

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2020-04

March 16, 2020

ALBERTA HEALTH SERVICES

Case File Number H6099

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint to this Office under the *Health Information Act* (HIA) that his Electronic Health Record (EHR) may have been accessed without authority.

The Adjudicator applied the principles set out by the Alberta Court of Appeal in *JK v. Gowrishankar* to section 27(1)(a) in the HIA (use of health information for providing health services). The Adjudicator determined that using health information to provide a health service includes using that information to defend the provision of the health service in a subsequent proceeding (see paras. 16-53 for the rationale, application, and limits of this interpretation).

The Adjudicator also determined that each affiliate of AHS complained about had authority to access the Complainant's health information in the EHR.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000 c. H-5, ss. 1, 3, 25, 27, 35, 56.1, 56.5, 62, 80

Authorities Cited: AB: Orders F2009-048, F2019-05, H2004-005, H2016-02, H2020-03

Cases Cited: *Alberta (Director of Child Welfare) v. C.H.S.*, 2005 ABQB 695 (CanLII), *Calgary Board of Education v. Alberta (Office of the Information and Privacy Commissioner)*, 2014 ABQB 189, *Gowrishankar v. JK*, 2018 ABQB 70, *JK v. Gowrishankar*, 2019 ABCA 316

I. BACKGROUND

[para 1] On February 25, 2014, the Complainant submitted a complaint to this Office that his Electronic Health Record (EHR) may have been accessed without authority under the *Health Information Act* (HIA) numerous times by various individuals. On March 25, 2015, this Office received a request for inquiry from the Complainant and the Commissioner agreed to hold an inquiry in this case file.

[para 2] The Complainant made a separate complaint regarding each access by each individual that he believes occurred without authority. As a result of the mediation, the Complainant agreed to withdraw his complaints regarding several accesses; the remaining accesses at issue for this inquiry are:

Individual named in the EHR log	Date of access
Dr. E.C.	April 2008
Dr. R.W.	April 2008 and June 2010
Dr. S.D.	April 2008
Dr. F.P.	January 2010
Dr. B.D.	May 2006
K.L.	April 2012
C.H.	April 2008
B.R.	March 2013
G.M.	April 2008

[para 3] One individual named by the Complainant was not employed by the Custodian at the time of the access. The access by that individual is not part of this inquiry.

[para 4] In its initial submission, the Custodian requested that this inquiry be put into abeyance pending the outcome of a judicial review of Order H2016-02. The Custodian argued that issues in this inquiry were sufficiently similar to issues in that Order such that the outcome of the judicial review could affect the analysis of the issues in this inquiry.

[para 5] The adjudicator previously assigned to this file agreed to place the inquiry in abeyance. The decision resulting from the judicial review was issued on January 26, 2018 (*Gowrishankar v. JK*, 2018 ABQB 70). However, that decision was appealed to the Court of Appeal. I had carriage of the file by that point, and after receiving submissions from the parties, decided to keep the file in abeyance pending the outcome of the appeal. The Court of Appeal issued its decision on August 30, 2019 (*JK v. Gowrishankar*, 2019 ABCA 316).

Pre and Post 2012 accesses

[para 6] The legislative scheme governing health information and the access of the EHR changed in 2010. On September 1, 2010, Part 5.1 of the HIA came into force. The provisions of Part 5.1 contain authority for the creation of the EHR and establish the authority for custodians to use electronic health information stored on this system.

[para 7] Prior to the introduction of Part 5.1, there were no statutory provisions specifically addressing the access and use of information by authorized custodians via the EHR. The 2010 amendments included section 56.5, which states that when an authorized custodian obtains health information through the EHR, this is a use of the information, rather than a collection. While the HIA did not include such a provision prior to 2010, it is consistent to treat the pre-2010 accesses also as a use of the Complainant's health information. This approach was taken by the adjudicator in Order H2016-02; while that Order was quashed on judicial review, this finding was not disputed.

II. ISSUES

[para 8] The issues set out in the Notice of Inquiry, dated July 21, 2016, are as follows:

1. Did any of the individuals who accessed [the] Complainant's Electronic Health Record do so as affiliates of the authorized custodian, Alberta Health Services (please address each individual separately when responding to this issue)?
2. If yes, was the use [of] the Complainant's health information in contravention of Part 4, section 25 of the HIA (please address each individual separately when responding to this issue)?
3. If the individuals used the Complainant's health information without authority in the capacity of representatives of Alberta Health Services, has Alberta Health Services taken reasonable steps to protect the Complainant's health information within the terms of section 60 (please address each individual separately when responding to this issue)?

III. DISCUSSION OF ISSUES

[para 9] The Complainant has sought an inquiry into the accesses of his health information in the EHR by several affiliates of the Custodian (physicians and non-physicians). In this case, the Complainant has pointed to several individuals who accessed his health information via the EHR in the last dozen or so years, and essentially asked that the Custodian account for these accesses. Other than to say that he did not receive a health service on a particular date that his information was accessed, or that he didn't recognize the name of the individual who accessed the information, the Complainant has not provided a specific reason to expect that any accesses were unauthorized. Below I will go through the reasons provided by the Custodian for each affiliate and explain why I accept them. In most cases, the explanations provided by the Custodian are supported by the information provided by the Complainant. In some instances, the Complainant

seems to accept the Custodian's explanation for an access but then objects to some other action (or inaction) taken by the individual that is irrelevant to the access.

[para 10] The allegations made by the Complainant that do not relate to the accesses in question are not relevant to this inquiry and I will not be addressing them. Such allegations comprise a large portion of the Complainant's voluminous submissions to this inquiry (approximately 800 pages as well as a 35-minute audio recording).

Preliminary issue – applicability of sections 34 and 35 of the HIA

[para 11] In its initial submission, the Custodian referenced the application of section 35 of the HIA. Section 35 sets out circumstances in which an individual's health information may be disclosed without the individual's consent, including for the purpose of a court or quasi-judicial proceeding (section 35(1)(h)).

[para 12] In this case, the issues properly raised in this inquiry are the Custodian's and affiliates' access and use of the Complainant's health information via the EHR/Netcare. The Custodian argues that in some cases, the information was accessed and used for the purpose of responding to a civil claim brought against a number of affiliates by the Complainant. Section 35(1)(h) may be relevant to a determination of whether health information could be *disclosed* in such circumstances, but it does not authorize the *use* of health information.

[para 13] Sections 56.5(1), (2) and (3) of the HIA specify that accessing health information via the EHR/Netcare is a *use* of that health information, and not a collection or disclosure. Therefore, provisions with respect to the collection and disclosure of health information are not relevant to whether the health information was accessed from the EHR/Netcare with authority. Rather, the provisions in the HIA addressing authority to *use* health information are the relevant provisions.

1. Did any of the individuals who accessed Complainant's Electronic Health Record do so as affiliates of the authorized custodian, Alberta Health Services (please address each individual separately when responding to this issue)?

[para 14] Alberta Health Services is a custodian under the HIA. The Custodian acknowledges that all of the individuals identified in the chart above are its affiliates. One individual named by the Complainant was not employed by the Custodian at the time of the access, and was therefore not its affiliate (C.L.).

[para 15] As the Custodian cannot be responsible for actions by an affiliate or employee other than its own affiliate or employee, the access of the Complainant's health information by C.L. is not part of this inquiry. By letter dated November 25, 2019, the parties were informed that I referred the complaint about C.L. to the Commissioner.

2. If yes, was the use the Complainant' health information in contravention of Part 4, section 25 of the HIA?

[para 16] Section 56.5 of the HIA states that no custodian shall use health information except in accordance with the Act.

[para 17] There is no provision in the HIA enabling affiliates to collect, use, or disclose information. However, section 62(2) states that any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection, use or disclosure by the custodian:

62(2) Any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection, use or disclosure by the custodian.

[para 18] Further, section 62(4) provides as follows:

62(4) Each affiliate of a custodian must comply with

(a) this Act and the regulations, and

(b) the policies and procedures established or adopted under section 63.

[para 19] These provisions are the same in the pre-2010 and post-2010 legislation.

EHR accesses occurring before September 1, 2010

[para 20] As noted above, the accesses of the Complainant's health information via the EHR will be considered as a use. All but two accesses occurred prior to September 2010. The authorities relevant to the accesses are primarily sections 27(1)(a) and/or 27(1)(c), although the Custodian has cited section 27(1)(g) with respect to one physician as well.

Individual named in the EHR log	Date of access	Authority cited by Custodian
Dr. F.P.	January 2010	Section 27(1)(a)
Dr. E.C.	April 2008	Section 27(1)(c)
Dr. S.D.	April 2008	Section 27(1)(c)
Dr. B.D.	May 2006	Section 27(1)(c)
C.H.	April 2008	Section 27(1)(c)
G.M.	April 2008	Section 27(1)(c)
Dr. R.W.	April 2008 and June 2010	Section 27(1)(g)

[para 21] Section 27 of the HIA lists the purposes for which a custodian may use health information. Sections 27(1)(a) and (c) are the same in the 2006, 2008, 2010, 2012 and 2013 versions of the HIA (i.e. at the time of each access at issue in this inquiry). They state:

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;

...

(c) conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline;

...

(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.

[para 22] Section 27(1)(a), cited above, permits a custodian to use health information in order to provide health services.

[para 23] A health service is defined in section 1(1)(m) of each version of the Act. The portions of that definition relevant to this inquiry state that it is a service provided to an individual for the purposes of:

- protecting, promoting or maintaining physical and mental health;
- preventing illness;
- diagnosing and treating illness;
- rehabilitation;
- caring for the health needs of the ill, disabled, injured or dying,

[para 24] In 2006, 2008 and 2010, these services must have been “directly or indirectly and fully or partially paid for by the Department [administered by the responsible Minister]”. As the accesses were done by affiliates of Alberta Health Services (and/or Capital Health as it may have been at the time of some accesses), the relevant health services met the requirement to have been funded by the Department.

Sections 27(1)(a) and (c)

[para 25] The Custodian cites section 27(1)(a) for only one of the above-listed accesses, by Dr. F.P. in January 2010. According to the Complainant’s EHR/Netcare audit logs, Dr. F.P. accessed the Complainant’s information in the EHR several dozen times in January 2010. The reason provided by the Custodian is that the Complainant was in the hospital on January 12, 2010 for orthopedic surgery. Dr. F.P. sought “immediate Lab/Xray results” for the provision of health services.

[para 26] In his request for inquiry, the Complainant confirms he was in the hospital for surgery. He makes several comments about x-rays that were done in 2006 but not provided to

him or not found until 2014. These comments do not seem to relate to the accesses made by Dr. F.P.

[para 27] The Complainant also commented on the number of accesses made by Dr. F.P. in one day. The EHR audit logs show that the various accesses happened between 11:05am and 12:20pm that day. This seems consistent with the explanation provided by the Custodian, that the doctor was waiting for lab or x-ray results to be available. Nothing the Complainant has raised with respect to Dr. F.P.'s accesses of his health information indicate that they were unauthorized. As such, and as the Custodian has provided a reasonable explanation, I find that they were authorized under section 27(1)(a).

[para 28] Dr. B.D. accessed the Complainant's health information in May 2006. The Complainant's complaint states that he does not recognize this physician's name. The Custodian's explanation provided to the Complainant is that Dr. B.D. was a Site Medical Director at that time, and that the access was for the purpose of conducting an investigation into a patient concern. In his request for inquiry, the Complainant acknowledges this investigation, and the physician's role in it; he states that he was never informed of the outcome of that investigation. Whether the Complainant was told about the outcome of the investigation is irrelevant to the authority of this physician to access the Complainant's health information in the EHR for that purpose. Section 27(1)(c) authorizes the use of health information to conduct an investigation. Both parties acknowledge there was an investigation. Nothing the Complainant has provided me indicates that the access was unauthorized. Therefore I accept the Custodian's explanation and conclude that the access was authorized under section 27(1)(c).

[para 29] The Custodian has cited section 27(1)(c) as authority for accesses by C.H., G.M., and Drs. E.C. and S.D. The information provided by the Custodian and Complainant indicate that these accesses relate to a civil action initiated by the Complainant against the above-named doctors, as well as the Custodian.

[para 30] Section 27(1)(c) authorizes the use of health information for conducting investigations, disciplinary proceedings, practice reviews or inspections relating to the members of a health profession or discipline. The provision seems to contemplate specific activities of a custodian – the activities listed in that provision are all of a similar category. In my view, the language of the provision – quoted above at paragraph 21 – does not indicate that it is so broad as to encompass court proceedings against the Custodian or an affiliate. A different analysis may apply if the court proceeding resulted from the investigation, disciplinary proceeding or other activity listed in section 27(1)(c). However, there is no indication that is the case here.

[para 31] In *JK v. Gowrishankar*, 2019 ABCA 316, the Court of Appeal considered the use of health information by physicians responding to a complaint made about the care they provided to the complainant in that case. In the excerpt below, the Court was considering the use by physicians when responding to an investigation being conducted by Alberta Health Services. As in this case, the physicians were affiliates of AHS at the time. The Court stated (at paras. 84-89):

Section 27(1)(c) allows a custodian to use health information for the purpose of “conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a

health profession or health discipline.” An affiliate may also use health information for that same purpose. That is what occurred here.

Any investigation requires the gathering of relevant information. An investigation is also contextual in that the information gathered will depend on the nature of the matter being investigated. At a minimum, it requires information surrounding the matter under investigation. It also assists the investigation if the person being investigated provides their response to the matter at issue. The response of the person being investigated is not for their personal benefit but for the benefit of the investigation as a whole.

We agree with AHS and the physicians that the *HIA* permits the use of health information by custodians and affiliates for various purposes. Use of information is not predicated on what is used or who created the information; rather use of health information is permitted so long as it is for a purpose provided by the *HIA* and only health information essential to carrying out the intended purpose is used.

The scope of the complaint will necessarily inform what information is essential to resolving the complaint and what information is appropriately shared and accessed. The scope of the complaint will thus inform what conduct is reasonably permitted under the *HIA*. There was no finding by the adjudicator, nor any suggestion on the record, that the physicians accessed health information that was not essential to enable the physicians to reply to the complaint and not essential for the Department Chair to complete the investigation.

The complaint that began the Department Chair’s investigation was respecting the physicians’ care of JK. This care included their diagnosis of the presenting health issue. The sole reason the physicians used JK’s health information was to reply to the complaint.

A diagnosis is based upon a physician gathering information from a number of sources such as the medical history from the patient, past and current medical tests (for example, blood work), and past diagnoses of other health care providers. The physicians, as affiliates of the Capital Health Authority, were permitted to use JK’s health information to respond to the complaint. Their reply, in turn, permitted the Department Chair to complete his investigation after which he replied to JK’s mother.

[para 32] The Court determined that the custodian in that case (AHS) was conducting an investigation, which entails the gathering of relevant evidence. The investigation was into a complaint made about care provided to a patient by particular physicians. The physicians were permitted to use the health information of that patient to respond to the complaint, which enabled the investigator to complete the investigation. The Court specified that precisely *what* health information was accessed by the physicians is a relevant question, but in that case there was no suggestion that the health information accessed by the physicians was not essential for the investigation.

[para 33] As I have said, it is my view that the civil court action initiated by the Complainant is not the same as the activities listed in section 27(1)(c).

[para 34] In *Gowrishankar*, the Court of Appeal also considered the physician’s use of health information for responding to a complaint made by a patient to the College of Physicians and Surgeons (College). The College is not a custodian under the *HIA*, and therefore the College’s investigation was not an investigation undertaken by a custodian. Nevertheless, the Court found

that section 27(1)(c) authorized the physician's use of the patient's health information for responding to that investigation. It said (at para. 97):

First, the complaint to the College put into issue the physicians' diagnoses and care of JK. The purpose of the physicians' use of JK's health information in 2012 was to respond to the complaint. As we said above, the physicians, as affiliates, were permitted by s 27(1)(c) to use health information that was essential to enable them to respond to the complaint.

[para 35] I interpret the Court's view to be that physicians must be permitted to use relevant health information in the EHR/Netcare to respond to complaints made about their provision of health services. While the comments were made relative to complaints made to the College, the question arises whether this view should also be taken to apply to civil court proceedings brought against health service providers. If so, is there a provision in the HIA that provides a result consistent with the Court of Appeal's conclusion in *Gowrishankar* regardless of whether the complaints are made in the context of a College proceeding or in a civil court proceeding?

[para 36] In Order H2020-03, I addressed a similar issue in applying the conclusion of *Gowrishankar* to different circumstances. In that case, a custodian was responding to a complaint made by a former patient to the College. The facts in *Gowrishankar* were directly applicable *except* that the custodian in that case could not rely on section 27(1)(c) to use/access health information in the EHR/Netcare, as the custodian was an authorized custodian under section 56.1(b)(ii) (and not section 56.1(b)(i), as the custodian in *Gowrishankar* was). Therefore, the custodian in Order H2020-03 was authorized to use/access health information in the EHR/Netcare for the purposes set out in sections 27(1)(a), (b), (f) or (g) (but not section 27(1)(c)) (see Order H2020-03 at paragraphs 17-21 and 24-26 for additional explanation of these provisions).

[para 37] In that Order, I provided an interpretation of section 27(1)(a) of the HIA that was consistent with the Court of Appeal's conclusion in *Gowrishankar* but eliminated the different application of that case to different types of custodians (and affiliates).

[para 38] In this case, the Custodian is the same custodian in *Gowrishankar*, so the distinction between authorized custodians in section 56.1(b) of the HIA is irrelevant. However, the approach taken in that Order – relying on section 27(1)(a) rather than section 27(1)(c), would result in an outcome consistent with *Gowrishankar* that does not have a different application depending whether a patient complaint is being addressed in a proceeding before the College or in a court proceeding.

[para 39] Section 27(1)(a) permits health information to be used for the purpose of providing health services. Under the proposed analysis, defending the provision of a health services is an extension of providing that health service. Where a health care provider had authority under section 27(1)(a) to use health information to provide a health service, the health care provider is also authorized to continue to use that health information to defend themselves against a complaint about how they provided the health service. This interpretation would apply to complaints made to the College, to civil court actions, and other such proceedings arising out of the provision of the health service.

[para 40] This interpretation also applies to information directly related to and emanating from the health service provided, such as the physician's report of the outcome of the health service, plans for ongoing care, and discharge reports that document the health service provided. In some cases, this information cannot be said to have been used by the health care provider when providing the health service in question, as it resulted from (i.e. came after) the service had concluded. However, such documentation is a direct result of and reports on the health service. It seems nonsensical to suggest that in a complaint or similar proceeding arising from the provision of a health service, a health service provider can use health information they reviewed when providing the service (e.g. lab results used to diagnose an illness), but cannot use the information generated from the service, such as a follow-up report.

[para 41] Therefore, health information used by a health service provider while providing a health service under section 27(1)(a) can continue to be used under the same authority in later proceedings arising from the provision of that health service (e.g. defending against a complaint). The information that directly related to and emanated from the provision of the health service, such as documentation of the service, can also be used in those proceedings under the same authority.

[para 42] This interpretation is consistent with similar circumstances under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). Where a public body is authorized to collect and use personal information for the purpose of one of its programs or services, that authority extends to include later proceedings that arose from the provision of the program or service (see *Alberta (Director of Child Welfare) v. C.H.S.*, 2005 ABQB 695 (CanLII), at para. 24, Order F2019-05, at para. 59). The general principle is that defending the way a program or service is provided is directly connected with providing that program or service.

[para 43] The FOIP Act and the HIA contain different authorities for the use of personal information and health information, due to the different needs and functions of public bodies and custodians. However, in my view, these differences do not preclude the extension of the general principle cited above to custodians under the HIA. I conclude that where a custodian (or affiliate) has used health information for the purpose of providing a health service under section 27(1)(a), that authority to use the health information extends to defending the provision of the health service in a subsequent proceeding.

[para 44] This principle is not without limit in the FOIP context, and should be similarly interpreted under the HIA. For example, in Order F2009-048, it was determined that the use of the personal information in a legal proceeding did not relate to the purpose for which that personal information had been collected. In other words, the legal proceeding did not arise from the same program or service that the personal information had been collected for. Therefore, that subsequent use was not authorized (upheld at *Calgary Board of Education v. Alberta (Office of the Information and Privacy Commissioner)*, 2014 ABQB 189).

[para 45] The interpretation of section 27(1)(a) that I have put forward cannot be taken as authority for a health care provider to undertake a general or wholesale review of any of an individual's health information in the EHR/Netcare for the purpose of finding something useful or relevant. Rather, this interpretation of section 27(1)(a) extends the authority to use *the health*

information that was used by the health service provider when they provided the health service, in a later complaint or proceeding that arose from the provision of the health service, as well as the information directly relating to and emanating from the service. As stated by the Court of Appeal in *Gowrishankar*, “[t]he scope of the complaint will thus inform what conduct is reasonably permitted under the *HIA*” (at para. 89, cited above).

[para 46] For example, a physician might treat a complaint about a back injury. In doing so, that physician can access the patient’s health information that the physician believes could be relevant to the back pain (e.g. past imaging of the patient’s spine, past diagnoses, etc.) in order to provide treatment. This use/access is authorized under section 27(1)(a). If the patient later brings a civil action against the physician for their treatment of the back injury, section 27(1)(a) also authorizes the physician to use/access that same information for the purpose of defending themselves in the civil proceeding (as well as information created when the treatment was provided). This provision also authorizes the physician to use the documentation written up as part of and following the care. However, this authority would not extend to using/accessing *other* health information located in the EHR/Netcare that didn’t relate to the physician’s treatment of the back injury. “Other health information” might include health information relating to subsequent treatment provided years later by a different health care provider. (This is not to say that “other” health information is entirely unavailable to a health care provider defending their care, as will be discussed below).

[para 47] Access logs may or may not always be specific enough to make the scope of the health care provider’s initial access/use sufficiently apparent, in which case providers must be conscious of this limitation when accessing the EHR/Netcare in the event of a subsequent complaint or proceeding arising from a health service they provided.

[para 48] To be clear, this interpretation of section 27(1)(a) does not vitiate other authorities or processes for accessing and using health information in the context of a complaint, investigation, court proceeding, etc. As discussed earlier, section 27(1)(c) remains a standalone authority to access and use health information for some custodians conducting investigations and other proceedings set out in that provision.

[para 49] Courts and other bodies (such as the College) also have processes for parties to obtain and present relevant information. The discovery processes in civil proceedings exist to enable the physician (other affiliates/custodians) to obtain health information that might be relevant to the civil proceeding but which was not directly related to the physician’s provision of health services. Sections 3(a) and (b) of the *HIA* specifically address the intersection between the common law rules in a legal proceeding and the *HIA*. These provisions state:

3 This Act

(a) does not limit the information otherwise available by law to a party to legal proceedings,

(b) does not affect the power of any court or tribunal in Canada to compel a witness to testify or compel the production of documents...

[para 50] In Order H2004-005, Former Commissioner Work discussed the operation of section 3(a). He said (at para. 66):

Section 3(a) of the Act expressly recognizes that information is otherwise available by law, and other procedures that enable parties to legal proceedings to obtain information outside the Act continue to exist. Although legislation is usually presumed to override the common law, this presumption is rebutted where the legislature clearly intends to preserve the common law. Read in its ordinary and grammatical sense, this section means that in the sphere of the “information otherwise available by law to a party to legal proceedings,” the Act is not intended to change or alter the information available to parties to legal proceedings. In my view, the Act is intended to co-exist along with other laws such as the common law that previously governed the information available by law to a party to legal proceedings.

[para 51] Referring back to the example provided regarding a physician defending their treatment of a back injury, health information of the patient *other than* what the physician used/accessed when treating the injury and/or documentation directly related to and emanating from the treatment may be relevant in defending against the civil claim (such as information about a similar injury that occurred years later and was treated by another physician). There are other, well-established processes that govern how the defending physician can obtain and present such relevant information. My point here is only that section 27(1)(a) is not the authority to do so if the information was not accessed and used by the physician in providing the health service in the first place, or if the information did not emanate from the provision of the health service.

[para 52] As I will discuss below, there is no indication that the health information accessed in relation to the legal proceeding was other than the health information used/accessed by each physician when providing the health service.

[para 53] I am also mindful of the fact that this interpretation might appear to render section 27(1)(c) redundant, if using health information to respond to complaints about the provision of health services is already permitted under section 27(1)(a). However, section 27(1)(c) is broader than health service providers responding to complaints about their provision of health services. The investigations, disciplinary proceedings or inspections may relate to other employees (e.g. clerical or custodial) who do not provide patient care. Section 27(1)(c) might permit a custodian such as AHS to use a patient’s health information if that information shed light on the investigation etc. (for example, investigating data entry errors).

Application of section 27(1)(a) to Drs. E.C. and S.D.

[para 54] Doctors E.C. and S.D. were named in a civil action initiated by the Complainant. Dr. E.C. accessed the Complainant’s health information in the EHR several times in a 1-hour period, in April 2008. Included with the various documents provided by the Complainant for this inquiry are legal documents relating to a proceeding initiated by the Complainant against various physicians, including Dr. E.C. A statement of claim was filed on January 24, 2008. The cover page to an examination of Dr. E.C. for discovery is dated May 2, 2011.

[para 55] The accesses the Complainant has complained about with respect to Dr. S.D. occurred in April 2008. The Complainant states he did not have health services from that

physician on that day. Included with the various documents provided by the Complainant for this inquiry are legal documents relating to a proceeding initiated by the Complainant against various physicians, including Dr. S.D. A statement of claim was filed on January 24, 2008. The cover page to an examination of Dr. S.D. for discovery is dated May 2, 2011.

[para 56] The Custodian states that these accesses “were in relation to a civil claim brought against [Dr. E.C., Dr. S.D and the Custodian].”

[para 57] In my view, the submissions of the parties and the dates of the relevant documents satisfy me that these physicians accessed the Complainant’s health information in the EHR/Netcare to respond to the civil claim brought against them. I have reviewed the audit logs provided by the Complainant, and the notations in the logs associated with the accesses by Drs. E.C. and S.D. do not indicate that any accesses were outside of what is permitted under section 27(1)(a). In his request for inquiry, the Complainant also notes that he was told that accesses conducted by Drs. E.C. and S.D. related to “historical patient services” provided by the physicians, which indicates that these physicians accessed the information that related to the care they provided to the Complainant.

[para 58] The Complainant has not argued, or provided any reason to expect, that the physicians accessed information other than what they were authorized to access. For example, the Complainant might have argued and/or provided evidence that one or more of the physicians submitted for the court proceeding health information that they would not have had (or accessed) when they treated the Complainant. In Order H2020-03, the complainant in that case had provided reasons she believed her physician ought not to have been permitted to use specific information in the course of a College complaint process. A similar argument made by the Complainant in this case could have raised questions about whether all of the physicians’ accesses of the EHR/Netcare were authorized under section 27(1)(a).

[para 59] Of the Complainant’s 800+ pages of submissions to this inquiry, only a few lines even refer to the accesses by Drs. E.C. and S.D.; these references amount to repeating the reasons for access provided to him by the Custodian prior to this inquiry (which are the same reasons provided to me by the Custodian for this inquiry), and a statement that the Complainant did not receive health services from the physicians on the dates they accessed his information. The Custodian has explained why the dates of the accesses are different from the dates the Complainant received health services. The Complainant has not provided sufficient reason to doubt the Custodian’s explanations.

[para 60] I find these accesses to have been authorized under section 27(1)(a).

Application of section 27(1)(a) to C.H. and G.M.

[para 61] C.H. accessed the Complainant’s health information in the EHR in April 2008. The Complainant’s complaint regarding C.H.’s accesses states that he was at home that day and not receiving health services. The Custodian’s explanation to the Complainant regarding this access states that C.H. works in administrative services and accessed the Complainant’s health information on behalf of the Custodian at the request of a law firm representing the Custodian,

for the purposes of conducting an investigation under section 27(1)(c). In his initial submission, the Complainant acknowledges that the particular law firm was representing the Custodian in a legal proceeding involving the Complainant. Regarding the access by C.H. for the law firm, he states “[C.H.] has and knows the original files from February 14, 2006 and February 16, 2006. This file medical record was replaced with 25 pages of other medical record” (page 111 of Complainant’s initial submission). He later outright alleges that some of his records are false/doctored/tampered with. (The Complainant has not provided evidence to substantiate these allegations of altering records. These allegations are not matters at issue in this inquiry in any event).

[para 62] The various documents provided by the Complainant for this inquiry confirm that the named law firm was representing the Custodian in a legal proceeding initiated by the Complainant. The date of the EHR/Netcare access corresponds to dates in the legal documents provided by the Complainant. The Complainant is aware that the firm requested his health information and has not objected to that purpose or otherwise provided reason to expect the access by C.H. for that purpose was not authorized.

[para 63] G.M. accessed the Complainant’s health information in the EHR/Netcare in April 2008. The Complainant’s complaint regarding G.M.’s access states that he was at home and not receiving health services that day. The Custodian’s explanation to the Complainant states that G.M. was a health records clerk, and that the Custodian’s legal area “sent notice to secure chart April 18/08. Access for conducting investigation.” In its initial submission, the Custodian also states that G.M. “[secured] the chart from [C.H.]”. Therefore, the authority for G.M. and C.H. to access the Complainant’s information in the EHR are directly related.

[para 64] In his initial submission, the Complainant appears to acknowledge that his legal counsel and the Custodian’s legal counsel received his health records for the purposes of conducting an investigation. The date of the EHR/Netcare access corresponds to dates in the legal documents provided by the Complainant. The Complainant has not objected to that purpose cited by the Custodian, or otherwise provided reason to expect the access by G.M. for that purpose was not authorized.

[para 65] In my view, the interpretation of section 27(1)(a) as extending to a custodian’s or affiliate’s use of health information for legal proceedings directly arising from the provision of the health service, extends also to the Custodian’s access of the EHR to provide the Complainant’s counsel with relevant health information. Notably, there is no provision in the HIA that permits the use of health information with the consent of the individual it is about.

[para 66] Unlike Drs. E.C. and S.D., neither C.H. nor G.M. were personally involved in the court proceeding. However, the Custodian (AHS) was named in the proceeding. While both C.H. and G.M. are affiliates in their own right under the Act, in this case, they were acting under the instruction of the Custodian, on its behalf. The Custodian cannot act except via its own employees (or contractors). This includes accessing the EHR. Only affiliates can access the EHR (as opposed to an employee who is not also an affiliate). The HIA grants affiliates their own authorities for accessing the EHR; however, I do not interpret this to mean that every access by an affiliate must be under their own authority. Where an affiliate is acting on behalf of the

Custodian, they can rely on the Custodian's authority to access the EHR. In this case, the Custodian had the same authority as Drs. E.C. and S.D. to access the Complainant's health information under section 27(1)(a); that C.H. and G.M. performed that function does not alter this authority.

[para 67] As with the accesses by Drs. E.C. and S.D., nothing in the audit logs indicates that C.H. or G.M. accessed information, on behalf of the Custodian, beyond what would be permitted under section 27(1)(a). Nor has the Complainant provided any objection on this point, or other reason to question these accesses.

[para 68] I find these accesses to have been authorized under section 27(1)(a).

Section 27(1)(g)

[para 69] The Custodian states that Dr. R.W. accessed the Complainant's health information in the EHR/Netcare with authority under section 27(1)(g). This provision, cited above, permits the use of health information 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.

[para 70] The Custodian states that the Complainant suffered an "adverse event" following treatment by Dr. R.W. It states "[a]s such the Complainant's complaint came up on his list of such events to monitor long term sequelae in relation to ongoing Quality Care Review" (initial submission at para. 9). I understand this argument to be that Dr. R.W. continued to review the Complainant's condition for quality improvement purposes, which falls within section 27(1)(g). I agree that this provision applies to such an access/use of health information.

EHR accesses occurring after September 1, 2010

[para 71] B.R. and K.L. accessed the Complainant's health information in 2013 and 2012, respectively. As noted earlier, provisions specific to the Alberta EHR came into force on September 1, 2010. Section 56.5 clarifies that an access of the EHR is a use of health information. It states:

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;

(b) an authorized custodian referred to in section 56.1(b)(ii) may use prescribed health information that is accessible via the Alberta EHR, and that is not otherwise in the custody or under the control of that authorized custodian, only for a purpose that is authorized by

(i) section 27(1)(a), (b) or (f), or

(ii) section 27(1)(g), but only to the extent necessary for obtaining or processing payment for health services.

(2) For greater certainty, the use pursuant to subsection (1) of prescribed health information that is accessible via the Alberta EHR does not constitute collection of that information under this Act.

(3) For greater certainty, the use pursuant to subsection (1) of prescribed health information that is accessible via the Alberta EHR does not constitute a disclosure of that information by

(a) the regulated health professional or authorized custodian who originally made that information accessible via the Alberta EHR pursuant to section 56.3,

(b) any other authorized custodian,

(c) the information manager of the Alberta EHR, or

(d) any other person.

[para 72] As I have also treated the pre-2010 accesses as a use of health information that must be authorized under section 27(1), the above provision does not significantly change the approach to determining B.R. and K.L.'s authority to use the Complainant's health information via the EHR.

[para 73] B.R. accessed the Complainant's health information in the EHR in March 2013. The Complainant's complaint regarding B.R.'s accesses states that he was at home that day and not receiving health services. The Custodian's explanation to the Complainant states that B.R. is a surgical lead, and that the access was for the purpose of providing a health service under section 27(1)(a).

[para 74] In his initial submission the Complainant states only that "I do not know anything else regarding the access for providing health services on March 14, 2013 on the Royal Alexandra Hospital with this custodian" (page 142 of initial submission package). I asked the Custodian to provide further details to explain B.R.'s access of the Complainant's health information.

[para 75] The Custodian responded with an explanation provided by the Custodian's Privacy Coordinator who had investigated the matter. The Coordinator explained that part of B.R.'s role was to "keep track of surgery waitlists at the Royal Alexandra Hospital." The Complainant was on a waitlist for oral surgery at the time that B.R. accessed his health information. The employee heading the relevant area advised that this access was consistent with B.R.'s role.

[para 76] In response to this explanation, the Complainant seems to accept that he was on a list for the oral surgery as described by the Custodian; however, he argues that he did not require that surgery. Whether the Complainant wanted or needed the oral surgery is irrelevant. Also in response to the Custodian's explanation of B.R.'s access of the EHR/Netcare, the Complainant provided an audio recording of an appointment with the physician who was purportedly to

perform the surgery. As that audio recording does not relate to the access of the EHR/Netcare by B.R. (or anyone else), it is irrelevant to this inquiry.

[para 77] I accept that accessing information of patients on a surgical waitlist is a part of providing health services to those patients. The Complainant seems to acknowledge that he was on the waitlist. The Custodian has responded to the only objection raised by the Complainant regarding B.R.'s access and the Complainant has not provided any reason to doubt this explanation or otherwise expect that this access was unauthorized. Accepting the explanation provided by the Custodian, I accept that it was authorized under section 27(1)(a).

[para 78] The Complainant's complaint about the access by K.L. states that he was at home that day, not receiving health services. The Custodian's explanation provided to the Complainant is that K.L. works in the area of Patient Concerns. The EHR audit log shows that she accessed the Complainant's information in April 2012 for a Patient Concern investigation. In his request for inquiry, the Complainant states that this investigation relates to his treatment at the Royal Alexandra Hospital in 2006. I note that Dr. B.D. conducted an investigation into a patient concern in 2006; I found his access of the Complainant's health information via the EHR to have been authorized under section 27(1)(c) (see discussion at para. 28 of this Order). It may be that this 2012 investigation related to the earlier investigation by Dr. B.D.

[para 79] In any event, the Complainant further states in his request for inquiry that "the custodian, Alberta Health Services will not investigate while litigation is ongoing and follow the instruction of Field LLP" (at page 2). As I said with respect to Dr. B.D., whether the Complainant was told about the outcome of the investigation is irrelevant to the authority of this affiliate to access the Complainant's health information in the EHR for that purpose. Similarly, whether the investigation was completed or placed on hold pending another legal proceeding is irrelevant.

[para 80] The Complainant's only objection to the accesses K.L. is that he was not receiving health services on the day of the accesses. The Custodian has addressed this point in its submissions. The Complainant has not provided any reason to doubt the Custodian's explanations. As such, and as both parties confirm the existence of a patient concerns investigation being conducted by the Custodian, there is no indication that the access was unauthorized. I therefore find it was authorized under section 27(1)(c).

3. If the individuals used the Complainant's health information without authority in the capacity of representatives of Alberta Health Services, has Alberta Health Services taken reasonable steps to protect the Complainant's health information within the terms of section 60 (please address each individual separately when responding to this issue)?

[para 81] I found that each individual accessed the Complainant's health information via the EHR with authority under the HIA. Therefore, I do not need to consider this issue.

IV. ORDER

[para 82] I make this Order under section 80 of the Act.

[para 83] I find that the Custodian and its affiliates had authority to access and/or use the Complainant's health information.

Amanda Swanek
Adjudicator