

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2023-09

August 28, 2023

DR. RAMNEEK KUMAR

Case File Number 015813

Office URL: www.oipc.ab.ca

Summary: An individual (the Complainant) made a complaint to this Office under the *Health Information Act* (HIA) that his Electronic Health Record (Netcare) had been accessed by Dr. R. Kumar (the Custodian) without authority under the HIA. With his complaint, the Complainant included a copy of a Netcare Disclosure Log provided to him by Alberta Health; this Log shows that the Custodian accessed the Complainant's health information on July 1, 2014 and November 27, 2015.

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, H2022-03, 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 his Electronic Health Record (Netcare) had been

accessed by Dr. R. Kumar (the Custodian) without authority under the HIA. With his complaint, the Complainant included a copy of a Netcare Disclosure Log provided to him by Alberta Health; this Log shows that the Custodian accessed the Complainant's health information on July 1, 2014 and November 27, 2015.

[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 his 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 the Complainant's 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 his spouse. This dispute is ongoing and has led to an acrimonious relationship between the Custodian, and the Complainant and his 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. The Custodian also made a complaint about the Complainant to the Complainant's 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).

[para 12] Regarding the July 1, 2014 access, the Custodian argues that the Complainant asked him to review lab results available in Netcare. The Custodian further argues that he was providing a health service to the Complainant when he accessed his lab results on Netcare and communicated those results to the Complainant. 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 unable to access the Complainant's Netcare profile without the Complainant's date of birth, because the Complainant has a common name. The Custodian states that he asked the Complainant for his date of birth in order to view his lab results. The Custodian argues that the Complainant provided the Custodian with his date of birth to enable the Custodian to access his health information.

[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 his complaint with this office.

[para 15] The Custodian argues that he did not access the Complainant's health information in Netcare on November 27, 2015. The Netcare audit log provided by the Complainant indicates that this access occurred at the Misericordia Community Hospital. The Custodian provided evidence that he was not working at that location on November 27, 2015 but was rather was working at the Sturgeon Community Hospital.

[para 16] The Custodian states that he does not recall having a reason to access the Complainant's health information on November 27, 2015.

Complainant's arguments

[para 17] The Complainant provided a copy of a Netcare audit log showing that the Custodian accessed his information on July 1, 2024 and November 27, 2015.

[para 18] The Complainant denies that he asked the Custodian to review lab results. He also denies having provided the Custodian with his date of birth to access his information in Netcare. The Complainant states that he was not a patient of the Custodian, and that he had a family physician at the relevant time. Therefore, he had no need to ask the Custodian to review lab results for him.

[para 19] The Complainant argues that his 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 20] In his rebuttal submission, the Complainant argues that the Custodian was not certified to provide health services independently, at the time he accessed his health information.

Applicable legislation

[para 21] 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 22] 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 23] 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 24] 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 25] 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 26] 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 27] 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 28] In this case, the Netcare audit logs showing that the Custodian accessed the Complainant’s lab results on July 1, 2014 is sufficient to meet the evidentiary burden of proof regarding that access.

[para 29] The Netcare audit logs also show that the Custodian accessed the Complainant’s health information on November 27, 2015. However, in his request for inquiry, the Complainant states that he is not “disputing that date, I am calling into question the access he had on November 25, 2015.” In his rebuttal submission, the Complainant refers to breaches that occurred on “November 25/27, 2015”.

[para 30] The Complainant did not provide any evidence that the Custodian accessed his health information in Netcare on November 25, 2015. Having no reason to expect such an access occurred, I will not consider this allegation further.

[para 31] That said, the Complainant seems to remain interested in the access that occurred on November 27, 2015, for which he provided evidence by way of the Netcare audit log.

Analysis

[para 32] The Complainant alleged that the Custodian was not authorized to provide health services independently at the time the Custodian accessed the Complainant’s health information. In response, 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.

July 1, 2014 access

[para 33] The Custodian states that he was providing a health service to the Complainant when he accessed the Complainant’s lab results in July 2014, despite not having a physician-patient relationship with the Complainant.

[para 34] 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 35] If the Complainant had asked the Custodian to obtain and interpret his lab results on one occasion, as the Custodian argues, then the Custodian was providing a health service when he did as the Complainant asked.

[para 36] That said, if the Custodian were the Complainant's physician, then accessing his 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 37] The Custodian has argued that he had to ask the Complainant for his date of birth in order to access the Complainant's health information in Netcare. However, it is not clearly the case that the Complainant's date of birth was necessary.

[para 38] 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 39] This Training Guide describes how a user can search for an individual in the Person Directory. On page 29 of the Training 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 40] 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 [personal identifier] is not available; First name, Last name and Date of Birth will most likely result in a match.

[para 41] 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.

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

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

[para 42] 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 43] 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 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 44] 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 his 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 45] 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 personal identifier to conduct a search for the Complainant's health information in Netcare.

[para 46] The Complainant has not offered any possible motive for the Custodian accessing his lab results on July 1, 2014 if it was not at his request. From the submissions of both parties, the relationship between them was amicable at the relevant time. It is

possible that the Complainant asked the Custodian to look up his lab results. 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 47] 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 his complaint on November 21, 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 48] 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 49] 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 the Complainant's lab work in Netcare on July 1, 2014, I cannot conclude that he had authority for that access.

November 27, 2015 access

[para 50] Regarding the Custodian's argument that he did not access the Complainant's health information on November 27, 2015, that argument depends on the accuracy of the location data in the Netcare audit log. The audit log indicates that the access occurred at the Misericordia Community Hospital; the Custodian states he had not worked there since June 2015. The Custodian states that he was working at the Sturgeon Community Hospital on November 27, 2015.

[para 51] The Sturgeon Community Hospital Neonatal On Call calendar provided at Tab I of the Custodian's initial submission shows that he was on call on November 26, 2015, but does not have him listed for November 27, 2015.

[para 52] That said, the call schedule for Misericordia for November 2015, also provided at Tab I of the Custodian's initial submission, does not list him as working at that location anytime in November.

[para 53] Past Orders of this office have noted that the location data in Netcare does not necessarily reflect the location at which the access of health information occurred. In Order H2022-03, Alberta Health Services (AHS) explained this as follows (at paras. 47-48):

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.

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.

[para 54] As the location information in Netcare is not necessarily reflective of where the access occurred, the Custodian’s actual location on November 27, 2015 is not determinative of whether he accessed the Complainant’s health information on that date.

[para 55] Aside from the argument based on the location data, the Custodian has not offered an explanation as to why the audit log lists him as conducting the November 27, 2015 access of the Complainant’s information in Netcare. Given the clear indication in the Netcare audit log showing that the Custodian’s credentials were used to access the Complainant’s health information on that date, and without a compelling reason to find that this access was undertaken by someone other than the Custodian, I conclude that the Custodian accessed the Complainant’s health information on November 27, 2015.

[para 56] Further, as the Custodian has not offered any explanation for this access, I cannot find that it was authorized.

Conclusion

[para 57] I find that the Custodian accessed the Complainant’s health information on July 1, 2014 and November 27, 2015, without authority.

[para 58] 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 59] 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 60] 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 61] I make this Order under section 80 of the Act.

[para 62] 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 63] 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