

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2024-03

October 24, 2024

DR. ROBERT DAVIES

Case File Number 029723

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint to this office under the *Health Information Act* (HIA) that an employee of Canada Diagnostic Centres (CDC) accessed the electronic health information of the Complainant, specifically diagnostic imaging, in the Alberta Electronic Health Record (EHR, or Netcare). The Complainant states that she did not receive any health services at the CDC at or around the time the access was made and therefore, the access was not authorized by the HIA.

The CDC is not a custodian under the HIA; nor is the employee identified in the Complainant's complaint. Dr. Robert Davies confirmed that as the Managing Director of the CDC, he is the Custodian responsible for the employee's (affiliate's) compliance with the HIA.

The Adjudicator found that the Custodian (and his affiliate) lacked authority to access the Complainant's diagnostic imaging under the HIA. The Adjudicator also found that the Custodian did not meet his obligations under section 60 of the Act.

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

Authorities Cited: AB: Order H2014-02

Cases Cited: *Alberta Health Services v Information and Privacy Commissioner of Alberta*, 2018 ABQB 467

I. BACKGROUND

[para 1] An individual made a complaint to this office under the *Health Information Act* (HIA) that an employee of Canada Diagnostic Centres (CDC) accessed the electronic health information of the Complainant in the Alberta Electronic Health Record (EHR, or Netcare). Specifically, the Complainant complained that the employee, who was a booking agent, viewed two diagnostic images in Netcare without authority. The Complainant states that she did not receive any health services at the CDC at or around the time the access was made and therefore, the access was not authorized by the HIA.

[para 2] The CDC is not a custodian under the HIA; nor is the employee identified in the Complainant's complaint. Dr. Robert Davies identified himself as the Managing Director of the CDC, and the Custodian responsible for the employee's (affiliate's) compliance with the HIA.

[para 3] In her complaint and request for inquiry, the Complainant provided a Netcare audit log showing that the booking agent accessed her health information, as well as a detailed explanation for why she believed this access was unauthorized. Given this, it was not necessary for the Complainant to make an initial submission to the inquiry to set out her position. The Custodian made an initial submission and both parties provided a rebuttal submission. Both parties also made brief additional submissions.

II. ISSUES

[para 4] The issues in this inquiry, as set out in the Notice of Inquiry dated July 24, 2024, are:

1. Did the Custodian (or Affiliate) use the Complainant's health information in contravention of Part 4 of the HIA when its employees accessed it from the EHR (Netcare)?
2. Did the Custodian fail to safeguard health information in contravention of section 60 of the HIA?

III. DISCUSSION OF ISSUES

- 1. Did the Custodian (or Affiliate) use the Complainant's health information in contravention of Part 4 of the HIA when its employees accessed it from the EHR (Netcare)?**

[para 5] The Complainant's complaint is concerned with the actions of an employee of the Custodian, specifically a booking agent. The Custodian states that the employee is an affiliate of the Custodian under the HIA.

[para 6] There is no provision in the HIA enabling affiliates to collect, use, or disclose information. However, 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:

62(2) 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.

[para 7] Further, section 62(4) provides as follows:

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 8] 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 9] Section 27 of the HIA lists the purposes for which a custodian may use health information.

[para 10] The Custodian in this case falls under section 56.1(b)(ii). Per section 56.5 (above), he may use health information from the EHR/Netcare only for the purposes authorized under section 27(1)(a), (b), (f) or (g). These provisions state:

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;*
- (b) determining or verifying the eligibility of an individual to receive a health service;*
- ...*
- (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 11] The Custodian states that section 27(1)(b) authorized the booking agent's (affiliate's) use of the Complainant's health information. Section 27(1)(a) may also be relevant.

[para 12] "Health information" is defined in section 1(1)(k) of the HIA as follows:

- (k) "health information" means one or both of the following:*
 - (i) diagnostic, treatment and care information;*
 - (ii) registration information*

[para 13] "Diagnostic, treatment and care information" is defined in section 1(1)(i) of the HIA as follows, in part:

- (i) "diagnostic, treatment and care information" means information about any of the following:*
 - (i) the physical and mental health of 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 14] "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 15] 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[...]

Complainant’s initial arguments

[para 16] In her request for inquiry, the Complainant states she was told by the CDC that the reason the booking agent accessed her health information in Netcare was to confirm the identity of an individual who called to book an appointment for imaging.

[para 17] The Complainant stated that there was no reason for the booking agent to look past the Patient Demographics screen in Netcare in order to make this confirmation. Specifically, there was no reason for the booking agent to view any diagnostic images in order to confirm the identity of a caller.

Custodian’s initial submission

[para 18] The Custodian provided a copy of a call log from its phone provider (Telus), showing that a call was received from a phone number matching the number appearing on the Complainant's complaint. The Complainant does not dispute that the phone number belongs to her; she agrees that this is her landline number.

[para 19] The call log shows that the call was made to the CDC on July 7, 2022, at 12:17pm, and that the call lasted a little under three minutes. The Custodian states that the call logs shows that the person who called from the Complainant's phone number chose to be connected to a booking agent; the call log shows that the booking agent named in the Complainant's complaint took the call.

[para 20] The Custodian states that callers to the booking line are directed (by an automatic menu) to choose options that correspond with the purpose of their call. One set of options is to book a new appointment; change or amend an existing appointment; ask general questions; or reach a physician line. If the caller chooses the automatic option to book a new appointment, the caller is asked to choose the type of appointment requested; options include nuclear medicine, pain management, obstetrical services, mammograms and breast ultrasounds, other ultrasounds, etc.

[para 21] The call log records the options chosen by each caller. The log shows that some calls were made to cancel an appointment, some calls for the physician line, some were for general questions, and others were for specific imaging, such as breast imaging¹. The call log shows that the person who called from the Complainant's phone number chose the options for a breast imaging appointment.

[para 22] The Custodian explained the standard protocol for booking agents includes verifying a caller's identity using name, date of birth, ULI number, and Personal Health Care Number (PHN). The booking agent verifies the validity of the information from the Patient Demographics screen in Netcare.

[para 23] The booking agent also views relevant diagnostic images, to ensure they are available to the radiologist. Specifically, the booking agent opens the Diagnostic Imaging page in Netcare, locates relevant images (previous images relating to the service being booked), and opens the images to ensure they are viewable. This enables the radiologist to compare the current image with images from past exams.

[para 24] The Custodian states that after taking the above steps, the booking agent is able to proceed with booking the appointment. The Custodian states that in this case, the call did not result in an appointment being booked. He says:

The call in question did not result in a booked appointment. However, it is not uncommon for callers to the CDC Booking Line to change their minds about booking an appointment, for example when a caller is not certain about their schedule or availability, or their desired appointment date and time is not available, they may end the call, and

¹ The Custodian redacted all phone numbers in the call log except the Complainant's.

they may choose to call back another time or to make their booking with another provider.

[para 25] I asked the Custodian several questions regarding the practice of viewing diagnostic images.

[para 26] I asked what problem the Custodian was addressing by having booking agents take this step, and how often images in Netcare were not viewable by a radiologist. The Custodian responded that several years ago the CDC had identified problems with viewing images as an issue that happened commonly enough that a process was implemented to address it.

[para 27] I asked why this step is taken by a booking agent rather than a radiologist. The Custodian responded that the booking agent is able to view the images at the time an appointment is being made. If a relevant image is not viewable, the CDC can take steps to rectify the problem prior to the appointment. If the images were viewed only by the radiologist, steps could not be taken before the appointment. This means that the radiologist's assessment of the current image may be delayed so that viewable images from past exams could be retrieved by other means.

[para 28] I asked what effect there may be on the health service provided to a patient if an existing image were not viewable by a radiologist. The Custodian responded:

The best standard of interpretation is provided by a direct comparison of the current images to the related prior images. If existing prior related images are not viewable for any reason, the radiologist will delay interpretation until the prior images are available for comparison, unless the case has been marked as "Stat" by the requesting physician, in which case only a preliminary opinion could be issued, complicating and delaying care for the patient.

[para 29] I asked what steps a booking agent takes if past images are not viewable. The Custodian responded that the booking agent will inform a team lead, who determines whether there is a technical fault, which is addressed by an IT team. If the image cannot be restored, the CDC will request a copy of the image from the clinic that created the image.

[para 30] I asked what the booking agents are instructed to look for when viewing the relevant images – for example, whether the agents merely ensure the images are viewable or whether specific information in the images is reviewed. The Custodian responded that booking agents only ensure that images are viewable. In this case, the booking agent opened two prior images; the Custodian pointed to the Netcare audit log provided by the Complainant, noting that “the two image views were so brief they were logged in the Netcare audit log as both occurring at the same second (12:18:24)”.

[para 31] Lastly I asked how the booking agent is able to determine which prior images may be relevant to the health service being requested. The Custodian responded that a

booking agent can identify relevant images by the manner in which these images are categorized and named in Netcare.

Complainant's rebuttal submissions

[para 32] In response to the Custodian's submission, the Complainant denies having called the CDC to make an appointment for imaging. She does not deny that the phone number identified in the call log is hers, but she argues that the call log is inaccurate. She states that "[e]veryone is aware or should be that incoming calls and call display numbers are not accurate." She states that she has received incoming calls that display her own number as the caller ID. She states that she has spoken to a Telus representative who informed her this was becoming a regular occurrence.

[para 33] The Complainant reiterates that the Patient Demographic screen in Netcare contains sufficient information to verify the identity of a patient, and that there is no reason for the booking agent to have accessed the Diagnostic screen or any diagnostic images.

[para 34] The Complainant also states that she regularly books her yearly mammograms for March. She states that she had a mammogram on March 22, 2022 and did not require a breast ultrasound. Therefore, she would not have called to book a mammogram (or other breast imaging) in July 2022.

Custodian's rebuttal submissions

[para 35] The Custodian states that he has no reason to believe the CDC's call log is inaccurate. He also states that in order for the booking agent to proceed to the stage she did with the booking, the caller would have had to have the Complainant's full name, date of birth, address and PHN. He argues:

If the caller had failed to accurately provide any of those pieces of information, the agent would not have proceeded with the Netcare look up.

[para 36] With respect to the Complainant's submissions regarding previous statements or arguments of the Custodian, the Custodian states that he did not previously tell the Complainant that the booking agent accessed her information in Netcare in error.

Analysis

[para 37] The Custodian and Complainant disagree about whether the Complainant called the CDC on July 7, 2022. Both parties have persuasive reasons for their respective positions. I do not have to make a determination as to whether the Complainant called the CDC on that day or not. The Complainant has not objected to the use of her health information to verify whether the caller was in fact her. Rather, the Complainant objects to the booking agent's viewing of her diagnostic images as part of that process. The following analysis focusses on whether the Custodian, or the booking agent as its affiliate, had authority to view those images.

[para 38] The Custodian has explained the standard steps taken by booking agents when patients call to make imaging appointments. As stated by the Complainant in her submission, patients can book their own routine mammogram, without a physician's referral, only once per year.

[para 39] I accept that the information used by booking agents, including a caller's name, date of birth, PHN and dates of past related imaging services in Netcare, is authorized under section 27(1)(b). This is information used to determine whether the caller is eligible for the health service.

[para 40] It is less clear to me that accessing past diagnostic images for the purpose of ensuring they are viewable, is part of determining a patient's eligibility for a health service.

[para 41] The Custodian has explained why booking agents view diagnostic images relevant to the appointment being made; I accept that this step is to ensure a radiologist can provide as accurate and complete an interpretation of a diagnostic image as possible. However, it seems that even if a patient's past images were not viewable for some reason, that would not make the patient ineligible to receive the service being booked. The Custodian's submissions indicate that the service would still be provided but the radiologist's interpretation of the imaging may be delayed if past images are not viewable at the relevant time. In other words, an unviewable past image affects the speed and possibly accuracy of a radiologist's interpretation, but this is not the same as an unviewable image affecting a patient's *eligibility* for imaging services. If the availability of past images does not affect a patient's eligibility, then section 27(1)(b) cannot authorize the viewing of those images to ascertain their availability. I find that section 27(1)(b) does not authorize a booking agent as an affiliate, or the Custodian, to view past diagnostic images for the purpose of verifying eligibility.

[para 42] Section 27(1)(a), which authorizes the use of health information for the purpose of providing a health service, seems applicable. Diagnostic imaging services are health services as that term is defined in section 1(1)(m) of the HIA, cited above. Although it is the booking agent and not the radiologist taking this step of ensuring relevant images are viewable, the purpose of this step is to ensure the radiologist has relevant information available to them when they provide the health service (specifically, interpreting the imaging). Therefore, this step is part of providing the health service. In other words, when booking agents, as affiliates of a custodian, view a diagnostic image relevant to the appointment being made, for the sole purpose of determining whether that image is viewable by a radiologist, that use of health information is for the purpose of providing a health service and authorized under section 27(1)(a) of the HIA.

[para 43] In this case, the Complainant (or whomever called from the Complainant's phone) did not book an appointment. The caller went far enough into the booking process that the booking agent was authorized to verify the caller's eligibility for the service the

caller indicated they wanted to book. However, as no service was actually booked, a health service was not being provided.

[para 44] In Order H2014-02, the adjudicator addressed a situation in which a physiotherapy clinic accessed a past patient's information in Netcare, anticipating that this patient would return for further services. However, the patient had not actually requested further services at the relevant time. The adjudicator concluded that access of the patient's information in Netcare was not authorized for the purpose of providing a health service because a health service was not requested at that time. The adjudicator said (at paras. 38-39):

A health service cannot be provided in the absence of the agreement of the patient or someone who acts on behalf of the patient. If an individual has requested that a health service provider provide him or her with health services, or has requested a health service provider's advice regarding a health service that could be given, or someone else with authority to do so on that person's behalf has requested such a service, then the terms of the provision are met that there is a purpose of providing a health service. Under these circumstances, section 27(1)(a) would authorize the use of health information for the purpose of providing that health service.

However, in a case where an individual or someone authorized on their behalf has not requested or otherwise agreed to the individual's receiving a health service or obtaining advice about a health service from the health service provider, there is no health service that is to be provided. The provision neither states, nor, in my view, does it contemplate, use of health information both for the purpose of providing a health service, as well as for possibly providing a health service should the need arise. Even if one were to limit the idea to a reasonably anticipated need, the latter interpretation would unreasonably strain the language chosen by the legislators.

[para 45] This decision was upheld in *Alberta Health Services v Information and Privacy Commissioner of Alberta*, 2018 ABQB 467 (*Alberta Health Services*), in which the Court found:

[64] First, to the extent that AHS takes issue with the Adjudicator's finding that the use of health information was not authorized under s 27(1)(a) and (b) absent a request for health services, or evidence that the provision of health services was within contemplation, her decision on this point is reasonable. Section 1(1)(m) of the *HIA* clearly defines "health service" as a service that "is provided" to an individual. The Adjudicator's conclusion that the use of the current or present tense suggests that to qualify, a service must be one that either is provided, or is to be provided to qualify is reasonable.

[para 46] In order for section 27(1)(a) to authorize the use of health information, the health service must be one that is provided or is to be provided. It may be argued that by proceeding to the booking agent in the manner the caller did (i.e. by choosing the options they did, to proceed to the booking agent), a request for breast imaging was reasonably contemplated. However, I disagree that merely contacting a booking agent is sufficient to meet the requirements of section 27(1)(a). As stated by the adjudicator in H2014-02, and

confirmed by the Court in *Alberta Health Services*, the patient, or a person authorized to act on behalf of the patient, must agree to the health service.

[para 47] A caller may contact the CDC and proceed through to a booking agent for reasons other than making an appointment at that time. For example, perhaps the caller was contacting multiple service providers to find the earliest appointment date, or to inquire about the possibility of booking several services together. It may be that the caller wanted other information they believed a booking agent could provide, and did not specifically intend to book a service at that time.

[para 48] In such situations, a health service is not contemplated within the terms discussed in Order H2014-02 and *Alberta Health Services*, such that section 27(1)(a) is engaged.

[para 49] In contrast, where an appointment *is* booked, it seems reasonable to say that a health service is contemplated or “to be provided”, such that a custodian or affiliate can take the steps required to ensure the health service is performed as efficiently and effectively as possible. Even if that appointment is later cancelled, the health service is contemplated and therefore section 27(1)(a) is engaged, up until the point of cancellation.

[para 50] It may seem like a small matter of timing to say that booking agents must wait until an appointment is actually *made* before viewing relevant diagnostic images, but health information must be used and accessed *only* where authorized under the HIA. As stated by the Court in *Alberta Health Services*:

[63] On whole, the *HIA* recognizes and seeks to guard the privacy rights of health care users, and thus generally prohibits the use of health information except for in specified circumstances authorized by the *Act*.

[para 51] Waiting until a service is booked before viewing relevant diagnostic images ensures that a health service is contemplated or “to be provided”, such that section 27(1)(a) can be engaged.

[para 52] As no service was booked by the person calling from the Complainant’s phone, I cannot conclude that the booking agent as an affiliate, or the Custodian, was authorized to view the Complainant’s diagnostic images.

2. Did the Custodian fail to safeguard health information in contravention of section 60 of the HIA?

[para 53] Section 60 of the HIA requires a custodian 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 54] 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 55] The Custodian states that as he did not contravene the HIA when accessing the Complainant’s health information, there was also no failure to safeguard that health information.

[para 56] The Custodian further states that he has “robust training and well-established processes in place for its Call Centres”. He states that all booking agents undertake privacy training and a 6-week training program. He states:

Training and supporting documents are provided to Booking Agents that include specific instructions to check Netcare for two purposes:

- 1) to verify the caller's identify using basic patient demographic information including name, birthdate, ULI number, and validation of Alberta Health Care coverage using the Personal Health Care Number (PHN), and,
- 2) to confirm the existence and availability of related prior diagnostic images to enable the radiologists to do a comparison of prior and current images and exams, ensuring a thorough assessment of the patient's health status.

Training documents are available to all CDC Booking Agents at all times during their workdays via an internal call centre wiki. Agent booking processes are also defined in CDC policies, which must be read and attested to by staff every year and are always available to staff.

[para 57] The Custodian further states that the booking agent named in the Complainant's complaint completed the training courses and several refreshers since 2021. There have not been any privacy complaints about this agent other than the Complainant's.

[para 58] I have found that the Custodian and the booking agent as its affiliate, did not have authority to access the Complainant's diagnostic images because the call from the Complainant (or from her phone) did not result in an appointment being made. From the Custodian's submissions, it is the Custodian's practice with respect to when diagnostic images are viewed by booking agents that contravenes the Act. In other words, the problem is not that the booking agent failed to follow the training and protocols of the Custodian, but rather than she did.

[para 59] Given this, I find that the Custodian has not met its obligations under section 60 of the Act.

[para 60] In order to bring the Custodian's practices in line with the requirements of the HIA, the Custodian might cease having booking agents view relevant images to ensure they are viewable by the radiologist; however, this practice seems to have valuable benefits to the health service providers and to patients.

[para 61] In the alternative, as indicated above, the issue could also be rectified by having booking agents view the images only once an appointment has been made by a patient, and not before; in other words, "book before you look". This will ensure that booking agents are viewing the images for the purpose of providing a health service, which is authorized under section 27(1)(a).

IV. ORDER

[para 62] I make this Order under section 80 of the Act.

[para 63] I find that the Custodian and/or affiliates were not authorized to use the Complainant's health information. I order the Custodian to stop using the Complainant's health information without authority.

[para 64] I find that the Custodian did not meet its duty under section 60 of the HIA. I order the Custodian to amend its practices as discussed in paragraphs 53-61 of this Order.

[para 65] I order the Custodian to notify me and the Complainant in writing, within 50 days of being given a copy of this Order, that he has complied with it.

Amanda Swanek
Adjudicator