ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2016-06

July 29, 2016

ALBERTA HEALTH SERVICES

Case File Number H5650

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Summary: An individual (the Complainant) made a complaint to the Commissioner that two physicians gained access to her health information from Alberta Netcare in contravention of the *Health Information Act* (HIA). Alberta Health Services (AHS), which operated the facilities at which the accesses occurred, and the two physicians involved conceded that the two physicians had gained access to the Complainant's health information in 2008 for the purpose of addressing a complaint to the Department Chair that had been made about care they had provided to the Complainant, and again in 2012 for the purpose of defending themselves in a related hearing conducted by the Alberta College of Physicians and Surgeons (the College). The two physicians also disclosed the health information they had obtained to the College.

The Adjudicator determined that AHS was the custodian in this case, and that the two physicians were affiliates of AHS. She determined that affiliates may use or disclose health information only at the direction of, under the authority of, or on behalf of, the custodian with whom they are affiliated. She found that the physicians had gained accessed to the Complainant's health information for their own personal purposes, rather than those of AHS, and that AHS had, by operation of section 62(2) of the HIA, contravened section 25 (prohibition regarding use of health information) of that Act on those occasions when the two physicians did this.

The Adjudicator also determined that the Complainant's health information had been disclosed to the College by the two physicians for the purpose of defending themselves in a complaint. She found that affiliates may disclose health information only under the authority of, or on behalf of the custodian with whom they are affiliated and are subject to the same limitations to which the

custodian is subject when they do so. She determined that AHS would have had no authority to disclose the Complainant's health information in the circumstances in which the two affiliates disclosed it, as AHS was not a party to the complaint conducted by the College, and had not received a formal demand for the records. The Adjudicator concluded that these accesses and disclosures caused AHS to contravene sections 25 and 31 of the HIA.

The Adjudicator determined that AHS's policies and procedures were not adequate to protect the Complainant's health information from the risks of unauthorized use and disclosure, as they appeared to permit affiliates to use and disclose health information for their own personal purposes, rather than purposes of AHS that are authorized by sections 27 and 35 of the HIA. While the Adjudicator found that use and disclosure of the Complainant's health information by the two physicians had led AHS to contravene the HIA, it appeared that the two physicians had not contravened AHS policies and procedures when they used and disclosed the Complainant's health information for their own personal purposes.

Although the Adjudicator ordered the two physicians to meet their duty to comply with the HIA and its regulations when they use and disclose health information, the Adjudicator decided that she could not order the two physicians to comply with AHS's policies and procedures, given that doing so would not ensure the confidentiality of the Complainant's health information. The Adjudicator ordered AHS to cease using and disclosing the Complainant's health information in contravention of the HIA. She suggested that compliance with the order could be achieved by revising the policies and procedures for affiliates such that they would convey the following:

> 1) only AHS is the custodian and authorized custodian at sites it operates,
>
> 2) the HIA authorizes only an "authorized custodian" to use or disclose health information via the Alberta EHR, and
>
> 3) affiliates may use or disclose health information via the Alberta EHR at AHS's sites only where AHS would have authority to use or disclose health information.

The Adjudicator also determined that AHS should review its policies to ensure that they create enforceable obligations for affiliates to collect, use, or disclose health information under the authority of AHS, in compliance with the HIA, such that section 62(4)(b) is engaged should an affiliate use or disclose health information in a way that contravenes the HIA.

Statutes Cited: AB: *Health Information Act,* R.S.A. 2000 c. H-5, ss. 1, 24, 25, 27, 28, 31, 35, 36, 37, 38, 39, 40, 43, 56.1, 56.2, 56.5, 60, 62, 63, 80; *Health Professions Act,* R.S.A. 2000 c. H-7 s. 63; Alberta Electronic Health Record Regulation, AR 118/2010, s. 3; Health Information Regulation, AR 70/2001 s. 2.1, 8

Authorities Cited: AB: Order H2014-02

I. BACKGROUND

[para 1] An individual (the Complainant) made a complaint to the Commissioner that two physicians, who will be referred to in this order as Doctors A and B, gained access to her health information from Alberta Netcare in contravention of the *Health Information Act* (HIA).

[para 2] The logs the Complainant submitted for the inquiry indicate that both Doctors A and B gained access to her health information from Alberta Netcare in 2008, and via the Alberta EHR[1] in 2012.

[para 3] The Commissioner authorized mediation to resolve the complaint. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] Alberta Health Services concedes that it is the authorized custodian for the portals from which Doctors A and B gained access to the Complainant's health information in Alberta Netcare and the Alberta EHR. As a result, it has been named as the respondent in this inquiry.

The legislation

[para 5] The legislative scheme governing health information that was in place during 2007 – 2008 differs significantly from that in place in 2012.

[para 6] On September 1, 2010, Part 5.1 of the HIA came into force. The provisions of Part 5.1 contain authority for the creation of the Alberta EHR and establish the authority for custodians to use electronic health information stored on this system.

[para 7] Section 56.2 establishes the purpose of Part 5.1 as the following:

> *56.2 The purpose of this Part is to enable the sharing and use, via the Alberta EHR, of prescribed health information among authorized custodians.*

Prior to the introduction of Part 5.1, there were no statutory provisions enabling the sharing and use of information by authorized custodians via the Alberta EHR, i.e. through the system that was previously referred to as Alberta Netcare.

[para 8] "Alberta Netcare" is the name of an electronic database of patient health information developed and maintained by the former Capital Health Authority. The Capital Health Authority entered agreements with physicians, which required the physicians to submit health information to the database and authorized them to gain access to health information in the database. Under the new legislation, the government department known as Alberta Health manages and maintains this system, which is now known as the "Alberta EHR".

[para 9] The present legislation (which was also in force at the time of the 2012 accesses) authorizes only "authorized custodians" to use health information accessible via the Alberta EHR. Section 56.1(b) defines the term "authorized custodian":

[1] The Alberta EHR is defined in section 56.1 of the HIA as the "integrated electronic health information system established to provide shared access by authorized custodians to prescribed health information in a secure environment as may be further defined or described in the regulations".

56.1 In this part,

(b) "authorized custodian" means

(i) a custodian referred to in section 1(1)(f)(iii), (iv) (vii), (xii) or (xiii), other than the Health Quality Council of Alberta, and

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

[para 10] Section 3 of the Alberta Electronic Health Record Regulation establishes eligibility requirements to become an authorized custodian within the terms of section 56.1(b)(ii). It states:

3(1) For the purposes of section 56.1(b)(ii) of the Act, the eligibility requirements that a custodian must meet in order to become an authorized custodian are as follows:

(a) the custodian must establish or adopt policies and procedures in accordance with section 63 of the Act;

(b) the custodian must prepare and submit to the Commissioner a privacy impact assessment in accordance with section 64 of the Act;

(c) the custodian must complete a Provincial Organizational Readiness Assessment established by the Department or meet any security requirements established by the Department, as directed by the Department;

(d) the custodian must enter into an Information Manager Agreement with the Department;

(e) the custodian must obtain approval for access to the Alberta EHR from the Department;

(f) subject to subsection (2), in the case of a custodian who is a regulated health professional, the health professional body of which the custodian is a member must have in place within 12 months after the coming into force of this Regulation standards of practice respecting

(i) the management of information in records, and

(ii) the management of electronic records, including, without limitation, standards respecting the protection, privacy and security of electronic records.

(2) Subsection (1)(f) does not apply in respect of a custodian who meets the requirements set out in subsection (1)(a) to (e) within 12 months from the coming into force of this 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.

[para 11] Section 56.5 of the current HIA establishes that when an authorized custodian obtains health information through the Alberta EHR, this is a use of the information, rather than a collection. Section 56.5 states:

56.5(1) Subject to the regulations,

(a) an authorized custodian referred to in section 56.1(b)(i) may use prescribed health information that is accessible via the Alberta EHR for any purpose that is authorized by section 27;

(b) an authorized custodian referred to in section 56.1(b)(ii) may use prescribed health information that is accessible via the Alberta EHR, and that is not otherwise in the custody or under the control of that authorized custodian, only for a purpose that is authorized by

(i) section 27(1)(a), (b) or (f), or

(ii) section 27(1)(g), but only to the extent necessary for obtaining or processing payment for health services.

(2) For greater certainty, the use pursuant to subsection (1) of prescribed health information that is accessible via the Alberta EHR does not constitute collection of that information under this Act.

(3) For greater certainty, the use pursuant to subsection (1) of prescribed health information that is accessible via the Alberta EHR does not constitute a disclosure of that information by

(a) the regulated health professional or authorized custodian who originally made that information accessible via the Alberta EHR pursuant to section 56.3,

(b) any other authorized custodian,

(c) the information manager of the Alberta EHR, or

(d) any other person.

[para 12] The foregoing scheme is relevant in relation to the instances in which Alberta Netcare was accessed in 2012. However, as it was not in place in 2007 – 2008, I will answer the questions posed for this inquiry regarding the 2007 – 2008 accesses by reference to the legislation in force at that time.

[para 13] In this Order, references to "Alberta Netcare" are references to the database operated by the Capital Health Authority prior to the introduction of Part 5.1 of the HIA on September 1, 2010. References to "the Alberta EHR" are references to the integrated electronic health information system for which Alberta Health is the "information manager".

II. ISSUES

Issue A: Did Doctors A and B use the Complainant's health information from Alberta Netcare?

Issue B: If yes, was this use done as affiliates of the authorized custodian, Alberta Health Services?

Issue C: If the answer to questions A and B is "yes", did Alberta Health Services use the Complainant's health information in contravention of or in compliance with Part 4, section 25 of the HIA?

Issue D: If the two doctors and/or their staff members used the information, but did so in their own capacities, did they use the Complainant's health information in contravention of, or in compliance with, Part 4, section 25 of the HIA?

Issue E: If the two doctors, and/or their staff members used the Complainant's health information without authority in the capacity of affiliates of AHS, has AHS taken reasonable steps to protect the Complainant's health information within the terms of section 60?

Issue F: If Doctors A and B used the Complainant's health information from Netcare as affiliates of Alberta Health Services, did they use the information in accordance with their duties to the custodian within the terms of section 28 of HIA?

Issue G: If the two doctors used health information from Netcare / the Alberta EHR in their own capacities as custodians and if their respective staff members used the Complainant's health information without authority, have the two doctors taken reasonable steps to protect the Complainant's health information within the terms of section 60?

III. DISCUSSION OF ISSUES

Issue A: Did Doctors A and B use the Complainant's health information from Alberta Netcare?

[para 14] According to the logs submitted for the inquiry, both Doctors A and B gained access to the Complainant's health information both from Alberta Netcare in 2008 and from the Alberta EHR in 2012. The Complainant also provided a copy of an email dated October 24, 2007, which Doctor A sent to an R.N. at the University of Alberta. This email states:

> According to netcare she had a renal biopsy done at RAH by [the Complainant's treating physician and another physician] on July 19, 06. Can you get them to send the report please by fax?

The Netcare access described in the email is not documented in the logs provided for the inquiry. However, as Doctor A has not disputed the authenticity of the email, and as I have no reason to believe that the email is not authentic, I accept that Doctor A also accessed the Complainant's health information from Netcare in 2007 even though the Netcare logs make no obvious reference to her having done so.

[para 15] Doctors A and B state that they gained access to the Complainant's health information from Netcare to prepare for a complaint made by the Complainant to the Chair of the Department of Pediatrics. Doctors A and B also gained access to her health information from the Alberta EHR in 2012 in order to prepare for a hearing before the College of Physicians and Surgeons of Alberta (the College). Doctors A and B argue that the HIA authorizes their use of the Complainant's health information for these purposes.

[para 16] I accept the evidence and submissions of the parties on this issue and find that Doctors A and B and employees acting under their direction used the Complainant's health information between 2007 and 2008 and again in 2012.

Issue B: If yes, was this use done as affiliates of the authorized custodian, Alberta Health Services?

The 2008 accesses

[para 17] The HIA defines "custodian" with reference to the types of entities that may be custodians. Section 1(1)(f) of the version of the HIA in force at the time of the accesses states:

> *1(1) In this Act,*
>
> *(f) "custodian" means*
>
> *(i) the board of an approved hospital as defined in the Hospitals Act other than an approved hospital that is*
>
> *(A) owned and operated by a regional health authority established under the Regional Health Authorities Act, or*
>
> *(B) established and operated by the Alberta Cancer Board continued under the Cancer Programs Act;*

(ii) the operator of a nursing home as defined in the Nursing Homes Act other than a nursing home that is owned and operated by a regional health authority established under the Regional Health Authorities Act;

(iii) a provincial health board established pursuant to regulations made under section 17(1)(a) of the Regional Health Authorities Act;

(iv) a regional health authority established under the Regional Health Authorities Act;

(v) a community health council as defined in the Regional Health Authorities Act;

(vi) a subsidiary health corporation as defined in the Regional Health Authorities Act;

(vii) the Alberta Cancer Board continued under the Cancer Programs Act;

(viii) a board, council, committee, commission, panel or agency that is created by a custodian referred to in subclauses (i) to

(vii), if all or a majority of its members are appointed by, or on behalf of, that custodian, but does not include a committee that has as its primary purpose the carrying out of quality assurance activities within the meaning of section 9 of the Alberta Evidence Act;

(ix) a health services provider who is paid under the Alberta Health Care Insurance Plan to provide health services;

(x) a licensed pharmacy as defined in the Pharmacy and Drug Act;

(xi) a pharmacist as defined in the Pharmacy and Drug Act;

(xii) the Department;

(xiii) the Minister;

(xiv) an individual or board, council, committee, commission, panel, agency or corporation designated in the regulations as a custodian;

but does not include

(xv) the Alberta Alcohol and Drug Abuse Commission continued under the Alcohol and Drug Abuse Act, or

(xvi) a Community Board as that term is defined in the Persons with Developmental Disabilities Community Governance Act;

[para 18] "Affiliate" is defined in section 1(1)(a) as:

1(1) In this Act,

(a) "affiliate", in relation to a custodian, includes

(i) an individual employed by the custodian,

(ii) a person who performs a service for the custodian as an appointee, volunteer or student or under a contract or agency relationship with the custodian, and

(iii) a health services provider who has the right to admit and treat patients at a hospital as defined in the Hospitals Act,

but does not include

(iv) an operator as defined in the Ambulance Services Act, or

(v) an agent as defined in the Health Insurance Premiums Act;

[para 19] The two definitions overlap as both the definition of "custodian" and the definition of "affiliate" include health service providers. Both Doctors A and B, as health service providers, fall within the terms of both sections 1(1)(a) and 1(1)(f), while Alberta Health Services falls within section 1(f) only.

[para 20] Section 1(3) of the HIA states:

1(3) A custodian who is an affiliate of another custodian is deemed not to be a custodian while acting in the capacity of an affiliate.

If a custodian acts as the affiliate of another custodian, section 1(3) deems the custodian not to be a custodian when doing so.

[para 21] Section 1(3) gives rise to the following question: when does a custodian act in the capacity of affiliate to another custodian? Neither the definitions nor section 1(3) offers clear guidance to resolve this question.[2] Nevertheless, it is necessary to answer it, as custodians and

[2] Section 2.1 of the Health Information Regulation refers to a process by which a custodian must obtain a "designation" from the Minister to become an affiliate of another custodian. While the provision appears to set out a process within the terms of section 1(3), the Regulation was apparently made under the authority of section 108(1)(a), which authorizes the Lieutenant Governor in Council to make regulations "respecting the designation of an affiliate for the purposes of section 1(1)(a)(v)". As a result, I conclude that the process described in section 2.1 of the Health Information Regulation applies solely to section 1(1)(a)(v) (which provides that a person is an affiliate if so designated under the regulations) and is not intended to determine who is a custodian and who is an affiliate in all

affiliates have different duties and obligations under the HIA. Under the 2008 legislation, as with the current legislation, custodians have duties under the HIA regarding the collection, use, and disclosure of health information. They also have duties to ensure its security and to make policies regarding it. The only rules under the HIA which govern affiliates are set out in sections 24, 28, 43, and 62(4) of the HIA. Sections 24, 28, and 43 restrict the ability of an affiliate to collect, use, or disclose health information except in accordance with their duties to a custodian, while section 62(4) requires an affiliate to comply with the policies set out by the custodian to whom the affiliate is affiliated, as well as to comply with the Act and the regulations.

[para 22] Section 25 prohibits a custodian from using health information except in accordance with the HIA. It states:

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

[para 23] Section 27 of the HIA establishes the circumstances in which use of health information by a custodian is authorized.

[para 24] Section 28 addresses the use of health information by an affiliate. It 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 25] Sections 35 – 40 prescribe circumstances in which a custodian may disclose health information.

[para 26] Section 43 sets out the circumstance in which an affiliate may disclose health information. It states:

> *43 An affiliate of a custodian must not disclose health information in any manner that is not in accordance with the affiliate's duties to the custodian.*

[para 27] The HIA authorizes a custodian to collect, use, and disclose health information in prescribed circumstances. However, the HIA contains no provisions authorizing an affiliate to collect, use, or disclose health information. Rather, the HIA contains requirements that when affiliates collect, use, or disclose health information that they do so (under sections 24, 28 and 43) in accordance with their duties to a custodian.

[para 28] In addition, section 62(4) provides:

> *62(4) Each affiliate of a custodian must comply with*
>
> *(a) this Act and the regulations, and*
>
> *(b) the policies and procedures established or adopted under section 63.*

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circumstances. In addition, section 2.1 was not introduced until 2010. As a result, it has no bearing on determining who is an affiliate within the terms of the HIA in force in 2008.

[para 29] Section 63 states:

> *63(1) Each custodian must establish or adopt policies and procedures that will facilitate the implementation of this Act and the regulations.*
>
> *(2) A custodian must at the request of the Minister or the Department provide the Minister or the Department, as the case may be, with a copy of the policies and procedures established or adopted under this section.*

[para 30] As already noted, the definition of "affiliate" under the HIA includes "a health services provider who is exercising the right to admit and treat patients at a hospital as defined in the *Hospitals Act*". When a physician (a health service provider) is exercising the right to admit and treat patients in a hospital, by operation of this definition, the collection, use or disclosure of health information by the physician is done as an affiliate. The physicians in question, Doctors A and B, had access to the information portal (of which the Capital Health Authority, and later AHS, was the custodian) because they were treating patients in a hospital, and they used this access point to obtain the Complainant's health information.

[para 31] As a function of section 1(3) of the HIA, which provides that a "custodian who is an affiliate of another custodian is deemed not to be a custodian while acting in the capacity of an affiliate", the two doctors, in the circumstances, were acting as affiliates and not as custodians.

[para 32] Despite the fact that Doctors A and B fall within the definition of "affiliate", in the circumstances in which they were acting, AHS takes the position that they were acting as custodians, rather than as affiliates, when they accessed the Complainant's health information. AHS's argument seems to be that the physicians were acting as custodians in the circumstances because the agreement gives them some custodian-like responsibilities, including choosing other affiliates who may also gain access to the information. AHS submitted copies of the Information Access Agreement, or "IAA" which appears to have been drafted by the former Capital Health Authority, and which the two doctors signed as a condition of obtaining access to the information portal, in support of its position that the doctors acted as "custodians" when accessing information from Netcare. However, I do not agree that any of the points about this agreement made by AHS support its position that the doctors were acting as custodians in accessing the Complainant's information; rather, the provisions of the agreement support the opposite conclusion.

[para 33] The IAA states that the responsibilities of a "custodian" are the following:

> 5. You will not allow any person to use or have access to Netcare unless that person has been designated by you as a Designated User and authorized by Capital Health to access the Netcare application. You are responsible for the actions of your Designated Users.
>
> With respect to Designated Users, you are responsible for the following:

a. You are responsible for selecting appropriate affiliates to be Designated Users and completing the appropriate steps to authorize these individuals. Only those Individuals who need that access to fulfill their responsibilities to you should be selected.

b. You are required to seek separate user identification for each individual accessing the system. "Shared" or "reused" user privileges are not permitted.

c. You are responsible for managing, in a secure manner, any devices or codes provided by Capital Health which enable access to Netcare. This includes user IDs, passwords, SecurID fobs, certificates and other like items.

d. You are responsible to inform Capital Health, in the appropriate way, when user access privileges are to be suspended or revoked. User access privileges must be revoked in a timely fashion when that Designated User no longer needs that access to fulfill his/her responsibilities to you. This includes circumstances where the user changes roles or leaves your employ.

6. You will use all reasonable efforts to protect Netcare; and the information against *any* unauthorized access, use, disclosure or modification. You must secure any Netcare workstation from public access either by physical removal or by a policy to consistently lock the application or the workstation.

7. You agree that the Information is private and confidential and that you will take all reasonable steps to maintain the confidentiality of the information, including taking appropriate disciplinary measures with respect to any Designated User designated by you who breaches his or her obligations in the use of Netcare or the Information.

8. Some information may be designated as "MASKED, which indicates a special sensitivity and special rules for disclosure. When you request a routine disclosure, you will be advised of the presence of masked information but not given the information. In using special access to view masked information, you must exercise a professional judgment to remove the masking. Netcare will provide a facility for recording the reason for overriding the masking.

9. You agree that the information shall be used only for the provision of patient care. [my emphasis]

10. You will not use Netcare or the information for commercial purposes.

11. You agree to cooperate with any audit or monitoring program required with respect to Netcare or the Information.

12. In the event of a breach of this Agreement, you are required to undertake the appropriate remedies including policy or process changes, and remedial education or disciplinary measures for Designated Users.

13. In the event of a breach of privacy or confidentiality resulting from this Agreement, you are fully accountable for legal and disciplinary consequences.

14. In the event of a breach that is not remedied by you, Capital Health may, at its sole discretion, discontinue your access to Netcare.

15. You will not provide copies of information acquired via Netcare directly to a patient. Requests for such copies should be referred to Patient Information Services at Capital Health.

[para 34] The document states that the Capital Health Authority's obligations under the agreement are the following:

16. Capital Health shall, in accordance with the terms of this Agreement

a. operate and manage Netcare;

b. use all reasonable efforts to provide a secure portal to Netcare. Capital Health does not, however, guarantee or warrant that Netcare will be available or operational at all

c. permit you to access Netcare;

d. regularly monitor access to Netcare to ensure that only authorized users are permitted access.

17. Capital Health may refer breaches of this Agreement or privacy to the appropriate health professional body for investigation and possible discipline.

18. Capital Health may also refer breaches of this Agreement or privacy to the Office of the Information and Privacy Commissioner for investigation and legal remedies.

[para 35] The "General" provisions of the agreement state:

1. This Agreement establishes the rules governing electronic access to Netcare. By accessing Netcare you agree to be bound by the terms and conditions of this Agreement.

2. You acknowledge and agree that each Custodian permitted to access Netcare will be required to enter into an Agreement similar to this Agreement and that nothing in this Agreement shall, or shall be deemed to, affect a Custodian's right and ability to collect, access, use or disclose the Information that the Custodian would otherwise be permitted by law to collect, access, use or disclose outside Netcare.

[para 36] The agreement imposes limitations and obligations on the signing physicians which they must accept as a condition of obtaining access to Alberta Netcare. That they needed to do so indicates that the Capital Health Authority was fulfilling its duties *as a custodian* under the Act; establishing policies and procedures to facilitate implementation of the HIA in accordance with section 63(1), and was imposing these obligations on its affiliates.

[para 37] Further, while giving the physician/signatory some responsibilities for protecting information, the Capital Health Authority retained the most significant ones for itself. The agreement did not place Doctors A and B in a position to be custodians over the health information in Netcare within the terms of the HIA. The two doctors could not reasonably be expected to be responsible for health information in the database, or monitor the collection, use, or disclosure of health information by persons other than those over whom they had control. In addition, the two doctors could not reasonably be expected to protect the information in the database as required by section 60, not only because their access to the database was limited to using the information necessary to provide treatment, but because the Capital Health Authority had reserved this function for itself.

[para 38] AHS argues that under the HIA, affiliates have no power to give their own affiliates the ability to collect, use, or disclose health information under the HIA. I agree with AHS that the HIA does not give affiliates the express power to grant to their own affiliates the ability to gain access to health information. However, as a matter of its own ability to organize its operations, a custodian may delegate some of its authority to its affiliates, such as the two doctors. There is no reason why the Capital Health Authority (now AHS) could not authorize affiliates to grant access to other affiliates.

[para 39] AHS also argues that the IAA "reflects the role of the physicians as custodians". I agree with AHS that the IAA refers to the signing physician as "custodian" in some places. However, given section 1(3), this is likely referable to the fact "custodian" is defined under the Act as including a health service provider, and physicians provide health services. Indeed, the definition of "affiliate" in section 1(1)(a) is said to be in relation to a custodian"; however, by reference to section 1(3), a custodian who acts as an affiliate does not act as a custodian at the same time.

[para 40] I acknowledge that the accesses at issue were not done for the purpose of treating the Complainant (for reasons given below, I reject AHS's argument that accessing the information to defend themselves against complaints was providing a health service). However, where physicians in a hospital, who are granted access to a hospital portal because they require it to treat patients, access information for a purpose other than treating patients, they are not thereby transformed, for that purpose, from affiliates, into custodians, of that information. If the custodial-like responsibilities imposed by the IAA meant signing physicians would be acting as custodians, this same point would apply when they accessed information for the purposes of treating patients. Yet, this is clearly not the case. If the custodial responsibilities imposed by the IAA do not transform the physicians in a hospital into custodians when they access information for treating patients, (indeed it cannot by operation of section 1(3)) no more could clauses in the IAA have such a transformative effect when the physicians access information for non-treatment purposes. They remain affiliates.

[para 41] Moreover, the IAA restricts the physicians to accessing information *for the purpose of treating patients*. In light of this, it could hardly be concluded that this agreement transforms them into the more responsible category of custodian when they are accessing information for purposes other than those which were permitted under the agreement.

[para 42] In my view, the terms of the IAA establish that the Capital Health Authority was the custodian of the information in Netcare. By reference to section 1(3), Doctors A and B could not be acting both as affiliates and as custodians. Thus, they were not custodians of the health information when they accessed from the Netcare database in 2008, but the Capital Health Authority was. Doctors A and B were affiliates of the Capital Health Authority within the terms of section 1(1)(a)(iii).

[para 43] The same conclusion can be reached on the basis of the generally-understood meanings of the terms "custodian" and "affiliate", and the overall scheme of the HIA. The *Canadian Oxford Dictionary* offers the following definition of the term "custodian": "A person who has custody of and responsibility for another person, a thing, etc."[3]

[para 44] The *Merriam-Webster Online Dictionary* offers a similar definition: "one that guards and protects or maintains; *especially*: one entrusted with guarding and keeping property or records […]"[4]

[3] Kathleen Barber Ed. *Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press, 2004) p. 373
[4] Merriam-Webster Online, http://www.merriam-webster.com/

[para 45] Section 1(1)(f) of the HIA defines the term "custodian" as an exhaustive list of entities. However, this provision does not describe the attributes of the entities it lists that result in their being members of the class "custodians".

[para 46] The ordinary meaning of the word "custodian" imparts the notion that a custodian has responsibilities and duties in relation to whatever is in the custodian's custody or control. In the context of the HIA, a custodian would have responsibilities and duties in relation to health information in the custodian's custody or control. The HIA places duties and limitations on a custodian with regard to the protection, collection, use, and disclosure of health information in the custodian's control, including collection, use and disclosure by the custodian's affiliates. The Legislature's choice of the word "custodian" in the HIA is not without meaning or purpose; the ordinary meaning of the word "custodian" informs the definition of "custodian" in the HIA, with the result that a custodian under the HIA is one of the entities listed in the definition *that has custodial duties in relation to health information under the HIA.*

[para 47] An entity is not in a position to meet those duties unless it has the necessary control over the information to do so, including sufficient authority to prevent others from gaining access to health information, and to make policies regarding the collection, use, or disclosure of health information by other users.

[para 48] Conversely, the term "affiliate" typically refers to one attached or connected – "affiliated" – to a larger organization. Again, if one considers the ordinary meaning of the word "affiliate" as coloring the definition in the HIA, then a custodian who is acting as an affiliate of a custodian under section 1(3), is an entity meeting the terms of both sections 1(1)(a) and 1(1)(f), whose collection, use, or disclosure of health information is dependent on the entity's affiliation with another custodian. Within the scheme of the HIA, an entity that collects, uses, or discloses health information under the authority of another entity, or according to terms for dealing with information imposed by the latter, acts as an affiliate of the latter entity.

[para 49] Thus, physicians act *as* custodians when they collect, use, or disclose health information over which they have control, and likewise, they have custodial duties over the information in such circumstances. In circumstances in which some other entity has control and exercises the primary responsibilities for security of the information, physicians act as affiliates.

[para 50] According to the foregoing analysis, the determination as to whether Doctors A and B used the Complainant's health information as custodians or affiliates rests on whether they, or the Capital Health Authority, had control over Netcare at the facilities at which Doctors A and B gained access to the Complainant's health information. Clearly, despite the imposition of some custodial-like responsibilities in the IAA that were discussed above, it was Capital Health Authority, and not the physicians, that had this requisite control.

para 51] In view of the foregoing considerations, I conclude that in accessing the information at issue, Doctors A and B were acting as affiliates. In the circumstances, Capital Health Authority was the custodian of the information in Netcare. Doctors A and B were not custodians of the health information they accessed from the Netcare database in 2008, but were

affiliates of the Capital Health Authority. They were also bound by the terms of the IAA in relation to their dealings with health information in Netcare.

para 52] By operation of section 62(2), the use of the Complainant's health information by Doctors A and B, who were affiliates of Capital Health Authority (now AHS), was a use of the information by the Capital Health Authority.

The 2012 accesses

[para 53] As discussed above, Part 5.1 of the current HIA (and the version of the HIA in force at the relevant times in 2012) contains provisions that were introduced in 2010 and which authorize the existence of, and establish rules for, what was formerly Alberta Netcare and is now the Alberta EHR. Section 56.2 states:

> *56.2 The purpose of this Part is to enable the sharing and use, via the Alberta EHR, of prescribed health information among authorized custodians.*

[para 54] Section 56.1(b) of the HIA defines the term "authorized custodian". It states:

> *56.1 In this Part,*
>
> *(b) "authorized custodian" means*
>
> *(i) a custodian referred to in section 1(1)(f)(iii), (iv), (vii), (xii) or (xiii), other than the Health Quality Council of Alberta, and*
>
> *(ii) any other custodian that meets the eligibility requirements of the regulations to be an authorized custodian;*

[para 55] Alberta Health Services is a custodian referred to in section 1(1)(f)(iv) of the HIA, and is therefore an authorized custodian within the terms of section 56.1(b)(i). Neither Doctor A nor B is a custodian within the terms of section 56.1(b)(i). The question is therefore whether they meet the eligibility requirements of the regulations, so as to fall within the terms of section 56.1(b)(ii).

[para 56] Section 3 of the Alberta Electronic Health Record Regulation (AEHRR) establishes the eligibility requirements for authorized custodians. It states:

> *3(1) For the purposes of section 56.1(b)(ii) of the Act, the eligibility requirements that a custodian must meet in order to become an authorized custodian are as follows:*
>
> *(a) the custodian must establish or adopt policies and procedures in accordance with section 63 of the Act;*
>
> *(b) the custodian must prepare and submit to the Commissioner a privacy impact assessment in accordance with section 64 of the Act;*

(c) the custodian must complete a Provincial Organizational Readiness Assessment established by the Department or meet any security requirements established by the Department, as directed by the Department;

(d) the custodian must enter into an Information Manager Agreement with the Department;

(e) the custodian must obtain approval for access to the Alberta EHR from the Department;

(f) subject to subsection (2), in the case of a custodian who is a regulated health professional, the health professional body of which the custodian is a member must have in place within 12 months after the coming into force of this Regulation standards of practice respecting

(i) the management of information in records, and

(ii) the management of electronic records, including, without limitation, standards respecting the protection, privacy and security of electronic records.

(2) Subsection (1)(f) does not apply in respect of a custodian who meets the requirements set out in subsection (1)(a) to (e) within 12 months from the coming into force of this 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.

[para 57] There is no evidence before me that Doctor A or B meets the requirements of section 3(1) or 3(3) of the AEHRR. The IAA does not have the effect of making Doctors A and B authorized custodians of the Alberta EHR under section 3(1), not only because it does not address the requirements of section 3(1), but because the IAA addresses access to the Netcare database maintained by the former Capital Health Authority, and not the Alberta EHR database, which is administered and maintained by Alberta Health.

[para 58] In addition, as I find that Doctors A and B were affiliates of AHS prior to enactment of the AEHRR, section 3(3) of the AEHRR does not apply to them, given that this provision is restricted in its application to "*any custodian* who immediately before the coming into force of this Regulation was a participating custodian as defined in the Information Exchange Protocol"[5]. Section 3(3) does not serve to make an affiliate an authorized custodian.

[5] Here I am addressing the possibility that Doctors A and B meet the definition of "participating custodian" in the Information Exchange Protocol. However, whether they are, in fact "participating custodians" within the terms of the protocol has not been argued in this inquiry and no evidence has been submitted to that effect.

[para 59] Under section 56.5 of the HIA, custodians who are authorized custodians may use health information accessed from the Alberta EHR.

[para 60] The HIA does not create an express ability for an authorized custodian to delegate its authority to collect, use, or disclose health information to an affiliate or to anyone else. However, the majority of entities listed as custodians in section 1(1)(f) are not individuals, but entities that act through employees or agents. It is therefore implicit in the HIA that the employees of an authorized custodian may use health information from the Alberta EHR as a function of their status as affiliates.

[para 61] As already discussed, Alberta Health Services argues that Doctors A and B could gain access to the Alberta EHR as custodians or as affiliates of Alberta Health Services. It states in its submissions:

> It is submitted that the physicians when acting as health services providers exercising the right to admit and treat patients at a hospital are affiliates of AHS under section 1(1)(iii) of HIA. However, any access not in an inpatient setting or access by a physician in his or her own right (for example for other purposes as authorized by HIA) would be in a custodial role. Further, the [IAA] reflects the role of physicians as custodians (in particular clause 5). Further, the [IAA] allows a physician as a custodian to designate access to its own affiliates something that could not occur under HIA if the physician was acting as an affiliate.

[para 62] In my view, neither Doctor A nor B could be considered a custodian or authorized custodian of the information in the Alberta EHR at the site at which they accessed the Complainant's health information, as the two physicians would have no ability to comply with custodial duties under the HIA in relation to health information accessible through portals managed by AHS. As the authorized custodian, only AHS was in a position to protect health information accessible at its site via the Alberta EHR, and to create policies regarding it.

[para 63] I reject, again for reasons already given, that when physicians access information at AHS facilities for purposes other than admitting and treating patients, they do so as "authorized custodians" in their own right. Section 56.1(b) of the HIA does not contemplate that taking such action transforms persons who are given access to information as affiliates, in order to treat patients, into authorized custodians.

[para 64] As discussed above, only authorized custodians may use health information in the Alberta EHR. In this case, AHS is the authorized custodian at the facilities it manages and Doctors A and B are not. Therefore, the only way the two physicians may gain access to health information in the Alberta EHR through portals managed by AHS is to do so by acting as affiliates of AHS.

[para 65] By operation of section 1(3), Doctors A and B were affiliates of the custodian AHS when they gained access to the Complainant's personal information from the Alberta EHR in 2012. By operation of section 62(2), their use of the Complainant's health information for the purpose of defending themselves in a complaint to the College was also a use by AHS.

Issue C: If the answer to questions A – B is yes, did Alberta Health Services use the Complainant's health information in contravention of or in compliance with Part 4, section 25 of the HIA?

[para 66] I have found that when the two physicians collected the Complainant's health information from Alberta Netcare prior to September 1, 2010, they did so as affiliates of AHS. I have also found that when the two physicians gained access to the Complainant's health information from the Alberta EHR after September 1, 2010, they did so as affiliates of the authorized custodian AHS. I turn now to the question of whether AHS was authorized to use this information in the circumstances in which the two doctors used the Complainant's health information.

[para 67] There is no provision in the HIA enabling affiliates to collect, use, or disclose information. However, section 62(2) states that any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection, use or disclosure by the custodian.

[para 68] Section 62(2) states that any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection use or disclosure by the custodian:

> *62(2) Any collection, use or disclosure of health information by an affiliate of a custodian is considered to be collection, use or disclosure by the custodian.*

[para 69] Further, section 62(4) provides as follows:

> *62(4) Each affiliate of a custodian must comply with*
>
> *(a) this Act and the regulations, and*
>
> *(b) the policies and procedures established or adopted under section 63.*

[para 70] Section 63 requires custodians to establish or adopt policies and procedures that will facilitate the implementation of the Act.

[para 71] Section 62(4) imposes an obligation on an affiliate to comply not only with the policies or procedures the custodian has established under section 63, but also with the Act and regulations, whether or not the custodian has, further to its mandatory obligations under section 63, established policies facilitating the implementation of the HIA. As noted earlier, most of the Act speaks in terms of collection, use and disclosure by custodians, not by affiliates. In order to give meaning to the obligation on affiliates to comply with the Act and regulations, which exists independently of the obligation to comply with the policies and procedures established by the custodian, section 62(4)(a) must be interpreted as imposing independent limitations on how an affiliate may deal with information. As there are no additional statutory limitations imposed by the Act on affiliates (beyond the duty to comply with the affiliate's duties to the custodian), the only possible limitations are those which the Act imposes on the custodians with whom they are affiliated.

[para 72] This is also a necessary interpretation given that, by operation of section 62(2), dealings with information by an affiliate are those of a custodian. Section 62(2) cannot be taken as expanding the powers of a custodian to deal with information, beyond the limitations imposed on custodians by the Act, to dealings for the independent personal purposes of an affiliate. In contrast, by making any use of health information by an affiliate, including an unauthorized use, a use by the custodian, the HIA makes custodians accountable for the actions of their affiliates in relation to health information, and helps to ensure that the custodian oversees the use its affiliates make of health information.

The 2008 collections

[para 73] Section 27 of the HIA lists the purposes for which a custodian may use health information. It 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;*
>
> *(b) determining or verifying the eligibility of an individual to receive a health service;*
>
> *(c) conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline;*
>
> *(d) conducting research or performing data matching or other services to facilitate another person's research*
>
> *(i) if the custodian or researcher has submitted a proposal to a research ethics board in accordance with section 49,*
>
> *(ii) if the research ethics board is satisfied as to the matters referred to in section 50(1)(b),*
>
> *(iii) if the custodian or researcher has complied with or undertaken to comply with the conditions, if any, suggested by the research ethics board, and*
>
> *(iv) where the research ethics board recommends that consents should be obtained from the individuals who are the subjects of the health information to be used in the research, if those consents have been obtained;*
>
> *(e) providing for health services provider education;*

> *(f) carrying out any purpose authorized by an enactment of Alberta or Canada;*
>
> *(g) for internal management purposes, including planning, resource allocation, policy development, quality improvement, monitoring, audit, evaluation, reporting, obtaining or processing payment for health services and human resource management.*

[para 74] Doctor B argues:

> On page four of her submissions dated December 7, 2015 (see Tab "B"), the Complainant stated: "ln late 2007 or early 2008 I spoke to [the Chair, Department of Pediatrics] to express my concerns regarding the difficulties concerning [Doctors A and B]. [The Complainant] had received a positive ANA test as well as a diagnosis of FSGS by her treating Nephrologist, […]"
>
> In accessing the Complainant's Netcare logs on February 12, 2008, Doctor B was responding to the above-noted patient complaint that had been made by the Complainant (see Tab "C"), further to the verbal request of [the then Chair, Department of Pediatrics]. Consequently, despite the fact that active treatment of the patient had ceased, [Doctor B] accessed the Complainant's health records in order to defend the allegations of misconduct which had been made against him.

[para 75] Doctor A argues:

> The Netcare log accesses by [Doctor A] that are at issue in this Inquiry were all in relation to either the complaint made to the Chair of the Department of Pediatrics in late 2007 /early 2008, or the complaint made to the College in December of 2011 . The use of the Complainant's health information by [Doctor A] and/or her staff on these occasions was under circumstances in which a custodian and/or their affiliates are permitted to use health information pursuant to section 27(1)(c) HIA and therefore the use of the Complainant's health information was appropriate and authorized.

[para 76] AHS argues:

> It is submitted that the access to review lab values at the request of the department chair would be authorized under section 27(1)(a) (provision of health services) as health services by definition (section l(l)(m)) involve the maintenance of physical health and the prevention of illness. A review of care and diagnosis it is submitted would fall into the provision of health services. In the alternate, it is submitted section 27(l)(c) (conducting investigations, discipline proceedings, practice reviews) would authorize the access.

[para 77] AHS and the two physicians state that the purpose of the physicians in accessing the Complainant's health information in 2007 – 2008 was to assist them to respond to a complaint made about their care. AHS further argues that by doing so, the two physicians provided health services to the Complainant.

[para 78] The Complainant (through her representative) disputes that Doctors A and B provided medical services to her after she was discharged from their respective care.

> [Doctor A] had absolutely nothing to do with my daughter's care following September 28, 2005. These Doctors had no legal, moral or ethical reason to involve themselves in any part of [the Complainant's] health care what so ever following her unfortunate involvement with them […]

> AHS has offered many absurd reasons why [the Complainant's] health information has been accessed. My lawyer requested, (I don't have one), internal audit, medical affairs, perhaps [the Complainant's] current treating physician called and asked the nurse, secretary and Doctors to look at [the Complainant's] net care???? And many others. I can assure you after April 26, 2006 for [Doctor B] and September 28, 2005 for [Doctor A] these Doctors clearly should have forgotten our names and accessed zero health information. If the excuse to respond to the CPSA is used as a reason to access, request and disclose health information then it should only involve the times [the Complainant] was in the [Doctors'] care and should have never involved my health, but it did. If one should choose to voice any concerns regarding a Doctor accessing your health information you best be prepared to suffer for a very, very long time.

[para 79] The Complainant provided copies of the discharge letters to which she refers to support her assertion that she had been discharged from the care of Doctors A and B in 2005 and 2006 respectively.

[para 80] Doctors A and B concede that the Complainant was discharged from their care at the times she states and that they did not access her health information from Netcare in 2007 – 2008 in order to provide a health service within the terms of section 27(1)(a). Despite this, AHS argues that the access of the Complainant's health information by the two physicians for the purpose of defending the treatment they provided in answer to a complaint, is a use made for the purpose of providing a health service within the terms of section 1(1)(m) and was authorized by section 27(1)(a) of the HIA. This argument is based on statutory interpretation rather than the existence of a doctor / patient relationship between the two doctors and the Complainant. I turn now to the question of whether section 1(1)(m) and section 27(1)(a) can be interpreted in the way AHS proposes.

[para 81] Section 27(1)(a), cited above, permits a custodian to use health information in order to provide health services.

[para 82] "Health service" is a defined term. In the version of the HIA in force at the time of the collection, section 1(1)(m) defines this term in the following way:

> *1(1) In this Act,*
>
> *(m) "health service" means a service that is provided to an individual*
>
> *(i) for any of the following purposes and is directly or indirectly and fully or partially paid for by the Department:*
>
> *(A) protecting, promoting or maintaining physical and mental health;*
>
> *(B) preventing illness;*
>
> *(C) diagnosing and treating illness;*
>
> *(D) rehabilitation;*

> *(E) caring for the health needs of the ill, disabled, injured or dying,*
>
> *or*
>
> *(ii) by a pharmacist engaging in the practice of pharmacy as defined in the Pharmacy and Drug Act regardless of how the service is paid for, but does not include a service that is provided to an individual*
>
> *(iii) by an ambulance attendant as defined in the Ambulance Services Act,*
>
> *(iv) by the Alberta Alcohol and Drug Abuse Commission continued under the Alcohol and Drug Abuse Act, or*
>
> *(v) by a Community Board as that term is defined in the Persons with Developmental Disabilities Community Governance Act […]*

[para 83] I drew to the attention of the parties that the version of the HIA in force at the time of the 2007 – 2008 accesses includes the qualification that health services "means a service that is provided to an individual for any of the following purposes and *is directly or indirectly and fully or partially paid for by the Department*." Doctors A and B responded to this portion of my letter by stating that they were no longer relying on section 27(1)(a) as authority for their use of the Complainant's health information. However, AHS maintained its position that section 27(1)(a) applies, stating:

> It is submitted that such use is in accordance with section 27(1)(a) and the definition of 1(1)(m) then in force. The nature of the health services appear that they would have been covered under the *Alberta Health Care Insurance Act* and thus meet the definition in section 1(1)(m) that they were "directly or indirectly and fully or partially paid for by the Department". It is submitted that reviewing health information at the request of the Department Chair and to answer a complaint would be authorized under section 27(1)(a) as a "health service" by definition in the then section [1(1)(m)(i)(A)] and the present subsection 1(1)(m)(i) which includes: "protecting promoting or maintaining physical and mental health". It is submitted that using this health information to review care and diagnosis would fall under the definition of a health service.

[para 84] I understand AHS to argue that a physician may review records from Alberta Netcare for which he or she is not the custodian, regarding the care of a patient by the physician or someone else, in order to respond to a complaint made the physician, and that this action constitutes a health service to an individual. AHS argues that doing so can be equated with treating the patient because the quality of care given to a patient is reviewed during the complaint process which promotes or maintains physical and mental health.

[para 85] Clearly, the version of the HIA in force for the period 2007 – 2008 excludes the complaint process from the scope of section 1(1)(m), given that health services under that Act must be "fully or partially paid for by the Department". In the context of the HIA in force at the time, "fully or partially paid for by the Department" refers to the circumstance where the department administered by the Minister of Health and Wellness (now the Minister of Health) funds health services through the Alberta Health Insurance Plan. The hospital complaint process

conducted by the former Capital Health Authority is not a service to a patient "fully or partially paid for by the Department." I acknowledge that AHS appears to argue that defending oneself in relation to a complaint is a service fully or partially paid for by the department within the terms of the *Alberta Health Insurance Act*. However, it did not cite any provisions of that Act to ground its arguments, and I am unable to find any reference in that Act to such activities being insured in that Act.

[para 86] In any event, I find that the doctors' defences of their care in the course of the complaint process were not health services that were provided to the Complainant. Section 1(1)(m)(i)(A) includes *services provided to an individual* for the purpose of protecting, promoting, or maintaining physical or mental health.

[para 87] The purpose of hearing a complaint is not to provide a health service to a complainant, but to determine whether the care that was previously provided met the standards the hospital expected its physicians to maintain. A finding that a complaint is founded or unfounded is not intended to protect, promote, or maintain a complainant's physical or mental health. In the context of a complaint, there is no health service provider/patient relationship in which health services could be provided.

[para 88] It does not appear to be the case that the two physicians ever considered whether they had authority to access the Complainant's health information from Netcare, such that they could be said to have a purpose authorized by section 27 when they did so. There is simply no evidence before me from the two physicians or AHS had the intent or purpose of providing health services to the Complainant, when they gained access to the Complainant's health information from Netcare. As discussed above, given that the Complainant had been discharged from their care, it appears to be impossible that they had the provision of health services as a purpose for accessing health information.

[para 89] The purpose of defending oneself in a complaint is not the same thing as providing a service to a complainant. Both Doctors A and B have explained for the inquiry that their purpose in obtaining the Complainant's health information was to defend the care they provided. In my view, this purpose has nothing to do with promoting or maintaining the Complainant's health.

[para 90] In Order H2014-02, I held that a health service cannot be provided to an individual who is not a patient. I said:

> A health service cannot be provided in the absence of the agreement of the patient or someone who acts on behalf of the patient. If an individual has requested that a health service provider provide him or her with health services, or has requested a health service provider's advice regarding a health service that could be given, or someone else with authority to do so on that person's behalf has requested such a service, then the terms of the provision are met that there is a purpose of providing a health service. Under these circumstances, section 27(1)(a) would authorize the use of health information for the purpose of providing that health service.
>
> However, in a case where an individual or someone authorized on their behalf has not requested or otherwise agreed to the individual's receiving a health service or obtaining advice about a health service from the health service provider, there is no health service that is to be provided. The provision neither

> states, nor, in my view, does it contemplate, use of health information both for the purpose of providing a health service, as well as for possibly providing a health service should the need arise. Even if one were to limit the idea to a reasonably anticipated need, the latter interpretation would unreasonably strain the language chosen by the legislators.

[para 91] In the foregoing case, AHS had gained access to an individual's health information in the absence of a request by the individual for health services from AHS. I determined that this use of health information could not be construed as being for the purpose of providing a "health service" in those circumstances, as the complainant in that case had not requested health services. When an individual makes a complaint about the quality of past care to a department chair, the individual is not seeking, or consenting to, the provision of health services by the chair, or by the physician who is the subject of the complaint. Similarly, any decision by the chair or response by the physician cannot be construed as providing a "health service" to a complainant.

[para 92] I conclude that defending oneself against a complaint is not a health service provided to an individual under section 1(1)(m). It follows that I find doing so is not a use of the health information for the purpose of "providing health services" within the terms of section 27(1)(a) of the HIA (cited above).

Was accessing the information authorized by section 27(1)(c) – conducting investigations or proceedings?

[para 93] I turn now to the question of whether the physicians gained access to the Complainant's health information to use it for the purpose of "conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline" as set out in section 27(1)(c).

[para 94] The word "conducting" typically means "directing" or "carrying out". There is nothing in the HIA to suggest that the Legislature intended to depart from the ordinary meaning of this word when it enacted section 27(1)(c). When a custodian uses health information to carry out an investigation or proceedings, section 27(1)(c) can be said to apply to that use. However, section 27(1)(c) does not address the situation where the physician whose conduct is the subject of the proceeding or investigation carried out by a custodian accesses health information for the purpose of defending him or herself.

[para 95] AHS and Doctor B assert that Doctor B consulted Netcare at the request of the Chair of the department who received the complaint, and Doctor A argues that she did so on her own accord. The purpose of both doctors in accessing the health information was to defend against a complaint about the treatment they provided to the Complainant that she had made to the Chair. Doctors A and B were not conducting the proceedings in question; the proceedings were conducted by the Chair on behalf of the Capital Health Authority. Section 27(1)(c) does not authorize use of the Complainant's health information in these circumstances, as the Doctors' use of the Complainant's health information to defend themselves was not done under the authority of the Capital Health Authority but for their own personal benefit.

[para 96] I acknowledge Doctor B's assertion that he gained access to the Complainant's health information in Alberta Netcare at the verbal request of the department Chair. Arguably, the Chair conducted the complaint investigation on behalf of AHS and would be authorized to use health information to the extent necessary to conduct the proceedings. However, neither Doctor B nor AHS recounted the details of the verbal request. Doctor B's assertion is that "[i]n accessing the Complainant's Netcare logs on February 12, 2008, [he] was responding to the above-noted patient complaint that had been made by the Complainant …further to the verbal request of [the then Chair, Department of Pediatrics]. This assertion is somewhat ambiguous as to what the Chair had requested – that Doctor B respond, or that he access the Netcare logs. In my view, the former seems more likely than the latter. In their submissions of June 28, 2016, both physicians argued that the Chair asked them to review their care and diagnoses of the Complainant. As I do not what the Chair asked of Doctors A and B, the evidence falls short of enabling me to find that the Chair authorized them to search the Complainant's health information in Netcare for relevant records at the direction of the Capital Health Authority. I do accept Doctor B's concluding argument that he gained access to the Complainant's health information "to defend the allegations of misconduct which had been made against him". Moreover, I note that the email of October 24, 2007 sent by Doctor A indicates that Doctor A did not limit herself to reviewing the care she provided but reviewed the care given to the Complainant by others. Moreover, she also argues that the accesses were for the purpose of responding to a complaint, which is a different purpose than assisting the Capital Health Authority to conduct an investigation.

[para 97] As I find that Doctors A and B's use of the Complainant's health information was not authorized by section 27, I find, by operation of section 62(2), that the Capital Health Authority (now AHS) contravened section 25 when the physicians used the Complainant's health information.

The 2012 accesses

[para 98] Doctors A and B state that the Complainant's health information was accessed from the Alberta EHR in 2012 in order to prepare for a hearing held by the College into the Complainant's complaint regarding their care.

[para 99] Doctors A and B argue in their rebuttal submissions:

> At paragraphs 5 and 9 of her rebuttal submissions (Tab "B") the Complainant raised that the "Authorization for Release of Information" (see Tab "E") that she signed in relation to the College complaint granted "only the College access to obtain, use and distribute medical information.
>
> Point Four of the Authorization (Tab E") states that the College may use the Authorization "to collect information from physicians and facilities." The College wrote to the Physicians in early 2012 and, while they did request that the Physicians provide commentary on specific issues, they also requested that "[i]n addition, please provide a clear photocopy of any medical documentation that may assist in the resolution of this matter."
>
> In addition to the Authorization, the Physicians were authorized to access the Complainant's health information pursuant to section 27(l)(c) of the HIA as discussed at paragraph 6 above.

> Moreover, section 35(4) of the HIA authorized the Physicians' subsequent disclosure of the Complainant's health information to the College.
>
> Section 4.3.2 b) of the IEP [the Information Exchange Protocol created by the former Capital Health Authority] also allowed the Physicians to use and disclose the Complainant's health information at the College's request under the circumstances where such "information is required with respect to an investigation, discipline proceeding or practice review".
>
> We submit that the Physicians' access to the Complainant's Netcare logs between January 16 to 18, 2012 and February 23, 2012 to March 2, 2012, all in response to the allegations of misconduct filed against them with the College, were authorized pursuant not only to the Authorization form, but also pursuant to the HIA and the IEP.
>
> Finally, we submit that the abovementioned authorization extended to [an administrative assistant] who accessed the Complainant's Netcare on March 2, 2012, under instructions from [Doctor A]. This access occurred on the same day as [Doctor A's] final access to the Complainant's Netcare and was to print off what was needed for [Doctor A] to respond to the College complaint.
>
> The Complainant appears to have submitted at paragraph 2 of her rebuttal submissions (see Tab "B") that this access was not timely to her complaint and thus, must be referencing a different alleged allegation." With respect, we disagree. As was submitted in Doctor A's initial submissions (see Tab "F"), she was away and did not receive the College complaint (dated January 4, 2012 - see Tab "E") until February 22, 2012 when she returned. The College granted her an extension to March 14, 2012 to provide her response to the complaint (see Tab "G"). Given the adjusted time period for [Doctor A's] response to the College complaint, we submit that [an assistant's] access to the Complainant's Netcare was authorized and was within the same period of time that [Doctor A] was reviewing the Complainant's health information in order to prepare a response to the College complaint.

[para 100] AHS argues:

> […] the access in 2012 with regard to the complaint made to the College would be authorized under section 27(1)(c) and the subsequent disclosure to the College authorized by section 35(4) of HIA. Additionally, AHS in its investigation into these accesses was informed through legal counsel for [Doctor A] that [the Complainant] had signed an Authorization for Release of Information on December 5, 2011 which allowed the College to collect, use and disclose the Complainant's health information. [my emphasis]
>
> Further, the use of health information with regard to the department chair would be authorized by the Information Exchange Protocol (IEP) section 3.3.1 a) (use of information for practice self audit and / or section 3.3.1 e) (for any other purpose essential to the practice's effective operation in the provision of health services to individuals). Likewise, use of health information regarding the College is allowed under the IEP clause 4.3.2 (Alberta Netcare information may be provided to a health professional body at its request).

[para 101] As Doctors A and B and AHS note, the Complainant signed a release form authorizing the College to collect her health information. This release authorizes the College of Physicians and Surgeons to "use this original form for faxing / photocopying to collect information from physicians and facilities […]" I note that the release the Complainant signed does not authorize anyone other than the College to collect the Complainant's health information.

[para 102] The Assistant Registrar and Complaints Director for the College wrote to Doctors A and B and stated:

I am notifying you that, in accordance with Section 55(2)(c) of the *Health Professions Act,* RSA 2000, c H-7 (the *"HPA* "), I will be retaining an expert to assess the complaint that you displayed a lack of knowledge, skill and/or judgment and contravened the College's Standards of Practice an or Code of Conduct as per Section 1(l)(pp)(i)(ii). The expert will produce a written report for me.

When preparing your response, please include your comments to the following issues:

• Accuracy of consult reports dated April 6, 2005 to [a doctor] indicating diagnosis of HSP May 1, 2006 to [a doctor] with the diagnosis healthy kidneys
• Diagnosis of healthy kidneys as documented in consult letter dated May l, 2006 to [a doctor]

I will collect the following preliminary information to assist the expert:

1. Your response to this complaint;
2. A response from [Doctor A]
3. Medical records from Stollery Children's Hospital

Therefore, please prepare a written response to the issues presented in the complaint. <u>In addition, please provide a clear photocopy of any medical documentation that may assist in the resolution of this matter.</u> [my emphasis]

Upon completion of the expert's review, the expert will produce a written report for me. Once I have received that, I will contact you concerning the resolution of the complaint. We will provide regular updates to you throughout the process.

[para 103] Section 63 of the *Health Professions Act* (HPA) sets out the authority for the College to demand the production of records when it conducts complaints. It states, in part:

63(1) An investigator

(a) may, at any reasonable time,

(i) require any person to answer any relevant questions and direct the person to answer the questions under oath, and

(ii) require any person to give to the investigator any document, substance or thing relevant to the investigation that <u>the person possesses or that is under the control of the person</u>, [my emphasis]

[…]

(2) The investigator may copy and keep copies of anything given under subsection (1).

(3) The complaints director, on the request of an investigator or without a request if the complaints director is the investigator, may apply to the Court of Queen's Bench for

(a) an order directing any person

(i) to produce to the investigator any documents, substances or things relevant to the investigation in the person's possession or under the person's control,

> *(ii) to give up possession of any document described in subclause (i) to allow the investigator to take it away to copy it, in which case the investigator must return it within a reasonable time after receiving it but return it no later than after a hearing is completed, or*
>
> *(iii) to give up possession of any substance or thing described in subclause (i) to allow the investigator to take it away, examine it and perform tests on it, in which case the investigator must return it, if possible, within a reasonable time of being given it but return it, if possible, no later than after a hearing is completed;*
>
> *(b) an order directing any person to attend before the investigator to answer any relevant questions the investigator may have relating to the investigation.*
>
> *(4) An application for an order under subsection (3) may be made without notice if the Court is satisfied that it is proper to make the order in the circumstances.*

Under the HPA, an investigator may seek production of records from a person where the records are 1) relevant to the matter under investigation, and 2) in the possession of, or under the control of, the person to whom the request is made.

[para 104] I will deal first with the argument that section 27(1)(c) authorizes the use of the Complainant's health information from the Alberta EHR by the two doctors for the purpose of defending themselves against a complaint to the College.

[para 105] As discussed above, section 27(1)(c) applies in the circumstance where a *custodian* is conducting an investigation. The College was conducting a complaint investigation in this case. Section 27(1)(c) does not apply to AHS or to the two physicians in these circumstances. The physicians were participating in the investigation, but they were, as discussed above, not conducting it. Therefore, their use of the Complainant's health information that they were able to access through the Alberta EHR is not authorized by section 27(1)(c).

[para 106] If I am wrong in my interpretation of section 27(1)(c), and it is the case that the physician whose treatment is the subject of a complaint can be said to "conduct" proceedings relating to the complaint, I note that AHS, the authorized custodian in this case, was not the subject of a complaint to the College. In my view, section 27(1)(c) authorizes a custodian to use health information for the purpose of conducting proceedings. In this case, AHS was not conducting the proceedings, nor, if it is accepted that conducting proceedings includes being the subject of them, was it a party to them. There would be no reason for AHS to use the Complainant's health information in order to prepare itself for the College's investigation. As discussed above, the two doctors, as affiliates, could access health information from the Alberta EHR only under the authority of AHS. The two doctors, who have been given access to the Alberta EHR through a portal managed by AHS for the sole reason that they are affiliates of AHS and require it to treat patients, used health information for purposes not available to AHS by reference to section 27(1)(c). In other words, the two physicians, despite being affiliates of

AHS, accessed health information via the Alberta EHR for personal use, as opposed to a use permitted to the custodian with whom they are affiliated.

[para 107] If I am wrong that the two physicians were not conducting proceedings, or in my conclusion that they may only access health information via the Alberta EHR for purposes permitted to AHS, rather than for personal reasons, then I must address the argument that the Complainant's authorization to the College, permitted the two physicians to access her health information from the Alberta EHR, or alternatively, that the College itself authorized this access.

[para 108] I am unable to interpret the investigator's letters to the doctors as suggesting or demanding that they produce records from the Alberta EHR. It is not clear from the investigator's request for documentation that she was seeking the Complainant's patient records from places other than a hard copy repository in the Stollery, given her statement that she would obtain the records from the Stollery, which is where records of the treatment the two physicians provided to the Complainant were located. Moreover, the investigator had the authority under the HPA to demand only records in the possession or control of the person to whom the demand was made. Given the restrictions in the HPA and the wording of the letter, I do not believe the investigator was directing the two doctors to search for and obtain patient records that were *not* in their possession or under their control when she asked them for any "medical documentation that may assist in the resolution of this matter." Information in the Alberta EHR was not in the possession of the two doctors or under their control, given that AHS is the authorized custodian of this information at the sites where the two doctors gained access to the information and Alberta Health is the information manager for the entire Alberta EHR. Had the investigator sought information from the Alberta EHR, her demand for records would properly have been made to Alberta Health. Even had she been asking the physicians to access the records in this way, it would have been beyond her authority to do so.

[para 109] AHS and Doctors A and B also argue that the disclosure of the Complainant's health information to the College by Doctors A and B was authorized by section 35(4) of the HIA. The authority for disclosure of the Complainant's health information to the College was not set out as an issue for inquiry. However, I agree that the issue arises on the facts before me. Moreover, as the parties have made arguments in relation to the disclosure, I consider it appropriate to address this issue.

[para 110] Section 35(4) states:

> *35(4) A custodian may disclose individually identifying diagnostic, treatment and care information to a health professional body for the purpose of an investigation, a discipline proceeding, a practice review or an inspection if*
>
> > *(a) the custodian has complied with any other enactment authorizing or requiring the custodian to disclose that information for that purpose, and*
> >
> > *(b) the health professional body agrees in writing*

> *(i) not to disclose the information to any other person except as authorized by or under the Act governing the health professional body, […]*

[para 111] I begin by observing that one can disclose only what one has; a provision authorizing disclosure does not authorize the prior collection, from an available source, for an unauthorized purpose. Further, section 35(4) gives a *custodian*, such as AHS in this case, discretion to disclose personally identifying health information to a health professional body for an investigation provided that the terms of both clauses (a) and (b) are met. However, the two physicians, who are affiliates of AHS, did not disclose health information to the College on behalf of the custodian AHS. I make this finding because the letter from the College requesting records was not addressed to AHS, but to the two physicians, and because AHS was not named in the complaint about the way the physicians treated the Complainant. (No argument was made that in treating patients, physicians in a hospital are acting on behalf of AHS, such that AHS might be an appropriate respondent to proceedings.) The evidence supports finding that the two physicians gained access to health information and submitted it to the College to defend *themselves* in relation to a complaint.

[para 112] Even if it could be said that the two physicians disclosed health information they accessed via the Alberta EHR to the College on behalf of AHS (itself an untenable proposition for the reasons just discussed), there is no evidence that the terms of clauses (a) or (b) were met.

[para 113] As a result, section 35(4) does not authorize the disclosure of the Complainant's health information accessed via the Alberta EHR to the College.

[para 114] In saying this, I do not mean to suggest that the College, in conducting an investigation, would not be empowered to obtain the health information that the two physicians accessed and submitted to the College, provided it had determined the information was relevant to the complaint proceedings and it had made a formal request for it to the custodian of the information or to Alberta Health (if it were seeking documents accessible via the Alberta EHR). It would also have been open to the College to disclose some or all of the information to the physicians to ensure procedural fairness. However, I find that these steps were not taken in this case and that the College did not decide to obtain the information or to make the information available to the two physicians.

[para 115] AHS and the two doctors also argue that the "Information Exchange Protocol (IEP)" authorized the 2012 accesses. This document is a policy originally created by the Capital Health Authority for Netcare Users. AHS confirmed for the inquiry that the IEP continues to be in use at its sites and notes that it has been updated. The date of the relevant portion of the protocol is March 2007. This protocol was developed in relation to Netcare, rather than the Alberta EHR, given that it predates the statutory creation of the Alberta EHR by over three years.

[para 116] As a policy developed by AHS in relation to the former Alberta Netcare, the IEP cannot authorize the collection, use, or disclosure of health information in circumstances where doing so contravenes the HIA. I find below in my discussion of whether AHS has adequate safeguards in place to protect health information that the IEP purports to authorize its affiliates to

use and disclose health information in circumstances where the HIA prohibits such use and disclosure. However, for the sake of completeness, I will address the argument that the two physicians complied with the terms of the IEP when they used and disclosed the Complainant's health information for the purpose of defending themselves in a complaint to the College.

[para 117] Clause 3.3.1 of the IEP states, in part:

> A health service provider who is a participating custodian or participating affiliate may access and use Alberta Netcare information for conducting self-audits
>
> > a) to determine whether the requirements of an applicable professional association are being maintained and its guidelines being adhered to,
> >
> > […]
> >
> > e) for any other purpose essential to the practice's effective operation in the provision of health services to individuals […]

[para 118] Clause 4.3.2 states:

> 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, 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 119] The provisions of the IEP to which the parties directed my attention, do not, in my view, provide the necessary authority for Doctors A and B to gain access to the Alberta EHR to search for health information useful for the purpose of defending themselves in a complaint to the College.

[para 120] Even if a clause in the IEP could ground the physicians' authority to use information in the Alberta EHR when the HIA does not, Clause 3.3.1 (a) would not authorize the access by Doctors A and B, as they did not gain access to the Complainant's health information to determine whether the requirements of the College were being maintained or its guidelines adhered to. Rather, they gained access to the Alberta EHR in order to find any health information that would be useful in defending themselves in relation to the Complainant's complaint. In the circumstances of the complaint, it was the College's role to determine whether the College's requirements were met, and not that of the two physicians. Moreover, it was the College's role to determine whether the information the two physicians accessed might be relevant to the proceedings and whether it should be obtained so that it could be entered into evidence.

[para 121] Clause 3.3.1(e) would not authorize the access as there is no evidence before me that Doctors A and B gained access to the Complainant's health information in the Alberta EHR for purposes essential to the "practice's effective operation".

[para 122] Clause 4.3.2 would not authorize Doctors A and B to gain access to the Alberta EHR, because, as already noted, the letter from the College does not request that they provide health records located in the Alberta EHR. Clause 4.3.2 requires that there be a request for records from a professional health body before these are to be provided. In any event, as noted, the IEP cannot provide authority for access to the Alberta EHR that goes beyond the authorizing provisions in the HIA and HPA. (As discussed above, the HPA authorizes an investigator to require only information that is in the possession or control of the person being asked for it.)

[para 123] In my view, none of the statutory provisions to which the parties have drawn my attention authorizes the use of the Complainant's health information by the two doctors that is the subject of the complaint before me, and that they contravened the HIA when they used the information. As the two doctors are affiliates of AHS and gained access to the Complainant's health information at portals for which AHS is responsible, by operation of section 62(2), AHS contravened section 25 of the HIA when the physicians did this. As I find that there was no authority for AHS to disclose the Complainant's health information to the College in the circumstances in which Doctors A and B disclosed this information, I find that AHS also contravened section 31 of the HIA when they did this.

Issue D: If the two doctors and/or their staff members used the information, but did so in their own capacities, did they use the Complainant's health information in contravention of, or in compliance with, Part 4, section 25 of the HIA?

[para 124] I have found that the Capital Health Authority was the custodian of Netcare, and that AHS is the authorized custodian of the Alberta EHR in this case. Doctors A and B collected the Complainant's health information from Netcare and the Alberta EHR in their capacity as affiliates, rather than in their "own capacities" as custodians. As a result, I need not answer this question.

Issue E: If the two doctors, and/or their staff members used the Complainant's health information without authority in the capacity of affiliates of AHS, has AHS taken reasonable steps to protect the Complainant's health information within the terms of section 60?

[para 125] I have found that AHS lacked authority to use and disclose the Complainant's health information in the circumstances in which the two doctors used and disclosed her health information. I must now consider whether AHS took reasonable measures to prevent this outcome.

[para 126] Section 60 of the HIA requires a custodian to protect health information. It states:

> *60(1) A custodian must take reasonable steps in accordance with the regulations to maintain administrative, technical and physical safeguards that will*

(a) protect the confidentiality of health information that is in its custody or under its control and the privacy of the individuals who are the subjects of that information,

(b) protect the confidentiality of health information that is to be stored or used in a jurisdiction outside Alberta or that is to be disclosed by the custodian to a person in a jurisdiction outside Alberta and the privacy of the individuals who are the subjects of that information,

(c) protect against any reasonably anticipated

(i) threat or hazard to the security or integrity of the health information or of loss of the health information, or

(ii) unauthorized use, disclosure or modification of the health information or unauthorized access to the health information,

and

(d) otherwise ensure compliance with this Act by the custodian and its affiliates.

(2) The safeguards to be maintained under subsection (1) must include appropriate measures

(a) for the security and confidentiality of records, which measures must address the risks associated with electronic health records, and

(b) for the proper disposal of records to prevent any reasonably anticipated unauthorized use or disclosure of the health information or unauthorized access to the health information following its disposal.

(3) In subsection (2)(a), "electronic health records" means records of health information in electronic form.

[para 127] Section 8 of the Health Information Regulation to which section 60(1) refers, states in part:

8(3) A custodian must periodically assess its administrative, technical and physical safeguards in respect of

(a) 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) any reasonably anticipated threat or hazard to the security or integrity of the health information or to the loss of the health information, and*
>
> *(c) any unauthorized use, disclosure or modification of the health information or unauthorized access to the health information.*

[para 128] AHS argues:

> With regard to the measures that must be taken with regard to reasonable steps that need to be taken Investigation Report F2013-IR-03 / P2-13-IR-01 / H2013-IR-02 at paragraph 20 stated:
>
> Taking reasonable measures to protect against risk implies that the respondent [needs] to analyse what kinds of risks may affect personal and health information. In performing this analysis, it is important to consider measures to mitigate these risks. Each law includes the concept of reasonableness, which means that mitigation strategies do not need to be perfect. Information security and breaches may still occur even when reasonable safeguards have been implemented. (TAB 3)
>
> A Privacy Impact Assessment ("PIA") was completed by the then Capital Health regarding Netcare and accepted by the OIPC on January 9, 2004. With each new repository that has been added to Netcare additional PIAs have been completed. Privacy Risks and Mitigation Plans for Netcare have been generally described in the Netcare Clinical Repositories PIA that was accepted by the OIPC on January 4, 2012 and is attached for reference at TAB 4.
>
> Additionally, prior to obtaining access to Netcare training is given and a User Agreement has to be executed. Current training is outlined in the Netcare Clinical Repositories PIA and is attached as part of TAB 4. In addition to the online AHS training that has now been released (the PIA refers to it coming online in 2011 /12) as of 2016 all AHS staff and employees must complete mandatory privacy and security training and sign the AHS Confidentiality and User Agreement once every three years.
>
> It is submitted that in determining compliance with section 60 that the aforementioned measures indicate that reasonable measures were in place.

[para 129] In response to my question as to what administrative measures, such as policies, were in place to protect health information in the Alberta EHR, AHS referred me to the IEP.

[para 130] The purpose of the IEP appears to be to clarify the circumstances in which AHS and its affiliates may collect, use, or disclose health information from the Alberta EHR. I conclude that the IEP is one of the policies AHS requires its affiliates to follow in order to safeguard health information from unauthorized use.

[para 131] Also cited above, section Clause 4.3.2 of the IEP states:

> 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, 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.

I found above that there is no evidence that the disclosure of the Complainant's health information (or use for the purpose of disclosing it to the College) complied with the terms of clause 4.3.2 of the IEP. However, I note that had the terms of this clause been met, that disclosure to the College in the circumstances would have contravened the HIA. As noted above, section 27(1)(c) authorizes use of health information for the purpose of conducting an investigation when the custodian (in this case AHS) is conducting the investigation or inspection relating to members of a health profession or discipline. Section 27(1)(c) contains no authority for an affiliate to conduct such an investigation, except in the circumstance where a custodian conducts such an investigation, and the affiliate acts on behalf of or as the custodian in relation to the investigation.

[para 132] Section 35(1)(h) authorizes disclosure of health information for the purpose of a proceeding before a quasi-judicial body to which *the custodian* is a party. As noted above, AHS was not a party to the proceedings before the College. As a result, section 35(1)(h) does not constitute authority for the two physicians to disclose the Complainant's health information to the College, or to use it for this purpose. If AHS were a party to the proceeding, and it was the responsibility of the two physicians to disclose health information for proceedings on behalf of AHS when AHS is a party to them, then section 35(1)(h) would authorize disclosure. However, AHS was not a party in this case, and the two physicians did not disclose the Complainant's health information under the authority of, or on behalf of, AHS.

[para 133] Clause 4.3.2 of the IEP, as drafted, appears to authorize disclosure of health information to the College, in circumstances where AHS would not be authorized to disclose health information to the College under the HIA for the reason that it would not be a party to a proceeding before the College within the terms of section 35(1)(h), and would not have received a formal request or demand for the information such that section 35(1)(p) would authorize disclosure. Further, it appears to authorize access to information by a person who does not have possession or control of it, which goes beyond the authority of the provision in the HPA that permits the College to require records from a person who has possession and control of them.

[para 134] There is simply no ability to exercise discretion under the HIA as a "custodian" in one's own right when one acts as the affiliate of another custodian. As discussed above, section 1(3) of the HIA precludes this possibility. However, as also discussed above, the IEP appears to authorize affiliates to use and disclose health information for their own personal purposes and benefit.

[para 135] I have found that the IEP did not authorize the use of the Complainant's health information in the circumstances in which the two doctors accessed it from Netcare and the Alberta EHR. However, I have also found that the IEP appears to authorize the use and disclosure of health information in the Alberta EHR (and previously in Netcare) in circumstances where doing so is a contravention of the use and disclosure provisions in the HIA. It is foreseeable that AHS's affiliates may rely on this policy in relation to the use of health

information, with the result that the affiliates, and therefore AHS as custodian, will contravene the HIA when affiliates use and disclose health information in reliance on this policy.

[para 136] For the foregoing reasons, I conclude that AHS does not have reasonable administrative safeguards in place to protect the confidentiality of health information accessible via the Alberta EHR at its sites. However, the policies AHS has drafted give rise to other issues, which are relevant to my discussion of section 62 of the HIA, below. Following my analysis of section 62, I will discuss the steps AHS must take to meet the terms of section 60 in relation to establishing administrative safeguards.

Issue F: If Doctors A and B used the Complainant's health information from Netcare as affiliates of Alberta Health Services, did they use the information in accordance with their duties to the custodian within the terms of section 28 of HIA?

[para 137] There is no evidence before me as to whether Doctors A and B have duties to AHS that were met or not met by their use of the Complainant's health information. As a result, I can draw no conclusions as to whether they used the Complainant's health information in accordance with such duties. However, the position of Doctors A and B, and AHS for the inquiry is that if the physicians used the Complainant's health information, they did so in accordance with AHS's policies. As discussed above, section 62(4) creates a duty for affiliates to comply with the HIA and with the policies and procedures set by a custodian when they use health information. I will therefore address the question of whether Doctors A and B complied with section 62(4), as the parties have made submissions regarding this issue.

[para 138] The position of AHS in this inquiry is that Doctors A and B used (and disclosed) the Complainant's health information in accordance with AHS policies. It states:

> Further such accesses were in compliance with the Netcare Information Protocol as set out in paragraph 21 of AHS' Initial Submission. Physician access was also in accordance with AHS policies that were initially approved on June 24, 2009 and subsequently revised on January 10, 2012.

[para 139] While I have found that the use and disclosure of the Complainant's health information did not comply with the express terms of the IEP, I acknowledge that the use and disclosure appear to have been in compliance with AHS's interpretation of the requirements of this policy, given AHS's submissions for the inquiry. I have also found that it is possible to comply with the terms of the IEP that were drawn to my attention, as AHS interprets them, and in so doing, contravene the terms of the HIA, as discussed above. It also appears to be the case that had the two physicians asked someone in authority at AHS whether the use and disclosure of the Complainant's health information they intended was authorized, they would have been told "yes". I draw this conclusion on the basis of AHS's submissions for the inquiry.

[para 140] When an affiliate uses and discloses health information in a manner that is not in accordance with the affiliate's duties to the Custodian, section 80(3)(a) of the HIA authorizes me to order the affiliate to comply with its duties under section 62(4)(b). However, in this case, there appears to be conflict between AHS's policies and procedures regarding the authority of its affiliates to collect, use, and disclose health information, and the terms of the HIA regarding that authority. As a result, ordering the affiliates to comply with AHS's direction or policies

regarding the collection, use, and disclosure of health information would not necessarily result in increased security or confidentiality of the Complainant's health information.

[para 141] I have found that the use and disclosure of health information by the two physicians contravened the HIA and was done for their own personal purposes, rather than those of AHS. I therefore find that the two physicians contravened section 62(4)(a) of the HIA.

[para 142] This contravention may be due in part to the fact that none of the policies and procedures AHS has shown me is drafted so as to create a clear duty in affiliates to collect, use, or disclose health information only for the purposes for which they have been granted access to health information by AHS and for purposes for which AHS is authorized to collect, use, or disclose health information. For example, clause 3.1 of document 1105 states:

> Access to AHS information shall only be granted if such access is necessary to fulfill authorized AHS duties and responsibilities. Access shall be to the minimum information necessary to perform the duties and responsibilities.

This clause indicates the reasons for which AHS may grant access to information to its affiliates and may be viewed as a duty applicable to AHS; however, this clause does not appear to contain an enforceable duty that would apply to its affiliates. In other words, clause 3.1 does not appear to apply to affiliates, or to address the situation in which an affiliate collects, uses, or discloses health information for the affiliate's personal purposes, with the result that an affiliate would not clearly be in contravention of AHS's policies if the affiliate did this.

[para 143] As section 60, discussed above, requires a custodian to maintain administrative safeguards to protect health information, and as the policies and procedures AHS has created are insufficient to protect health information accessible via the Alberta EHR from use and disclosure not authorized by the HIA, I will ask AHS to review the policies it has created under section 63 and to redraft any provisions which appear to permit affiliates to use or disclose patient health information for their own personal purposes. I will ask it to ensure that its policies reflect that 1) only AHS is the custodian and authorized custodian at its sites, 2) the HIA authorizes only an "authorized custodian" to use and disclose health information via the Alberta EHR, and 3) affiliates may only use or disclose health information via the Alberta EHR if they are doing so in circumstances in which AHS would have authority to use or disclose health information. In addition, I will ask it to review its policies to ensure that they create enforceable obligations for affiliates to collect, use, or disclose health information in compliance with the HIA, such that section 62(4)(b) is engaged should an affiliate use or disclose health information in a way that contravenes the HIA.

[para 144] Once AHS has revised its policies to reflect the foregoing, section 62(4)(b), which requires affiliates to comply with policies and procedures established or adopted under section 63, will require the two physicians to comply with the new, revised policies.

Issue G: If the two doctors used health information from Alberta Netcare and the Alberta EHR in their own capacities as custodians and if their respective staff members used the Complainant's health information without authority, have the two doctors taken

reasonable steps to protect the Complainant's health information within the terms of section 60?

[para 145] As I have found that the two Doctors used the Complainant's health information as affiliates of AHS, I need not answer this question.

IV. ORDER

[para 146] I make this Order under section 80 of the Act.

[para 147] I order the Custodian, AHS, to cease using and disclosing the Complainant's health information in contravention of sections 25 and 31 of the HIA.

[para 148] I order Doctor A to comply with her duty under section 62(4) of the HIA to comply with the Act and regulations when using and disclosing health information at AHS's sites.

[para 149] I order Doctor B to comply with his duty under section 62(4) of the HIA to comply with the Act and regulations when using and disclosing health information at AHS's sites.

[para 150] I order the Custodian, AHS, to take reasonable steps to maintain administrative safeguards to protect against unauthorized use and disclosure of the Complainant's health information by its affiliates.

[para 151] Compliance with paragraphs 147 and 150 of this order could be achieved if AHS reviews the policies it has created under section 63 and redrafts any provisions which appear to permit affiliates to use or disclose patient health information for their own personal purposes, ensuring that the policies state the following:

> 1) only AHS is the custodian and authorized custodian at sites it operates,
> 2) the HIA authorizes only an "authorized custodian" to use and disclose health information via the Alberta EHR, and
> 3) affiliates may use and disclose health information via the Alberta EHR at AHS's sites only where AHS would have authority to use or disclose health information.

[para 152] AHS should also review its policies to ensure that the policies create enforceable obligations for affiliates to collect, use, or disclose health information in compliance with the HIA, such that section 62(4)(b) is engaged should an affiliate use or disclose health information in a way that contravenes the HIA.

[para 153] While I ask that the AHS consider the foregoing as a means to comply with paragraphs 147 and 150, it is not precluded from taking alternate measures it believes will enable it to cease using and disclosing the Complainant's health information in contravention of the HIA, or to protect the Complainant's health information from unauthorized use and disclosure.

[para 154] I further order the Custodian, AHS, and the affiliates, Doctors A and B, to notify me within 50 days of receiving this Order that they have complied with this Order.

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Teresa Cunningham
Adjudicator