

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2021-11

October 13, 2021

DR. CHARLES B. METCALFE

Case File Number 007989

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request under the *Health Information Act* (HIA) to Dr. Charles B. Metcalfe for his complete file. The Applicant specified that he was particularly seeking records relating to his attendances at the Rockyview General Hospital Emergency Room, subsequent admissions to the Hospital, and urological surgeries.

Dr. Metcalfe provided the Applicant with copies of two procedure reports and one diagnostic imaging report relating to procedures that occurred on October 8, and November 20, 2015.

The Applicant requested an inquiry into Dr. Metcalfe's response as he believed further records should be provided to him.

The Adjudicator found that Dr. Metcalfe failed to fulfill his duty to assist the Applicant by not informing him that most of the records sought by the Applicant are in the custody and control of Alberta Health Services. Dr. Metcalfe also failed to satisfy the Adjudicator that the search for records was adequate. The Adjudicator ordered Dr. Metcalfe to provide the Applicant with additional information about the search for records, and conduct any additional search as appropriate. The Adjudicator also ordered Dr. Metcalfe to familiarize himself with his obligations under section 10 of the Act, as set out in this Order, and to instruct staff at his clinic about those obligations.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 10, 80.

Authorities Cited: AB: Orders 96-022, 97-003, 2001-016, F2007-007, F2007-029, F2012-09, F2016-02, F2020-13, F2021-24, H2005-003, H2006-003

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

I. BACKGROUND

[para 1] An Applicant made an access request under the *Health Information Act* (HIA) to Dr. Charles B. Metcalfe for his complete file. The Applicant specified that he was particularly seeking records relating to his attendances at the Rockyview General Hospital Emergency Room, subsequent admissions to the Hospital, and urological surgeries.

[para 2] The Custodian provided the Applicant with copies of two procedure reports for procedures that occurred on October 8, and November 20, 2015, and one diagnostic imaging report for a test conducted on November 20, 2015. The Applicant requested a review of Dr. Metcalfe's response as he believed further records should have been provided, such as records relating to:

- medications prescribed by Dr. Metcalfe;
- calls from the Applicant to Dr. Metcalfe's office on October 12, 13 and 14, 2015;
- the Applicant's attendance at the hospital ER on October 23, 2015 and the decisions made regarding his care;
- communications between the Applicant's family physician and Dr. Metcalfe between October 20 and November 20, 2015;
- a procedure performed by Dr. Metcalfe on November 20, 2015;
- medications prescribed by Dr. Metcalfe on November 20, 2015;
- the Applicant's attendance at the hospital ER on November 30, 2015;
- a referral from [Dr. W] to Dr. Metcalfe for lithotripsy, which the Applicant believes occurred on April 18, 2017 with paperwork provided on April 20, 2017.

[para 3] The Commissioner authorized an investigation to attempt to settle the matter. According to the Senior Information and Privacy Manager's Mediation Overview letter (dated March 17, 2019) Dr. Metcalfe did not participate in that review. Subsequently, the Applicant requested an inquiry.

[para 4] The Custodian did not initially provide a submission to this inquiry. After being contacted by the Office, Dr. Metcalfe said he did not receive the Notice of Inquiry. A copy of the Notice was sent to his office, and he subsequently stated that he located the first copy, and asked to make a late submission. As it is preferable to hear from both parties before making a decision, I permitted Dr. Metcalfe to make a late submission.

II. INFORMATION AT ISSUE

[para 5] As this inquiry addresses the adequacy of Dr. Metcalfe's response under section 10 of the Act, there are no records directly at issue.

III. ISSUES

[para 6] The issue in this inquiry, as set out in the Notice of Inquiry dated May 14, 2021, is:

Did the Respondent meet its obligations required by section 10(a) for HIA of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

IV. DISCUSSION OF ISSUES

Submissions of the parties

[para 7] In his request for review, the Applicant states that when he received the three responsive records from Dr. Metcalfe, they came without a cover letter or any explanation.

[para 8] In his initial submission, the Applicant states that following the review process by this Office, the Applicant brought Dr. Metcalfe's actions before the College of Physicians & Surgeons of Alberta. He states that through the College's process he learned the following:

... (despite the well laid out requirements of the College's *Code of Conduct* and *Standards of Practice* and the *Health Information Act* ("HIA") and Dr. Metcalfe's responsibility for the continuity of my care and numerous interactions with respect to my care outside of my two surgeries at the Rockyview General Hospital), Dr. Metcalfe:

- (a) has claimed that he did not maintain any record or files related to my care; and
- (b) in addition to the interactions already listed in my Request for Inquiry, in response to my calls to his office of October 12, 13 and 14, 2015, has claimed that he issued a prescription for additional pain medication on October 13, 2015, but as he did it by phone, no records were kept.

...

Dr. Metcalfe has asserted before the College that he has no file, that he created no records in respect of my care. As a result, I submit that Dr. Metcalfe failed to meet the requirements of the *Code of Conduct*, the *Standards of Practice* and the *Health Information Act* (HIA) to create and maintain health records in respect of my care. Simply, by failing to create and maintain the records required, Dr. Metcalfe has failed in his duty and frustrated my ability to review his conduct of my care and thus control my body, and control and direct my own health care.

[para 9] The Applicant states that without a file, Dr. Metcalfe appears to have had no system in place to ensure his medical needs were properly addressed.

[para 10] The Applicant further states that he was able to obtain records relating to prescriptions given, test results and referrals, through other means. He states:

As a result, I have been able to locate records from other sources showing that Dr. Metcalfe's office received records related to my care, leaving me with the concerns: Did Dr. Metcalfe's office fail to properly create, process, retain and protect the records related to my care? Did Dr. Metcalfe's office fail to search for these records and provide same to me in accordance with my access request under the HIA? If they were not managed through a patient file, what happened to these records? And, if these records were available through other record systems, why did Dr. Metcalfe's office fail to assist by directing me to those other systems?

[para 11] The Custodian states that he is a urologist at the Southern Alberta Institute of Urology (SAIU), which is where his clinic is located. He is also a urologist at the Rockyview General Hospital (RGH). He states that the Applicant went to the RGH emergency department for a medical issue on October 8, 2018; he was admitted to the RGH by a physician other than Dr. Metcalfe. The Custodian was the urologist on call at the time, and performed a procedure on the Applicant. The Custodian scheduled the Applicant for another procedure in six weeks, and prescribed pain medication.

[para 12] The following week, the Applicant called Dr. Metcalfe's clinic at SAIU regarding concerns about pain management. The Custodian states that he was at RGH and not SAIU at the time, and that his assistant advised the Applicant to return to RGH emergency department if his pain became severe. The Applicant's concerns were relayed to Dr. Metcalfe when he returned to his office.

[para 13] The second procedure that had been previously scheduled took place on November 20, 2015, at RGH. The Custodian states that he had no further involvement in the Applicant's care after that time.

[para 14] Dr. Metcalfe states that upon receiving the Applicant's access request, he asked his assistant to coordinate the payment of the required fee, and the provision of the responsive records to the Applicant. Dr. Metcalfe states that his assistant called the Applicant on December 14, 2017 and left a voice message regarding his access request. He states that the Applicant followed up with Dr. Metcalfe's office on January 15, 2018, and was informed of an administrative fee for the records, and the manner in which the records would be provided to him. The Applicant paid the fee on January 24, 2018 and was provided with the records on January 30, 2018.

[para 15] Dr. Metcalfe states that when working at the RGH, he is an affiliate of Alberta Health Services (AHS), for the purpose of the HIA. As such, AHS would be the custodian having custody and control of the relevant records.

[para 16] Dr. Metcalfe states that the records he provided to the Applicant – the two procedure reports and a diagnostic imaging report – had been copied to him at his SAIU office. He further states that he did not provide medical care to the Applicant at SAIU and did not have a treatment file for the Applicant at SAIU. Any records at SAIU regarding the Applicant’s treatment at RGH were therefore limited.

[para 17] Dr. Metcalfe states that on July 29, 2021, his assistant conducted an additional search for responsive records. He states that the search included all medical records relating to the Applicant from July 1, 2015 to July 29, 2021. The search encompassed Dr. Metcalfe’s electronic health record system, as he does not maintain paper charts.

[para 18] The search resulted in the following additional records, which were provided to the Applicant:

- (a) An internal note from Dr. Metcalfe to himself following [the Applicant’s] second [procedure] on November 20, 2015, which lists billing codes and a brief summary of [the Applicant’s] discharge plan at RGH. While prepared in the SAIU EMR under ‘visit record’, Dr. Metcalfe had no visit with [the Applicant] at SAIU and the November 20, 2015 [procedure] proceeded at RGH;
- (b) A message report from Dr. Metcalfe’s office assistant dated October 13, 2015, summarizing her call with [the Applicant] regarding pain medication;
- (c) Dr. Metcalfe’s October 8, 2015 Procedure Report;
- (d) A letter from [Dr. W] at Hygieia Medical Clinic to Dr. Martin Duffy at RGH, dated November 6, 2015, asking Dr. Duffy to see [the Applicant] for a phone consultation. Dr. Duffy wrote on the letter “already seeing Chuck [Dr. Metcalfe] Nov 20/15 3x booked” and forwarded a copy of the letter to Dr. Metcalfe;
- (e) The November 20, 2015 Diagnostic Imaging Report on which Dr. Metcalfe was copied; and
- (f) Dr. Metcalfe’s November 20, 2015 Procedure Report.

[para 19] Dr. Metcalfe states that items (a), (b) and (d) were not provided to the Applicant in the initial response to his access request, as the Applicant “indicated that he was seeking records relating to his ‘attendances at the Rockyview General Hospital Emergency Room, subsequent admissions to the Hospital and urological surgeries’” (submission, at para. 36).

[para 20] Dr. Metcalfe further states that the updated records comprise all of the medical records relating to the Applicant in Dr. Metcalfe’s custody and control; there are no further records.

[para 21] Dr. Metcalfe also addressed the records identified by the Applicant as missing from the response.

- Prescribing medications (October 8, 2015)

[para 22] Dr. Metcalfe states that the prescriptions from this date were written at RGH and are therefore records in the custody and control of AHS. Dr. Metcalfe states that he does not have a copy of these records.

- Calls to Dr. Metcalfe's office regarding pain response (October 12, 13, 14, 2015)

[para 23] Dr. Metcalfe states that the recent records include a message regarding a call from the Applicant on October 13, 2015. No other records of calls exist.

- Attendance at RGH ER on October 23, 2015

[para 24] Dr. Metcalfe states that he did not provide care to the Applicant on this day. Any records relating to the Applicant's attendance at RGH on this day would be in the custody or control of AHS.

- Dr. [TJ] contacting Dr. Metcalfe's office between October 20, 2015 and November 20, 2015 to address pain and complications, as well as prescriptions from Dr. Metcalfe.

[para 25] Dr. Metcalfe states (submission, at para. 48):

Dr. Metcalfe was not contacted by Dr. [TJ] between October 20, 2015 and November 20, 2015 and denies that Dr. [TJ] attempted to contact him during this time period. Of note, the College conducted an investigation into these events and concluded that Dr. [TJ] did not attempt to contact Dr. Metcalfe in October or November 2015. Dr. Metcalfe learned through the College's investigation that Dr. [TJ's] medical chart for [the Applicant] evidences she attempted to contact another physician involved in [the Applicant's] care, not Dr. Metcalfe, in October or November of 2017.

- Dr. Metcalfe's procedure on November 20, 2015, and related lab analysis

[para 26] Dr. Metcalfe states that he provided all records relating to this procedure, and any additional records are in the custody and control of AHS.

- Prescribing medications (November 20, 2015)

[para 27] Dr. Metcalfe states that any prescription was issued at RGH and is part of that patient file; AHS is the relevant custodian of those records.

- Applicant's attendance at RGH ER on November 30, 2015 re complications

[para 28] Dr. Metcalfe states that records relating to this attendance are in the custody and control of AHS.

- Dr. W's referral of the Applicant's file to Dr. Metcalf on April 18-20, 2017

[para 29] Dr. Metcalfe acknowledges that Dr. W faxed a referral to him at his clinic. However, he states that he does not have a copy of this referral. He further states (submission, at paras. 53-54):

In conjunction with advice received from the College following [the Applicant's] complaint, Dr. Metcalfe has re-evaluated his office's facsimile protocol to ensure proper follow up on faxes. All faxes received by Dr. Metcalfe's SAIU office are now routed directly to email, where they can be checked by multiple parties. Dr. Metcalfe's office assistant routinely checks and manages the facsimile email inbox as part of her regular administrative duties.

Dr. Metcalfe did not accept [Dr. W's] referral, and therefore no care was provided to [the Applicant] at SAIU in 2017 for which Dr. Metcalfe would have records.

[para 30] In his additional submission, the Applicant argues (September 2, 2021 submission, at pages 5-6):

[Counsel for Dr. Metcalfe] has not provided any evidence that Dr. Metcalfe searched for the requested records (see definition in HIA) containing my health information (see definition in HIA) in any of the other systems or files likely to contain same, including:

- physical files;
- Netcare (such as for prescriptions or test results);
- diary systems (such as appointments for further surgery and follow up);
- referral systems (such as [Dr. W's] referral);
- test result systems (such as stone test results); and
- billing systems (such as his billing for my care).

With respect, from his own submissions and conduct, Dr. Metcalfe's office has had a number of issues in respect of record keeping. For example...

...

Accordingly, there is no reason to believe that Dr. Metcalfe's EMR contains the complete record of his care, or that Dr. Metcalfe could reasonably rely on his EMR as the single source for responsive records. Simply, given the well documented issues with his filing and record keeping, it is reasonable for Dr. Metcalfe to have recognized these limitations and searched each of the relevant other systems.

With respect, this is further highlighted by his own actions, wherein either he or his assistant accessed Netcare 7 times following my access request. Dr. Metcalfe had no reason to access my Netcare files other than to respond to my access request and yet neither his initial response to my request nor his most recent disclosure indicate that he searched Netcare and provided any of the relevant records (records such as the prescriptions or test results arising from his care outside of my time at Rockyview General Hospital).

As a result, the searches conducted to date cannot be considered reasonable or complete until he has reviewed each record keeping system for relevant records. Simply, his poor record keeping practices should not frustrate my right to access my health information and, as a result, have control of my health care.

Applicable legislation and case law

[para 31] Sections 1(1)(a) and 1(3) of the HIA state, in part:

1(1) In this Act,

(a) “affiliate”, in relation to a custodian, means

(i) an individual employed by the custodian,

(ii) a person who performs a service for the custodian as an appointee, volunteer or student or under a contract or agency relationship with the custodian,

(iii) a health services provider who is exercising the right to admit and treat patients at a hospital as defined in the Hospitals Act,

...

(3) A custodian who is an affiliate of another custodian is deemed not to be a custodian while acting in the capacity of an affiliate.

...

7(1) An individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian.

...

8(1) To obtain access to a record, an individual must make a request to the custodian that the individual believes has custody or control of the record.

...

10 A custodian that has received a request for access to a record under section 8(1)

(a) must make every reasonable effort to assist the applicant and to respond to each applicant openly, accurately and completely.

...

[para 32] Past Orders of this office have determined that a custodian is in the best position to show that it conducted an adequate search for responsive records; therefore, the burden of proof is on the custodian to show that it has done so (see Orders H2005-003 and H2006-003).

[para 33] Regarding the test for whether an adequate search was conducted, former Commissioner Work stated the following in H2005-003 (at paras. 19-21):

These FOIP Orders have not established a specific test for adequacy of the search; this is a question of fact to be determined in every case. The standard for the search is not perfection but rather what is “reasonable” in the circumstances. The decision about adequacy of a search is based upon the facts of how the search was conducted in the particular circumstances. In order to discharge its burden of proof under FOIP, a public body must provide sufficient evidence to show that it has made a reasonable effort to locate responsive records.

In its written and oral submissions, the Custodian argued that the FOIP approach to interpretation should be applied to the parallel provision in HIA. I accept this

argument. I hereby adopt the above described FOIP criteria and approach for deciding whether the adequacy of the search and therefore the duty to assist under section 10(a) of HIA has been satisfied by a custodian.

To address the Applicant's concerns, I must review the thoroughness of the Custodian's search. In its written and oral submissions, the Custodian provided detailed descriptions of the steps that were taken, the communications that occurred, the documentation utilized and the efforts that were made to attempt to locate the information requested.

[para 34] The standard for determining whether a public body conducted an adequate search for records under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) have been applied to organizations under the *Personal Information Protection Act*. I agree with former Commissioner Work, that these standards are also applicable under the HIA.

[para 35] Under the FOIP Act, a public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17).

[para 36] Further, an adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 37] The informational component of the duty to conduct an adequate search for records was discussed in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89, with respect to the FOIP Act. The Court upheld the adjudicator's conclusion that a public body has a duty, in some cases, to provide an applicant with information about the steps taken to locate responsive records.

[para 38] In Order F2020-13, the Director of Adjudication said (at para. 79):

In some earlier orders of this office, the Adjudicator held that the fact a very thorough search had been conducted and records were not found was itself an adequate explanation for the belief that no further records exist. While I agree with the logic of this in the appropriate case, in circumstances such as the present, where the Applicant is able to demonstrate with certainty for some of the records she describes that the public body was once in possession of them, or that this is reasonably likely, I believe the duty under section 10 includes giving an explanation as to what happened to them or likely happened to them that would account for their no longer being in the public body's possession.

[para 39] In Order F2021-24, I reviewed the above and concluded that while an explanation of the search conducted is not required in every case, an explanation may be required where an applicant has provided logical reasons to believe records exist. In other

words, an explanation seems to be required where there is a “gap between the Applicant’s request and the Public Body’s response that begs for additional explanation.”

[para 40] Under the FOIP Act, a public body’s duty to assist includes clarifying the scope of the Applicant’s request. Past Orders of this Office have found that a public body will fail to meet this duty to assist if it unilaterally narrows the scope of an Applicant’s request. In Order F2012-09, the adjudicator stated (at para. 53):

If a public body interprets a request for records too restrictively, or wrongly, the public body runs the risk of unilaterally narrowing the scope of the access request and failing in its duty to assist the Applicant, by failing to search for records falling within the scope of the access request.

[para 41] In my view, there is no reason that these standards should not also apply where a custodian is responding to an applicant’s request for their health information under the HIA.

[para 42] Past Orders under the FOIP Act have also addressed a public body’s duty to inform an applicant if another public body is likely to have the records being sought. Order F2016-02 states (at para. 26):

Section 10(1) of the Act also includes the duty to advise an Applicant when it knows that another public body likely has responsive records (see Order 99-039 at para 109). The Public Body did not advise the Applicant of this and therefore failed to meet its duty in this regard. This duty is particularly important in this inquiry given that the Public Body retained few records but was well aware of where responsive records could be found. This is information that the Applicant may not be aware of and therefore, in order to assist the Applicant, the Public Body ought to have advised the Applicant that she should make a request to Alberta Infrastructure, if she had not already done so.

[para 43] In my view, there is no reason that these standards should not also apply where a custodian is responding to an applicant’s request for their health information under the HIA.

Analysis

Dr. Metcalfe’s initial response to the Applicant

[para 44] Dr. Metcalfe has referred to his clinic at SAIU as his “personal clinic”. I understand this to mean that Dr. Metcalfe is a custodian with respect to work performed through his clinic. This means that Dr. Metcalfe is also a custodian under the HIA.

[para 45] When performing services through the RGH, he is an affiliate of AHS, of which RGH is a part. AHS is a custodian under the HIA. Per section 1(3) of the Act (reproduced above), this means that when Dr. Metcalfe is performing services through

RGH, he is an affiliate of AHS. When he is an affiliate of AHS, he is not *also* a custodian, while acting in the capacity of an affiliate.

[para 46] Under section 7(1) of the Act, an individual has a right of access to any record containing their health information, in the custody or control of a custodian. The individual must make the access request to the custodian *the individual believes has custody or control* (section 8(1)).

[para 47] Unlike the FOIP Act, the HIA does not have a provision that addresses when a custodian can transfer an access request to another custodian that has custody or control of the requested record. However, the HIA does not require an applicant to make an access request to the correct custodian in order for it to be an access request made under the Act; rather, an applicant need only make the request to the custodian they believe has custody or control. This indicates that a custodian receiving an access request under the HIA has some obligations under the Act even if they are not the custodian having custody or control of the requested records. Specifically, the duty to assist under section 10 is triggered, such that the custodian is obliged to respond to the applicant and provide reasonable assistance. What is encompassed by ‘reasonable assistance’ will depend on the particular circumstances of each case. That said, it seems reasonable to expect that when a custodian is aware that the requested records are in, or likely in, the custody or control of another custodian, the duty to assist includes informing the applicant of this fact so that the applicant can make the request to the other custodian. This is consistent with the Orders describing the ‘informational aspect’ of the duty to assist.

[para 48] In this case, the Applicant made the request to Dr. Metcalfe, who is a custodian under the Act, believing that Dr. Metcalfe had custody or control of the requested records. It is understandable why the Applicant believed Dr. Metcalfe would have the responsive records. Dr. Metcalfe did have some responsive records: the two procedure reports and the diagnostic report had been copied to Dr. Metcalfe at his clinic. As the Applicant’s procedures were done at RGH, AHS had custody or control over the remaining records.

[para 49] In my view, Dr. Metcalfe had an obligation to inform the Applicant that many of the records he was seeking were in the custody and control of AHS, and that the Applicant would have to make an access request to AHS to obtain those records. Dr. Metcalfe provided a transcript of his call to the Applicant on February 14, 2018; in that call, Dr. Metcalfe informs the Applicant that he has some records responsive to the Applicant’s request, and noted that other surgeons had been involved in providing care to the Applicant. This response is not sufficient to alert the Applicant that he would have to make an access request to AHS (or other surgeons) for the records he sought.

[para 50] Regarding the initial search for records, the Custodian provided two procedure reports and one diagnostic report. Further records were provided during the inquiry; the Custodian argues that the latter records were not originally provided because the Applicant’s request was for records relating to his attendances at RGH. The

Custodian states that he did not think the items later provided were helpful to the Applicant.

[para 51] The Applicant's access request states:

Please provide a complete copy of my file with Dr. Metcalfe. In particular, I would like a complete copy of my file with Dr. Metcalfe related to my attendances at the Rockyview General Hospital Emergency Room, subsequent admissions to the Hospital and urological surgeries.

[para 52] The Applicant requested all records in his file with Dr. Metcalfe. He identified *particular* records he was seeking, but did not limit his request to those records. To the extent that the Custodian limited his initial response to records relating to the procedures conducted at RGH, the Custodian unilaterally narrowed the scope of the Applicant's request. I understand that the Applicant told the Custodian that he wanted his records "in case he required emergency care on his travels" (Custodian submission, at para. 40). Nevertheless, the Applicant's request was broader than just the records relating to the procedures. If the Custodian believed that only some records were responsive, he (or his office) should have contacted the Applicant to clarify his request.

[para 53] I find that the Custodian did not meet his duty to assist the Applicant. While the Custodian unilaterally narrowed the Applicant's request with its first response, and failed to inform the Applicant how to obtain the records he sought, these issues were remedied when it provided the Applicant with the remaining records in July 2021, and provided a new response to the Applicant on August 5, 2021.

Adequacy of the search performed by Dr. Metcalfe

[para 54] The Applicant raised concerns about several records he expected to receive from Dr. Metcalfe. Dr. Metcalfe addressed each record in his submission (discussed above, at paras. 21-29).

[para 55] In many instances, Dr. Metcalfe explained that AHS is the custodian having custody and control of the particular record. The records Dr. Metcalfe states are in the custody and control of AHS are records relating to the Applicant's care at RGH. I accept that these records are in the custody and control of AHS, and that Dr. Metcalfe did not maintain his own copies at his clinic.

[para 56] I acknowledge that Dr. Metcalfe did maintain copies of some records relating to the Applicant's care at RGH: specifically, the Procedure Report dated October 8, 2015, a Procedure Report dated November 20, 2015, and Diagnostic Imaging Report dated November 20, 2015. Dr. Metcalfe has explained how these copies came to be located in his clinic; specifically, that they were sent to him at his clinic and therefore he maintained a copy at the clinic.

[para 57] That Dr. Metcalfe has maintained his own copies of some records related to the Applicant's care at RGH at his clinic does not mean he was obligated under the HIA to maintain copies of all records at his clinic. The Applicant has referred to various obligations imposed on Dr. Metcalfe by the College of Physicians and Surgeons, such as its Code of Ethics, and various Standards of Practice. This inquiry encompasses only the obligations imposed on Dr. Metcalfe by the HIA. The HIA does not impose obligations on Dr. Metcalfe to maintain his own copies of records relating to care provided to patients as an affiliate for AHS. The College is a better forum to raise concerns about Dr. Metcalfe's compliance with its standards. I understand that the Applicant has raised his concerns with the College.

[para 58] Further, Dr. Metcalfe is responsible for providing records for which he is the custodian. Records in the custody and control of AHS are not records Dr. Metcalfe is responsible for providing to the Applicant under the HIA. The Applicant has questioned why Dr. Metcalfe accessed his health information in Netcare if not to obtain records for the Applicant; the transcript of the call from Dr. Metcalfe to the Applicant indicated that Dr. Metcalfe confirmed via Netcare that four other surgeons were involved in providing care to the Applicant. Possibly Dr. Metcalfe meant to indicate that the Applicant would have to contact those other surgeons for the records related to that care.

[para 59] With respect to records in Netcare relating to care provided by Dr. Metcalfe to the Applicant, where those records are in the custody and control of AHS, Dr. Metcalfe is not obligated to obtain them from Netcare to provide to the Applicant.

[para 60] Dr. Metcalfe did not locate records relating to calls to his clinic from the Applicant, other than an internal message of a call made October 13, 2015 (the Applicant states that he also called on October 12 and 14). Dr. Metcalfe was also unable to locate a copy of a referral from Dr. W, although he acknowledges it was received at his clinic (discussed at para. 29 of this Order).

[para 61] Dr. Metcalfe states that the second search for records, conducted in July 2021, encompassed Dr. Metcalfe's electronic medical record system (EMR). He states that "[t]he scope of the EMR search conducted by [his office assistant] included all medical records relating to [the Applicant] from July 1, 2015 to July 29, 2021" (submission, at para. 32).

[para 62] The Applicant has indicated that he believes the search should have included Netcare, diary systems, referral systems, test result systems, and billing systems.

[para 63] The Applicant states that there is no reason to expect that Dr. Metcalfe's search located all responsive records. He notes that Dr. Metcalfe initially failed to provide a submission to this inquiry, due to having misplaced the *Notice of Inquiry* sent by this Office. The Applicant argues that this, along with the fact that Dr. Metcalfe cannot locate a copy of the referral faxed to his clinic by Dr. W, indicates that Dr. Metcalfe has a poor record-keeping system.

[para 64] Dr. Metcalfe has pointed to past Orders of this Office that have found that a search needn't be perfect in order to meet the obligations set out in section. Further, the fact that additional records were located after the initial search does not mean that the initial search was inadequate. I agree with past Orders in this regard. However, it is also the case that Dr. Metcalfe has the burden of satisfying me that the search for records was adequate. In this case, the Applicant has raised reasonable questions regarding the thoroughness of Dr. Metcalfe's search. I cannot answer those questions with the information provided to me in Dr. Metcalfe's submission. As a consequence, I cannot uphold Dr. Metcalfe's search as adequate.

[para 65] For example, Dr. Metcalfe has explained that the second search encompassed Dr. Metcalfe's electronic health record system. It is not clear why the search was restricted to this area, other than to say that paper charts are not maintained. I accept that he does not maintain paper charts; however, this does not necessarily mean that he does not maintain paper records other than charts (although it is possible that he converts any physical record to electronic format). It may be the case that in Dr. Metcalfe's office, all patient-related records are filed in the electronic health record system (or destroyed, as appropriate), such that any responsive records would only be located in that system. However, Dr. Metcalfe has not said as much and so I do not know this to be the case.

[para 66] I will order Dr. Metcalfe to provide a more thorough explanation to the Applicant of the search conducted. Dr. Metcalfe should explain why the electronic health records system is the only repository searched. If, in providing this explanation, there is an indication that another search may elicit results, Dr. Metcalfe should conduct that search. If no additional search is warranted, Dr. Metcalfe should explain why not.

[para 67] Lastly, the Applicant has asked "that Dr. Metcalfe be required to undergo a full privacy impact assessment of his current office practices and systems so that no further health information is mishandled or lost" (rebuttal submission, at page 10).

[para 68] A custodian has a duty to prepare a privacy impact assessment in particular circumstances, set out in section 64 of the Act. This section states:

64(1) Subject to subsection (3), each custodian must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of the individual who is the subject of the information.

(2) Subject to subsection (3), the custodian must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).

(3) Subsections (1) and (2) do not apply to custodians described in section 1(1)(f)(iv), (ix.1) and (xii) in the collection, use or disclosure of health information between or among these custodians for a function set out in section 27(2), unless the custodians will implement a new information system or change an existing information system in conjunction with the collection, use or disclosure.

[para 69] The Commissioner's authority with respect to privacy impact assessments is limited to commenting on the implications of a privacy impact assessment on access to, or protection of, health information. Ordering Dr. Metcalfe to conduct a privacy impact assessment is not an appropriate remedy in this situation.

[para 70] However, I will order Dr. Metcalfe to familiarize himself with his obligations under section 10 of the Act, as set out in this Order, and to instruct staff at his clinic about those obligations.

V. ORDER

[para 71] I make this Order under section 80 of the Act.

[para 72] I find that Dr. Metcalfe failed to meet his duty to assist the Applicant. I order Dr. Metcalfe to provide the Applicant with additional information about the search for records, and conduct any additional search as appropriate, as set out in paragraph 66 of this Order. I also order Dr. Metcalfe to familiarize himself with his obligations under section 10 of the Act, as set out in this Order, and to instruct staff at his clinic about those obligations.

[para 73] I further order Dr. Metcalfe to notify me and the Applicant, within 50 days of receiving a copy of this Order, that he has complied with the Order.

Amanda Swanek
Adjudicator