical decision support tool used in the provision of health services.

² Electronic system generated record that documents the disclosure of health information made available via Netcare.

³ Investigation report H2008-IR-001, paragraph 56

<http://www.oipc.ab.ca/orders/investigation.cfm?year=YR2008&descriptor=2008&docflag=DOC002>

⁴ A health information custodian is required to submit a PIA to the Commissioner before implementing a new practice or system or making changes to an existing practice or system.

[3] The Commissioner authorized Mr. Dan Cameron, Portfolio Officer to conduct this investigation under section 85(e) of the *Health Information Act* (HIA) and 53(2)(e) of the *Freedom of Information and Protection of Privacy Act* (FOIP). Section 85(e) and 53(2)(e) allow the Commissioner to investigate complaints that health and personal information have been collected, used or disclosed in contravention of the Acts. Following Mr. Cameron's retirement from this Office, the Commissioner re-assigned the case to me on June 16, 2008.

[4] This report outlines findings and recommendations resulting from the investigation.

II Background

[5] Section 5 of the *Public Health Act, Communicable Diseases Regulation* (the Regulation) requires that the medical officer of health be notified about a person who is infected with a communicable disease. The notifiable communicable diseases are listed in Schedule 1 of the Regulation. The Regulation also requires that a health services provider who may have face to face contact with patients be immunized against Rubella.

[6] The Complainant is a nurse who, shortly before filing this complaint, was a prospective employee for a job offered by Caritas. As a nurse, the Complainant is a health services provider who may have face to face contact with patients.

[7] Caritas is an organization that provides health services and is an employer. Caritas says OH&S nurses provide health services and do so when collecting immunization status on prospective employees.

[8] Caritas OH&S completes a job-related health assessment as a condition of employment prior to an employee's commencement. As part of this assessment, the prospective employee is typically asked to bring their immunization records with them when they book their health assessment.

[9] Caritas OH&S nurses have been given access to Alberta Netcare. In this case, audit logs have demonstrated that a Caritas OH&S nurse accessed the Complainant's health information via Netcare. Caritas says the access occurred to review the Complainant's immunization status as part of the job-related health assessment. The Complainant had not provided consent for her health information to be accessed.

[10] The Complainant says her health information was accessed via Alberta Netcare for purposes related to determining suitability for employment. The following statement taken from her letter of complaint summarizes her concern about this access:

“The EHR is a tool used by health care professionals for health care purposes, and just because access to the EHR is readily available to Caritas Health Group health care providers for those purposes I feel they should not be accessing it for employment purposes.”

III Application of the HIA & FOIP

[11] The HIA applies to “health information” in the custody or control of a “custodian”. FOIP applies to “personal information” in the custody or control of a “public body”.

[12] Caritas Health Group is a “custodian” under section 1(1)(f)(i) of the HIA. Caritas is also a “public body” under section 1(g)(vii) of FOIP.

[13] Capital Health is a “custodian” under section 1(1)(f)(iv) of the HIA. Capital Health is also a “public body” under section 1(g)(v) of FOIP.

[14] The HIA defines health information as “registration information”, “health services provider information” and “diagnostic, treatment and care information”⁵. Recorded information about immunizations contains registration, diagnostic, treatment and care information, and some information about the health services provider who provided the health service.

[15] FOIP defines personal information as recorded information about an identifiable individual, including but not limited to the individual’s name or contact information, age, sex, marital or family status, an identifying number, blood type and information about health and health care history⁶. Recorded information about immunizations is information about an identifiable individual.

[16] The information collected, used and disclosed relevant to this complaint is about immunizations provided to the Complainant. This information falls both within the definition of health information and the definition of personal information. As stated by the Commissioner in Orders H2005-001 and F2004-005, these “definitions have some common ground”⁷. The Commissioner went on to say these definitions could apply to the same information. What type of information was collected, used and disclosed about the Complainant in this case, whether health or personal information, will be addressed later in this report.

[17] Caritas and Capital Health have custody and control of health and personal information, and are both custodians and public bodies. Therefore, I find that both the HIA and FOIP apply to health and personal information in the custody and control of Caritas and Capital Health.

⁵ *Health Information Act*, section 1(1)(k)

⁶ *Freedom of Information and Protection of Privacy Act*, section 1(n)

⁷ <http://www.oipc.ab.ca/orders/investigation.cfm?year=YR2005&descriptor=2005&docflag=DOC002>

IV Issues

1. Is the information collected and used by the Caritas Health Group health information subject to the HIA or personal information subject to FOIP?
2. Did the Caritas Health Group OH&S nurse have authority to collect the information?
3. Did the Caritas Health Group OH&S nurse have authority to collect the information indirectly?
4. Did the Caritas Health Group OH&S nurse have authority to use the information?
5. Did Capital Health have authority to disclose the information to the Caritas Health group?

VI Analysis

[18] The information at issue in this complaint generally falls both within the definition of health information under the HIA and personal information under FOIP. As Caritas and Capital Health are subject to both the HIA and FOIP, a determination must be made as to which Act applies in this case.

Issue 1 - Is the information collected and used by the Caritas Health Group health information subject to the HIA or personal information subject to FOIP?

[19] Section 4(1)(u) of FOIP says the Act does not apply to health information as defined in the HIA that is in the custody or under the control of a public body that is a custodian as defined in the HIA. The effect of this is that in situations where information could fall within both definitions, FOIP does not apply where the information is health information as defined in the HIA. As the Commissioner has stated, "... FOIP ends where HIA begins"⁸.

[20] Section 1(2) limits the scope of the HIA. It generally says the Act does not apply to a custodian or to information relating to services provided by a custodian that are not health services. A health service is defined in section 1(1)(m). The relevant portion reads as follows:

1(1)(m) "health service" means a service that is provided to an individual

(i) for any of the following purposes and is directly or indirectly and fully or partially paid for by the Department:

(A) protecting, promoting or maintaining physical and mental health;

(B) preventing illness;

⁸ Orders H2004-001 and F2004-005, para 89

(C) diagnosing and treating illness;

(D) rehabilitation;

(E) caring for the health needs of the ill, disabled, injured or dying,

[21] Section 1(2) establishes that the HIA does not apply unless a health service is provided. If a health service is not being provided to an individual, the information is not health information. The HIA begins when a health service is provided and ends where one is not.

Was a health service provided to the Complainant?

[22] The Complainant says information was collected by Caritas to determine her immunization status for the purpose of employment. She does not believe a health service was provided to her by Caritas in this situation.

[23] Caritas submits that the OH&S nurse provides a health service when collecting information about immunization status. Caritas says health services provided by OH&S nurses directly protect employees in relation to exposure/transmission of communicable disease and indirectly protect the health and safety of patients. Caritas also provided me with an October 2005 position description that outlines key responsibilities of an OH&S nurse, and specifically pointed to clause 1.1 - "Conducts health and physical demands, assessment, evaluates and teaches injury prevention during assessment and makes recommendations for work suitability", and clause 1.4 - "Implements site immunization program". I also took note of clause 1.12 - "Documents patient health and safety data on the employee file and maintains confidentiality of all files". FOIP is listed beside this clause as a "Standard of Performance".

[24] To further support its position, Caritas pointed to section 2.12 of the Service Alberta "Human Resources Guide for Local Public Bodies, Revised January 2007". The guide says that the HIA applies to certain human resources information in the custody or control of a custodian pursuant to the HIA. The guide says that, for all employees, health information collected during the staffing process will fall under the HIA.

[25] I do not disagree with the statements made in the Service Alberta guide; however I feel they may be mis-interpreted. As written, I believe the guide is correct. It says the HIA applies to human resources information in the custody or control of a custodian that is health information pursuant to the HIA. The key words are that the HIA applies to human resources information that is health information. The guide correctly concludes that health information, as defined in the HIA, collected during the staffing process is subject to the HIA. However, as previously noted, for the information to be health information and subject to the

HIA, a health service must be provided. Section 1(2) clearly establishes that the HIA does not apply to information relating to services that are not health services.

[26] An OH&S nurse may provide a health service during the staffing process. An OH&S nurse is also an employee of an organization and may provide employee management services for his or her employer. There are instances where the purpose for which an OH&S nurse collects information more clearly aligns with managing and administering personnel than with the provision of a health service.

[27] The dual role of an OH&S nurse is reflected in the Alberta Occupational Health Nurse's Association "Privacy and Confidentiality Guidelines". The guide points out the challenge faced by OH&S nurses when they must balance "the interests of both the employees as clients and the employers they work for". The guide states that OH&S nurses collect, use and disclose information for both "employment management" purposes and in the role of a "health provider".⁹

[28] Capital Health, in a submission to me, also referred to the dual role of an OH&S nurse, saying "they provide health services as well as manage personnel for their employer". Capital Health said that OH&S nurses wear "two hats" during the performance of their duties. I agree with Capital Health that an OH&S nurse wears two hats. I disagree with the suggestion that both hats are worn at the same time. I agree that when an OH&S nurse provides an influenza vaccination, treats an employee injury or treats employees where there has been a chemical spill or exposure to radiation, that a health service has been provided. What I question is whether a health service is provided when an OH&S nurse is collecting information to determine if a prospective employee is suitable to work.

[29] In Orders H2005-001 and F2005-017, the Commissioner said the "context in which the information is collected must be considered when determining whether the records contain health information under the HIA, or alternatively, personal information under FOIP; I must consider the "surroundings that colour the words" (*Bell Express Vu*).¹⁰" I must therefore consider the purpose of collection. Was the purpose to provide a health service or for employee management purposes?

[30] I believe there is merit to Caritas' argument that collection of immunization status assists in protecting employees in relation to exposure or transmission of communicable disease and indirectly protects the health and safety of patients. In as much as collection and use does this, it can be argued a health service is provided. I also acknowledge that providing a health service can include preventative services. However, the HIA requires that the health service be provided to an individual. In this case, the individual is the Complainant. Is the purpose to provide a health service to the Complainant? Is this the central purpose?

⁹ Alberta Occupational Health Nurse's Association "Privacy and Confidentiality Guidelines", May 2007

¹⁰ <http://www.oipc.ab.ca/orders/investigation.cfm?year=YR2005&descriptor=2005&docflag=DOC002>

[31] The Complainant did not seek a health service from Caritas; she sought a job. Caritas did not provide any care or treatment to her for an illness. Caritas accessed the Complainant's health records via Netcare to see whether her immunizations were up to date to determine if she was a suitable candidate to begin working. While this may protect her from exposure to a communicable disease, the action was taken because the Complainant sought a job. The collection did not occur as the result of the Complainant seeking a health service. It seems to me the purpose for collection and use of this information is primarily for employment management purposes.

[32] The context in which the Complainant presented to Caritas was not to receive a health service. This context does not support the argument that Caritas collected and used information to provide a health service to the Complainant. I believe the primary purpose of collection and use of the information was to determine if the Complainant was suitable to begin working. The purpose was to manage or administer personnel. I find that a health service was not provided. As no health service was provided, the information is not health information. I therefore find the information is personal information subject to FOIP.

Issue 2 - Did the Caritas Health Group OH&S nurse have authority to collect the information?

[33] Caritas provided an initial response to this complaint that outlined its view that it had authority to collect the Complainant's information under the HIA. In a letter dated January 23, 2008, Mr. Cameron advised Caritas that one of the questions he must answer is whether the information collected was subject to FOIP or the HIA, and invited comments in this regard. On March 11, 2008, Caritas responded that they believed the information collected was subject to the HIA and provided relevant authorities under that Act. Argument was not provided in the event of a possible finding that the information collected was personal information subject to FOIP.

[34] I invited Caritas to make a further submission on potential authorities under the FOIP Act, which I received on November 3, 2008.

[35] I have found the information relevant to this Complaint is personal information. Therefore, I will only address the Caritas submission relevant to authorities cited under FOIP.

[36] Caritas submits that section 33(c) provides authority to collect the Complainant's personal information. This section reads:

33 No personal information may be collected by or for a public body unless

(c) that information relates directly to and is necessary for an operating program or activity of the public body

[37] Caritas suggests that they needed to collect the Complainant's information in order to meet obligations to ensure the health and safety of its employees. Caritas referenced section 2(1) of the *Occupational Health and Safety Act*, which requires employers to ensure, where it is reasonably practicable for them to do so, the health and safety of their staff. Caritas also noted that the *Public Health Act, Communicable Diseases Regulation*, Schedule 1 requires that employees be immunized for Rubella. Caritas says collection of immunization information is necessary to protect employees who may be exposed to communicable diseases while working, and also indirectly protects the health and safety of the patients they treat.

[38] The collection of immunization information is directly related to and necessary for Caritas to protect its staff and patients. Therefore, I find collection of the information is authorized under section 33(c) of FOIP.

Issue 3 - Did the Caritas Health Group OH&S nurse have authority to collect the information indirectly?

[39] The Caritas OH&S nurse did not collect immunization information from the Complainant. The information was collected via Netcare without the Complainant's knowledge or consent.

[40] Caritas says section 34(1)(n) of the FOIP Act authorizes indirect collection of personal information. This section reads:

34(1) A public body must collect personal information directly from the individual the information is about unless,

(n) the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body

[41] I have already found that the information was collected for the purpose of managing or administering personnel. Therefore, I find the indirect collection of the Complainant's information was authorized.

[42] The Complainant was already employed by Caritas and was looking at a new position within the organization. Therefore, she was an employee and Caritas argument is well founded that they indirectly collected information to manage and administer personnel.

[43] This finding would not apply to an individual applying for a job who is not already an employee of that organization. In this case, the individual would not yet be an employee and there would be no argument that the information was collected to manage or administer personnel.

Issue 4 - Did the Caritas Health Group OH&S nurse have authority to use the information?

[44] Caritas says section 39(1)a) authorizes use of the Complainant's information. This section reads:

39(1)(a) A public body may use personal information for the purpose for which it was initially collected or for a use consistent with that purpose

[45] I have found that Caritas collected the Complainant's information for employee management purposes to determine suitability to work. There is no dispute that the information was used for any purpose other than to determine the Complainant's immunization status and suitability to work. Section 39(1)(a) authorizes use of personal information for the purpose for which it was collected. Therefore, I find Caritas had authority to use the Complainant's information.

Issue 5 - Did Capital Health have authority to disclose the information to the Caritas Health group?

[46] PIAs submitted to and accepted by our office establish that Capital Health is the custodian that made the Complainant's immunization records available through Alberta Netcare. I must now consider whether a disclosure occurred when these records were accessed.

[47] A participating custodian in Alberta Netcare must sign an information manager agreement with Alberta Health and Wellness (AHW) before making health information available via Netcare. AHW is the information manager for Netcare. This role is described in Investigation Report H2008-IR-001¹¹.

[48] Rules for the collection, use and disclosure of health information via Netcare are set out in the "Information Exchange Protocol" (the IEP), which becomes part of the information manager agreement. The IEP defines "disclosure" as "the provision of information from Alberta Netcare to a participating custodian, participating affiliate or the Information Manager who are accessing the information directly from the Alberta Netcare system". Investigation Report H2008-IR-001 is also instructive here. At paragraph 56 it said, "When a user accesses health information from a registry or repository which they do not exercise custody or control over, the custodian which has custody or control of the health information has disclosed the health information to the user"¹².

[49] In this case, information was provided from Alberta Netcare when the OH&S nurse accessed the Complainant's immunization records via Netcare. As Capital

¹¹ Investigation report H2008-IR-001

<http://www.oipc.ab.ca/orders/investigation.cfm?year=YR2008&descriptor=2008&docflag=DOC002>

¹² Investigation report H2008-IR-001, paragraph 56

<http://www.oipc.ab.ca/orders/investigation.cfm?year=YR2008&descriptor=2008&docflag=DOC002>

Health is the custodian that made this health information available via Netcare, I find that Capital Health disclosed the information.

[50] Having found that Capital Health disclosed health information via Alberta Netcare, I must now consider whether there is authority for that disclosure.

[51] Section 34(1) of the HIA authorizes the disclosure of health information with consent; however, the Complainant did not consent to the disclosure of her health information. Section 35 of the HIA authorizes disclosure of health information without consent in some circumstances. A key provision is section 35(1)(a) which, when read in conjunction with section 27(1)(a), authorizes disclosure of health information to another custodian for the purpose of providing a health service.

[52] Capital Health provided me with proposed authorities under the HIA to disclose health information for the purpose of providing a health service. In situations where an OH&S nurse is not providing a health service, Capital Health said it would require the consent of the individual the information is about.

[53] I have found that the Caritas OH&S nurse did not provide a health service. Therefore, there is no authority for Capital Health to disclose the Complainant's health information to the OH&S nurse under section 35(1)(a) of the HIA.

[54] After reviewing the remaining HIA provisions that could authorize disclosure without consent, I agree with Capital Health that the HIA would require consent in this situation. As consent was not provided, I find that the disclosure made by Capital Health contravenes the HIA.

[55] The Complainant's immunization records were disclosed by Capital Health, as it is the organization that made the information available via Alberta Netcare that was accessed. However, the decision to access these records was made by the Caritas OH&S nurse. The Netcare IEP states that a participating custodian retains responsibility for all information they access from Netcare and is subject to the rules contained within the IEP.

Adherence to the Alberta Netcare Information Exchange Protocol

[56] I have previously accepted that an OH&S nurse could have dual roles. They provide health services and manage personnel for their employer. An OH&S nurse who is employed by a custodian could be given access to Alberta Netcare so information necessary to provide health services can be accessed.

[57] This presents a challenge for an organization that is a custodian who provides health services and is also a public body and employer. It is particularly challenging when an individual employee within such an organization has dual roles, one of which provides health services and has access to Netcare and the other does not. As demonstrated in this case, an employee may have authority to access Netcare and health information in one role and not in another. The duality of this position requires an understanding of which role is being exercised in order

to properly determine the authority to collect, use and disclose health or personal information. For example, if the OH&S nurse was providing a health service in treating an employee for a needle stick, access of that individual's Netcare record may be required and appropriate to ensure a fully informed treatment decision can be made. The OH&S nurse, in this instance, is an affiliate of a custodian providing a health service and access of relevant information via Netcare is reasonable. Should the OH&S nurse be accessing information to process an employment application, the nurse is managing personnel for the employer. In this instance, the nurse is not providing a health service and the collection and use of the information is subject to the FOIP Act as opposed to the HIA.

[58] The Alberta Netcare IEP outlines when health information can be accessed via Netcare. Relevant portions read:

3.1.2 A participating custodian may access and use information in Alberta Netcare when

- a) they are in a current care relationship with the individual who is the subject of the information,*
- b) they are providing health services to the individual either in the presence or absence of that individual,*
- c) their access to the information is necessary for the provision of the health service or for making a determination for a related health service, and*
- d) the information is related to and necessary for the current session of care.*

3.1.3 Information disclosed from Alberta Netcare for the provision of health services is for the sole and exclusive use of the accessing participating custodian or participating affiliate ...

[59] As a custodian participating in Alberta Netcare, Caritas signed an information manager agreement with AHW that binds them to the rules of the IEP. Clause 3.1.2 says a participating custodian may access an individual's health information via Netcare when they are providing a health service to that individual. As I have found the Caritas OH&S nurse did not provide a health service to the Complainant, it seems to me Caritas may have contravened the IEP.

[60] IEP section 7.0 "Protocol Compliance and Enforcement" outlines steps to address a suspected breach of Alberta Netcare, including contraventions of the IEP.

[61] Section 7.1.1 says the information manager will "immediately investigate any suspected breach" where the breach is a) identified by itself, or b) investigation is requested by a participating custodian.

[62] Section 7.1.2 says a participating custodian will “immediately investigate any suspected breach’ where the breach is a) identified by itself, or b) investigation is requested by the information manager.

[63] Sections 7.1.3 and 7.1.4 indicate that an information manager and a participating custodian may declare a breach. Section 7.1.5 says where the information manager declares a breach; it will immediately inform participating custodians related to or likely to be impacted by the breach.

[64] It is not my role to determine whether there has been a contravention of the IEP agreement between Caritas and AHW (information manager). However, there has been a disclosure made via Netcare in contravention of the HIA, which occurred as the result of an access made by a participating custodian. In my view, there is reason to believe this access contravened the IEP. I believe this matter should be examined further, particularly as it relates to possible inappropriate use of Netcare by employers for employee management purposes. As such, I will recommend to Caritas and Capital Health that this matter be reported to the information manager as a suspected breach of the IEP.

VII Conclusion

[65] I have found that the collection of immunization records to determine suitability for employment was for the primary purpose of managing or administering personnel. As such, I found that no health service was provided in this context. The HIA does not apply when a health service has not been provided. Therefore, the collection of this information is subject to FOIP, not HIA.

[66] I subsequently found that FOIP authorizes the collection of the Complainant’s immunization records, as necessary for the purpose of managing or administering personnel. This collection is needed to protect an employee or prospective employee from exposure to an infectious disease and also indirectly protects patients.

[67] While FOIP authorized the collection of the Complainant’s immunization records, the manner in which the information was collected was flawed. Caritas did not collect the information from the Complainant. Caritas chose to indirectly collect the information via Alberta Netcare. Netcare makes health information available to health services providers for the purpose of providing health services. However, Caritas was not providing a health service in this case; it was managing or administering personnel and should not have used Netcare for this purpose.

[68] When Caritas chose to access the Complainant’s immunization records via Alberta Netcare, it triggered a disclosure of this information via Netcare. I found the disclosure of the Complainant’s immunization records via Netcare for the employment management purposes of a public body was not authorized under the HIA.

[69] Caritas provides health services and has access to Alberta Netcare. Caritas, as is the case with nearly all organizations that provide health services, is also an employer. In choosing to access the information for employment management purposes, Caritas may have contravened the Netcare Information Exchange Protocol.

[70] Custodians must recognize they have dual roles. They are both health services providers and employers. Custodians have access to Alberta Netcare as health services providers. Netcare should not be used in the role of an employer to manage or administer personnel.

[71] There were other ways Caritas could have obtained the information it needed for employment management purposes. It could have sought the information directly from the Complainant, or indirectly with the Complainant's authorization. It was not necessary to access a system intended to support the provision of health services to validate the employee's immunization status for employment purposes.

VIII Recommendations

[72] Caritas Health Group and Capital Health have agreed to the following recommendations and have started taking steps to address them:

1. Caritas review and revise as required, policies and procedures that instruct OH&S staff regarding collection of information for the purpose of managing or administering personnel under the FOIP Act.
2. Caritas review and revise as required, policies and procedures that instruct OH&S staff regarding use of Alberta Netcare.
3. Caritas provide training to OH&S staff regarding collection, use and disclosure of personal or health information.
4. Caritas provide revised policies and procedures to the Commissioner within 90 days of release of this report.
5. Caritas and Capital Health report the access of the Complainant's immunization records via Netcare as a suspected breach of the IEP.

Submitted by

LeRoy Brower
Director, Health Information Act