

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2014-02

July 4, 2014

ALBERTA HEALTH SERVICES

Case File Number H4986

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that a program coordinator employed by Alberta Health Services (the Custodian) had called up and read his health information from Alberta Netcare on seventeen occasions, alleging this was contrary to section 25 of the *Health Information Act* (HIA). Ten of the occasions had taken place after the Complainant had decided to discontinue physiotherapy treatment.

The Custodian argued that the program coordinator had used the Complainant's health information in compliance with sections 27(1)(a) (use for the purpose of providing a health service) and (b) (use for the purpose of determining eligibility for a health service) of the HIA.

The Adjudicator found that neither the Complainant nor anyone providing health services to him had made a request that he receive health services nor had the Complainant agreed to receive any such services. Since health services can be provided only to someone who has agreed to receive them, she determined that the Custodian's use of the Complainant's health information could not be said to be for the purpose of providing a health service or determining eligibility for one. She also found, in the alternative, that there was no evidence that the program coordinator had restricted her use of the Complainant's health information to only that health information essential for carrying out her purpose, as required by section 58 of the HIA.

The Adjudicator found that the Custodian had not prescribed the circumstances in which the program coordinator would be authorized to call up and read health information from Netcare in the course of her duties. While the Custodian had created a new guideline for Netcare use in its

physiotherapy program, which was far more restrictive, the Custodian's evidence raised the possibility that the guideline was not necessarily followed.

The Adjudicator ordered the Custodian to cease using the Complainant's health information in contravention of the HIA. She also ordered it to ensure that employees in the physiotherapy area complied with the new guideline.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000 c. H-5 ss. 1, 2, 25, 27, 56.1, 56.5, 58, 60, 80,

Authorities Cited: AB: Order F2009-48

Case Cited: *McInerney v. MacDonald*, [1992] 2 SCR 138

I. BACKGROUND

[para 1] The Applicant made a complaint to the Commissioner that an employee of Alberta Health Services (the Custodian) had accessed his health information from Alberta Netcare without authority to do so under the *Health Information Act* (the HIA) on seventeen occasions.

[para 2] The Commissioner authorized mediation to resolve the complaint. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The parties exchanged initial submissions. After I reviewed the initial submissions of the parties, I decided that I had questions for the Custodian. I also asked for evidence, including evidence from the employee who accessed the Complainant's health information, in order to support its arguments that the use of the Complainant's health information complied with the HIA. In response to my questions and request for further evidence, the Custodian submitted the affidavit of the Program Manager for Community and Rural Health, Calgary Zone. I accepted the affidavit, and I gave the Complainant the opportunity to provide rebuttal submissions, which he did. Once the Complainant provided rebuttal submissions, the Custodian was invited to provide any comments it had regarding the rebuttal submissions. The Custodian provided rebuttal submissions.

II. ISSUES

Issue A: Did the Custodian use the Complainant's health information in contravention of section 25 of the *Health Information Act*?

Issue B: Did the Custodian fail to safeguard health information in contravention of section 60 of the *Health Information Act*?

III. DISCUSSION OF ISSUES

Issue A: Did the Custodian use the Complainant’s health information in contravention of section 25 of the *Health Information Act*?

[para 4] The HIA defines “use” for the purposes of the Act in section 1(1)(w). This provision states:

1(1) In this Act,

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

[para 5] Section 25 of the HIA prohibits a custodian from using health information unless a provision of the HIA authorizes doing so. It states:

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

[para 6] Section 27 sets out the circumstances in which a custodian may use health information. It states, in part:

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[...]

[para 7] Section 56.5 of the HIA, which specifically addresses health information stored in the Alberta Netcare system, authorizes a custodian to use health information if the use complies with specified provisions in section 27. It states, in part:

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.

[para 8] The Complainant alleges that a program coordinator gained access to his health information from the Alberta integrated electronic health information system, which is referred to in section 56.1 as the “Alberta EHR”, and which is commonly known as “Netcare”). The Complainant submitted into evidence a Netcare log documenting the occasions the program coordinator accessed his health information, and the category of information that was accessed on each occasion.

[para 9] The Custodian argues that the program coordinator was authorized to use the Complainant’s health information either by section 27(1)(a) or (b). The Custodian states:

Section 27(1) of HIA identifies the circumstances under which a custodian may use health information without the consent of the individual. Custodians are authorized under HIA to access/use health information in Netcare without the consent of the individual who is the subject of the information if the access / use is for a purpose identified in section 27(1).

The employee, as an affiliate of AHS, was directly involved with the funding and the determination of the types of health services that the Complainant was to receive. The Complainant was receiving health services from AHS and funding during the time of the searches. AHS therefore, submits that the employee’s use of the health information in Netcare was authorized under section 56.5, 27(1)(a) and 27(1)(b) of HIA.

It is noted that additional searches took place during the period of January 14, 2012 to March 26, 2012 when the Complainant was not receiving health services. AHS submits that the program area / unit was still involved in a relationship with the client though services were not being directly provided during this time. The employee’s searches during this time were periodic consultations in Netcare for the purpose of determining that future treatment and/or funding would be necessary. AHS submits that section 27(1)(b) still applies to such situations where an individual has already qualified for a service and the custodian needs to determine whether the individual remains eligible.

[para 10] The log submitted by the Applicant indicates that the program coordinator gained access to his health information on October 21, 2011 (four times), December 16, 2011 (twice) January 3, 2012 (once), February 23, 2012 (twice), March 7, 2012 (four times), April 10, 2012 (twice), and April 27, 2012 (twice). The program coordinator accessed information about the Complainant’s prescriptions, and a consultation between the Complainant and his treating physician. AHS argues that the program coordinator’s actions in relation to the Complainant’s health information were done for the purpose of determining whether the information would be relevant in deciding whether the Complainant would be entitled to further funded physiotherapy and that sections 27(1)(a) and (b) authorize her actions.

[para 11] The first question to be determined is what action, or actions, by the program coordinator in relation to the Complainant’s health information constitutes a “use” within the terms of the HIA.

[para 12] “Use”, within the terms of the HIA, is the application of health information for a purpose. “Reproducing health information” is specifically cited in 1(1)(w) as an example of a “use”. “Reproducing” in the context of records, typically refers to producing a copy or representation of a record¹.

¹ Katherine Barber ed., *Canadian Oxford Dictionary 2nd Edition*, (Don Mills: Oxford University Press, 2004)

[para 13] In my view, both the act of calling up a health record from Netcare and of reading it is are “uses” within the terms of section 1(1)(w) of the HIA (cited above).

[para 14] The act of calling up a health record from Netcare may be viewed as “reproducing health information”, as doing so amounts to producing an electronic copy of a record containing health information.

[para 15] The act of reading health information also falls within the definition of “use” under the HIA, even if the health information is read solely for the purpose of determining its contents. When health information is retrieved from Netcare and reviewed, the health information to decide whether it is relevant to an authorized or purportedly authorized purpose is being applied for a purpose. In saying this, I recognize that Order F2009-048, an order issued under the FOIP Act, puts forward the following position:

If reading or reviewing personal information in order to determine whether the information is relevant for the purpose of disclosure is a use of the information under the Act, a public body would *use* information under section 39 in each instance where information was disclosed by it under section 40 [...] If simply reading over the information were a *use* as contemplated under the Act, a public body might be in a situation where they do not have authority to use personal information for a purpose for which they could disclose the information and therefore cannot disclose the information simply because they cannot determine the contents and appropriateness first. [emphasis in original]

Order F2009-048 can be distinguished from the present case on the basis that it was decided under the FOIP Act. It addresses the problem under the FOIP Act that if reading for the purposes of deciding whether to disclose were a ‘use’, since there is no provision in FOIP that permits such a use, the consequence could be that reading for the purposes of determining whether to disclose could be an unauthorized use in circumstances in which a disclosure would be unauthorized. The HIA is not problematic in this way because section 27(1)(f) of the HIA authorizes use of health information for carrying out purposes authorized under an enactment of Alberta or Canada. The HIA (an enactment of Alberta) authorizes the disclosure of health information under prescribed circumstances, and Section 27(1)(f) therefore authorizes reviewing information to determine whether it may be disclosed or not under the HIA.

[para 16] Here, the information was in an event being read not for the purposes of determining whether it should be disclosed, but was read, according to AHS, for the purpose of determining eligibility should additional physiotherapy services be requested in future. Reviewing information for the purpose of determining its relevancy for an ostensibly legitimate purpose is, in my view, clearly a ‘use’ of that information, both with respect to information that is accepted for the purpose and that is rejected as irrelevant. All such information is “used” for the purpose of determining its relevance.

[para 17] I am supported that reading to determine content is a use by the fact that if it were otherwise, any employee with access to Netcare could call up and read health information stored in Netcare to learn its contents without offending the HIA. It is axiomatic that this would be contrary to the purpose of the Legislature in enacting the HIA.²

² The Act’s purposes are stated in section 2 of the Act as follows:

[para 18] I say this because the only provisions in the Act that support the privacy purposes of the Act with respect to Netcare are those that limit access by governing use. The HIA governs collection, use, and disclosure of health information. The collection provisions, including the requirements for direct collection, do not apply in the circumstances when health information is called up from Netcare, because a collection within the terms of the HIA must be from a person, and Netcare is not a person. It is also not a disclosure where a person authorized to call up health information from Netcare views information for an unauthorized purpose; rather, it is an unauthorized use of the health information, as section 56.5(3) establishes that a use of health information accessible via Netcare is not a disclosure.

[para 19] As already set out above, section 56.5 prescribes the circumstances in which health information that is accessible via Netcare may be used, limiting authorized purposes for use to the circumstances set out in section 27 and section 25 prohibits use of health information that is not in accordance with the HIA. Since these are the only limits in the HIA as to how health information that is accessible via Netcare may be treated, it is essential that calling up and reading health information accessible via Netcare is understood as a “use” of this information.

[para 20] To conclude, in my view, calling up and reading health information from Netcare falls within the definition of “use” within the terms of section 1(1)(w). As the HIA has as a purpose “establishing strong and effective mechanisms to protect the privacy of individuals and protecting the confidentiality of health information”, as well as the purpose of prescribing rules for the use of health information, which are to be carried out in the most limited manner, I find that interpreting “use” as incorporating the act of calling up and reading health information better achieves these goals than would interpreting “use” as excluding these actions.

[para 21] It follows that when calling up and reading health information from Netcare, a custodian must have a purpose in doing so that is authorized by section 27(1) of the HIA.

Was the program coordinator’s use of the Complainant’s health information authorized by section 27?

[para 22] The Custodian argues that sections 27(1)(a) and (b) authorize the program coordinator’s use of the Complainant’s health information both before and after January 14, 2012 (the date the Complainant discontinued physiotherapy treatment). To find that section 27(1)(a)

(a) to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information,

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

(c) to prescribe rules for the collection, use and disclosure of health information, which are to be carried out in the most limited manner and with the highest degree of anonymity that is possible in the circumstances [...]

authorizes the program coordinator's use of the information, the evidence must support finding that the program coordinator called up and read the Complainant's health information for the purpose of providing health services to him. To find that section 27(1)(b) of the HIA authorizes the program coordinator's use of the Complainant's health information, the evidence must establish that the program coordinator called up and read the Complainant's health information for the purposes of determining or verifying the Complainant's eligibility to receive a health service.

Section 27(1)(a)

[para 23] The Complainant states in his initial submissions that he did not make a request for additional physiotherapy treatment. He also states that he discontinued physiotherapy after January 14, 2012. He therefore questions the authority of the program coordinator to access and read his health information after January 14, 2012.

[para 24] The evidence submitted by the Applicant includes a letter dated November 25, 2011 from the program coordinator to a physiotherapy clinic, approving an additional fourteen physiotherapy sessions over a fourteen week period.

[para 25] In his rebuttal submissions, the Complainant argues that the program coordinator's use of his health information was unauthorized. He argues in relation to the March 7, 2012 viewing of his information:

Not only was the Complainant not receiving physiotherapy care at the time of the above viewing, [the program coordinator] had no right, qualification, or legitimate justification to view the Complainant's confidential physician consultation record. [The program coordinator's] conduct is a clear and unfettered violation of section 39(1) of FOIP, and sections 27(1)(a), 27(1)(b), 28, 58(1), and 60 of the HIA.

The Custodian has not satisfactorily explained, or attempted to explain, why the Complainant's physician consultation was accessed after he ceased receiving care from the Community Physiotherapy Program, why [the program coordinator] had access to a record she was not qualified to interpret, how or if that consultation record as used, if that record was recorded or transcribed, who had / has access to that record, and how and where that record was / is stored.

[...]

[The program coordinator had absolutely no decision making authority whatsoever concerning the Complainant's specific care. Each and every one of the Complainant's treatments were preapproved by senior government staff. All discussions, inquiries, communications, assessments, funding requests, treatment parameters, extension, funding approvals, and decisions concerning the Complainant's specific care were made in advance by [other employees of AHS]. The Affiliate had no legitimate reason to examine or have access to any of the Complainant's medication records, physician consultations, diagnostic imaging records, or any of his other health records which she repeatedly and unlawfully accessed, viewed, printed, and may have disseminated. [The program coordinator's] conduct unmistakably violates multiple sections of FOIP, the HIA, the Alberta Electronic Health Record Regulations, the Alberta Ambulatory Community Physiotherapy Program Use of Netcare Guidelines, and her own AHS confidentiality agreement.

[para 26] At paragraph 21 of the Complainant's rebuttal submissions, he provides an overview of physiotherapy he received, and the decisions made regarding the funding of the physiotherapy:

On December 21, 2009, I spoke to [the Allied Health Leader & Director of Program Development, Alberta Health Services] by telephone during which time she stated that she would be administering my physiotherapy file now that [an employee of the Custodian] had left Alberta Health Services. She also remarked that I was obviously eligible for ongoing physiotherapy coverage until March 2010 and told that it was my decision as to whether or not I attend a Community Accessible Rehabilitation Clinic. She informed that she would advise her staff, [the program manager and another employee of the Custodian], that she was managing my file and would be continuing my existing treatments, extensions, and renewals.

Upon learning of [the program coordinator's] November 25, 2011, letter to my physiotherapist, I called [the Allied Health Leader & Director of Program Development, Alberta Health Services] on November 28, 2011. I left her a voice mail message indicating that I was concerned about [the program coordinator's] attempt to arbitrarily reduce my physiotherapy coverage, her attempt to dictate the timing of my visits which conflicted with my doctor's advice, and her attempt to breach the long-standing agreement I had in place with her [the Allied Health Leader & Director of Program Development, Alberta Health Services], and [another employee of AHS].

On November 29, 2011, [the Allied Health Leader & Director of Program Development, Alberta Health Services] called in response to my above voice mail message. She provided me with her cell phone number and advised me that [the program coordinator] was new to the office and wasn't aware that she [the Allied Health Leader & Director of Program Development, Alberta Health Services] was managing my file or that we had an arrangement in place for my physiotherapy treatments. [The Allied Health Leader & Director of Program Development, Alberta Health Services] told me to disregard [the program coordinator's] letter. She indicated that she was approving my request for twice-a-week visits until the end of January 2012. I informed her that I would not be requiring physiotherapy after January 14, 2012, and explained why that was. She indicated that she would advise [the program manager], [the program coordinator], and my physiotherapy provider of her decision as well as the January 14, 2012, end date of my funded treatments.

On December 1, 2011, I confirmed with my physiotherapy provider that they had been notified by the Alberta Health Service Community Rehabilitation Department that I was now approved to receive twice-per-week physiotherapy treatments, and that those treatments would be ending as of January 14, 2012, for personal health reasons.

As promised by [the Allied Health Leader & Director of Program Development, Alberta Health Services], I did in fact receive twice-per-week funded physiotherapy treatments from December 1, 2011 to January 13, 2012. [The program coordinator] did not, at any time, have input, impact, or decision making authority concerning my care. [The program coordinator's] violations of my Netcare records did not change my eligibility for physiotherapy treatments nor my actual care.

[para 27] The Complainant argues that the program coordinator who accessed his health information from Netcare had no authority to do so. He points to the fact that his funded physiotherapy treatment had already been approved until January 14, 2012, at which point he elected to discontinue treatment for health reasons.

[para 28] There is no evidence that the Complainant requested or sought further funded physiotherapy treatment from the Custodian after January 14, 2012. In my view, the Complainant's previous receipt of physiotherapy treatment does not amount to a request for, or consent to receive, further physiotherapy treatment.

[para 29] Despite this, the program coordinator accessed his health information from Netcare ten times following January 14, 2012. She accessed information regarding a medical consultation with his treating physician, in addition to information about the medications the Complainant was taking.

[para 30] In my letter of March 18, 2014 to the Custodian, I asked the Custodian the following questions:

2. For what purposes did the program coordinator access the Complainant's health information and how did this information assist her to carry out these purposes? The answer should be provided in an affidavit sworn by the program coordinator and should address each instance of access.

3. Did the program coordinator form the view that the Complainant had requested additional physiotherapy services during the period between January 14, 2012 and March 26, 2012? If so, what is the basis of this view? Please provide evidence to support this answer.

[para 31] The Custodian did not provide evidence from the program coordinator regarding her reasons for using the Complainant's health information which she accessed from Netcare, but provided the affidavit of the Program Manager for Community and Rural Health, Calgary Zone. This affidavit states:

With regard to the access to the Complainant's records after January 14, 2012 this related to anticipating a decision. We were informed by the community physiotherapist that the client was to undergo medical intervention and surgery and the Netcare review by the Program Coordinator was done to follow-up on the outcome and anticipated future need for physical therapy. In practice we do not do this for all our clients. However, this particular case, this client had been accessing extra visits (funding) for a very prolonged period of time and it was anticipated that this client would return for further therapy. Netcare was accessed to determine what the current state was and so that future need for physical therapy could be anticipated. The accesses were intended so that we could do our job well and plan ahead.

With regard to the viewing of medication information that is to learn what pain medication the client is on as this may inform the decision. For example, if a patient requires a great deal of pain management then services may still be needed. Consultation notes are viewed on occasion where a Program Coordinator is not familiar with a physician so there may be access to see if the consult was [related] to the provision of physiotherapy.

Accesses such as diagnostic imaging, demographics and consults are necessary given the community physiotherapy program supports short term treatment for musculoskeletal issues. Wherever there is a demand for long term support there needs to be consideration of co-morbid presentations which could contribute to demand or treatment of the main issue. In order to be able to understand and make a decision on offering additional treatment sessions, it is important to understand co-morbid factors. In addition, it is also important to understand if there are recent exacerbations or other interventions pertaining to the musculoskeletal issues. Reviewing diagnostic information and other potentially relevant medical information can help in making a reasonable decision on how to support the patient seeking funding for therapy.

[para 32] The program manager's affidavit explains the Custodian's purposes in accessing the Complainant's health information after January 14, 2012. This purpose was to assess whether the Complainant would need further physiotherapy in the future and to make a decision as to whether additional funding treatment would be offered.

[para 33] The evidence does not establish that the Complainant ever made a request for additional services or was told that he would need to make a request for additional services if he should wish to receive funded physiotherapy. It therefore appears that the decision documented in the program coordinator's letter of November 25, 2011 was based on an assumption or anticipation that the Complainant would request further funded physiotherapy sessions, rather than an actual request for further funded physiotherapy sessions. (The Complainant did attend further physiotherapy sessions after November 25, 2011; however, at the time the decision was made, this was not necessarily in prospect or as a function of her decision.)

[para 34] There are two questions to be answered. The first is whether in circumstances in which there is no request for a service but the need for a service is anticipated, there can be a purpose of providing a health service within the terms of section 27(1)(a). If the answer to this question is yes, the second question is whether the information called up and reviewed by the program coordinator was actually used for this purpose.

Can there be a purpose of providing a health service where there is no request but only a possible request in future?

[para 35] Set out above, section 27(1)(a) states:

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

(a) providing health services[...]

[para 36] 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[my emphasis]:

(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[...]

[para 37] In my view, the answer to the first question is 'no'. The phrase, "health services", refers to services that are provided to an individual, for enumerated purposes. A service is not a

health service under the HIA if it is not, or is not actually to be, provided to an individual for one of the purposes enumerated in section 1(1)(m). In other words, health information can be used for the purpose of providing the service, which is not the same as for the purpose of possibly providing a service depending on future events.

[para 38] 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.

[para 39] 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 40] I recognize that the submissions of AHS also refer to its use of the information for the purposes of 'doing their job well and planning ahead', and that sections 27(1)(g) and 27(2) make reference to planning and resource allocation. In this regard, however, I note that AHS itself did not rely on these provisions, and I cannot do so on its behalf. Furthermore, such an argument would require evidence of the need to plan in the particular circumstances, and what was being planned in terms of considerations such as resource allocation. Moreover, section 27(1)(g) appears restricted in its application to internal management purposes, while section 27(2)(a) appears to refer to planning care within a geographical area, and not to the care of a single patient. In any event, other than the single statement referred to above, the evidence before me is insufficient to ground the application of these provisions.

Was the information accessed by the program manager used for the ostensibly authorized purpose?

[para 41] The program manager indicates that information about the medications prescribed to an individual is typically accessed to inform the decision regarding further funding for treatment. The program manager does not state that the program coordinator reviewed the Complainant's prescriptions for this purpose, only that this is usually the case. The program manager also indicates that consultations are often accessed to see if they relate to physiotherapy. He further states that consults and other relevant medical information "can help in making a reasonable decision on how to support the patient seeking funding for therapy". These statements describe general reasons why health information might be accessed; however, I have no evidence as to the program coordinator's actual purposes in calling up and reviewing the information she did.

[para 42] I note that a letter dated November 25, 2011 from the program coordinator to a physiotherapy clinic approves an additional fourteen physiotherapy sessions over a fourteen week period. This letter states:

Thank you for providing the additional information that was requested regarding this client. Upon a review of this information and documentation in HealthFirst, it would appear that [the Complainant] is making some progress in his ability to manage his symptoms with exercise and pain control strategies.

This letter refers to information received from the clinic and documentation from a system called “HealthFirst” as providing the sole foundation for the decision to extend physiotherapy for fourteen weeks. There is no mention anywhere in this letter to the health information that the program coordinator obtained from Netcare as having any bearing on this decision.

[para 43] It appears that the November 25, 2011 decision to approve further benefits was based solely on the additional information provided by a clinic and documentation in what the program coordinator refers to as “HealthFirst”. I am not in a position to infer that the program coordinator’s use of the Complainant’s health information that is accessible via Netcare was for the purpose of making this decision. While the letter of November 25, 2011 appears to have been written for the purpose of ensuring that the Complainant received the health services to which she had decided he was entitled, it does not follow that the program coordinator’s review of the Complainant’s health information served this same purpose. Rather, given the lack of reference to the information obtained from Netcare, and the absence of evidence from the program coordinator herself, I am unable to say that the Complainant’s health information that was obtained from Netcare was used for the purpose of making the decision regarding additional physiotherapy.

[para 44] In the result, I am not left with a clear picture as to why the program coordinator was looking at the information in Netcare that she looked at. Despite the Custodian’s assertions regarding its usual purposes in calling up and reviewing health information, I cannot conclude that the program coordinator used the Complainant’s health information for any of the various purposes put forward, in a largely speculative way, by the Custodian.

Conclusion under section 27(1)(a)

[para 45] For the foregoing reasons, I am unable to find that the program coordinator’s use of the Complainant’s health information on the seventeen occasions on which she accessed it and reviewed it was authorized by section 27(1)(a).

Was the program coordinator’s use of the Complainant’s health information authorized by section 27(1)(b)?

[para 46] As set out above, section 27(1)(b) states:

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

(b) determining or verifying the eligibility of an individual to receive a health service;

[para 47] I am unable to find that section 27(1)(b) of the HIA provides authority for the program coordinator's uses of the Complainant's health information that are the subject of this complaint.

[para 48] For the uses of the Complainant's health information that took place prior to January 14, 2012, I am unable to say that they were for the purpose of determining or verifying the Complainant's eligibility to receive a health service. While it appears that the program coordinator was making a decision regarding the Complainant's eligibility at this time, given her letter of November 25, 2011, referred to above, this letter does not indicate that she used the Complainant's health information she obtained from Netcare in reaching this decision. Moreover, there is no evidence before me regarding the program coordinator's reasons for accessing the Complainant's health information. Even if there had been a request for a service (which was not the case), or if it had been legitimate to determine eligibility by reference to the fact that a future need was anticipated, the evidence provided by AHS does not establish that the health information the program coordinator reviewed, even given her training and position, was necessary to reach conclusion about eligibility.

[para 49] Section 27(1)(b) does not authorize access in this case for the same reason that section 27(1)(a) does not: the Complainant did not request a health service. If a Custodian is to establish that its purpose in using health information is to determine eligibility for a health service, then it must be established that there was a health service that could be provided. On the evidence before me, there is nothing to indicate that a providing health service was within contemplation, as the Complainant had not asked for one. There was therefore no need to determine the Complainant's eligibility for a health service. Consequently, the program coordinator's seventeen uses of the Complainant's health information could not serve the purpose of determining eligibility for a health service.

Did the Custodian comply with section 58?

[para 50] Section 58 of the HIA imposes a duty on custodians to use health information in a limited manner. It states, in part:

58(1) When collecting, using or disclosing health information, a custodian must, in addition to complying with section 57, collect, use or disclose only the amount of health information that is essential to enable the custodian or the recipient of the information, as the case may be, to carry out the intended purpose.

[para 51] Section 58 requires a Custodian to use only the amount of health information that is essential for the Custodian to carry out its intended purpose. If a Custodian does not comply with section 58, it will offend section 25, as section 25 prohibits using health information except in accordance with the HIA, and section 58 is a provision in the HIA governing use.

[para 52] Even if I am wrong in my conclusions that sections 27(1)(a) and (b) do not authorize the Custodian's use of the Complainant's health information, there is simply no evidence before me that the amount of the Complainant's health information that was used was limited to only that which was essential for providing a health service, or determining eligibility for one. I have been told in the program manager's affidavit that the program coordinator's use of the Complainant's health information was work-related, but I have not been told that it was essential to the purposes that the Custodian argues were served by using the Complainant's health information or how it was essential.

Conclusion

[para 53] As I find that it has not been established that section 27(1)(a) or section 27(1)(b) authorizes the Custodian's use of the Complainant's health information on the seventeen occasions that the program coordinator accessed it from Netcare, and as the Custodian has not pointed to any other provision authorizing its use of the Complainant's health information, it follows that I find that the Custodian contravened section 25 of the HIA when the program coordinator accessed the Complainant's health information. In the alternative, I find that the Custodian has not established that it complied with section 58 of the HIA. I must therefore require the Custodian to cease using the Complainant's health information in contravention of section 25 of the HIA in the future.

Issue B: Did the Custodian fail to safeguard health information in contravention of section 60 of the *Health Information Act*?

[para 54] Section 60 of the HIA imposes a duty on a Custodian to take reasonable steps to protect the confidentiality of health information. This provision 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.

Section 60 requires a custodian to take reasonable measures to protect health information from foreseeable risks such as unauthorized access.

[para 55] The Custodian argues:

With regard to the second issue since access was authorized it is submitted that AHS properly safeguarded the health information in question.

AHS working in collaboration with Alberta Health have implemented adequate controls to protect information in Alberta Netcare EHS. This is evident through the acceptance of two major Netcare PIAs by the Office of the Information and Privacy Commissioner. The Alberta Netcare Portal (ANP) PIA submitted by Alberta Health and Netcare Clinical [Repositories] PIA submitted by AHS and endorsed by Alberta Health. ANP is the Netcare viewer. Access to information stored in Netcare repositories via the ANP is governed by the Netcare permission matrix. The implementation of the matrix ensures that access to information in Netcare is based on need-to-know and least amount of information required for job tasks. In addition each employee granted access executes a Confidentiality and User Agreement as well as taking privacy training.

AHS’s policy on “Collection, Access, Use and Disclosure of Information” Document #1112 is attached. In addition, upon investigation of this complaint the Ambulatory Community Physiotherapy Program updated its own “Use of Netcare Guidelines” which are also attached.

[para 56] The Custodian argues that the program director’s use of the Complainant’s health information was “authorized”. It therefore reasons that there was no unauthorized use (or access) of the Complainant’s health information within the terms of section 60.

[para 57] The Custodian submitted its “Collection, Access, Use and Disclosure of Information Policy” for the inquiry. This policy is dated January 12, 2012. Point 1: Collection and Use of Information of this policy states:

1.1 Authorized Persons 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's activities; and
- b) Personal and business information, in accordance with FOIPP, only where the collection of the Information relates directly to, and is necessary for, AHS's operating programs or activities, and the use is for the purpose for which the Information was originally collected or compiled.

AHS may collect and use Information in accordance with other applicable legislation.

Authorized Persons shall only access and use Information required for the performance of their duties with AHS.

The program coordinator's access and use of the Complainant's health information on February 23, 2012 and following, were done while the foregoing policy was in place, although the instances of access and use prior to this date were not.

[para 58] I understand from the Custodian's submissions that it has in place administrative safeguards to protect health information from unauthorized access by its employees. These measures include requiring employees who are granted access to Netcare to execute a Confidentiality and User Agreement, and taking privacy training. In addition, it has created the policy cited above. The fact that the Custodian has created this policy indicates that it anticipates that there is a risk that its employees may use or gain access to health information without authority. The policy and the human resources measures it takes are administrative measures intended to protect against this risk.

[para 59] The Custodian states that in October 2012, following the Complainant's complaint, it introduced the Ambulatory Community Physiotherapy (ACPT) Program Use of Netcare Guidelines (the ACPT Guidelines). The Custodian submitted this guideline for my review. It states:

1. ACPT Staff shall comply with AHS Policy document #1112.
2. ACPT job activity requiring access of information on Netcare is to determine need for physical therapy when there is a request for extra visits.
3. ACPT staff will access Netcare only when in their conversation with the referral source and /or client it is determined that past medical history or recent diagnostic testing is needed to confirm need of therapy, and that the information is not yet available to the client nor the referral source.
4. ACPT staff shall not access Netcare for information on a client who is on their current caseload or has completed current funding requirements unless they present with point #2.
5. ACPT staff shall comply with AHS Policy document #1112 when there is a request for information from an external source such as the client or referral source.

This guideline clarifies that Netcare access is for the purpose of determining the need for physical therapy when there has been a request for it. Moreover, the guideline instructs employees to access Netcare only when they have spoken with a client or referral source and to determine that past medical history or recent diagnostic testing is required to establish need for continued therapy. Moreover, the ACPT Guideline contains the further limiting factor that the health information that will be used will not be available to the client or referral source at the time of the conversation.

[para 60] I have already found that the program coordinator's use of the Complainant's health information was not authorized by section 27 of the HIA, and is therefore contrary to section 25 of the HIA. I turn now to the question of whether the Custodian has demonstrated that it has taken all reasonable steps to maintain safeguards to protect the Complainant's health information from unauthorized use of this kind by the program coordinator.

[para 61] In this case, the Complainant's health information was subjected to unauthorized use within the terms of the HIA by an employee who apparently accessed it as part of her work duties. I will therefore consider the extent to which the Custodian mitigated this risk.

[para 62] I turn first to the question of whether the Custodian has adequately instructed its employees in the ACPT area regarding Netcare use as a means to prevent these employees from using health information without authority.

[para 63] The Custodian submitted the program coordinator's position description for the inquiry. The program coordinator's position description states that the program coordinator's duties include "making determinations about *requests* for additional funded visits for individual clients" [my emphasis]. There is nothing in the position description to indicate that the duties of the position include making decisions about additional funded visits when such visits have not been requested, although it does not necessarily exclude doing so.

[para 64] Significantly, the position description for the program coordinator position does not indicate the circumstances in which Netcare would be used in order to carry out the duties of the position. None of the duties set out in the position description indicates that Netcare access would be necessary or useful in order to perform it in a reasonable way. However, the Custodian has granted the program coordinator full access to Netcare, which indicates that the Custodian envisioned that the program coordinator position might possibly entail some access to Netcare when it created the position, despite not referring to Netcare in the job description. It is unclear to me how an employee would know whether they are an "authorized person" accessing Netcare for the performance of their duties, if the extent to which the employee may access Netcare, and the circumstances in which it is appropriate to do so for the purpose of performing work duties are not prescribed in the position description or in some other document governing the employee's employment. (If some other such document exists, or formed a part of the employee's training, none has been shown to me.) Quite possibly, an employee might assume from the fact that the Custodian had provided the employee with Netcare access that the Custodian expected the employee to consult Netcare in order to be diligent in performing the employee's duties. Such an employee might not be aware that doing so could in some circumstances offend section 25 of the HIA and amount to unauthorized use of health information by the Custodian within the terms of section 60 of the HIA.

[para 65] The ACPT Guideline was introduced in October, 2012, following the Complainant's complaint regarding unauthorized use of his health information. Cited above, the ACPT Guideline restricts the circumstances in which Netcare may be accessed by physiotherapy staff. This Guideline has the effect of limiting the circumstances in which employees of the ACPT area may access health information from Netcare.

[para 66] However, I find that this Guideline does not necessarily mitigate the risk of unauthorized use, as the Custodian's evidence might be taken to suggest that it is not always followed. Part of the program manager's affidavit refer to practices that appear to conflict with the ACPT Guideline. The program manager's references to these practices are in the present tense, which may suggest that these practices are ongoing. I base this observation on the program manager's affidavit, which states:

Consultation notes are viewed on occasion where a Program Coordinator is not familiar with a physician so there may be access to see if the consult was [related] to the provision of physiotherapy. [my emphasis]

[para 67] The foregoing explanation does not appear to take into account that the ACPT Guideline would require the program coordinator to have determined that the information would be necessary by holding a conversation with a client or referral source, and to have determined that the information was not yet available to the client, before gaining access to the information. Under the Guideline, it would not appear necessary to determine whether a particular consult was related to physiotherapy: provision 3 of the Guideline refers to very particular, "not yet available", necessary information, which would therefore be information that would have been provided by the referral source or the client.

[para 68] My uncertainty as to whether the Guideline is necessarily followed is also raised by the concluding part of the program manager's affidavit where he says:

From my perspective after reviewing the Netcare accesses with the branch investigator [...] the accesses were work related and part of our business process. Given that conclusion the Program Coordinator was not interviewed and the investigation was concluded. After this incident a guideline was put in place to increase our confidence that we do handle health information in the way that we have always done within our business process.

[para 69] Here the program manager appears to state that the guideline was intended to increase confidence that employees could use information in the way that *they had always done* within the Custodian's business process. However, what the program coordinator did in this case was outside the restriction created by the ACPT Guideline. Indeed, the ACPT Guideline appears to move away from the Custodian's previous practices by restricting the circumstances in which employees may use health information accessible via Netcare as part of their work duties.

[para 70] While I accept that the new ACPT Guideline does not appear to permit accessing patient health information unless the patient or the referral source has requested a service and is unable to obtain the health information necessary, it appears possible that program coordinators might, as a matter of practice, still access medical consultations if they are unfamiliar with the patient's physician or wish to know whether a medical consultation related to the provision of physiotherapy. However, doing so would fall outside the restriction imposed by section 3 of the ACPT Guideline, and would amount to an unauthorized use under this Guideline.

[para 71] In *McInerney v. MacDonald*, [1992] 2 SCR 138, the Supreme Court of Canada commented on the special status of the physician-patient relationship and the special status of information exchanged in the course of this relationship. The Court said:

A physician begins compiling a medical file when a patient chooses to share intimate details about his or her life in the course of medical consultation. The patient "entrusts" this personal information to the physician for medical purposes. It is important to keep in mind the nature of the physician-patient relationship within which the information is confided. In *Kenny v. Lockwood*, (ON CA), [1932] O.R. 141 (C.A.), Hodgins J.A. stated, at p. 155, that the relationship between physician and patient is one in which "trust and confidence" must be placed in the physician. This statement was referred to with approval by LeBel J. in *Henderson v. Johnston*, (ON SC), [1956] O.R. 789, who himself characterized the physician-patient relationship as "fiduciary and confidential", and went on to say: "It is the same relationship as that which exists in equity between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward" (p. 799). Several academic writers have similarly defined the physician-patient relationship as a fiduciary or trust relationship; see, for example, E. I. Picard, *Legal Liability of Doctors and Hospitals in Canada* (2nd ed. 1984), at p. 3; A. Hopper, "The Medical Man's Fiduciary Duty" (1973), 7 *Law Teacher* 73; A. J. Meagher, P. J. Marr and R. A. Meagher, *Doctors and Hospitals: Legal Duties* (1991), at p. 2; M. V. Ellis, *Fiduciary Duties in Canada* (1988), at p. 10-1. I agree with this characterization.

In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, (SCC), [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others. That being said, certain duties do arise from the special relationship of trust and confidence between doctor and patient. Among these are the duty of the doctor to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. (Picard, *supra*, at pp. 3 and 8; Ellis, *supra*, at pp. 10-1 and 10-12, and Hopper, *supra*, at pp. 73-74.) When a patient releases personal information in the context of the doctor-patient relationship, he or she does so with the legitimate expectation that these duties will be respected. [my emphasis]

[para 72] The foregoing case was primarily concerned with the question of whether a patient is entitled to obtain and review their medical records. The HIA may be viewed as codifying the right of a patient to the patient's health information, so that a patient need not rely on common law or equitable principles in order to obtain this information. However, I do not interpret the provisions of the HIA as negating or overriding the principle set out in *McInerney* that there is a fiduciary relationship between a physician and a patient and that this relationship imposes a duty on a physician to hold information resulting from this relationship in confidence.

[para 73] To provide health services, health service providers may require information from patients that patients that would not provide unless they are assured that it will be kept confidential. If the information a health service provider records is read by employees of a custodian simply to learn its contents or for other purposes that are not authorized, the confidentiality of the information, in addition to the relationship of trust between the patient and the health service provider, is undermined. Patients may not provide necessary health information to a health service provider, even when it is in the interests of their health to do so, if they are concerned that the information may be read by others who lack authority to do so.

[para 74] Health information arises from the relationship between an individual and a health service provider. In many cases, the health information stored in Netcare is generated from a fiduciary relationship between a doctor and a patient. One of the records accessed and reviewed by the program coordinator was a record of a consultation taking place between the Complainant

and his treating physician, and is an example of a record generated from a fiduciary relationship with its attendant duties and expectations regarding confidence.

[para 75] In the case before me, the program coordinator called up and reviewed a record documenting a consultation between the Complainant and his treating physician, in addition to a list of the medications the Complainant had been prescribed and his demographic information.

[para 76] In his submissions, the Complainant described the personal impact of learning that the program coordinator had gained access to his health information. He noted that the information involved “highly personal and sensitive bodily issues” and that learning that the program coordinator had gained access to this information led to feelings of violation and betrayal. He is concerned that his health information is not secure from unauthorized access and may have been disclosed further.

[para 77] I note that the Custodian has not acknowledged in its submissions the impact that unauthorized access of health information by its employees may have on an individual such as the Complainant, whose health information is in its custody or control, or the damaging effect that unauthorized use of health information may have to the healthcare system in general.

[para 78] I find that the seventeen instances of unauthorized use of the Complainant’s health information were likely a function of the fact that the Custodian provided ACPT staff members with access to Netcare, but did not provide adequate explanation of the circumstances in which Netcare could be used in accordance with the HIA as part of their duties. I therefore find that the Custodian did not take reasonable measures to mitigate the risk that employees would not use the Complainant’s health information without authority under the HIA to do so.

[para 79] Following the Complainant’s complaint, the Custodian introduced the ACPT Guideline. If this Guideline is followed by the program coordinators, then instituting it may have been sufficient to mitigate the risk of unauthorized access by ACPT staff. However, I am unable to conclude that this guideline is followed strictly by ACPT staff given the indication in the affidavit that there may be other circumstances not contemplated by the ACPT Guideline in which program coordinators use health information accessible via Netcare.

[para 80] In addition, the position of the Custodian throughout the inquiry has been that the program coordinator was authorized under the HIA to call up and use the Complainant’s health information as she did. The program manager’s affidavit can possibly be interpreted as indicating that the introduction of the ACPT Guideline did not markedly change its practices in relation to the use of health information between the time of the unauthorized accesses and the present. As well, given the position of the Custodian that it has authority under section 27(1)(a) and (b) to use health information in the absence of a request for health services, it is unclear why it introduced the ACPT Guideline, which would prevent using health information accessible via Netcare in the absence of a request for health services.

[para 81] I am left with uncertainty as to the extent the ACPT Guidelines are followed by ACPT staff. Moreover, assuming that ACPT staff members do now follow the ACPT Guidelines, there is no evidence before me that all the Custodian’s employees with access to Netcare are

subject to similar guidelines that would restrict the use of health information to the purposes authorized by section 27 of the HIA. In particular, given the position of the Custodian for the inquiry that health information may be used in accordance with section 27(1)(a) or (b) of the HIA in the absence of a request for health services, it appears possible or even likely that health information may be used without authority in other areas for which the Custodian is responsible. However, this possibility, while troubling, is not within the scope of this inquiry, and must be left for another day.

[para 82] The question before me is whether the Custodian failed to safeguard the Complainant's health information from the risk of unauthorized use by the program coordinator in the ACPT area. I have concluded that it did so fail.

[para 83] In making an order in relation to the Custodian's compliance with section 60, I must also consider whether the Custodian has introduced measures that would now safeguard against this risk. For the reasons above, it is not clear to me that the Custodian has effective safeguards in place to mitigate the risk of unauthorized use of health information by employees.

[para 84] If the ACPT Guideline is followed by ACPT staff, then this is an effective safeguard. If that is not the case, the Custodian must develop measures to safeguard against this risk, such as ensuring the Guidelines are followed.

IV. ORDER

[para 85] I make this Order under section 80 of the Act.

[para 86] I order the Custodian to cease using the Complainant's health information in contravention of section 25 of the HIA.

[para 87] I order the Custodian to comply with its duty under section 60 and take steps to safeguard the Complainant's health information against the risk that its employees in the ACPT Area will use health information accessible via Netcare without authority. Compliance with this portion of the order may be achieved by ensuring that ACPT staff members are compliant with the ACPT Guideline.

[para 88] I further order the Custodian to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator