

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2022-01

February 28, 2022

Alberta Health Services

Case File Number 009826

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Summary: The Complainant complained that Alberta Health Services (the Custodian), used her health information in contravention of the *Health Information Act* (the HIA). Specifically, the Complainant alleged that the Custodian contravened the HIA when its affiliate, Dr. Abdulhafid, accessed her Netcare file on June 9, 2018. The Complainant further alleged that the Custodian failed to take reasonable steps to safeguard her healthcare information, as required by section 60 of the HIA.

The Adjudicator found that Dr. Abdulhafid accessed the Complainant's Netcare account in accordance with his duties to the Custodian as required by section 28 of the HIA. The Custodian provided Dr. Abdulhafid discretion to access Netcare for the purposes of an investigation under the *Health Professions Act*, which was the reason why he accessed Netcare. The Adjudicator found that such access was a permitted use of health information under section 56.5(1)(a) of the HIA for the purposes in section 27(1)(f) of the HIA.

The Adjudicator found that the Custodian had implemented administrative safeguards against unauthorized access to the Complainant's Netcare file, sufficient to meet its responsibilities under section 60 of the HIA.

Statutes Cited: AB: *Health Information Act*, RSA 2000, c. H-5 ss. 1(1)(a)(i), 1(1)(a)(ii); 1(1)(w); 1(1)(f)(ix); 2(b); 25; 27(1)(f), 27(1)(g); 28; 34(1); 56.5(1)(a); 56.1(b)(i); 56.1(c); 60; 62(2); 80; *Health Professions Act*, RSA 2000, c. H-7 ss. 54; 54(1); 55(1), 55(2),

55(2)(d); 63(1), 63(1)(a)(ii); *Health Statutes Amendment Act*, 2020 (No. 2), SA 2020, c 35. s. 61; *Alberta Electronic Health Record Regulation*, AR 118/2010 ss. 3(3); 4; *Health Information Regulation*, AR 20/2001 s. 2(2)(i); *Physicians, Surgeons, and Osteopaths Profession Regulation*, Alberta Regulation 250/2009; *Physicians, Surgeons, Osteopaths, and Physicians Assistants Profession Regulation*, AR, 200/2020.

Authorities Cited: AB: Orders H2016-06, H2021-01; Investigation Report H2011-IR-004

Cases Cited: *Gowrishankar v JK*, 2018 ABQB 70; *JK v Gowrishankar*, 2019 ABCA 316

I. BACKGROUND

[para 1] On August 8, 2018, the Complainant complained that multiple affiliates of Alberta Health Services (the Custodian) accessed her Netcare file in contravention of the *Health Information Act*, RSA 2000, c. H-5 (the HIA). Netcare is an electronic health record containing the Complainant's health information.

[para 2] Investigation and mediation resolved issues surrounding all but one occasion on which an affiliate accessed the Complainant's Netcare file: access by Dr. Adel Abdulhafid, an affiliate of the Custodian, on June 9, 2018. That access is the subject of this Inquiry.

[para 3] The scope of information available to Dr. Abdulhafid as a physician with access to an individual's Netcare file is immense. As part of my function to inquire into the subject matter of this Inquiry, I reviewed the Getting Started in Alberta Netcare Portal User Guide¹ and the Alberta Netcare Super User Training Guide.²

[para 4] The Alberta Netcare Super User Training Guide contains a description of the information available through a patient's Netcare file. The pertinent portion for this Inquiry, reads as follows:

When you open a patient's EHR, it navigates to the Clinical Document Viewer (CDV). The default view consists of:

- 1) The Menu Baron the far left (My Details, Searches, Patient Lists, Help, Messaging, etc).
- 2) The **Clinical Document Tree** includes all available clinical documents including lab results, diagnostic imaging, images and other transcribed documents.

[para 5] The Getting Started in Alberta Netcare Portal User Guide elaborates on the search capabilities of the Clinical Document Tree in Netcare.

¹ This guide was previously at the following URL: <https://www.albertanetcare.ca/learningcentre/ANP-User-Guide.htm>. In the time since I reviewed it, the link has been deactivated.

² <https://www.albertanetcare.ca/learningcentre/documents/SuperUser-Training-Guide.pdf>

Clinical Document Viewer Tree

The Clinical Document Viewer Tree lists all lab results, transcribed reports and other clinical documents available for viewing. Open by clicking the desired folder name and then click the name of the lab result or document you wish to view.

CUSTOMIZING THE CLINICAL DOCUMENT VIEWER TREE

You can sort and search for clinical documents by category, date, status, author and result source. You can also filter the documents to display only those you are interested in. The default Clinical Document Viewer Tree structure is by category, with lab results in alphabetical order followed by transcribed reports. Labs pending are always at the bottom.³

[para 6] Netcare enables searches for specific clinical documents, and permits the printing of such. The details of how that is performed are set out in the Alberta Netcare Portal Quick Reference Guide – How to View and Print a Single Clinical Document, also made publically available by the Government of Alberta.⁴ To put it succinctly, a specific clinical document may be printed by opening a patient's Netcare file, searching the available documents, and selecting the desired document for printing.

[para 7] In order to safeguard an individual's health information on Netcare, when Netcare is accessed, an audit log is created. The Audit Logs detail when, by whom, what organization, and via what organization's facility a Netcare file was accessed. The audit logs also indicate the type of the information that was viewed, described as the function that Netcare was used for. Audit logs can be obtained by a patient by making a request to Alberta Health.

[para 8] The Complainant learned of the June 9, 2018 access after obtaining the audit logs in respect of her Netcare file. In the case of the June 9, 2018 access by Dr. Abdulhafid, there are five such entries, each recording one function. The combined information from each indicates that on June 9, 2018 from 09:55:06 to 09:57:40, Dr. Abdulhafid accessed Netcare and executed five functions, back to back, with no time unaccounted for in between. Each function is "view" function indicating that Dr. Abdulhafid viewed the Complainant's Patient Demographics, Diagnostic Imaging (DI), Single Transcribe, Pathology, and Cancer Screening information.

[para 9] For each function, Dr. Abdulhafid was logged in under his own name, accessed Netcare through the Custodian (identified in the Audit Logs as the organization responsible for access), at a facility of the Custodian, in the role of physician.

[para 10] The Complainant believes that Dr. Abdulhafid accessed her Netcare file at the request of an investigator (the Investigator) with the College of Physicians and

³ While the Getting Started in Alberta Netcare Portal User Guide is no longer publically available, the same information quoted remains publically available in the ANP Quick Reference How to Navigate the Clinical Document Viewer (CDV) at:

https://www.albertanetcare.ca/learningcentre/documents/ANP_QR_CustomizeNavigateCDV.pdf

⁴https://www.albertanetcare.ca/learningcentre/documents/ANP_QR_ViewPrintSingleClinicalDocument.pdf

Surgeons of Alberta (CPSA), who was investigating a complaint made by her in respect of another physician. The complaint was made under the *Health Professions Act*, RSA 2000, c H-7 (the HPA). Dr. Abdulhafid initially believed that he accessed her Netcare file after being carbon copied on a letter in error, but later changed his explanation and adopted the position that he accessed the file at the request of the Investigator in order to confirm if he had information that the investigator requested. In either case, having received the letter from the Investigator, Dr. Abdulhafid accessed Netcare without consultation or guidance from anyone else at the Custodian.

[para 11] The Complainant argues that the Custodian is responsible for the access by Dr. Abdulhafid and that it contravened the HIA when he used the access to Netcare he enjoyed as an affiliate of the Custodian, in order to respond to the Investigator.

II. ISSUES

Issue A: Did Dr. Abdulhafid, as an affiliate of the Custodian, access and use health information on June 9, 2018 in compliance with section 27 of the HIA?

Issue B: In regards to the June 9, 2018 access, did the Custodian use the Complainant's health information in compliance with section 27 of the HIA?

Issue C: In regards to the June 9, 2018 access, did the Custodian fail to safeguard health information in contravention of section 60 of the Act?

III. DISCUSSION OF ISSUES

Preliminary Matter – Application of Section 34(1)

[para 12] As part of the CPSA's investigation into her complaint, it had the Complainant sign a consent form permitting it to collect her information in the course of its investigation. The Custodian argued that in light of the decision in *Gowrishankar v JK*, 2019 ABCA 316 (*Gowrishankar*) the consent provided to the CPSA by the Complainant permitted Dr. Abdulhafid to access her Netcare file as part of the CPSA's investigation, pursuant to section 34(1) of the HIA. Section 34(1) states,

34(1) Subject to sections 35 to 40, a custodian may disclose individually identifying health information to a person other than the individual who is the subject of the information if the individual has consented to the disclosure.

[para 13] I do not consider the application of section 34(1) in this case. I note that the Custodian argued that access was permitted under section 27(1)(f) in the alternative to section 34(1). Below, I find that the access to the Complainant's Netcare file was permitted pursuant to section 56.5(1)(a) for the purpose in section 27(1)(f) of the HIA, as was subsequent use of the information therein. Use of health information pursuant to those sections of the HIA is not contingent upon consent from the individual that the information is about.

Preliminary Matter - Access to be considered as an affiliate, rather than a custodian

[para 14] Dr. Abdulhafid, at the time of access, was contracted by the Custodian to provide services. As such, he was, by the definition of “affiliate” in section 1(1)(a)(ii) of the HIA, an affiliate of the Custodian. As a regulated member of the CPSA, he was also a custodian as that term is defined in section 1(I)(f)(ix) of the HIA and 2(2)(i) of the *Health Information Regulation*, AR 20/2001. As set out above, Dr. Abdulhafid used Netcare access afforded to him as an affiliate of the Custodian; accordingly Netcare access by an affiliate is the issue in this Inquiry. As Dr. Abdulhafid is its affiliate, the Custodian is responsible for his access to Netcare. This point was set out in Investigation Report H2011-IR-004 at para. 22 which considered Netcare access by affiliate physicians:

Under section 62(2) of the HIA, 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. Therefore, while Covenant Health affiliates may have carried out the Netcare accesses described in this report, Covenant Health remains responsible for any related contraventions of the HIA as custodian.

[para 15] Moreover, based on the evidence before me, only the Custodian is an authorized custodian permitted to access Netcare under the HIA. It appears that Dr. Abdulhafid’s authority to access Netcare at all rests on his affiliate status.

Issue A: Did Dr. Abdulhafid, as an affiliate of the Custodian, access and use health information on June 9, 2018 in compliance with section 27 of the HIA?

Why did Dr. Abdulhafid access Netcare?

[para 16] There is no dispute that Dr. Abdulhafid accessed the Complainant’s Netcare file on June 9, 2018. Audit Logs detailing when anyone accessed the Complainant’s Netcare file confirm that on June 9, 2018, Dr. Abdulhafid accessed the Complainant’s Netcare file for a total of two minutes and 34 seconds. The Audit Logs record accesses as far back as February 23, 2012, up to June 9, 2018. The Audit Logs do not indicate that Dr. Abdulhafid accessed the Complainant’s Netcare during that period, other than on June 9, 2018. The parties have different understandings of why access occurred.

[para 17] Dr. Abdulhafid’s explanation for access has varied over the course of the complaint about it.

[para 18] Dr. Abdulhafid’s initial explanation arose after the Custodian contacted him about the complaint regarding access on June 9, 2018. Initially, Dr. Abdulhafid appears to have understood that the access in question occurred as a result of receiving a carbon copy of a letter concerning the Complainant in error. The Custodian forwarded to the Complainant that initial explanation of the June 9, 2018 access by way of letter dated, February 1, 2019. The explanation read:

...we are advised that Dr. Adel Abdulhafid accessed your Netcare Electronic Health Record on June 9, 2018 after he was carbon copied on a document regarding health

services provided to you by the writer. Upon review of your Netcare profile, Dr. Abdulhafid determined he had last seen you in 2012 at his former practice, that he may have been sent a copy of that document in error and that no further action was required on his part. Dr. Abdulhafid then destroyed the document he had been carbon copied on, in keeping with the provisions of HIA.

Given the brevity of Dr. Abdulhafid's review of the document, he is no longer able to recollect details in regards to the information contained in the document. Dr. Abdulhafid believes the original document and any other copies are likely in the custodianship of your current physician.

[para 19] The Custodian's initial position was that this use was permitted under section 27(1)(g) of the HIA, for internal management purposes.

[para 20] The Complainant disputes the version of events initially suggested by Dr. Abdulhafid. The Complainant states that no "carbon copy of a letter" exists. On August 27, 2019, the Complainant made an access to information request seeking the carbon copy letter, but it was not among the records she received.

[para 21] The Complainant's understanding is that Dr. Abdulhafid accessed her Netcare file in connection with an investigation by the CPSA into the practices of a different physician.

[para 22] As described by the Complainant in her initial submission, years ago, the Complainant was referred to Dr. Abdulhafid by the physician under investigation by the CPSA. The Complainant met with Dr. Abdulhafid for a consultation in December 2011. According to the Complainant, the CPSA's investigator required a copy of a referral letter sent to Dr. Abdulhafid by the physician under investigation (the Referral Letter), as well as consultation notes. The Complainant suggests that Dr. Abdulhafid accessed her Netcare file in response to a request from the Investigator for the Referral Letter.

[para 23] The Custodian's initial submission, submitted after the Complainant's initial submission, contains an affidavit from Dr. Abdulhafid wherein he changes his explanation for accessing the Complainant's Netcare file, and abandons his initial explanation for access. As he states in his affidavit,

6. I understand that the Applicant subsequently requested that the Office of Information and Privacy Commissioner review the Netcare Access (the "OIPC Review"). As a result of the OIPC Review, Alberta Health Services ("AHS") requested that I provide an explanation for the Netcare Access. An explanation was subsequently provided by my counsel, and, at the time, I failed to appreciate that the OIPC Review and request from AHS involved the Netcare Access (as defined in paragraph 4). Having failed to make the connection between the OIPC Review and the Netcare Access, I mistakenly believed that the access giving rise to the OIPC Review occurred as a result of being copied on a document pertaining to the Applicant, which then prompted me to access the Applicant's Netcare Account.

[para 24] Dr. Abdulhafid's subsequent explanation describes that access occurred much as the Complainant has described.

[para 25] According to Dr. Abdulhafid, on June 5, 2018, the CPSA sent him a letter regarding an investigation into another physician. In the letter, the CPSA requested a copy of the Referral Letter, and any notes from his consultation with the Complainant. In order to respond to the CPSA's request, Dr. Abdulhafid accessed the Complainant's Netcare file. Upon review of the information on Netcare, he determined that he did not have the information requested by the CPSA, and informed the Investigator of the same. The Investigator then suggested that the Complainant may have incorrectly identified Dr. Abdulhafid as someone with information relevant to the CPSA's investigation.

[para 26] Dr. Abdulhafid's affidavit includes e-mails between him and the Investigator, establishing the chain of events he describes. In an e-mail dated June 16, 2018 from him to the Investigator, Dr. Abdulhafid states,

I am writing in respond to your letter dated June 5 2018 with File No. 170217.1.1.

My secretary [sic] looked in all my office charts and on the computer for the patient you had asked information about and she could not found any record under her name. I had also look [sic] at the Netcare and i could not found any surgery or investigation for her under my name.

I will appreciate if you can send me more information about her to help me. I will be happy to help by any way.

Sincerely

Dr Adel Abdulhafid

[para 27] In light of the different explanations for why access occurred, the Complainant is now concerned that neither one may be accurate. She argues that the explanations for why her Netcare file was accessed cannot be reconciled with the information in the Audit Logs.

[para 28] Based on the evidence before me, the Complainant is correct that Dr. Abdulhafid's different explanations of why he accessed her Netcare file cannot be reconciled with the Audit Logs. The Audit Logs show only one occasion when he accessed her Netcare file, and his differing explanations suggest that there might have been two accesses: one in respect of being carbon copied on a letter, and another at the request of the Investigator. While it would have been possible that he accessed Netcare in order to address the carbon copy letter and the Investigator's request at the same time, his own affidavit indicates that was not the case. I note that it is possible that Dr. Abdulhafid accessed the Complainant's Netcare a second time, after June 9, 2018 in response to a carbon copy of a letter, but there is no evidence before me that that was the case. The "carbon copy letter" is only described in the Custodian's letter of February 1, 2019 as a document "regarding health services provided to [the Complainant] by the writer." Who "the writer" of the carbon copy letter was is not specified; when it was sent and received, or the details of it are unknown or forgotten. The only evidence that there was such a letter is Dr. Abdulhafid's recollection that he received a letter and then accessed the

Complainant's Netcare file as a result; this is an explanation for accessing Netcare that he has since abandoned.

[para 29] I find that the evidence establishes on the balance of probabilities that Dr. Abdulhafid accessed the Complainant's Netcare file upon the request of the Investigator. There is no doubt that the CPSA was investigating a complaint against another physician at the time, and contacted Dr. Abdulhafid about the investigation. The e-mail correspondence between Dr. Abdulhafid and the Investigator states that the Investigator requested information from him on June 5, 2018 and he replied on June 16, 2018. In the reply he specifically noted that he had reviewed information from the Complainant's Netcare file.

Was Access Authorized under the HIA?

[para 30] In *Gowrishankar* the Alberta Court of Appeal clarified how the HIA shares authority among Custodians and their affiliates. The Court of Appeal stated at paras. 25 to 28:

Turning next to affiliates of custodians. While there is no provision in the *HIA* that expressly authorizes an affiliate to collect, use, or disclose health information, this authorization is implicit in the *Act*. Section 62(2) provides that:

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.

(emphasis added)

This section contemplates that affiliates will be collecting, using, and disclosing health information. As a number of the defined custodians are entities, such as the department of the responsible Minister, it is the employees and contractors of those entities that collect, use, and disclose the information as prescribed by the *Act*. Because the *Act* permits a custodian to collect, use, and disclose information for specific purposes, its affiliates are also permitted to collect, use, and disclose the information for those same purposes. Indeed, this is the interpretation previously adopted by the OIPC: *Re Alberta Health and Wellness* (March 25, 2008), 2008 CanLII 88791 (AB OIPC), Order H2007-005 and Order P2007-013.

The nature of an affiliates relationship with the custodian imposes limitations on how an affiliate may collect, use, and disclose health information. An affiliate may only collect, use or disclose health information in accordance with its duties to the custodian. This must be inferred from the provisions that prohibit affiliates from collecting, using or disclosing health information in a manner that is not in accordance with the affiliate's duties to the custodian: ss 24, 28, 43. Affiliates must also comply with any policies or procedures established by the custodian: s 63(4)(b).

In summary, the collection and use of health information by a custodian (including an authorized custodian) and its affiliates is authorized by the *Act* so long as i) it is for a purpose permitted by the *Act*; and ii) the information is essential to carry out the intended purpose. An affiliate is subject to further limitations based on the affiliate's duties to the

custodian, and any policies or procedures put into place by the custodian. Custodians and affiliates are permitted to disclose health information with or without consent, depending on the circumstances.

[para 31] An affiliate's limitation on using information only in accordance with their duties to the custodian is codified in section 28 of the HIA.

[para 32] The Court of Appeal clarified the proper approach to considering access by affiliates in these cases at para. 86 of *Gowrishankar*,

We agree with AHS and the physicians that the HIA permits the use of health information by custodians and affiliates for various purposes. Use of information is not predicated on what is used or who created the information; rather use of health information is permitted so long as it is for a purpose provided by the HIA and only health information essential to carrying out the intended purpose is used.

[para 33] I also observe the reminder to focus on the purposes of the HIA while considering the minutiae of its terms set out in *Gowrishankar v JK*, 2018 ABQB 70.

[para 34] In light of the decisions of the Court of Queen's Bench and Court of Appeal in the *Gowrishankar* case, I do not consider whether the Investigator might be construed as asking Dr. Abdulhafid for information in his capacity as an affiliate or a custodian in his own right. He was an affiliate of the Custodian under the HIA at the time of access, and used the access provided to him in that role to access the Complainant's Netcare file. The examination of the issues in this matter will involve two steps:

- 1) Considering whether the Custodian would have been authorized to access Netcare under the circumstances of this case. If it was not, Dr. Abdulhafid, as its affiliate could not have been.
- 2) Provided the Custodian was authorized to access Netcare, the next question is whether Dr. Abdulhafid accessed Netcare in accordance with his duties to the Custodian, as required by section 28 of the HIA.

Complainant's Argument that access violated the HIA

[para 35] The Complainant argues that the June 9, 2018 access was contrary to the HIA. The Complainant's conclusion that access was contrary to the HIA appears to be premised on a statement from the CPSA. The Complainant states that she was told by the CPSA that access by Dr. Abdulhafid was improper, since he had not properly maintained medical records either in paper or electronic format. The Complainant does not elaborate on how, or if at all, the alleged failure to properly keep records would mean that access to Netcare was not permitted.

Custodian's Argument that it complied with the HIA

[para 36] "Use" is defined in section 1(1)(w) of the HIA as follows:

(w) “use” means to apply health information for a purpose and includes reproducing the information, but does not include disclosing the information.

[para 37] Previous orders have held that accessing a person’s Netcare file is use of that person’s health information. See Order H2021-01 at para. 17.

[para 38] In light of the information contained in the affidavit of Dr. Abdulhafid, the Custodian no longer argues that access was permitted pursuant to section 27(1)(g) of the HIA. The Custodian now argues that access was permitted under section 27(1)(f) of the HIA. Section 27(1)(f) of the HIA 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 39] I note that section 27 only provides authority to use information that is in the custody or under the control of the Custodian. However, section 56.5(1)(a) permits use of prescribed health information so long as it accessible via Netcare, regardless of whether or not it is under the custody or control of an authorized custodian. Section 56.5(1)(a) 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;

[para 40] The Custodian is an authorized custodian under section 56.1(b)(i) of the HIA. Nothing in the regulations limits an authorized custodian’s authority under section 56.5(1)(a) to use health information.⁵

[para 41] I now consider 1) above, whether the Custodian was authorized to access Netcare.

⁵ “prescribed health information” is defined in section 56.1(c) of the HIA,

“prescribed health information” means health information about an individual that is of a class or type prescribed by the regulations that a regulated health professional or an authorized custodian may or must make accessible to authorized custodians via the Alberta EHR;

Section 4 of the *Alberta Electronic Health Record Regulation*, AR 118/2010 lists the classes and types of information that are included in “prescribed health information.” However, no health information is excluded from the definition, and there is no limit on what health information a regulated health professional or authorized custodian *may* make accessible to authorized custodians on Netcare. “Prescribed health information” thus includes any health information posted to Netcare in compliance with the HIA.

Would the Custodian have been authorized to access Netcare under section 27(1)(f) in this case?

[para 42] As described below, accessing Netcare in response to the Investigator is using information for the purpose of carrying out a purpose under an enactment of Alberta, in this case, the HPA. As described below, conducting investigations and collecting information in the course of them is specifically authorized by the HPA.

[para 43] At the time of the events in question, under the HPA and the *Physicians, Surgeons, and Osteopaths Profession Regulation*, Alberta Regulation 250/2009⁶ (AR 250/2009) the CPSA had the authority and responsibility to investigate complaints made against its members.

[para 44] As part of its role, the CPSA must address complaints made to its Complaints Director, made under section 54 of the HPA:

54(1) A person who makes a complaint to a complaints director regarding a regulated member or a former member must do so in writing and must sign the written complaint.

[para 45] Section 55(2) of the HPA prescribes steps that the CPSA's complaint director must take in response to a complaint, which may include appointing an investigator to investigate the complaint under section 55(2)(d). Sections 55(1) and (2)(d) of the HPA state,

55(1) Within 30 days after being given a complaint or treating information as a complaint, the complaints director must give notice to the complainant of the action taken with respect to it.

(2) The complaints director

(d) may conduct, or appoint an investigator to conduct, an investigation,

[para 46] The letter from the Investigator to Dr. Abdulhafid requests information specifically under the authority of section 63(1) of the HPA, which includes the authority to require a person to provide documents in subsection 63(1)(a)(ii). Section 63(1) of the HPA states,

63(1) An investigator

(a) may, at any reasonable time,

(ii) require any person to give to the investigator any document, substance or thing relevant to the investigation that the person possesses or that is under the control of the person,

⁶ Since replaced by the *Physicians, Surgeons, Osteopaths, and Physicians Assistants Profession Regulation*, Alberta Regulation, 200/2020.

[para 47] The Investigator appears to have been exercising the power in section 63(1)(a)(ii) specifically, when requesting the Referral Letter and consultation notes from Dr. Abdulhafid.

[para 48] Since the Custodian could access Netcare in response to the Investigator, the question becomes whether when Dr. Abdulhafid did so, he was using health information in accordance with his duties to the Custodian. Doing so otherwise is prohibited by section 28 of the HIA.

[para 49] I now consider 2) above, whether Dr. Abdulhafid accessed Netcare in accordance with his duties to the Custodian.

Did Dr. Abdulhafid access Netcare in accordance with his duties to the Custodian?

Scope of section 28

[para 50] To begin this discussion I briefly address the concept of abuse of health information which arose in the decision of the Court of Queen's Bench in *Gowrishankar v JK*, 2018 ABQB 70. The Court stated at paras. 54 to 55:

There is no finding by the Adjudicator that the doctors abused the complainant's health information. They used it to respond to complaints the mother made about them, which the Adjudicator unreasonably found to be a personal use.

[para 51] It seems to me that the Court of Queen's Bench is suggesting that an affiliate may not use information in a manner that constitutes an abuse of health information, which would be part of the limitations section 28 of the HIA places on affiliates. As there is no indication of abuse in this case, I do not consider the matter further.

[para 52] In my view, the limits that section 28 of the HIA places on affiliates are understood in light of, and in contrast to, section 25. 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 53] An affiliate's authority to use health information is limited by section 28. An affiliate can only use health information in manner in accordance with their duties to their custodian. Section 28 of the HIA states,

28 An affiliate of a custodian must not use health information in any manner that is not in accordance with the affiliate's duties to the custodian.

[para 54] Read together, sections 25 and 28 indicate that the broader authority to use information provided to custodians under the HIA, is the custodian's to allocate among its affiliates, via regulating the duties they perform. As stated in *Gowrishankar* at para. 86 (quoted above at paragraph 31 of this Order) the proper application of section 28 will be purposive one.

[para 55] Determining whether an affiliate operated within the boundaries of section 28, therefore, will involve considering the role an affiliate has in seeing the purposes of the HIA fulfilled in the specific circumstances of a given case, without losing sight of the affiliate's duties to their custodian, and the authority to use health information provided to an affiliate by their custodian. Broadly put, an affiliate will comply with section 28 so long as the affiliate's use of health information is for a purpose under the HIA that their custodian may use information, and is carried out in a manner that respects the confines of their authority to use health information set by their custodian.

Considering the case at hand

[para 56] I now consider whether Dr. Abdulhafid, as an affiliate, acted within the boundaries set by section 28 in this case.

Did Dr. Abdulhafid access Netcare for a purpose that the Custodian could access Netcare?

[para 57] As set out above, the Custodian was authorized to access Netcare for the purposes of section 27(1)(f); it is clear that Dr. Abdulhafid accessed Netcare for the same reason. He accessed Netcare in order to respond to the Investigator, in order to carry out the purpose of the investigative function of the CPSA, authorized by the HPA.

Did access fall within the confines of Dr. Abdulhafid's authority to use health information set by the Custodian?

[para 58] For the following reasons, I find that when Dr. Abdulhafid accessed Netcare, he did so within the confines of his authority to use health information.

[para 59] To begin, I note that the Custodian, which sets its affiliates' authority to access Netcare has no issue with Dr. Abdulhafid's access to Netcare, and contends that he is permitted to do so. This fact is relevant to the extent that the Custodian, which authorizes affiliate access, approves of the access; had it denied he had authority it would likely be the case that he did not. The Custodian's approval is not the end of the matter, however. I do not believe that the Legislature would have undermined the HIA's restrictions on how affiliates may use health information by permitting custodians to "bless" uses after the fact. There must still be some objective basis to conclude that use was in accordance with the affiliate's duties in the first place.

[para 60] The Custodian is the largest custodian in Alberta. According to the Custodian's website, it has over 108,600 direct employees,⁷ all of whom are its affiliates by definition, under section 1(1)(a)(i) of the HIA. A large number of those employees will be regulated members of various professions, including physicians who are regulated by the CPSA. As a matter of its regular operations, the Custodian, and its affiliates, must deal with regulatory bodies such as the CPSA on a regular basis. As was the case in

⁷ As of February 28, 2022 see: <https://www.albertahealthservices.ca/about/about.aspx>

Gowrishankar, and here, dealing with regulatory bodies may requiring using health information.

[para 61] Permitting health information to be used in the processes of professional regulatory bodies is one of the purposes of the HIA, in so far as regulating the conduct of their members is part of managing the health system, as set out in section 2(b) of the HIA:

2 The purposes of this Act are

(b) to enable health information to be shared and accessed, where appropriate, to provide health services and to manage the health system,

[para 62] As explained below, the Custodian, as an authorized Custodian, has authority to release information from Netcare specifically in the context of an investigation by a professional regulatory body.

[para 63] At the time of the access in question, the Custodian made use of Netcare pursuant to the Alberta Netcare Electronic Health Record Information Exchange Protocol (the IEP).⁸ The IEP establishes specific rules for collection, use, and disclosure of information in Netcare. The IEP is intertwined with the operation of Netcare as stipulated in section 3(3) of the *Alberta Electronic Health Records Regulation*, Alta Reg., 118/2010 (the AEHR Regulation):

*(3) Despite subsections (1) and (2), any custodian who immediately before the coming into force of this Regulation was a participating custodian as defined in the Information Exchange Protocol under Alberta Netcare is an authorized custodian.*⁹

[para 64] At my request, the Custodian provided the sections of the IEP that are applicable to the circumstances of this case.¹⁰ Section 4.3.2 of the IEP sets out permission to access Netcare required in an investigation by a professional body:

- 4.3.2 Alberta Netcare information may be provided to a health professional body at its request where
- a) the participating custodian has complied with any other legislation authorizing or requiring the participating custodian to disclose that information for that purpose,
 - b) the information is required with respect to an investigation,

⁸ In the time since the access in question, the functioning of the IEP has been affected by the addition of section 56.71 to the HIA pursuant to section 61 of the *Health Statutes Amendment Act*, 2020 (No. 2), SA 2020, c 35.

¹⁰ The Custodian states that the section of the IEP which would permit Dr. Abdulhafid's access is section 4.1.5. Section 4.1.5, however, is applicable to circumstances where health information is released to the individual that it is about. That is not the case here; Dr. Abdulhafid accessed Netcare with a view to responding to the Investigator, rather than the Complainant herself.

- discipline proceeding or practice review, and
- c) the information
 - i. has been entered by a member of the requesting health professional body, or
 - ii. pertains to an activity of a member of the requesting health professional body.

[para 65] When it comes to providing health information to professional bodies, the Custodian, as a paper entity, must act through its employees, who are, by definition its affiliates. This point is discussed *Gowrishankar* at para. 26. The Custodian confirmed that as its affiliate, the IEP applies to Dr. Abdulhafid's access to Netcare.¹¹

[para 66] In his role as a physician with the Custodian, Dr. Abdulhafid had authority to access Netcare on his own volition. While, as discussed under Issue C, the Custodian has policies and guidelines that apply to his use of Netcare, he is left to his own discretion as to whether and when he should access Netcare, so long as this is done within the scope of his employment duties. Further, as a physician in the employ of the Custodian, Dr. Abdulhafid plays a part in the Custodian's role to oversee and run the health care system in Alberta, including dealing with the CPSA. As a regulated member of the CPSA, he also has a responsibility to reasonably cooperate with its investigations; this is a responsibility that the Custodian must understand comes with employing physicians.

[para 67] Under the above circumstances, while accessing Netcare was not something that Dr. Abdulhafid was specifically tasked to do by the Custodian, it was nevertheless done within the confines of his authority to access Netcare. The Custodian has a responsibility toward ensuring a well-running health system, which includes dealing with professional regulatory bodies, and fulfilling the purpose of the HIA stated in section 2(b). As an affiliate through whom the Custodian must act, Dr. Abdulhafid shares in that responsibility. Further, the Custodian is no doubt aware that Dr. Abdulhafid has his own duty toward the CPSA as regulated member, and that it cannot employ him as a physician without regard for that duty. Understanding its responsibility, and the professional responsibility of Dr. Abdulhafid, the Custodian provided him with access to access Netcare at his own discretion, which includes authority under the IEP to provide information to the CPSA investigator, as its affiliate. Upon receipt of the letter from the Investigator, Dr. Abdulhafid elected to exercise that discretion. In sum, it appears that the Custodian left him discretion to access Netcare for the reason he did. As such doing so was within his authority.

¹¹ I note that the Custodian argues forcefully that the IEP, or accessing Netcare under its terms, is irrelevant to this matter in light of the decision in *Gowrishankar*. The Custodian, correctly, notes that neither the Court of Queen's Bench decision nor the Court of Appeal's decision in the *Gowrishankar* case rested its conclusion that accessing Netcare in that case was permitted in light of the IEP, notwithstanding that it was specifically mentioned in Order H2016-06. The Custodian notes that the Courts found that the complainant's consent in that case was sufficient to permit access. While it may be the case that the IEP is irrelevant as far as the Custodian's consent argument is concerned (which I do not consider here as stated at the outset of this Order), I find that the IEP is applicable in considering whether section 28 has been complied with regarding access for the purposes of section 27(1)(f) which is not contingent upon consent.

[para 68] In closing on this issue, I observe that the actions taken once Dr. Abdulhafid accessed Netcare indicate that he acted within the limits of his authority, and did not take any extraneous actions. It appears that Dr. Abdulhafid used Netcare on June 9, 2018, strictly to the extent necessary to respond to the Investigator' request to search for information believed to be in his possession. He was not asked to, and did not, perform a general search of Netcare or provide access to Netcare on behalf of the Investigator in a general manner. He only accessed the Complainant's Netcare file for two minutes and 34 seconds, viewing five pages during that time, and then stopped. There is no indication that he sought any information other than that which he was believed to possess and was asked for. Neither did he linger over the Complainant's health information once he determined that he did not have the information that the Investigator wanted. Had Dr. Abdulhafid accessed Netcare for purposes in addition to or other than responding to the Investigator, accessing Netcare for those additional purposes would have to be justified under the HIA as well.

Conclusion on whether the Custodian, and Dr. Abdulhafid as its affiliate, complied with section 27

[para 69] In light of the above, I find that accessing the Complainant's Netcare file was permitted the purpose given in section 27(1)(f) of the HIA.

Issue B: In regards to the June 9, 2018 access, did the Custodian use the Complainant's health information in compliance with section 27 of the HIA?

[para 70] As noted above, under section 62(2) of the HIA, when Dr. Abdulhafid, as the Custodian's affiliate, accessed the Complainant's Netcare, it is considered a use by the Custodian.

[para 71] For the same reasons that access by Dr. Abdulhafid was permitted for the purpose in section 27(1)(f) of the HIA, so too is access by the Custodian.

Issue C: In regards to the June 9, 2018 access, did the Custodian fail to safeguard health information in contravention of section 60 of the HIA?

[para 72] Section 60 of the HIA 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 73] The standard the Custodian must meet under section 60 of the HIA is one of taking reasonable steps; it is not required to implement measures that *perfectly* protect an individual’s health information such that no unauthorized access could possibly occur.

[para 74] In the present case, the key issue regarding section 60 is whether the Custodian took reasonable steps to maintain administrative measures that provided proper direction to Dr. Abdulhafid regarding accessing an individual’s Netcare file. I find that it has.

[para 75] The Custodian provided a signed Confidentiality and User Agreement (the Agreement) between itself and Dr. Abdulhafid. The Agreement is drafted in broad terms aimed at complying with the HIA, and safeguarding health information. I note that it is not so detailed as to explicitly consider whether Netcare might be accessed for the sort of purposes in section 27(1)(f) of the HIA; however item 2 below reflects the limitations on affiliate access set by section 28.

[para 76] The Agreement contains the following provisions regarding use of information:

Appropriate Collection, Use and Disclosure of Information

1. I shall only collect, access, use and disclose the minimum information necessary for the purpose of fulfilling my duties and responsibilities related to my role at AHS (“AHS Responsibilities”).
2. I will not access information except as necessary for my AHS Responsibilities. I will not otherwise access information, including my own health information, or the information pertaining to: a family member, friend, colleague, or anyone who is not within my scope of my AHS Responsibilities. There are other procedures in place (including in Health Information Management) which would allow me or others to appropriately request access to health information.

...

7. I shall not collect, use, transmit or disclose any AHS information except as allowed by AHS policies and procedures.

System Security

...

9. I am responsible for any use of any AHS system performed under my login information.

...

Audit and Sanctions

17. I understand and acknowledge that AHS conducts random audits of AHS Systems and may audit my use of any AHS System without notice.
18. I understand that AHS, in its sole discretion, may revoke or restrict my access the any AHS information of AHS System for any reason, with reference to AHS Policies, Bylaws or Agreements.
19. I acknowledge that I have read the policies referenced above and understand the consequences for a violation of those policies and/or this Agreement.

[para 77] The Custodian’s Collection, Use, Access and Disclosure Policy states the following regarding use of information:

1. Collection and Use of Information

1.1 AHS people shall collect and use:

- a) health information, in accordance with the HIA, only where the collection of the information relates directly to, and is necessary for, carrying out AHS’ activities; and
- b) personal and business information, in accordance with FOIP, only where the collection of the information relates directly to, and is necessary for, AHS’ operating programs or activities, and the use is for the purpose for which the information was originally collected or compiled (or for a use

consistent with that purpose), or another use authorized by FOIP.

- 1.2 AHS may collect and use information in accordance with other applicable legislation.
- 1.3 AHS people shall only access and use Information required for the performance of their duties with AHS.

[para 78] The Custodian also has a Privacy Protection and Information Access Policy. It speaks more generally to the Custodian's commitment to protect health information from unauthorized use. The following provisions are relevant here:

1. InfoCare Behaviours

- 1.1 AHS people hold each other accountable and support each other to ensure that we all demonstrate the following behaviours:

- a) Act on need

We collect, use, and share only the personal and health information that we require to perform our job duties and responsibilities.

- b) Consider purpose

We use and access personal and health information for purposes consistent with its collection or as authorized by law.

4. Compliance

- 4.1 AHS people are required to comply with the InfoCare behaviours.
- 4.2 AHS is committed to timely and just processes and, if disciplinary action is required, follows the *Progressive Discipline* Procedure and applicable collective agreements to address incidents of unsatisfactory conduct or performance.
- 4.3 Failure to comply with this Policy may result in disciplinary action up to and including termination of employment or appointment.

[para 79] The Custodian states that every three years its employees must refresh their understanding of InfoCare best behaviours through an on-line course.

[para 80] Taken all together the Agreement and Policies of the Custodian mandate training and compliance with the HIA, periodic refreshing of privacy principles, and provide for sanctions and discipline in the event that the Agreement and Policies are contravened. I find that these are sufficient administrative safeguards to meet the requirement to reasonable steps to protect the Complainant's health information.

V. ORDER

[para 81] I make this Order under section 80 of the HIA.

[para 82] I confirm that the Custodian, and Dr. Abdulhafid as its affiliate, complied with the HIA.

John Gabriele
Adjudicator
/bah