

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2020-12

May 29, 2020

ALBERTA HEALTH SERVICES

Case File Number 005087

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Summary: The Applicant made an access request to Alberta Health Services (AHS) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for data from the Alberta EHR regarding Netcare accesses by health services providers at specific locations.

AHS responded to the Applicant by stating that it did not have responsive records. It also explained that it could not create responsive records, given the nature of the database.

The Adjudicator confirmed that AHS had met its duty to assist the Applicant under the FOIP Act. She noted that the information in Netcare is health information subject to the *Health Information Act* (HIA). The FOIP Act excludes health information, such as that stored in Netcare, from its scope. Moreover, AHS lacked authority under the HIA to access health information in Netcare for the purpose of responding to an access request. As the information requested could not be accessed under the FOIP Act, and as AHS lacked authority to access the requested information, the Adjudicator confirmed that AHS had met its duties in relation to the access request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 72; *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 27, 56.1, 56.5

Authorities Cited: AB: Orders F2007-029, F2015-29, F2019-34

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*
2010 ABQB 89

I. BACKGROUND

[para 1] On December 9, 2016, the Alberta Health Services (AHS) received the Applicant's access request. He requested the following:

Pursuant to the *Freedom of Information and Protection of Privacy Act* ("FOIP") I am requesting that you provide me with the following numerical/statistical records concerning the Alberta Netcare Electronic Health Record System ("Netcare"):

1. The total number of accesses to Netcare made by staff members/affiliates at the Calgary Community Physiotherapy Department, Alberta Health Services ("AHS"), during each year from 2004 to 2016.
2. The total number of persons/patients who had their Netcare records accessed with respect to the above department, during each calendar year from 2004 to 2016. (i.e.: 100 accesses may relate to 10 persons or 100 persons, for example).
3. The number of Netcare accesses made by each staff member/affiliate in the Calgary Community Physiotherapy Department during each year from 2004 to 2016, and the number of persons/patients those accesses pertained to. That is, a breakdown of the number of Netcare accesses by each employee's or affiliate's name, including [a named employee of AHS], with the number of affected persons/patients listed for each staff member/affiliate (see example below).
4. The total number of accesses to Netcare made by staff at the Edmonton Community Physiotherapy Department, AHS, or equivalent department, during each year from 2004 to 2016.
5. The total number of persons/patients who had their Netcare records accessed with respect to the Edmonton department above, during each calendar year from 2004 to 2016.
6. The number of Netcare accesses made by each staff member/affiliate in the Edmonton Community Physiotherapy Department during each year from 2004 to 2016, and the number of persons/patients those accesses pertained to. That is, a breakdown of the number of Netcare accesses by each employee's or affiliate's name with the number of affected persons/patients listed for each staff member/affiliate.
7. The total number of accesses to Netcare made by staff at Community Physiotherapy Departments, or equivalent departments, other than Calgary and Edmonton, broken down by geographic region throughout the province of Alberta, during each year from 2004 to 2016. That is, the number of Netcare accesses in Lethbridge, Red Deer, Medicine Hat, and all other centres which offer funded physiotherapy care.
8. The total number of persons/patients who had their Netcare records accessed with respect to each of the above centres, during each calendar year from 2004 to 2016.

[para 2] On January 9, 2017, the Public Body advised the Applicant:

We regret to inform you that a search by AHS has determined that no responsive records exist relating to the subject of your request. We have contacted the Breach Investigation & Education unit of Alberta Health Services, the primary area responsible for the records you have requested, and have been advised that Netcare audits can only be generated based on patient name or staff user. Netcare is not designed to generate reports based on site location, therefore, we are unable to provide the statistics you have requested.

[para 3] On January 12, 2017, the Applicant asked that this Office review the AHS's response to his access request.

[para 4] The Commissioner authorized a senior information and privacy manager (SIPM) to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

II. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

Issue B: Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 5] The Applicant argues:

By way of a letter dated January 9, 2017, [an employee of AHS] indicated: "We regret to inform you that a search by AHS has determined that no responsive records exist relating to the subject of your request. We have contacted the Breach Investigation & Education unit of Alberta Health Services, the primary area responsible for the records you have requested, and have been advised that Netcare audits can only be generated based on patient or staff user. Netcare is not designed to generate reports based on site location, therefore, we are unable to provide the statistics you have requested."

I found the above response to be both disingenuous and deliberately evasive as AHS has the names and user identification numbers of ACPT affiliates who have been granted Netcare access and the names and PHN/ULIs of persons who received physiotherapy funding through each community physiotherapy office. Using that information, it is a simple matter to create a record which would satisfy my request. Alberta Health confirmed same to me in its letter of December 8, 2016, and again by way of a follow-up telephone conversation. Furthermore, it does not appear that AHS contacted any of its ACPT offices, the most likely repositories of records responsive to my request.

[...]

Pursuant to FOIP, I asked AHS to create and provide me with a statistical record concerning Netcare use by AHS affiliates within community physiotherapy departments or equivalent

departments from 2004 to 2016 inclusive. The locations I specified were Calgary, Edmonton, Lethbridge, Red Deer, Medicine Hat, and all other centres which offer funded physiotherapy.

It has been explained to me that AHS community physiotherapy departments should have been recording accesses to patient Netcare records for compliance, management, and audit purposes. Were they doing so, each community physiotherapy department would have the data readily available to satisfy my FOIP request for records.

If for some reason those departments were not keeping track of accesses to confidential patient health records, a responsive record can be created by submitting record requests (a.k.a. audit requests) to Alberta Health. Given that AHS has the names and I.D. numbers of past and present ACPT affiliates/staff who were granted Netcare access, as well as the names and PHN/ULIs of individuals/patients who received funding through community physiotherapy offices; a record can be created which sets out: (a) the number of Netcare accesses per affiliate, per office, per year; (b) the total number of Netcare accesses per office, per year; and, (c) the number of individuals who had their Netcare records accessed per affiliate, per office, per year. In graphic terms, I suggested that the information could be provided as follows:

Number of Netcare Accesses	Number of Persons/Patients
Office Total: xxxx xxx	
Affiliate Mary Jones: xxx xx	
Affiliate John Smith: xxx xx	

To be clear, I am not requesting any personally identifiable information whatsoever concerning patients. Likewise, I am not requesting the names or locations of contracted physiotherapy clinics or treating physiotherapists. Further, I am not requesting funding amounts provided per person, per clinic, or otherwise. I am only requesting Netcare access/use statistics as described above. (Note: It has been established that each Netcare access constitutes a use of patient information).

In order to differentiate between affiliates, I have asked and would prefer that names be used. If the OIPC determines and can support excluding the use of first and last names of affiliates, I would in that case be satisfied with first initials and last names. If the OIPC were to determine and support excluding the use of the first initial and last name of affiliates, I would in that case be satisfied with using first names and last initials. If the OIPC were to determine and support excluding the use of the first name and last initial of affiliates, I would in that case be satisfied with the use of initials in place of affiliate's names provided that no two initials were identical.

While I have suggested two possible methods for AHS to satisfy my request for records - accessing records at ACPT offices or creating a record using audit requests - those approaches are not mutually exclusive or exhaustive as other means may exist.

[para 6] AHS explains the search it conducted in the following terms:

In this instance the Information and Privacy Coordinator contacted the Breach and Investigation Unit where he was told that Netcare's functionality can only generate audit reports by using patient or staff names, reports cannot be audited by location. Given this information no further searches could be conducted nor given the nature of Netcare, that other possible repositories could be located.

[para 7] Section 10 of the FOIP Act states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 8] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order F2007-029, the Commissioner noted:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 9] In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 10] In *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII), the Alberta Court of Queen's Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced.* [Emphasis added in original]

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords

would not lead to responsive records, *its reasons for concluding that no more responsive records existed.* [My emphasis]

[para 11] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional responsive records are likely to exist.

[para 12] AHS has provided an explanation of the search it conducted and explained how it conducted the search, the results of the search, and the limitations of Netcare as a database. Most importantly, it has explained why it believes no responsive records exist. AHS has explained that the search parameters in Netcare do not permit it to search for information by location, but only permits it to conduct audits by patient or health services provider name. It states that given the nature of Netcare, it cannot conduct the searches requested by the Applicant.

[para 13] The position of the Applicant is that AHS should perform the audit of Netcare using the names of health services providers who work at particular locations and to search for the information he has requested in that way. He stresses that he is not seeking the names of patients.

[para 14] In his submissions, the Applicant notes that accessing health information in Netcare is a “use” of health information. I agree with the Applicant that accessing information in Netcare constitutes a use of patient health information. Further, I consider it a use of health information within the terms of the *Health Information Act* (HIA).

[para 15] “Netcare” (referred to in the HIA as the “Alberta EHR”) is an integrated electronic health information system, within the terms of section 56.1 of the *Health Information Act* (HIA). AHS’s use of Netcare is governed by Part 5.1 of the HIA. The information housed in Netcare is “health information” within the terms of section 1 of the HIA. Section 4(1)(u) of the FOIP Act excludes health information within the terms of the HIA from the application of the FOIP Act. It states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(u) health information as defined in the Health Information Act that is in the custody or under the control of a public body that is a custodian as defined in the Health Information Act.

AHS is a custodian as defined in the HIA, in addition to being a public body under the FOIP Act. Health information as defined in the HIA in its custody or under its control is exempt from the FOIP Act. AHS has custodial duties under the HIA in relation to Netcare portals located at its facilities and its ability to use information in Netcare is governed by the HIA, rather than the FOIP Act.

[para 16] The Applicant's access request is for data regarding Netcare usage; however, Netcare contains no mechanism to generate the requested data without accessing health information – either by the recipient of health services or the provider of health services.

[para 17] The Applicant proposes that AHS enter the names of affiliates and recipients of funding for health services into Netcare to generate the data he requests. However, the HIA prescribes the circumstances in which a health information custodian may, and may not, access health information in Netcare. These limitations are set out in the HIA as follows:

[para 18] Section 56.5 of the HIA authorizes AHS to use health information in Netcare for purposes authorized by section 27 of the HIA:

56.5(1) Subject to the regulations,

(a) an authorized custodian referred to in section 56.1(b)(i) may use prescribed health information that is accessible via the Alberta EHR for any purpose that is authorized by section 27 [...]

[para 19] Section 27 states:

27(1) A custodian may use individually identifying health information in its custody or under its control for the following purposes:

- (a) providing health services;*
- (b) determining or verifying the eligibility of an individual to receive a health service;*
- (c) conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline;*
- (d) conducting research or performing data matching or other services to facilitate another person's research*
 - (i) if the custodian or researcher has submitted a proposal to a research ethics board in accordance with section 49,*
 - (ii) if the research ethics board is satisfied as to the matters referred to in section 50(1)(b),*
 - (iii) if the custodian or researcher has complied with or undertaken to comply with the conditions, if any, suggested by the research ethics board, and*
 - (iv) where the research ethics board recommends that consents should be obtained from the individuals who are the subjects of the*

health information to be used in the research, if those consents have been obtained;

- (e) providing for health services provider education;*
- (f) carrying out any purpose authorized by an enactment of Alberta or Canada;*
- (g) for internal management purposes, including planning, resource allocation, policy development, quality improvement, monitoring, audit, evaluation, reporting, obtaining or processing payment for health services and human resource management.*

(2) A custodian referred to in section 1(1)(f)(iii), (iv), (vii), (ix.1), (xii) or (xiii) may, in addition, use individually identifying health information in its custody or under its control to carry out the following functions within the geographic area in which the custodian has jurisdiction to promote the objectives for which the custodian is responsible:

- (a) planning and resource allocation;*
- (b) health system management;*
- (c) public health surveillance;*
- (d) health policy development.*

[para 20] AHS is permitted to access health information for the foregoing purposes. Accessing health information in order to respond to an access request under the FOIP Act is not one of the purposes for which AHS may access health information. Were AHS to do what the Applicant asks, it would be accessing health information in Netcare for a purpose not authorized by the HIA.

[para 21] I acknowledge that section 27(1)(f) authorizes AHS to access Netcare in order to comply with another enactment. While the FOIP Act is another enactment, it specifically excludes health information from its scope. As a result, section 27(1)(f) does not authorize AHS to conduct a search of Netcare for the ostensible purpose of complying with section 10 of the FOIP Act, given that the FOIP Act does not apply to the information the Applicant has requested.

[para 22] I also acknowledge that the Applicant asks that AHS anonymize the names of patients in order to generate the data he seeks. However, were AHS to access information in the way he proposes, it would necessarily access patient health information prior to anonymizing it. The HIA does not permit AHS to do so.

[para 23] The Applicant also proposes that audit requests be submitted to Alberta Health in order to obtain the data he seeks. However, Alberta Health, like AHS, is a custodian under the HIA and must comply with the HIA in relation to health information

in its custody or under its control. Alberta Health would not be conducting an audit of Netcare if it were to respond to audit requests in the scenario advanced by the Applicant; rather, it would be searching Netcare for records responsive to a FOIP request. As discussed above, section 27 of the HIA does not authorize a custodian such as AHS or Alberta Health to access Netcare in order to respond to FOIP requests.

[para 24] To summarize, I find that AHS is not authorized to access Netcare to provide the information the Applicant is seeking. Further, the search it has conducted is reasonable and I find it communicated information about its search appropriately. I find that AHS has met its duty to assist the Applicant under section 10(1) of the FOIP Act.

Issue B: Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?

[para 25] Section 10(2) of the FOIP Act states:

10(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[para 26] In Order F2019-34, the Adjudicator interpreted section 10(2) in the following way:

Section 10(2) requires a public body to create a record if that record can be created from another record that is in electronic form using the public body's normal computer hardware and software and its expertise. This requirement is subject to limits in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as "electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants" (see Order F2011-R-001, at para. 19).

I agree with the foregoing interpretation.

[para 27] AHS states:

The Acting Director, Privacy Investigations, has confirmed the search functions of Netcare. There can be two audits run: a patient and a user unit. The patient audit includes: a ULI, user ID, user last and first name, user role function, date, time of access and facility. In the case of facility this is described as "AHS". The patient audit is a mirror image of the user audit. It was confirmed that there is no function to search data by discrete operational unit or specific facility. Although AHS is the information manager of Alberta Netcare, Alberta Health [is] responsible for the system and any changes to functionality would be its responsibility. The collection, use and disclosure of health information in Netcare is also subject to the Information Exchange Protocol (the "IEP"), which in its current edition (IEP v2.1-March 2007), does not allow for secondary disclosures of information as contemplated by the Applicant's access request.

[para 28] AHS asserts that it is unable to create electronic records from Netcare, as Alberta Health is ultimately responsible for this database; in other words, AHS lacks authority to create records by manipulating data in Netcare.

[para 29] AHS also notes that the health information in Netcare is subject to the Information Exchange Protocol, which does not allow for secondary disclosure of information.

[para 30] In my view, the Information Exchange Protocol, which is a policy relating to the use of Netcare by custodians and affiliates, would not be a bar to creating a record under section 10(2), if it were the case that the FOIP Act required AHS to create a record from Netcare to satisfy the access request. However, the Information Exchange Protocol is a policy developed in order to interpret the duties of affiliates and custodians under the HIA. The fact that the Information Exchange Protocol applies is an indication that the HIA, rather than the FOIP Act, applies to the information in Netcare.

[para 31] To create a record to satisfy the Applicant's access request would require manipulation of data in the Netcare database, which AHS lacks authority to do. Moreover, as discussed above, AHS lacks authority to access the information in Netcare for the purpose of responding to an access request under the FOIP Act.

[para 32] To conclude, I find that section 10(2) of the FOIP Act does not require AHS to create a record from Netcare in order to satisfy the Applicant's access request.

IV. ORDER

[para 33] I make this Order under section 72 of the FOIP Act.

[para 34] I confirm that AHS has met its duties under 10 of the FOIP Act.

Teresa Cunningham
Adjudicator