

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER H2022-05

March 31, 2022

### ALBERTA HEALTH SERVICES

Case File Number 023859

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual made a complaint under the *Health Information Act* (the Act) that her health information and that of her two minor children (Child A and Child B) in the Alberta Electronic Health Record (the EHR, commonly referred to as Netcare) had been accessed numerous times without authority by a number of employees of Alberta Health Services (the Custodian).

The individual further complained that Child A's health information in the Clinibase electronic medical record system and the Sunrise Clinical Manager electronic medical record system had been accessed without authority by employees of the Custodian.

The complaints about the accesses to the individual's own health information, and Child A's health information were addressed in separate inquiries. This inquiry deals only with the complaints the individual made about accesses to Child B's health information in the EHR/Netcare by the employees of the Custodian. Child B is the Complainant in this inquiry.

The Adjudicator determined that with the exception of three accesses made in 2013 to the Complainant's health information by one employee of the Custodian, the accesses to the Complainant's health information by the Custodian's employees were in compliance with Part 4 of the Act.

The Adjudicator determined that three accesses made by one employee of the Custodian to the Complainant's health information in 2013, were in contravention of Part 4 of the Act.

The Adjudicator determined that the Custodian had met its duty to take reasonable steps to maintain administrative, technical and physical safeguards to protect the confidentiality of health information under section 60 of the Act.

**Statutes Cited: AB:** *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1, 25, 27, 28, 56.1, 56.5, 60, 62, 80 and 104.

**Regulations Cited: AB:** *Health Information Regulation*, AR 70/2001 and *Alberta Electronic Health Regulation*, AR 118/2010.

**Authorities Cited: AB:** Investigation Report H2018-IR-01 and Orders H2020-04, F2020-12, H2021-01, H2021-06 and H2022-01.

**Cases Cited:** *Gowrishankar v JK*, 2018 ABQB 70; *JK v Gowrishankar*, 2019 ABCA 316.

## I. BACKGROUND

[para 1] On April 12, 2016, this Office received a complaint from an individual (the Mother) that her health information was accessed in the Alberta Electronic Health Record (the EHR, commonly referred to as Netcare) without authority under the *Health Information Act*, R.S.A. 2000, c. H-5 (the HIA or the Act) numerous times, by various individuals employed by Alberta Health Services (the Custodian).<sup>1</sup>

[para 2] The Mother also complained on behalf of her two minor children, (whom I will refer to as Child A and Child B), that their health information was accessed in the EHR/Netcare without authority under the Act numerous times, by various individuals employed by the Custodian.<sup>2</sup>

[para 3] The Mother also complained that Child A's health information in the Clinibase electronic medical record system (Clinibase) was accessed without authority by an individual employed by the Custodian.

[para 4] In addition, the Mother complained that Child A's health information in the Sunrise Clinical Manager electronic medical record system (SCM) was accessed without authority by individuals employed by the Custodian.

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<sup>1</sup> Complainant's Mother's Request for Review/Complaint received April 12, 2016.

<sup>2</sup> Section 104(1)(c) of the Act permits the guardian of an individual who is under 18, and who does not meet the criterion in clause (b), to exercise any right or power conferred on an individual by the Act.

[para 5] The Commissioner appointed a Senior Information and Privacy Manager to investigate and attempt to settle the matter. Subsequently, the Mother requested an inquiry into the accesses to her health information and the health information of her two children, in the EHR/Netcare, and the accesses to Child A's health information in Clinibase and the SCM.<sup>3</sup>

[para 6] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct the inquiry to me.

[para 7] By way of letter dated November 12, 2021, I asked Child B's Mother to inform me whether Child B had now turned 18, as the information before me indicated that this may have been a possibility. If so, I requested that Child B confirm to me that he wished this inquiry to continue, and if so, to complete this Office's Change of Contact and/or Address for Service form (the Form). The Form contains a box to check if an individual is authorizing someone to act on their behalf.

[para 8] On November 22, 2021, Child B's Mother e-mailed the Form to this Office and the Custodian, signed by Child B. Child B indicated that he authorized his Mother to act on his behalf for the purposes of this complaint.

[para 9] Neither Child B's Mother nor Child B complied with my requests exactly. Child B's Mother did not inform me if Child B had in fact, turned 18. Nor did Child B specifically state that he wished this inquiry to continue.

[para 10] However, since Child B had completed the Form, I advised the parties that I would interpret the Form that Child B signed as his indication that he wished the inquiry to continue, and that he was either 18, in which case section 104(1)(a) of the HIA applied, or, alternatively, that he was under 18 and understood the nature of the right or power and the consequences of exercising the right or power, in which case section 104(1)(b) of the HIA applied.<sup>4</sup>

[para 11] The inquiry was then divided into three separate inquiries: one for the Mother, one for Child A and one for Child B. This inquiry deals solely with the complaints the Mother made regarding accesses to Child B's health information in the EHR/Netcare by the employees of the Custodian.

[para 12] Child B is the sole Complainant in this inquiry. All submissions in this inquiry have been made on his behalf by his Mother.

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<sup>3</sup> Complainant's Mother's Request for Inquiry Form received May 23, 2017.

<sup>4</sup> Letter to Parties dated December 3, 2021. As I do not have confirmation that Child B has now turned 18, he will be referred to in this inquiry as Child B or the Complainant.

## II. ISSUES

[para 13] The issues for this inquiry are as follows:

- 1. Did the Custodian or its Affiliates use the Complainant's health information in contravention of Part 4 of the HIA?**
- 2. Did the Custodian fail to safeguard the Complainant's health information in contravention of section 60 of the HIA?**

### *Scope of Inquiry*

[para 14] The Complainant's Mother provided a copy of the Complainant's Netcare audit log, showing the accesses to his health information in the EHR/Netcare for the period January 1, 2010 to March 3, 2016, with her Request for Review/Complaint Form. The Complainant's Mother attached a page titled "Statement of Claim" to her Request for Review/Complaint Form. The Complainant's Mother attached a handwritten list to the page titled "Statement of Claim" in which she identified the accesses recorded in the Complainant's Netcare audit log to his health information in the EHR/Netcare, which she alleged were made in contravention of the Act by employees of the Custodian.

[para 15] The Complainant's Mother also made multiple additional allegations in her submissions about individuals accessing, using and/or disclosing the Complainant's health information, located in the EHR/Netcare system or in paper files. The Complainant's Mother provided no evidence to support these allegations and they do not form part of this inquiry.

[para 16] This scope of this inquiry is limited to reviewing only the accesses by the Custodian or its Affiliates to the Complainant's health information in the EHR/Netcare, which the Complainant's Mother identified in item numbers 33 – 38 of her handwritten list, and determining whether those specific accesses were made in contravention of, or in compliance with, the Act.

## III. DISCUSSION OF ISSUES

- 1. Did the Custodian or its Affiliates use the Complainant's health information in contravention of Part 4 of the HIA?**

[para 17] Section 25 of the Act prohibits a custodian from using health information unless a provision of the Act authorizes doing so. It states:

*25 No custodian shall use health information except in accordance with this Act.*

[para 18] The Act defines “custodian” in section 1(1)(f)(iv) to include “a regional health authority established under the *Regional Health Authorities Act*”.

[para 19] Alberta Health Services is a custodian under the Act.<sup>5</sup>

[para 20] “Health information” is defined in section 1(1)(k) of the Act as follows:

*1(1) In this Act,*

(k) “health information” means one or both of the following:

- (i) diagnostic, treatment and care information;
- (ii) registration information;

[para 21] “Diagnostic, treatment and care information” is defined in section 1(1)(i) of the Act as follows:

*1(1) In this Act,*

(i) “diagnostic, treatment and care information” means information about any of the following:

- (i) the physical and mental health of an individual;
- (ii) a health service provided to an individual, including the following information respecting a health services provider who provides a health service to that individual:
  - (A) name;
  - (B) business title;
  - (C) business mailing address and business electronic address;
  - (D) business telephone number and business facsimile number;
  - (E) type of health services provider;
  - (F) license number or any other number assigned to the health services provider by a health professional body to identify that health services provider;
  - (G) profession;

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<sup>5</sup> Custodian’s submission dated May 14, 2021 at para. 18. See too, Order H2020-04 at para. 14.

- (H) *job classification;*
  - (I) *employer;*
  - (J) *municipality in which the health services provider's practice is located;*
  - (K) *provincial service provider identification number that is assigned to the health services provided by the Minister to identify the health services provider;*
  - (L) *any other information specified in the regulations;*
  - (iii) *the donation by an individual of a body part or bodily substance, including information derived from the testing or examination of a body part or bodily substance;*
  - (iv) *a drug as defined in the Pharmacy and Drug Act provided to an individual;*
  - (v) *a health care aid, device, product, equipment or other item provided to an individual pursuant to a prescription or other authorization;*
  - (vi) *the amount of any benefit paid or payable under the Alberta Health Care Insurance Act or any other amount paid or payable in respect of a health service provided to an individual,*
- and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record;*

[para 22] “Registration information” is defined in section 1(1)(u) of the Act as follows:

*1(1) In this Act,*

- (u) *“registration information” means information relating to an individual that falls within the following general categories and is more specifically described in the regulations:*
  - (i) *demographic information, including the individual's personal health number;*
  - (ii) *location information;*
  - (iii) *telecommunications information;*

- (iv) *residency information;*
- (v) *health and service eligibility information;*
- (vi) *billing information;*

*but does not include information that is not written, photographed, recorded or stored in some manner in a record;*

[para 23] Section 3 of the *Health Information Regulation*, AR 70/2001 states:

*3 The following information, where applicable, relating to an individual is registration information for the purposes of section 1(1)(u) of the Act:*

- (a) *demographic information, including the following:*
  - (i) *name, in any form;*
  - (ii) *signature;*
  - (iii) *photograph or electronic image of the individual's face for identification purposes;*
  - (iv) *personal health number or any other unique identification number that is used to identify the individual as eligible for, or a recipient of, a health service;*
  - (v) *gender;*
  - (vi) *date of birth;*
  - (vii) *birth information, including*
    - (A) *the birth facility; and*
    - (B) *birth order, in the case of a multiple birth*
  - (viii) *marital status;*
  - (ix) *date of death;*
  - (x) *treaty status;*
  - (xi) *whether the individual is a registrant or a dependant of a registrant under the Health Insurance Premiums Act;*

- (b) *location, residency and telecommunications information, including the following:*
- (i) *home, business and mailing addresses, electronic address and telecommunications numbers;*
  - (ii) *health regions, as established under the Regional Health Authorities Act, in which the individual resides and previously resided;*
  - (iii) *citizenship or immigration status, including the date on which the individual's current immigration status expires if the individual is not a Canadian citizen or landed immigrant;*
  - (iv) *date of entry into Canada and into Alberta;*
  - (v) *province or country of birth or of last residence;*
  - (vi) *date on which the individual became or is expected to become a permanent resident of Canada;*
  - (vii) *in the event the individual is a registrant or dependant under the Health Insurance Premiums Act and the individual intends to be temporarily or permanently absent from Alberta,*
    - (A) *date of departure;*
    - (B) *destination and intended date of arrival at the destination;*
    - (C) *forwarding address;*
    - (D) *intended date of return, where the individual intends to be temporarily absent;*
    - (E) *purpose of absence;*
- (c) *health service eligibility information, including the following:*
- (i) *whether the individual is registered as a registrant or dependant under the Health Insurance Premiums Act;*
  - (ii) *whether the individual is eligible to receive health services that are directly or indirectly paid for by the Government of Alberta, in full or in part;*
  - (iii) *whether the individual has elected to opt out of the Alberta Health Care Insurance Plan and the Hospitalization Benefits Plan;*

- (iv) *whether the individual is exempt from the requirement to register under the Health Insurance Premiums Act;*
  - (v) *whether the individual is eligible to receive a reduction or waiver of premiums or charges payable in respect of health services and the level or amount or both, of that reduction or waiver;*
  - (vi) *information about any program of a custodian that is related to the information described in subclauses (i) to (vi), including the effective and termination dates of the program and, if applicable, the program name;*
- (d) *billing information, including the following:*
- (i) *information about amounts owed by the individual to the custodian;*
  - (ii) *method of payment;*
  - (iii) *the individual's account number;*
  - (iv) *if another person is liable for or will be billed for the amount owed by the individual, that person's name and account number.*

[para 24] Section 1(1)(w) of the Act defines “use” as follows:

*1(1) In this Act,*

- (w) *“use” means to apply health information for a purpose and includes reproducing the information, but does not include disclosing the information.*

[para 25] The circumstances in which a custodian may use health information are set out in section 27 of the Act. Section 27(1) states:

*27(1) A custodian may use individual 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*

- ...
- (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.*

[para 26] The definition of a “health service” is set out in section 1(1)(m) of the Act as follows:

*1(1) In this Act,*

*(m) “health service” means a service that is provided to an individual for any of the following purposes:*

- (i) protecting, promoting or maintaining physical and mental health;*
- (ii) preventing illness;*
- (iii) diagnosing and treating illness;*
- (iv) rehabilitation;*
- (v) caring for the health needs of the ill, disabled, injured or dying,*  
*but does not include a service excluded by the regulations.*

[para 27] Section 28 of the Act regulates the use of health information by an affiliate. It states:

*28 An affiliate of a custodian must not use health information in any manner that is not in accordance with the affiliate’s duties to the custodian.*

[para 28] “Affiliate” is defined in section 1(1)(a) of the Act as follows:

*1(1) In this Act,*

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

- (i) an individual who is employed by the custodian,*
- (ii) a person who performs a service for the custodian as an appointee, volunteer or student under 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,*
- (iv) *any information manager as defined in section 66(1), and*
- (v) *a person who is designated under the regulations to be an affiliate, but does not include*
- (vi) *an agent as defined in the Health Insurance Premiums Act, or*
- (vii) *a health information repository other than a health information repository that is designated in the regulations as an affiliate;*

[para 29] As noted by the adjudicator in Order H2020-04 at paragraph 6:

[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 30] In Order F2020-12, the adjudicator described the Alberta EHR at paragraph 15 as follows:

[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 ...

[para 31] As stated in previous Orders of this Office, accessing health information in the EHR/Netcare is considered to be a “use” of health information under the Act.<sup>6</sup>

[para 32] Section 56.5 of the Act sets out the circumstances in which authorized custodians may use health information in the EHR. 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*

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<sup>6</sup> See, for example, Orders H2020-04 at paras. 7 and 71, H2021-01 at paras. 17 and 19, and H2021-06 at para. 8.

- (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 33] Section 4 of the *Alberta Electronic Health Regulation*, AR 118/2010 sets out what “prescribed health information” in section 56.1(c) of the Act includes. It states:

*4 For the purposes of section 56.1(c) of the Act, prescribed health information in respect of an individual includes:*

- (a) *the demographic information that uniquely identifies the individual,*
- (b) *information that uniquely identifies health service providers who provide health services to the individual,*
- (c) *information about where health services are performed on and delivered to the individual,*
- (d) *information about key clinical events at the point of care in respect of the individual,*
- (e) *known allergies and intolerances of the individual,*
- (f) *immunizations of the individual,*
- (g) *prescription information in respect of the individual,*
- (h) *dispensing information relating to prescriptions in respect of the individual,*

- (i) *drug-to-drug interaction alerts in respect of the individual,*
- (j) *laboratory test results of the individual,*
- (k) *diagnostic imaging reports and tests of the individual,*
- (l) *diagnostic imaging digital images of the individual, and*
- (m) *other medical reports of the individual.*

[para 34] In this case, all of the accesses the Complainant’s Mother asserted in her handwritten list were made by the Custodian or its Affiliates to the Complainant’s health information in the EHR/Netcare in contravention of the Act, occurred after September 1, 2010.

[para 35] As noted above, Alberta Health Services is a custodian under section 1(1)(f)(iv) of the Act. Alberta Health Services is therefore an authorized custodian under section 56.1(b)(i) of the Act.<sup>7</sup>

[para 36] While section 56.5(1) only refers to the use of health information by “authorized custodians” and does not mention the use of health information by affiliates, 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:<sup>8</sup>

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

[para 37] Additionally, section 62(4) provides:

*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 38] At paragraph 16 of Order H2021-06, the adjudicator made the following comments regarding the use of health information by affiliates:

[para 16] In *JK v. Gowrishankar*, 2019 ABCA, the Alberta Court of Appeal held that under section 62(2) affiliates have, subject to their duties with their custodian, the same authority as their related custodians to use health information. The Court stated at paras 25 to 28:

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<sup>7</sup> See too Order H2021-06 at para. 11.

<sup>8</sup> See Orders H2020-04 at paras. 16 – 19, H2021-01 at paras. 18 – 19, H2021-06 at paras. 15 – 16, and *Gowrishankar v. JK*, 2018 ABQB 70 at paras. 44 - 45 (upheld on appeal at *JK v. Gowrishankar*, 2019 ABCA 316).

Turning next to affiliates of custodians. While there is no provision in the *HIA* that expressly authorizes an affiliate to collect, use, or disclose health information, this authorization is implicit in the Act. Section 62(2) provides that:

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

(emphasis added)

This section contemplates that affiliates will be collecting, using, and disclosing health information. As a number of the defined custodians are entities, such as the department of the responsible Minister, it is the employees and contractors of those entities that collect, use, and disclose the information as prescribed by the *Act*. Because the *Act* permits a custodian to collect, use, and disclose information for specific purposes, its affiliates are also permitted to collect, use, and disclose the information for those same purposes. Indeed, this is the interpretation previously adopted by the OIPC: *Re Alberta Health and Wellness* (March 25, 2008), 2008 CanLII 88791 (AB OIPC), Order H2007-005 and Order P2007-013.

The nature of an affiliates relationship with the custodian imposes limitations on how an affiliate may collect, use and disclose health information. An affiliate may only collect, use or disclose health information in accordance with its duties to the custodian. This must be inferred from the provisions that prohibit affiliates from collecting, using or disclosing health information in a manner that is not in accordance with the affiliate's duties to the custodian: ss 24, 28, 43. Affiliates must also comply with any policies or procedures established by the custodian: s 63(4)(b).

In summary, the collection and use of health information by a custodian (including an authorized custodian) and its affiliates is authorized by the Act so long as i) it is for a purpose permitted by the Act; and ii) the information is essential to carry out the intended purpose. An affiliate is subject to further limitations based on the affiliate's duties to the custodian, and any policies or procedures put into place by the custodian. Custodians and affiliates are permitted to disclose health information with or without consent, depending on the circumstances.

[para 39] Accordingly, like the Custodian, an affiliate of the Custodian may use health information only for purposes set out in section 27 of the Act.

#### *Accesses to the Complainant's health information in the EHR/Netcare*

[para 40] The Complainant's Mother questioned a number of accesses to the Complainant's health information in the EHR/Netcare that occurred in 2011, 2013, 2014 and 2015.

[para 41] In item numbers 33 – 38 of the Complainant’s Mother’s handwritten list attached to her Request for Review/Complaint Form, the Complainant’s Mother identified the accesses recorded in the Complainant’s Netcare audit log which she believed were made without authority under the Act, and in some cases provided a reason why she believed the access was unauthorized, as follows:<sup>9</sup>

33. Nov 6/15 [Name] viewed [Complainant] from [location/facility] never been.
34. May 25/15 [Name] viewed [Complainant] electronic Netcare from [facility] never been.
35. Oct 16/14 [Name] viewed [Complainant] electronic Netcare from AHS [location] [facility].
36. Sept 18/13, Sept 16/13, Sept 3/13 Ap. 5/13 [Name] from [location] again viewed [Complainant] electronic Netcare.
37. Sept. 16/13 [Name] viewed [Complainant] electronic Netcare from [location]
38. Nov 4/11 [Name] from [location] viewed [Complainant] electronic Netcare.

[para 42] The Custodian advised that individuals named by the Complainant’s Mother in item numbers 33 – 38 of her handwritten list were affiliates of the Custodian at the time they accessed the Complainant’s health information. The accesses by these individuals, which the Complainant’s Mother identified in her handwritten list as accesses which she believed were made without authorization, are accordingly, within the scope of this inquiry.<sup>10</sup>

*Accesses Identified in Item Numbers 33, 34, 35, 37 and 38*

[para 43] The Custodian conducted an investigation and determined that the accesses to the Complainant’s health information identified by the Complainant’s Mother in item numbers 33, 34 and 38 of her handwritten list were made by employees of the Custodian in accordance with section 27(1)(a) of the Act, and the accesses to the Complainant’s health information identified by the Complainant’s Mother in item numbers 35 and 37 of her handwritten list were made by employees of the Custodian in accordance with section 27(1)(g) of the Act.<sup>11</sup>

[para 44] As noted above, section 27(1)(a) permits a custodian to use health information in order to provide health services, and section 27(1)(g) permits a custodian to use 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 45] In its submission, the Custodian provided details for each of the accesses in item numbers 33, 34, 35, 37 and 38, which included an explanation on the role of the employee, what

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<sup>9</sup> Complainant’s Mother’s handwritten list attached to Complainant’s Mother’s Request for Review/Complaint Form received April 12, 2016.

<sup>10</sup> Custodian’s submission dated May 14, 2021.

<sup>11</sup> *Ibid.*

type of information was accessed and how the access met the requirements of either section 27(1)(a) or section 27(1)(g), as applicable.

[para 46] The Custodian also provided the following information about the EHR/Netcare, Netcare PD, and the Netcare audit log:

13. Netcare is a repository that contains both demographic information and other health information about a patient. Netcare PD is an iteration of Netcare that only shows demographic information about a patient. Where 'Netcare PD' is noted in the audit log, only demographic information was accessible to the user.
14. One of the columns in the Netcare audit is titled 'Facility'. In general, this column denotes the primary facility to which the User is affiliated. However, it is not uncommon for AHS employees to work at multiple facilities which would not be reflected in this column. The 'Facility' column does not indicate the facility the user was at when they accessed the patient's health information.

[para 47] The Custodian provided the following explanations for the accesses made by its employees to the Complainant's health information, identified in item numbers 33, 34, 35, 37 and 38 of the Complainant's Mother's handwritten list. For each of these item numbers, the Custodian referenced what the Complainant's Mother had written in her handwritten list, and then provided its explanation:<sup>12</sup>

Access 33:

*November 6, 2015 [Individual] viewed [Complainant] from [location/facility] – never been.*

66. [Individual] is a reception clerk employed with AHS in [location]. She accessed [the Complainant]'s demographic health information in Netcare PD on November 4, 2011, as part of a last name search for another patient with the same last name as [the Complainant].
67. [Individual] was an affiliate of AHS at the time of access. Access is authorized under s 27(1)(a) of the HIA, for the provision of health services.

Access 34:

*May 25, 2015 [Individual] viewed [Complainant] electronic Netcare from [facility], never been.*

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<sup>12</sup> I have organized the Custodian's explanations for the accesses in the order that the Complainant's Mother identified the accesses in her handwritten list. As a result, the Custodian's paragraph numbering is out of order in some instances.

68. [Individual] is was [sic] a registration clerk employed with AHS who worked at the [location/facility] at the time of access. [Individual] accessed [Complainant]'s demographic health information in Netcare PD on May 25, 2015. [Complainant] was seen at the [location/facility] on this date and information was accessed to validate [Complainant]'s health care number.
69. The Netcare audit log [the Complainant's Mother] obtained for this access notes the facility as [facility]. This user may have had an affiliation with the [facility], but was working at the [location/facility] at the time of access. The Facility column in the Netcare audit log does not indicate the facility from which the access occurred, but rather is the facility that the user was affiliated with in some way.
70. Access is authorized under section 27(1)(a) of the HIA, for the provision of health services.

Access 35:

*October 16, 2014 [Individual] viewed [Complainant] electronic Netcare from AHS [location] [facility].*

71. [Individual] was an accounts receivable clerk employed by AHS in [location] at the time of access, and viewed [Complainant]'s demographic health information in Netcare PD on October 16, 2014, for the purposes of [redacted] billing.
72. Access is authorized under s 27(1)(g), for reporting, obtaining or processing payment for health services.

Access 37:

*September 16, 2013 [Individual] viewed [Complainant] electronic Netcare from [location]*

73. [Individual] was an accounts receivable clerk employed by AHS in [location] at the time of access, and viewed [Complainant]'s demographic health information in Netcare PD on September 16, 2013, for the purposes of [redacted] billing.
74. [Individual] was an affiliate of AHS at the time of access. Access is authorized under s 27(1)(g), for reporting, obtaining or processing payment for health services.

Accesses 6, 27 and 38:<sup>13</sup>

...

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<sup>13</sup> The Custodian's reproduction of the 6<sup>th</sup> and 27<sup>th</sup> accesses identified by the Complainant's Mother in her handwritten list have been excluded as they do not involve accesses to the Complainant's health information.

November 4, 2011 [Individual] from [location] viewed [Complainant]'s electronic Netcare

36. [Individual] accessed demographic health information in Netcare PD on November 4, 2011, for [Child A], [the Complainant], and [the Complainant's Mother]. At the time of access, [Individual] was a secretary at the [facility], and was an employee of AHS. During investigation, AHS Privacy determined that the demographic information was viewed in searching for another unrelated patient, with the same last name as [the Complainant's Mother, Child A, and the Complainant]. When trying to locate a patient by last name (versus ULI, for example) Netcare PD will bring up all relevant records, for the service provider to search through. Netcare PD only contains demographic information.
37. [Individual] was an affiliate of AHS at the time of access. Accesses are authorized under s 27(1)(a), for the provision of health services.

[para 48] The Custodian has explained how the location identified under the heading "Facility" in the Netcare audit log denotes the *primary* facility to which the User is affiliated.

[para 49] The Custodian has explained that it is not uncommon for AHS employees to work at multiple facilities and that where this is the case, the facility that is noted under the heading "Facility" in the Netcare audit log reflects the primary facility to which the employee is affiliated, which may not be the facility where the employee was actually working at when they accessed the patient's health information. I accept the Custodian's explanation.<sup>14</sup>

[para 50] While I understand how seeing a reference in their Netcare audit log to a facility or location they have not attended, can lead an individual to question whether their health information has been accessed without authorization, given the Custodian's explanation about the information that is recorded in the "Facility" column of the Netcare audit log, it does not automatically follow that the individual's health information has in fact been accessed without authorization.

[para 51] The Custodian has also explained how Netcare PD permits users (in this case the Custodian's employees) to search for an individual/patient to whom health services are being provided, by their last name, and to scroll through the matches that are produced in order to locate the correct individual/patient.

[para 52] As I understand the Custodian's submission, every individual whose name appears as a match to the last name search in Netcare PD, would see an access to their demographic information in Netcare PD in their Netcare audit log, simply because their name appeared as a match to the last name of the individual/patient the user/employee was searching for.

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<sup>14</sup> I also note that in Order F2020-12 at paragraph 27, the Custodian submitted "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".

[para 53] As I understand the Custodian's position, where an employee uses Netcare PD to look up an individual/patient, using their last name, who is, has, or will be receiving a health service, the employee is viewing the demographic information produced by the broad search query as part of their job responsibilities. In these circumstances, viewing the demographic information of the individuals whose last name matches the individual/patient who is the subject of the search is a use of that information that is permitted under section 27(1)(a) of the Act. I agree that section 27(1)(a) applies in these particular circumstances.<sup>15</sup>

[para 54] The Complainant's Mother did not make any persuasive arguments or provide any evidence in her rebuttal submissions that would refute the submissions and conclusions reached by the Custodian following its investigation that the accesses to the Complainant's health information by the employees of the Custodian, identified in item numbers 33, 34, 35, 37 and 38 of the Complainant's Mother's handwritten list, were authorized under the Act.

[para 55] Having reviewed the Custodian's submissions and the Complainant's Mother's submissions, I find the Custodian has established that the accesses to the Complainant's health information made by its employees, as Affiliates of the Custodian, which were identified in items numbers 33, 34 and 38 of the Complainant's Mother's handwritten list, were in compliance with section 27(1)(a) of the Act, and that the accesses to the Complainant's health information by the Custodian's employees which the Complainant's Mother identified in item numbers 35 and 37 of her handwritten list, were in compliance with section 27(1)(g) of the Act.

#### *Accesses Identified in Item Number 36*

[para 56] In item number 36 of her handwritten list, the Complainant's Mother alleged that an employee of the Custodian (the Employee) accessed the Complainant's health information in the EHR/Netcare on four occasions in 2013: April 5, 2013, September 3, 2013, September 16, 2013 and September 18, 2013, in contravention of the Act. The Complainant's Mother stated that the Employee "used to be roommates [sic] with my ex's cousin".<sup>16</sup>

[para 57] The Complainant's Netcare audit log shows accesses to the Complainant's health information in Netcare PD by the Employee on April 5, 2013, September 3, 2013 and September 18, 2013; however, there is no evidence in the Complainant's Netcare audit log of the Employee accessing the Complainant's health information in the EHR/Netcare or Netcare PD on September 16, 2013.

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<sup>15</sup> Where an employee of the Custodian accesses Netcare PD and views demographic information for purposes *unrelated* to their job responsibilities, as determined in Investigation Report H2018-IR-01, such use of the information is a contravention of section 27 of the Act. There is no information or evidence before me to suggest that the employees in item numbers 33 and 38 of the Complainant's Mother's handwritten list accessed Netcare PD and viewed the demographic information in the search results, which included the Complainant's demographic information, for purposes unrelated to their job responsibilities.

<sup>16</sup> Complainant's Mother's Request for Review/Complaint Form received April 12, 2016.

[para 58] The Custodian advised that the Employee did not access the Complainant's information in Netcare on September 16, 2013.<sup>17</sup>

[para 59] In the absence of an entry in the Complainant's Netcare audit log evidencing the Employee accessing the Complainant's health information in EHR/Netcare or Netcare PD on September 16, 2013, I am unable to find that the Employee accessed the Complainant's health information in the EHR/Netcare or Netcare PD on September 16, 2013 in contravention of the Act.

[para 60] With respect to the Complainant's Mother's allegation that the Employee accessed the Complainant's health information in the EHR/Netcare on April 5, 2013, September 3, 2013 and September 18, 2013 in contravention of the Act, the Custodian determined that the Employee accessed the Complainant's demographic health information in Netcare PD on these three dates without authorization.<sup>18</sup>

[para 61] The Custodian stated that the Employee "was a clerk employed by AHS at the [location/facility] at the time of the accesses". It stated that the Employee "only has access to demographic health information in Netcare PD and did not have access to patient health information beyond demographics".<sup>19</sup>

[para 62] The Custodian advised that during the investigative interview, the Employee acknowledged that the access to the Complainant's health information was not work related, and acknowledged a personal connection to the Complainant's Mother. The Custodian advised that it concluded that the Complainant's demographic health information was accessed by the Employee in contravention of section 27 of the HIA.<sup>20</sup>

[para 63] I find that the Employee accessed and therefore used the Complainant's health information on April 5, 2013, September 3, 2013, and September 18, 2013 without authorization, in contravention of Part 4 of the Act.<sup>21</sup>

[para 64] Section 62(2) of the Act states that "Any collection, use or disclosure of health information by an affiliate of a custodian is considered to be a collection, use or disclosure by the custodian". Accordingly, pursuant to section 62(2) of the Act, I find that the Custodian contravened Part 4 of the Act when the Employee used the Complainant's health information in Netcare PD on April 5, 2013, September 3, 2013 and September 18, 2013 in contravention of the Act.

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<sup>17</sup> Custodian's letter dated January 7, 2022.

<sup>18</sup> Custodian's submission dated May 14, 2021 at paras. 76 – 78, and Custodian's letter dated January 7, 2022.

<sup>19</sup> Custodian's submission dated May 14, 2021 at para. 77.

<sup>20</sup> Custodian's submission dated May 14, 2021 at para. 78 and Custodian's letter dated January 7, 2022.

<sup>21</sup> As noted herein, the definition of "health information" in section 1(1)(k) of the Act includes "registration information". Pursuant to section 1(1)(u) of the Act, and section 3 of *Health Information Regulation*, AR 70/2001, "registration information" includes demographic information.

## 2. Did the Custodian fail to safeguard the Complainant's health information in Netcare in contravention of section 60 of the HIA?

[para 65] Section 60 of the Act sets out the duty on custodians to protect health information. It states:

*60(1) A custodian must take reasonable steps in accordance with the regulations to maintain administrative, technical and physical safeguards that will*

- (a) protect the confidentiality of health information that is in its custody or under its control and the privacy of the individuals who are the subjects of that information,*
  - (b) protect the confidentiality of health information that is to be stored or used in a jurisdiction outside Alberta or that is to be disclosed by the custodian to a person in a jurisdiction outside Alberta and the privacy of the individuals who are the subjects of that information.*
  - (c) protect against any reasonably anticipated*
    - (i) threat or hazard to the security or integrity of the health information or of loss of the health information, or*
    - (ii) unauthorized use, disclosure or modification of the health information or unauthorized access to the health information,*
- and*
- (d) otherwise ensure compliance with this Act by the custodian and its affiliates.*

*(2) The safeguards to be maintained under subsection (1) must include appropriate measures*

- (a) for the security and confidentiality of records, which measures must address the risks associated with electronic health records, and*
- (b) for the proper-disposal of records to prevent any reasonably anticipated unauthorized use or disclosure of the health information or unauthorized access to the health information following its disposal.*

*(3) In subsection (2)(a), "electronic health records" means records of health information in electronic form.*

[para 66] Section 60 requires a custodian to take reasonable steps to protect health information from foreseeable risks such as unauthorized access.

[para 67] I asked the Custodian to tell me, if it determined that any of the accesses to the Complainant's health information identified in the Complainant's Mother's handwritten list were

made by an Affiliate without authorization, what steps the Custodian had taken to comply with the requirements of section 60 of the Act and the regulations, prior to the occurrence of the unauthorized access or accesses.

[para 68] I also asked the Custodian to tell me, if it determined that any of the accesses to the Complainant's health information identified in the Complainant's Mother's handwritten list were made by an Affiliate without authorization, whether that individual received privacy training prior to the unauthorized access, and whether they signed anything acknowledging the training and/or agreeing to adhere to the Custodian's policies.

[para 69] Finally, I asked the Custodian to tell me, if it determined that any of the accesses to the Complainant's health information identified in the Complainant's Mother's handwritten list were made by an Affiliate without authorization, what steps it had taken or policies it had subsequently implemented, to comply with section 60.

[para 70] The Custodian provided the following submissions (footnotes omitted):<sup>22</sup>

82. The legislation requires custodians to take reasonable mitigation steps; however it does not demand perfection. This principle was confirmed in *Alberta Health Services (Re)*, 2016 CanLII 11567 (AB OIPC) at para. 14, attached at TAB 2:

The Custodian is not obliged to maintain safeguards that will completely eliminate risks of breaches of the Act. There will be instances, such as the case here, that individuals will circumvent the safeguards.”

Notwithstanding AHS' best efforts, this is unfortunately what occurred in this case.

*General Safeguards:*

83. AHS has extensive safeguards in place to mitigate the risk of unauthorized use of health information. These safeguards include periodic auditing of all systems to monitor usage, and sophisticated password protection for all systems. Affiliates are only provided access to the minimum amount of health information required in their employment role.
84. AHS has a well-established and robust suite of policies governing the protection of privacy and access to health information. The AHS policies that relate to this inquiry are as follows:
  - Policy 1105 – Access to Information (Physical, Electronic, Remote)
  - Policy 1109 – Collection, Access, Use and Disclosure of Information
  - Policy 1112 – Information Security and Privacy Safeguards
  - Policy 1142 – Information Classification Policy

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<sup>22</sup> Custodian's submission dated May 14, 2021.

- Policy 1143 – Information Technology Acceptable Use
- Policy 1144 – Monitoring and Auditing of Information Technology Resources
- Policy 1177 – Privacy Protection and Information Access

All of these policies, aside from Policy 1177, were in place in 2013 when the unauthorized accesses occurred on this file. Policy 1177 was established in 2018. The policies apply to all affiliates of AHS. Attached to these submissions as TAB 3 are the current versions of the above policies.

85. Since 2016, AHS has moved to an online learning system called My Learning Link which tracks the training modules completed by each Employee in a centralized manner. The Required Organizational Learning (ROL) module related to privacy is called “InfoCare – On Our Best Behaviours” (formerly “*Collect It Protect It*”). It is an online training course which must be completed within 30 days of being hired and every three years thereafter. The training requirement includes the electronic signing of the AHS Confidentiality and User Agreement, which also must be re-signed every three years. The privacy training covers AHS privacy policies as well as the AHS Code of Conduct.
86. Attached as TAB 4 is an overview of the “On Our Best Behaviours” training course, and a description of the mandatory training requirements taken from the AHS “Insite” intranet system. Prior to 2016, privacy training was not centrally tracked in the same manner as it is today and I am informed by AHS Privacy, that information about an affiliate’s privacy training was often held with local management.
87. When a potential breach is identified, investigation and interviews are undertaken by AHS. Access for that affiliate may be suspended while the investigation is ongoing. The affiliate may be suspended from work, with or without pay, while the investigation is ongoing.
88. Where a privacy breach is confirmed, further disciplinary action may be taken against the affiliate, including but not limited to suspension from work with or without pay or termination. The determination of discipline is made on a case-by-case basis and aligns with the principles of progressive discipline and labour and employment jurisprudence. If the affiliate remains an employee, AHS may also undertake proactive or follow-up auditing of the employee’s actions to monitor their accesses. The affiliate will be reassigned privacy training and instructed to review privacy policies, practices, and the manager maintains performance management.

[para 71] The Custodian submitted that additionally, a patient’s health information can be masked in Netcare, such that any user must identify the reason for the access prior to viewing any health information, including demographic information.<sup>23</sup>

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<sup>23</sup> *Ibid.*, at para. 89.

[para 72] The Custodian advised that when the privacy breaches were suspected in 2016 (after the Complainant’s Mother had submitted her Request for Review/Complaint Form to this Office), it conducted an investigation which included interviewing the Employee. The Employee indicated during their interview that they had completed privacy training and had executed a Confidentiality and User Agreement upon hire, which would have been a requirement.<sup>24</sup>

[para 73] The Custodian advised that it was able to confirm that the Employee had taken privacy training in 2011 (“Information Privacy and IT Security Awareness”) prior to the unauthorized access in 2013.<sup>25</sup>

[para 74] The Custodian advised that after the unauthorized accesses were discovered in 2016, the Employee was required to, and did complete the InfoCare – On Our Best Behaviors (then known as *Collect It Protect It*) training module, and re-signed the Confidentiality and User agreement. It further advised that the Employee would have been subject to managerial monitoring and performance management. The Custodian advised that the Employee faced employment based discipline.<sup>26</sup>

[para 75] The Custodian stated that the Employee remains employed by AHS, and as with all employees, renews privacy training every three years.<sup>27</sup>

[para 76] The Custodian advised that following these unauthorized accesses, the Complainant’s health information “was masked in Netcare which provides an additional layer of protection.” It advised that this ‘masking’ further addresses the specific risk posed by the Employee to the Complainant.<sup>28</sup>

[para 77] In conclusion, the Custodian submitted:<sup>29</sup>

95. It is submitted that the general and specific safeguards put in place by AHS were reasonable in this case, despite the unfortunate instance of unauthorized access. As such, it is submitted that AHS did not violate section 60 of the HIA.

[para 78] The Custodian is correct that the standard required by section 60 is one of reasonableness and not perfection. As stated by the adjudicator in Order H2021-01 at paragraph 46:<sup>30</sup>

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<sup>24</sup> *Ibid.*, at para. 91.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, at para. 92. Section 8.1(7) of *Health Information Regulation*, AR 70/2001 states that a custodian must establish sanctions that may be imposed against affiliates who breach, or attempt to breach, the custodian’s administrative, technical and physical safeguards in respect of health information. The Custodian’s submission dated May 14, 2021 indicates it has established such sanctions.

<sup>27</sup> *Ibid.*, at para. 93.

<sup>28</sup> *Ibid.*, at para. 94.

<sup>29</sup> *Ibid.*, at para. 95.

<sup>30</sup> See too, Order H2022-01 at para. 73.

[para 46] Section 60(1) requires a custodian to take reasonable steps to maintain administrative, technical and physical safeguards. This provision does not require perfection; a breach of the HIA does not necessarily mean that reasonable safeguards were not in place.

[para 79] Despite the efforts and measures taken by the Custodian, which included implementing privacy policies, providing privacy training to the Employee, and having the Employee sign a Confidentiality and User Agreement, the Employee accessed the Complainant's health information in Netcare PD in contravention of the Act.

[para 80] In light of the measures the Custodian had put in place in 2013 to address its obligations under section 60, including the policies it had implemented, the privacy training it provided to its employees, and the requirement that its employees sign a Confidentiality and User Agreement upon hire, I find that the Custodian had taken reasonable steps to protect health information from unauthorized access, and complied with the requirements of section 60 in 2013 when the Employee accessed the Complainant's health information.

[para 81] The Custodian advised that since 2016, it has moved to an online learning system which included a privacy module called "InfoCare – On Our Best Behaviours". The training course must be completed within 30 days of being hired and every three years thereafter. The training requirement includes the electronic signing of the AHS Confidentiality and User Agreement, which also must be re-signed every three years. The privacy training covers AHS privacy policies as well as the AHS Code of Conduct.

[para 82] The Custodian advised that following the discovery of the unauthorized accesses in 2016, the Employee was required to, and did complete the InfoCare – On Our Best Behaviors (then known as *Collect It Protect It*) training module, and re-signed the Confidentiality and User agreement. It further advised that the Employee would have been subject to managerial monitoring and performance management. It also advised that the Employee faced employment based discipline. The Custodian also advised that the Employee, as with all employees, renews privacy training every three years. Finally, the Custodian masked the Complainant's health information in Netcare to provide an additional layer of protection.

[para 83] In her rebuttal submission, the Complainant's Mother took issue with the fact that the Employee was still employed by the Custodian.<sup>31</sup> If the Complainant's Mother is asking that I order the Custodian to terminate the Employee's employment, I do not have the authority under the Act to make such an order. I do not have the authority to issue fines, disciplinary actions or other punitive measures.<sup>32</sup>

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<sup>31</sup> Complainant's Mother's rebuttal submission dated May 21, 2021 at para. 2.

<sup>32</sup> This has been confirmed in other Orders of this Office (see, for example, Order H2021-01 at para. 12).

[para 84] There is no evidence before me to indicate that the Employee accessed the Complainant's health information in contravention of the Act after the Custodian addressed the Employee's actions with them following its investigation in 2016, and took the steps it took to protect the Complainant's health information from any further unauthorized access by the Employee.

[para 85] I find that by requiring the Employee to complete the *Collect It Protect It* training module and re-sign the Confidentiality and User Agreement after the unauthorized accesses were discovered in 2016, and by masking the Complainant's health information in Netcare to protect it from any further unauthorized accesses, and by implementing the additional measures in 2016 for all employees regarding privacy training, the Custodian met its obligations under section 60.

#### **IV. ORDER**

[para 86] I make this Order under section 80 of the Act.

[para 87] I find that with the exception of the three accesses by the Employee in 2013, the remainder of the accesses by the Custodian's employees to the Complainant's health information were made in compliance with Part 4 of the Act.

[para 88] With respect to the three accesses by the Employee to the Complainant's health information in Netcare PD on April 5, 2013, September 3, 2013 and September 18, 2013, given the Custodian's concession that these three accesses were unauthorized, I find that the Employee used the Complainant's health information in contravention of Part 4 of the Act. I also find that pursuant to section 62(2) of the Act, when the Employee used the Complainant's health information in Netcare PD on April 5, 2013, September 3, 2013 and September 18, 2013 in contravention of the Act, the Custodian contravened Part 4 of the Act.

[para 89] I find that the Custodian had taken reasonable steps to meet its duty under section 60 of the Act when the unauthorized accesses occurred in 2013. I find that the Custodian took reasonable steps in 2016 to meet its obligations under section 60 after determining the Employee had accessed the Complainant's health information without authorization. In conclusion, I find the Custodian has met its duty under section 60 of the Act in this case.

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Carmen Mann  
Adjudicator