

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2023-03

May 2, 2023

Dr. Mahmoud Ismael

Case File Number 010710

Office URL: www.oipc.ab.ca

Summary: An individual (the Complainant) complained that VM, an affiliate of Dr. Mahmoud Ismael (the Custodian), accessed her health information through Netcare in contravention of the *Health Information Act* (the HIA). The Complainant alleged that VM accessed her Netcare file and obtained sensitive health information about her which she disclosed to the Complainant's family after the friendship between the Complainant and VM had ended.

Although repeatedly asked for submissions, the Custodian did not provide any submissions addressing the substance of the complaint during the Inquiry.

The Adjudicator found that it was appropriate, in this case, to find that the Custodian contravened the HIA in respect of access to Netcare by VM.

The Adjudicator ordered the Custodian to maintain safeguards required by section 60(1) of the HIA and to establish or adopt policies and procedures required by section 63(1) of the HIA. The Adjudicator also ordered the Custodian to ensure his affiliates were aware of and adhere to the safeguards and policies and procedures required under sections 60(1) and 63(1) of the HIA.

Statutes Cited: **AB:** *Alberta Electronic Health Record Regulation*, Alberta Regulation 118/2010 s. 3(1); *Health Information Act*, RSA 2000, c. H-5 ss. 1(1)(f)(ix), 25, 27(1), 28, 56.1(a), 56.1(b)(ii), 56.5(1)(b), 56.6(1), 62(2), 60, 60(1), 60(1)(a), 60(1)(c), 60(1)(d),

63(1), 80, 80(3)(a), 80(3)(e); *Health Information Regulation*, Alberta Regulation 70/2001, ss. 2(2)(a), 8(6).

Authorities Cited: AB: Orders H2004-005, H2006-003, H2007-005, H2016-02, H2020-02, H2021-01, H2022-01

I. BACKGROUND

[para 1] On October 3, 2018, the Complainant made a request to Alberta Health Service for audit logs (the Audit Logs) listing who accessed her Netcare file from the period of July 1, 2008 to October 3, 2018.

[para 2] Once the Complainant received the Audit Logs she identified an occasion when, according to the Complainant, VM (the Affiliate), an employee and affiliate of Dr. Mahmoud Ismael (the Custodian) accessed her health information through Netcare for reasons unrelated to her medical care. The Complainant believes that VM accessed her Netcare records to obtain sensitive health information that VM subsequently disclosed to the Complainant's family.

[para 3] On October 11, 2018, the Complainant filed a complaint alleging that her health information on Netcare had been accessed in contravention of the *Health Information Act*, R.S.A. 2000, c. H-5 (the HIA).

[para 4] Investigation and mediation were authorized to resolve the issues raised by the complaint, but did not do so. The matter proceeded to inquiry.

II. ISSUES

[para 5] Given that the Complainant's complaint was directed at the actions of an affiliate of the Custodian, the issue for the inquiry was initially framed as follows:

Issue A: Did the employee (affiliate) access health information in contravention of the *Health Information Act*?

[para 6] However, the HIA (and previous orders of this Office) clearly establish that a custodian may be held to have contravened the Act as a function of contravention by their affiliate. (See, for example, Order H2022-01 at para. 14). Whether this issue will be considered has been held to depend on whether the custodian has put appropriate measures in place to protect health information. In Order H2020-02, the Director of Adjudication found that in the circumstances before her, in which the Custodian had implemented proper safeguards against unauthorized access to health information as required by sections 60(1) and 63(1) of the HIA, it was not appropriate to consider whether an affiliate's unauthorized access to Netcare was also a contravention of the HIA by the custodian.

[para 7] In order to obtain information that would help me determine whether the present case is an appropriate one for considering whether the Custodian had contravened the Act by virtue of his affiliate's access to Netcare, I wrote to the parties on December 7, 2022. I referenced Order H2022-01, and indicated that I would similarly consider whether the circumstances were such that it would be appropriate to find that the Custodian had contravened the HIA as a function of his affiliate's unauthorized access. I also added the following two issues:

Issue B: Did the Custodian meet his duty to protect health information as required by section 60(1) of the HIA?

Issue C: Did the Custodian meet his duty to establish policies and procedures to facilitate the implementation of the HIA as required by section 63(1)?

The parties were afforded opportunities to make submissions on these issues.

III. DISCUSSION OF ISSUES

Preliminary Matter – Custodian did not make submissions

[para 8] Despite numerous requests to do so, the Custodian did not provide any substantive submissions in this Inquiry, nor any explanation for his failure to do so. The following correspondence specifically invited submissions from him:

- The Notice of Inquiry dated June 10, 2021
- Letter requesting further information from both parties dated August 31, 2021
- Notification that Inquiry will resume, dated April 14, 2022
- Letter to parties setting new deadlines for submissions dated May 25, 2022
- Letter to parties replying to the Custodian's late objection to an extension for a deadline for the Complainant to provide a submission, dated May 26, 2022
- Letter to parties adding Issues B and C and reopening submissions, dated December 7, 2022.

[para 9] In addition to the above correspondence, there were numerous notices and letters sent to the parties in relation to abeyance and extension requests made by the Complainant. None were returned undeliverable. In addition, my letter to the parties of May 25, 2022 was sent to the Custodian by courier, and receipt was confirmed.

[para 10] The only submission made by the Custodian was the aforementioned objection to an extension request made by the Complainant. The objection request did not address any of the issues in this in this inquiry.

Issue A: Did the employee (affiliate) access health information in contravention of the *Health Information Act*?

[para 11] Under section 28 of the HIA, an affiliate must not use health information in any manner that is not in accordance with their duties to a custodian.

[para 12] The scope of a custodian's permissible uses of health information is set by the HIA. Section 25 states,

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

[para 13] The Custodian appears on the Alberta College of Physicians and Surgeons' list of registered members, available on its website.¹ Accordingly he is a custodian under the HIA pursuant to section 1(1)(f)(ix) of the HIA and section 2(2)(a) of the *Health Information Regulation*, Alberta Regulation 70/2001.

[para 14] Section 56.1(b) of the HIA defines "authorized custodian." Authorized custodians are custodians permitted to access and use the Alberta integrated electronic health information system (Alberta EHR, per section 56.1(a)) otherwise referred to as Netcare. As a custodian pursuant to section 1(1)(f)(ix) of the HIA, the custodian will be an "authorized custodian" per the definition in section 56.1(b)(ii), provided he has met the eligibility requirements set in the regulations.

[para 15] Accessing health information on Netcare is considered a use of health information under the HIA (Orders H2021-01 at para. 17 and H2022-01 at para. 37).

[para 16] Section 56.5(1)(b) of the HIA limits the circumstances in which authorized custodians under section 56.1(b)(ii), are permitted to use health information via Netcare; it states,

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

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

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

[para 17] In view of the above, an affiliate only properly accesses Netcare when done for a purpose that their custodian may access Netcare, and which forms part of the affiliate's duties to the custodian.

[para 18] The Audit Logs show that VM accessed the Complainant's Netcare records on October 28, 2015. On that date, VM accessed the Complainant's demographic information and PIN (Pharmaceutical Information Network medical profile) at 9:01:43am and Chemistry and Lab information at 9:06:23am. The Complainant states that VM

¹ <https://cpsa.ca/>

accessed her PIN information two days after she had an appointment at the Custodian's medical clinic. According to the Complainant, VM is a medical receptionist for the Custodian and would not need to access her PIN medical profile on Netcare as part of her duties.

[para 19] Since the Custodian did not make any submissions, I have no information about how VM's access to Netcare may have complied with the permitted purposes of the HIA or her duties to him. As well, I have no reason to doubt the Complainant's credibility. I now consider whether the burden of proof to demonstrate that access by VM contravened the HIA has been met.

Burden of Proof

[para 20] The HIA is silent on the burden of proof in cases where an individual complains about collection, use, and disclosure of health information. This point was considered in Orders H2004-005 and H2007-005. In those Orders, the Adjudicators concluded that a complainant will have an initial evidential burden, which, if met, will then require a Custodian to meet the legal burden of demonstrating compliance with the HIA (Order H2004-005 at para. 76; Order H2007-005 at paras. 17 – 18.) I adopt the same approach here.

[para 21] I find that the Complainant has met the evidential burden in this case. The Audit Logs demonstrate that VM accessed her Netcare file for a period of at least 5 minutes, in circumstances in which, according to the Complainant, she would not need to.

[para 22] The Custodian, who is the respondent in this matter and bears the burden to show authority, has offered no explanation as to how access to Netcare might have been authorized under the HIA. There is nothing else before me to suggest that the affiliate's use of the Complainant's health information was in accordance with an authorized purpose under section 27(1) the HIA as that provision is referenced in section 56.5(1)(b)(ii). Accordingly, I find that VM's access of the Complainant's health information in Netcare was unauthorized.

Issue B: Did the Custodian meet his duty to protect health information as required by section 60(1) of the HIA?

Issue C: Did the Custodian meet his duty to establish policies and procedures to facilitate the implementation of the HIA as required by section 63(1)?

[para 23] Sections 60(1) and 63(1) state:

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.*

* * *

63(1) Each custodian must establish or adopt policies and procedures that will facilitate the implementation of this Act and the regulations.

Burden of Proof – under sections 60(1) and 63(1)

[para 24] The HIA is silent on which party bears the burden of proof to establish whether or not a custodian has complied with sections 60(1) and 63(1). Earlier Orders have found that where the HIA is silent on the burden of proof, the burden must be considered on a case-by-case basis. The party that is in the best position to address an issue will generally carry the burden. See, for example, Order H2006-003 at para. 8.

[para 25] In the present case, the Custodian is in the best position to address compliance with sections 60(1) and 63(1). The Custodian has the duty to comply with those sections and, being familiar with his own practice, would be aware of the steps taken to comply with them. In contrast, I cannot see how the Complainant could be expected to have access to such information.

[para 26] Since the Custodian made no submissions, he has failed to meet the burden of demonstrating compliance with sections 60(1) and 63(1).

Whether this is an appropriate case for finding the Custodian contravened the HIA as a function of unauthorized access by VM

[para 27] Under section 62(2) of the HIA, any use of health information by an affiliate is considered to be a use by the custodian (See for example, Order H2022-01 at para. 14).

[para 28] As discussed above, in Order H2020-02, in a case in which the custodian had implemented proper safeguards against unauthorized access to Netcare as required by sections 60(1) and 63(1) of the HIA, the Director of Adjudication found that this was not

an appropriate case for considering whether the Custodian had contravened the Act as a function of the affiliate's contravention.

[para 29] In the present case, my letter to the Custodian of December 7, 2022 referenced Order H2022-01 at para 14, and indicated that I would similarly consider whether the circumstances were such that it would be appropriate to find that he had contravened section 62(2) of the Act as a function of his affiliate's unauthorized access. The Custodian did not provide any submissions on this question or provide any evidence that he had met the duties under sections 60(1) or 63(1) such as could make this an inappropriate consideration in the present case.

[para 30] Therefore, it is appropriate in this case to consider whether, by reference to section 62(2) of the HIA, the Custodian contravened the HIA as a function of VM's unauthorized access to Netcare. For the reasons above, I find that the Custodian contravened section 25 of the HIA with regard to VM's access.

[para 31] I am also empowered to order a custodian to perform the duties imposed by the HIA and its regulations. These include the duties to safeguard information under sections 60(1)(a), 60(1)(c), 60(1)(d) and 63(1), quoted above at paragraph 23. With regard to affiliates in particular, section 60(1)(d) requires the Custodian to maintain safeguards that ensure the Custodian and his affiliates comply with the HIA. As well, under section 8(6) of the *Health Information Regulation*, Alberta Regulation 70/2001 the Custodian must ensure that affiliates are aware of and adhere to the safeguards required under section 60(1) of the HIA. There is no evidence that such safeguards against improper access by VM (an affiliate) were in place, or that VM was aware of them or adhered to them, I will therefore order the Custodian to comply with these provisions.

IV. ORDER

[para 32] I make this Order under section 80 of the HIA.

[para 33] Under section 80(3)(e) of the HIA, I order the Custodian to cease accessing the Complainant's health information without authorization, by taking steps to ensure that his affiliate, VM, ceases doing so. If VM is no longer employed by the Custodian, the Custodian shall confirm such to the Complainant and to me, in writing.

[para 34] Under section 80(3)(a) of the HIA I order the Custodian take reasonable steps to maintain administrative safeguards required under section 60(1) of the HIA.

[para 35] Under section 80(3)(a) of the HIA I order the Custodian to establish or adopt policies and procedures required under section 63(1) of the HIA.

[para 36] Under section 80(3)(a) of the HIA I order the Custodian to ensure his affiliates adhere to and follow the safeguards and policies and procedures required by sections 60(1) and 63(1) of the HIA.

[para 37] I order the Custodian to confirm in writing to me and the Complainant that he has complied with this Order within 50 days of receiving a copy.

John Gabriele
Adjudicator