

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2023-10

November 1, 2023

DR. OLUWASEUN OYENIRAN

Case File Number 009544

Office URL: www.oipc.ab.ca

Summary: Under the *Health Information Act* (the HIA), the Applicant made an access request for his own health information to Dr. Oyeniran (the Custodian). The Applicant alleged that the Custodian failed to provide all responsive records. The Adjudicator considered whether the Custodian properly responded to the access request.

The Adjudicator found that the Custodian failed to establish that he conducted a proper search for records as required by section 10(a) of the HIA. The Adjudicator also found that the Custodian failed to comply with sections 12(1), 12(2)(a), and 12(2)(c)(i). However, since the requested records had been provided to the Applicant, there was no need to make an order in respect of those failures.

The Adjudicator also considered whether the Custodian had custody or control over Netcare records from a time prior to when he took over the Applicant's care and/or records based on referrals that were not from, or addressed to, the Custodian. The Adjudicator found that the HIA conferred the requisite control for the purposes of responding to the access request.

The Adjudicator ordered the Custodian to conduct a new search for records, and to provide the Applicant with any responsive records not already provided to him.

Statutes Cited: **AB:** *Alberta Electronic Health Record Regulation*, Alberta Regulation 118/2010 s. 3(1); *Health Information Act*, R.S.A. 2000, c. H-5 ss. 1(1)(f)(ix), 2(d), 7(1), 10(a), 12(1), 12(2), 12(2)(a), 12(2)(c)(i), 27(1)(f), 56.1(b)(ii), 56.5(1)(b)(i), 80; *Health Information Regulation*, Alberta Regulation 70/2001 s. 2(2)(i); *Health Statutes Amendment Act*, 2020 (No. 2), SA 2020, c. 35

Authorities Cited: AB: Order H2022-06

I. BACKGROUND

[para 1] On August 22, 2017, the Applicant made a request under the *Health Information Act*, R.S.A. 2000, c. H-5 (the HIA) for the following information:

- All Chart notes, specialist reports, etc.
- Dr. Gagnon's Reporting
- Diagnostics
- Whole chart from beginning of care @Humana.

[para 2] The relevant time period for the requested records is August 2016 to the date of the access request.

[para 3] The request was initially made to Humana Medical Clinic (Humana). The Applicant's doctor, Dr. Oyeniran (the Custodian), worked at Humana at the time of the access request. The Custodian has since left Humana.

[para 4] There appears to have been some dispute over whether the Custodian took the Applicant's medical records with him when he left, or whether they remained at Humana. Following investigation/mediation it was determined that the Custodian had custody of them after he left Humana.

[para 5] In response to his access request, the Applicant received partial copies of specialists' reports, but no notes from his chart. There was also disagreement between the Custodian and the Applicant over whether the Custodian would provide certain records from Netcare. Those records consist of consultations that were done before the Custodian took over the Applicant's care, and/or records based on referrals that were not from, or addressed to, the Custodian. The Custodian did not provide them since, in his words, he was not the custodian of them.

[para 6] The Applicant filed a request for review with this Office on June 8, 2018. Investigation and mediation were authorized to attempt to resolve the issue.

[para 7] At some point after filing his request for review, the Applicant received a copy of his chart, although he states that it took over 500 days to receive it. He continues to assert that some records are missing or have been altered. For example, the Applicant recalls that the Custodian had charted notes regarding the impact his diet had on his lung function, but those notes are not in the material he received.

[para 8] Since the Applicant continues to dispute that the Custodian properly responded to this access request, the matter proceeded to inquiry.

II. ISSUES

- A. Under the *Health Information Act*, did the Respondent have custody or control over the records requested by the Applicant?
- B. Did the Respondent comply with section 12(1) of the *Health Information Act* (time limit to respond to an access request)?
- C. Did the Respondent comply with section 12(2) of the *Health Information Act* (contents of response to an access request)?
- D. Did the Respondent meet its obligations required by section 10(a) of the *Health Information Act* (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

III. DISCUSSION OF ISSUES

Preliminary Matter – Allegations of altered records not considered

[para 9] The Applicant’s request for review of the response to his access request did not include allegations of altered records; he had not yet received a copy of them. Accordingly, I do not consider those allegations here.

Preliminary Matter – HIA amendments pending

[para 10] Some terms of the HIA in respect of electronic health records on Netcare referred to in this Order will be significantly amended by the *Health Statutes Amendment Act, 2020* (No. 2), SA 2020, c. 35, upon proclamation of certain sections thereof. The sections of the HIA referred to in this Order represent the HIA, and its regulations, as they were at the time of the events in question, and govern them accordingly.

- A. Under the *Health Information Act*, did the Respondent have custody or control over the records requested by the Applicant?

[para 11] There are two matters to consider under this issue. The first is whether the Custodian or Humana had custody or control over the requested records. It appears that the Custodian had custody or control at all material times. The Custodian states that the Applicant received everything “we” (Humana) had about him when the access request was first made. The Custodian also had custody after he left, as clarified following the investigation/mediation stage.

[para 12] The second matter is whether the Custodian had custody or control over records on Netcare that were not sent to the Applicant, as described above.

[para 13] Under section 7(1) of the HIA the Applicant has a right to any of his records under the custody or control of a custodian. There is no access right to records other than those under the custody or control of a custodian. Section 7(1) states,

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

[para 14] I considered custody and control over records on Netcare in Order H2022-06. While the issue in that Order was whether Alberta Health Services had custody or control over Netcare records, portions of the analysis of that issue are relevant to this case as well. In Order H2022-06, I stated at para. 52:

A non-exhaustive list of factors that may indicate custody or control was given in Order F2018-37 at paras. 19 to 21. I do not repeat the list here, as I find that consideration of those factors is not particularly germane to the question of custody or control over Netcare records. Netcare is unique under the HIA as a database of health information created, uploaded, accessible, and usable by numerous custodians from all facets of the health care system. No one custodian is responsible for all of the information on it, and access to and use of information accessible through Netcare is expressly regulated under Part 5.1 of the HIA and the *Alberta Electronic Health Record Regulation*, Alberta Regulation 118/2010 (AEHRR). Custody or control over health information on Netcare thus arises as a matter of authority to access and handle the information thereon.

[para 15] In Order H2022-06 at para. 72 I also concluded that nothing in the HIA indicates that no more than one entity could have custody or control over health information on Netcare.

[para 16] For the purposes of this case, the pertinent sections of the HIA that regard custody or control that apply to the Custodian are sections 56.1(b)(ii), 56.5(1)(b)(i), and 27(1)(f).

[para 17] Under the HIA, only authorized custodians may access Netcare. Section 56.1(b) defines two groups of custodians; the Custodian is an authorized custodian under section 56.1(b)(ii). It states,

(b) “authorized custodian” means

...

(ii) any other custodian that meets the eligibility requirements of the regulations to be an authorized custodian;

[para 18] As a member of the College of Physicians and Surgeons of Alberta the Custodian is a custodian pursuant to section 1(1)(f)(ix) of the HIA, and section 2(2)(i) of the *Health Information Regulation*, Alberta Regulation 70/2001. The eligibility requirements to be an authorized custodian are set out in section 3(1) of the *Alberta Electronic Health Record Regulation*, Alberta Regulation 118/2010. Since the Custodian has had access to Netcare while at Humana, and does not argue that he has since lost it, I

conclude that he is in compliance with the eligibility requirements. Hence he is an authorized custodian under section 56.1(b)(ii).

[para 19] As an authorized custodian referred to in section 56.1(b)(ii), the Custodian's permitted use of health information on Netcare is set out in section 56.5(1). Section 56.5(1)(b)(i) is the pertinent subsection in this case; it states,

56.5(1) Subject to the regulations,

...

(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

...

[underlining mine]

[para 20] In Order H2022-06 at para. 57, I said the following regarding the underlined words above:

The underlined portion of 56.5(1)(b) could sensibly be interpreted to confer custody or control where that is not otherwise the case, thus enabling the permitted uses under section 27(1).

[para 21] I find the above is the case. Accordingly, custody or control will be conferred for the purposes authorized by sections 27(1)(a), (b), and (f) per section 56.5(1)(b)(i).

[para 22] Section 27(1)(f) permits use of health information for the purpose of carrying out the purpose of an enactment; it states,

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

...

(f) carrying out any purpose authorized by an enactment of Alberta or Canada;

...

[para 23] The HIA is an enactment of Alberta. One of its purposes, as set out in section 2(d) is,

...

(d) to provide individuals with a right of access to health information about themselves, subject to limited and specific exceptions as set out in this Act,

...

[para 24] Providing health information in response to an access request is necessary to carrying out the purpose stated in section 2(d); as such, section 56.5(1)(b)(i) confers on a custodian custody or control over health information for the purposes of responding to an access request. Thus the Custodian had the requisite control over records on Netcare to respond to the access request, even if the records were consultations from before the time when the Custodian treated the Applicant, or were referrals neither sent to nor from the Custodian.

B. Did the Respondent comply with section 12(1) of the *Health Information Act* (time limit to respond to an access request)?

[para 25] Section 12(1) of the HIA states,

12(1) A custodian must make every reasonable effort to respond to a request under section 8(1) within 30 days after receiving the request or within any extended period under section 15.

[para 26] The Applicant states it took over 500 days to receive a copy of his chart as requested. The Custodian did not address this issue. Accordingly, I find that the Custodian failed to comply with section 12(1). Since the Applicant eventually received a copy of his chart, I do not need to make any order with respect to the Custodian's failure to comply with section 12(1).

C. Did the Respondent comply with section 12(2) of the *Health Information Act* (contents of response to an access request)?

[para 27] Section 12(2) of the HIA states,

(2) In a response under subsection (1), the custodian must tell the applicant

- (a) whether access to a record or part of it is granted or refused,*
- (b) if access to the record or part of it is granted, where, when and how access will be given, and*
- (c) if access to the record or part of it is refused,*
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
 - (ii) the name, title, business address and business telephone number of an affiliate of the custodian who can answer the applicant's questions about the refusal, and*

(iii) that the applicant may ask for a review of that decision by the Commissioner.

[para 28] The issues here are whether the Custodian complied with sections 12(2)(a) and 12(c)(i).

[para 29] While, at some point in time, the Custodian informed the Applicant that some records from Netcare would not be provided on the basis that the Custodian believed he did not have custody or control over them, there is no indication that the Applicant was informed that he would not have access to his chart, or given an explanation for the refusal to grant access to his medical chart for 500 days. No explanation has been offered at inquiry either. I find that the Custodian failed to comply with sections 12(2)(a) and 12(2)(c)(i). However, since the Applicant has since received a copy of his chart, there is no reason to order the Custodian to provide an explanation of why access was not granted at first.

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

[para 30] In the Notice of Inquiry, the Custodian was asked to address the following points regarding this issue:

- The specific steps taken by the Respondent to identify and locate records responsive to the Applicant's access request.
- The scope of the search conducted, such as physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search? (Note: that person or persons is the best person to provide the direct evidence).
- Why the Respondent believes no more responsive records exist other than what has been found or produced. (In answering this question the Respondent should have regard to the reasons the Applicant gave for believing more records exist than were located/provided to them, and/or the Applicant's description of the records/kinds or records they believes should have been located and provided.)
- Any other relevant information.

[para 31] The Custodian did not address the above points, or provide any other information about the steps taken to locate responsive records. He did not address the Applicant's assertion that records from his chart were missing. The Custodian only asserts that everything was provided to the Applicant, save for Netcare records discussed above. In light of the lack of information about how the search for responsive records was

carried out, I find that the Custodian has failed to establish that he complied with section 10(a).

IV. ORDER

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

[para 33] I order the Custodian to provide the Applicant access to Netcare records, requested in his access request, that have not already been provided to him.

[para 34] I order the Custodian to conduct a new search for responsive records, and forward to the Applicant any records not already provided.

[para 35] I order the Custodian to confirm to me, in writing, that he has complied with this Order within 50 days of receiving it.

John Gabriele
Adjudicator