

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2023-08

August 28, 2023

DR. RAMNEEK KUMAR

Case File Number 015808

Office URL: www.oipc.ab.ca

Summary: An individual (the Complainant) made a complaint to this Office under the *Health Information Act* (HIA) that her Electronic Health Record (Netcare) had been accessed by Dr. R. Kumar (the Custodian) without authority under the HIA. With her complaint, the Complainant included a copy of a Netcare Disclosure Log provided to her by Alberta Health; this Log shows that the Custodian accessed the Complainant's health information on October 5, 2012.

The Adjudicator found that the Custodian did not have authority to access the Complainant's health information.

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

Authorities Cited: AB: Investigation Reports H2017-IR-02, H2018-IR-01, Orders H2021-01, P2006-008

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112

I. BACKGROUND

[para 1] An individual (the Complainant) made a complaint to this Office under the *Health Information Act* (HIA) that her Electronic Health Record (Netcare) had been

accessed by Dr. R. Kumar (the Custodian) without authority under the HIA. With her complaint, the Complainant included a copy of a Netcare Disclosure Log provided to her by Alberta Health; this Log shows that the Custodian accessed the Complainant's health information on October 5, 2012.

[para 2] The Commissioner authorized a Senior Information and Privacy Manager to investigate the complaint and attempt to settle the matter. Following that investigation, the Complainant requested an inquiry.

[para 3] The Complainant's spouse made a similar complaint against the Custodian, which is the subject of a separate inquiry.

II. ISSUES

[para 4] The issue in this inquiry, as set out in the Notice of Inquiry dated April 24, 2023, is:

Did the Custodian use the Complainant's health information in contravention of Part 4 of the HIA (section 25)?

III. DISCUSSION OF ISSUES

Preliminary issue – scope of inquiry

[para 5] In her rebuttal submission, the Complainant raised a concern about whether the Custodian met his duty under section 60 of the HIA, which requires a custodian to have reasonable safeguards to protect health information. A rebuttal submission is too late in the process to raise a new issue and I will not be adding it to the inquiry.

Did the Custodian use the Complainant's health information in contravention of Part 4 of the HIA (section 25)?

[para 6] Both parties have provided extensive submissions regarding the personal history between them.

[para 7] The Custodian states that he had been a friend and business associate of the Complainant and her spouse. From the parties' submissions, I understand that their respective families socialized and went on family holidays together (see Tab D of the Custodian's initial submission, at page 3).

[para 8] In 2017, a dispute arose between the Custodian, and the Complainant and her spouse. This dispute is ongoing and has led to an acrimonious relationship between the Custodian, and the Complainant and her spouse.

[para 9] According to the parties, various court and regulatory proceedings were initiated by the parties against each other. For example, in November 2019, the

Complainant initiated a complaint against the Custodian with the College of Physicians and Surgeons of Alberta (CPSA) that is essentially the same as the complaint at issue in this inquiry: that the Custodian accessed the Complainant's health information in Netcare without authority on October 5, 2012. The Custodian also made a complaint about the Complainant's spouse to his professional regulatory body. There are ongoing court proceedings between the parties, as well as various allegations of criminal wrongdoing.

[para 10] I will not detail the various allegations as the details are largely immaterial to my determination. It is sufficient to note the clear hostility between the parties.

Custodian's submission

[para 11] The Custodian states that he is a pediatrician. He states that he "occasionally provided healthcare services to the Complainants" at the time he accessed the Complainant's information (initial submission, at para. 3). The Custodian argues that he accessed the Complainant's information in Netcare on October 5, 2012 because the Complainant asked him to review lab results.

[para 12] The Custodian further argues that he was providing a health service to the Complainant when he accessed her lab results on Netcare and communicated those results to her. He argues that it is not necessary to have an ongoing physician-patient relationship with the Complainant in order to access health information in Netcare for an authorized purpose.

[para 13] The Custodian states he was initially unable to access the Complainant's Netcare profile because she has a common name; as such, he asked the Complainant for her date of birth in order to view her lab results. The Custodian argues that the Complainant provided the Custodian with her date of birth "for the express purpose of accessing [her] health information to obtain test result for [her] at [her] request" (rebuttal submission, at para. 3(b)).

[para 14] The Custodian refers to the numerous allegations the parties have leveled against each other, implying that the Complainant may have an ulterior motive in filing her complaint with this office.

Complainant's arguments

[para 15] The Complainant provided a copy of a Netcare audit log showing that the Custodian accessed her information on October 5, 2012.

[para 16] The Complainant denies that she asked the Custodian to review lab results. She also denies having provided the Custodian with her date of birth to access her information in Netcare. The Complainant states that she was not a patient of the Custodian, and that she had a family physician at the relevant time. Therefore, she had no need to ask the Custodian to review lab results for her.

[para 17] The Complainant argues that her family and the Custodian's family celebrated birthdays together, and therefore it is possible that the Custodian already knew the Complainant's date of birth.

[para 18] In her rebuttal submission, the Complainant argues that the Custodian was not certified to provide health services independently, at the time he accessed her health information in 2012.

Applicable legislation

[para 19] The Custodian has authority to use health information in accordance with the Act, as stated in section 25:

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

[para 20] Section 56.5 clarifies that an access of the EHR (Netcare) is a use of health information. It states:

56.5(1) Subject to the regulations,

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

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

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

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

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

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

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

(b) any other authorized custodian,

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

(d) any other person.

[para 21] Section 27 of the HIA lists the purposes for which a custodian may use health information. The Custodian has relied on section 27(1)(a) in this case. This provision states:

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

(a) *providing health services;*

[para 22] Section 1(1)(m) of the HIA defines “health services”. This provision states:

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[...]

Burden of proof

[para 23] In Order P2006-008, former Commissioner Work explained the burden of proof in relation to complaints made under the *Personal Information Protection Act* in the following way (at paras. 10-11):

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

[para 24] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, Yamauchi J. approved this approach to the burden of proof in complaints made under the FOIP Act. The Court found (at para. 108):

But see, Order P2006-008: *Lindsay Park Sports Society* (March 14, 2007) at paras. 9-21, where the OIPC said that complainants under FOIPPA do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show “that it has the authority ... to collect, use or disclose personal information,” at para. 20. Because of FOIPPA’s structure, this Court agrees with the *Lindsay Park* analysis of the burden of proof and evidentiary burden.

[para 25] This approach has also been applied to complaints under the HIA (see Order H2021-01). The Complainant must adduce some evidence to meet their evidentiary burden.

[para 26] In this case, the Netcare audit logs showing that the Custodian accessed her lab results on October 5, 2012 is sufficient to meet the evidentiary burden of proof. The burden now shift to the Custodian to show that the access was authorized.

Analysis

[para 27] Regarding the Complainant's allegation that the Custodian was not authorized to provide health services independently at the time he accessed her health information, the Custodian provided a printout of the College of Physicians and Surgeons of Alberta (CPSA) register history, which shows that the Custodian was registered on the Provisional Register Conditional Practice. The Custodian also provided copy of a CPSA Registration Understanding and Acknowledgement form that outlines conditions the Custodian had to meet to be so registered. None of these conditions prevented him from practicing medicine independently.

[para 28] The Custodian states that he was providing a health service to the Complainant when he accessed her lab results in 2012, despite not having a physician-patient relationship with the Complainant.

[para 29] Nothing in section 27 of the HIA indicates that a health service must be provided in the course of a regular or ongoing physician-patient relationship. In other words, section 27(1)(a) authorizes the access of health information in Netcare even if the health service being provided is a one-off.

[para 30] If the Complainant had asked the Custodian to obtain and interpret her lab results on one occasion, as the Custodian argues, then the Custodian was providing a health service when he did as she asked.

[para 31] That said, if the Custodian were the Complainant's physician, then accessing her lab results could be assumed to have been done as part of providing a health service, absent reason to conclude otherwise. Because the Custodian is not the Complainant's physician, the only reason he would have to provide a health service (in this case, accessing and interpreting lab results) is at the Complainant's request. This is the very issue, as the parties disagree about whether the Complainant made such a request.

[para 32] The Custodian has argued that he had to ask the Complainant for her date of birth in order to access her health information in Netcare. However, it is not clearly the case that the Complainant's date of birth was necessary.

[para 33] I have reviewed the *Alberta Netcare Super User Training Guide*¹, available online. This Guide has provided some insight into how health information is accessed in Netcare.

[para 34] This Guide describes how a user can search for an individual in the Person Directory. On page 29 of the Guide is an image of the relevant screen in Netcare; that screen indicates that a search requires *one* of the following fields to be filled: last name, PHN/ULI [Personal Health Number/Unique Lifetime Identifier] or Alternate ID. The instructions indicate that accessing an individual's records by entering the PHN/ULI is the best practice; if that is not available, the user should input the individual's full name and date of birth. The instructions indicate that this is the best way to ensure an accurate result; however, the screen does not indicate that these additional data elements are required.

[para 35] Similarly, the *Getting Started in Alberta Netcare Portal User Guide*² states that when searching for an individual in Netcare:

You do not need to use Initial Caps, but you must include both names. When a ULI is not available; First name, Last name and Date of Birth will most likely result in a match.

[para 36] This information provides the best way to obtain an accurate match, but does not state that a personal identifier or date of birth is required.

[para 37] This office has conducted numerous investigations into unauthorized accesses of Netcare. Investigation Report H2018-IR-01 discusses the unauthorized access of patient information by an employee of Alberta Health Services (AHS). The number of individuals whose information was accessed and the manner in which access occurred is described as follows (at para. 33):

In the first interview, the Employee denied accessing health information in Netcare for purposes other than performing her work duties. In the second interview, the Employee admitted to accessing the records of about 20 individuals, whose names were read to her, for purposes not related to her work. As a result of the interviews, AHS determined that the Employee accessed information in Netcare for reasons related to her work, but also for other non-work related reasons. The AHS Privacy Office requested the audit log from Alberta Health for all accesses made by the Employee back to 2004 (when Netcare logging commenced), and the subsequent review of audit logs by the AHS Privacy Office found that the Employee accessed the health information of over 12,000 individuals between 2004 and 2015, in contravention of HIA.

[para 38] The Report further states (at para. 35):

In the second interview done by AHS, the Employee admitted to accessing numerous, named individuals for the purpose of confirming their address or date of birth. This included physicians or other employees working at Alberta Hospital Edmonton, their

¹ <https://www.albertanetcare.ca/learningcentre/documents/SuperUser-Training-Guide.pdf>

² https://www.albertanetcare.ca/learningcentre/documents/ANP_UserGuide_GettingStartedANP.pdf

relatives, or the Employee's own relatives. For some of these accesses, the Employee offered explanations related to the individuals' life events, such as their birthdays, their passing or the passing of a family member. For many other accesses, the Employee was able to explain how the individuals she looked up were related to her or to her colleagues at Alberta Hospital Edmonton, but gave no work-related reasons for accessing their information in Netcare.

[para 39] It seems unlikely that the AHS employee in the above case had the personal identifier or date of birth information for all 12,000 individuals whose information she accessed in Netcare. From this description, and the Guide, it seems possible that the Custodian could have accessed the Complainant's information in Netcare from her name alone. While the Complainant's first and last name may have resulted in multiple hits, the parties' submissions – specifically the submissions stating that the parties' families regularly socialized prior to the falling out – indicate that the Custodian would have the Complainant's home address and phone number to find the correct account. It may also be the case that the Custodian was aware of the Complainant's date of birth from family birthday gatherings.

[para 40] Having said this, from the training materials and screenshots of Netcare, it also seems entirely possible that the Custodian believes that he required either the Complainant's date of birth or unique identifier to conduct a search for the Complainant's health information in Netcare.

[para 41] The Complainant has not offered any possible motive for the Custodian accessing her lab results on October 5, 2012 if it was not at her request. From the submissions of both parties, the relationship between them was amicable at the relevant time. It seems possible that the Complainant asked the Custodian to review lab results for her. That said, several Investigation Reports of this office reveal that a number of custodians or affiliates have accessed health information of friends and family out of curiosity (see Investigation Reports H2018-IR-01, H2017-IR-02). It is possible that the Complainant mentioned having labs taken and the Custodian accessed the results out of curiosity.

[para 42] The timing of the Complainant's complaint is also relevant. Specifically, the relationship between the Complainant and Custodian had become acrimonious by the time the Complainant submitted her complaint on November 19, 2019. Several other allegations had been made by the parties against each other, and legal proceedings between the parties were underway at this time.

[para 43] It is possible that the Complainant's version of events is true, in whole or in part. It is also possible that the Custodian's version of events is true in whole or in part. On the basis of the submissions before me, I find both versions just as likely to be true. However, since the Custodian bears the burden of proof, he is in the position of having to satisfy me that his version is at least slightly more plausible than the Complainant's version. In my view, he has not done so.

[para 44] Because the Custodian has not satisfied me, on a balance of probabilities, that he was providing health services to the Complainant at the time he accessed her lab work in Netcare, I cannot conclude that he had authority for that access.

[para 45] The remedy in such situations is to order the Custodian to stop accessing the Complainant's health information. There is no indication that he has not already done so.

[para 46] The only other point to add is that health information is usually sensitive information. As stated in the Training Guide (at page 6):

Only authorized users may access a person's medical and demographic data. EHR access is based on your user role and profession. Access permissions and other security credentials are set up to ensure you have enough information available for you to do your job, and that information is accessed only on a need to know basis. Be aware that Alberta Netcare Portal access is monitored and audited on a regular basis, as well as at the request of a patient, physician or manager.

[para 47] It seems clear that Netcare (or any other EHR) is intended to be accessed only as a part of a health service provider's job duties. Even if section 27(1)(a) permits a custodian to provide a health service to a friend on a one-time basis (such as by accessing and interpreting information in Netcare) this situation outlined in this Order illustrates why it is often unwise to do so.

V. ORDER

[para 48] I make this Order under section 80 of the Act.

[para 49] I find that the Custodian did not have authority to access/use the Complainant's health information. I order the Custodian to stop accessing the Complainant's health information, if he has not already done so.

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

Amanda Swanek
Adjudicator