ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2022-06

May 12, 2022

ALBERTA HEALTH SERVICES

Case File Numbers 008518 & 008527

Office URL: www.oipc.ab.ca

Summary: Under the *Health Information Act* (the HIA), the Applicant made two requests to Alberta Health Services (the Custodian) to access his own health information. One request was for all of the Applicant's Netcare records, the other was for his entire file at a hospital. The Applicant required the requested information on a short timeline, and the Custodian expedited its responses to them.

The Custodian responded to both requests in a timely fashion, well within the timelines set out in section 12(1) of the HIA. At the same time as it provided the Applicant with the requested information, the Custodian notified the Applicant that invoices for fees for responding to the requests were forthcoming. The invoices were paid by the Applicant.

The Applicant sought review of the manner in which the fees were assessed. The Applicant alleged that the Custodian failed to provide a fee estimate in advance of responding to the access requests, and improperly charged him fees, contrary to section 67 of the HIA. The Custodian's position was that it handled the access requests pursuant to its own "informal request" process rather than the process under the HIA and that, therefore, the HIA does not apply. The Custodian argued that its practice of implementing its "informal request" process is permitted under section 17 of the HIA.

The Adjudicator found that the process under the HIA governed the Custodian's responses to the access requests. The Applicant exercised his rights to his own health information under the HIA when he made the requests, and never elected to seek the

information through any other process. While section 17 of the HIA permits the existence of access processes other than those in the HIA, it did not permit the Custodian to unilaterally impose another process on the Applicant, once the Applicant exercised his access rights under the HIA.

The Adjudicator found that the Custodian improperly assessed fees for responding to the access requests. He concluded that the Custodian did not establish that the fees it charged were limited to the actual cost of responding to the access request, as required by sections 67(2) and (6) of the HIA. The Adjudicator also found that the Custodian failed to provide the Applicant a fee estimate before providing services, as required by section 67(3) of the HIA.

The Adjudicator reduced the fees for the first request to $0.00. He reduced all fees for the second request to $0.00, save for actual costs incurred by the Custodian for retrieving records from a third party.

With regard to the request for Netcare records, the Applicant alleged that the Custodian failed to meet the duty to assist in section 10(a) of the HIA by failing to provide records in an electronic format, and failing to properly search for and provide diagnostic images specifically requested. The Custodian argued that it did not have custody or control over the Applicant's Netcare records.

The Adjudicator found that the Custodian had control over the Applicant's Netcare records sufficient for the purposes of responding to the access request for Netcare records. The Adjudicator also found that the Custodian failed to meet the duty to assist in section 10(a) by failing to inform the Applicant in advance of providing records and charging fees that it could not provide records in electronic format, and could not provide diagnostic images from Netcare at all. The Adjudicator further found that the Custodian failed to adequately explain whether the Applicant had received all of the records he requested, or whether diagnostic images were not provided owing to the Custodian's inability to print them.

Statutes Cited: AB: *Alberta Electronic Health Record Regulation*, Alberta Regulation 118/2010, ss. 2; 3(1), 3(1)(d), 3(1)(e); 4(k), 4(l); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 C. F-25 ss. 6(1); 10(1); 10(2); 13, 13(1), 13(2); 93; 93(1), 93(2), 93(6); *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008, Schedule 2 – Fees Schedule, ss. 1, 3(a); *Health Information Act,* R.S.A. 2000, c. H-5 ss. 1(1)(f)(iii), 1(1)(f)(iv), 1(1)(f)(xii), 1(1)(f)(xiii); 2, 2(d); 7, 7(1); 8(1); 8(3), 8(3)(a); 10, 10(a); 10(b); 11; 12(1); 12(2)(b), 12(2)(c); 17; 27, 27(1); 33; 56.1(a); 56.1(b), 56.1(b)(i), 56.1(b)(ii); 56.1(c); 56.5(1), 56.5(1)(a), 56.5(1)(b); 56.7(1); 67, 67(1), 67(2), 67(3), 67(6); 80; 80(3)(c); 104. *Health Information Regulation*, Alberta Regulation 70/2001 ss. 10(1), 10(1)(c), 10(1)(h), 10(2), 10(3); 11; 11(1); 11(2); 12; 12(3); Schedule ss. 1; 2(a); 2(q)(i); *Health Statutes Amendment Act*, 2020 (No. 2), SA 2020, c 35.

Authorities Cited: AB: Orders 2000-005, 2000-021, 2001-013, F2011-R-001, F2018-37, F2019-09, F2019-18, F2020-24, F2020-34, F2021-36, H2004-005, H2005-002, H2015-01, and H2021-11.

I. BACKGROUND

[para 1] This Inquiry addresses files 008518 and 008527. Since both files concern a common access request, I have joined them into one inquiry. The background facts are as follows:

[para 2] The Applicant made two access to health information requests to Alberta Health Services (the Custodian). The first request is dated December 6, 2017; the second request is dated December 11, 2017. Collectively, I refer to these access to health information requests as "the requests."

[para 3] The December 6, 2017 request:

> Please provide a complete, electronic copy, including all diagnostic imaging, of my Alberta Netcare file from January 1, 2010 to present. I require these records in electronic format as I travel extensively for work and must have the diagnostic imaging and health records available should I require emergency care. A paper copy is not acceptable and may result in delays in an emergency situation. A CD (or equivalent) is preferred. My Alberta Health Number is [Applicant's Alberta Health Number].
>
> I am travelling outside of Canada in December and January, as such I need to receive these records as soon as possible. Thank you for your assistance.

[para 4] The December 11, 2017 request:

> Please provide a complete copy of my file at Rockyview General Hospital. In particular, I would like a complete copy of my file related to my attendances at the Emergency Room, subsequent admissions to the Hospital and [Applicant's Health Information]. [Applicant's health information and health number].
>
> I am traveling outside of Canada in December and January and need to have my records with me should I require emergency care. As such, I need to receive these records as soon as possible. Please advise by phone [Applicant's telephone number] when I may pick up same. Thank you for your assistance.

[para 5] I note that with each request the Applicant included a notification to the Custodian that he was set to travel abroad in short order and he needed to have the requested health information with him on his travels, in case medical complications arose.

[para 6] The Custodian expedited its responses to the requests. After learning that the Applicant was set to depart on his travels on December 16, 2017, the Custodian issued a response to the first request on December 12, 2017. It provided the Applicant 257 pages of records. The records are paper copies of the Applicant's Netcare records, rather than

electronic copies as he requested. In a letter accompanying the records, the Custodian advised the Applicant that it was unable to provide records in a CD format, and thus only provided paper copies of records.

[para 7] The Applicant did not receive the diagnostic images he mentioned in the first access request. Later, he was able to retrieve an electronic copy of them from the Rockyview General Hospital Diagnostic Imaging department.

[para 8] The Custodian issued its response to the second request on December 21, 2017. It provided the Applicant 640 pages of records.

[para 9] With each response, the Custodian sent the Applicant the requested health information and, at the same time, notification that an invoice for fees for the cost of responding to the request would be forthcoming. The invoice notifications indicated that fees were $84.25 and $195.96 for the first and second requests, respectively. Subsequently, the Custodian sent invoices in those amounts to the Applicant. The Applicant paid the fees as invoiced on the basis that he did so without prejudice to his right to seek a review of the handling of his access requests.

[para 10] The Applicant requested that this Office review the amount and manner in which the Custodian assessed fees. The Applicant contends that the Custodian failed to comply with the fee structure set out in the HIA.

[para 11] The Applicant also takes issue with the format and content of the response to his request for Netcare records. The Applicant was foremost concerned with receiving an electronic copy of the requested information, rather than a paper copy, and with obtaining diagnostic images as specifically requested.

[para 12] Investigation and mediation were authorized to attempt to resolve the issues, but did not do so. The matter proceed to inquiry.

II. ISSUES

[para 13] The issues identified in the Notice of Inquiry in file 008518 relate to both access requests. The issues are:

Issue A: Did the Custodian properly charge fees for services, pursuant to section 67(1), (2) and (6) of the HIA?

Issue B: Did the Custodian comply with section 67(3) of the HIA?

[para 14] The issues identified in the Notice of Inquiry in file 008527 relate only to the first access request. The issues are:

Issue C: Are the electronic records requested by the Applicant in the custody or under the control of the Custodian, as set out in section 7(1) of the HIA?

Issue D: Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly accurately and completely, as required by section 10(a) of the HIA?

[para 15] In the Custodian's initial submission in file 008518, it raised the argument that the requests were handled pursuant to its "informal request" access procedure rather than the access process prescribed in the HIA. The Custodian's position is that when handling an access request under another process, the provisions of the HIA regarding fees do not apply. The Applicant maintains that his requests were not made under any informal process and that the fee provisions do apply. I address these arguments under the following issue:

ISSUE E: Are the access requests governed by the HIA?

III. DISCUSSION OF ISSUES

Preliminary Matter – HIA since amended

[para 16] In the time since the Custodian responded to the access requests, the pertinent terms of the HIA in respect of electronic health records on Netcare were significantly amended by the *Health Statutes Amendment Act*, 2020 (No. 2), SA 2020, c. 35. The sections of the HIA referred to in this Order represent the HIA, and its regulations, as they were at the time of the events in question, and governed them accordingly.

Order of Issues

[para 17] In the event that the requests are not governed by the access procedures in the HIA, Issues A through D are largely moot since they only apply to the access procedures set out in the HIA. Accordingly, I consider Issue E first.

ISSUE E: Are the access requests governed by the HIA?

[para 18] The access to health information procedures under part 2 of the HIA are not the only path to obtaining health information. Section 17, which appears in part 2, allows for other procedures. Section 17 states:

> **Existing procedures still available**
>
> 17 An individual is not limited to the procedure set out in this Part to request access to health information about the individual if another procedure is available.

[para 19] The Custodian's position is that it handled the access requests under its own access to health information process, rather than pursuant to the terms of the HIA. The Custodian stated that it regarded the access requests as "informal requests" for access to the health information.

[para 20] The Custodian cites the following passage from Order H2004-005 at para. 69 in support of its position:

> Reading the words in the context of the entire Act, other sections in HIA clearly allow processes outside the Act to continue and co-exist along with processes created in HIA. For example, section 17 of the Act says an individual is "not limited" to the HIA procedure when requesting access to information.

[para 21] The Custodian explained the parallel nature of its process for handling access requests as "informal requests" or via the process in the HIA, as follows:

> AHS' existing procedures differ from the formal procedures under the HIA so as to ensure that routine inquiries for access to health information are dealt with in a timely and efficient manner. This is a necessary administrative requirement for the AHS due to the amount of access requests received each year. Therefore, AHS follows a broad practice of treating access requests received through its Access and Disclosure department as "informal requests" absent something in the access request which, in the opinion of the specialist assigned to the request, would require the matter to be directed to the procedures outlined in part 2 of the HIA.

[para 22] There is no single document setting out the Custodian's informal request process, but the Custodian explained some of the particulars of that process. In general, it does away with processing delays caused by the requirement for fee estimates under the HIA. The Custodian summarizes the informal process as follows:

> To confirm, AHS' existing procedures used to process "informal requests" does not change the scope of responsive records, or the fees associated with processing a request, rather, it merely avoids processing delays occasioned by administrative procedures laid out in the HIA which impact the timely processing of access requests.

[para 23] To summarize the Applicant's response to the Custodian's position, he states that when he made the access requests he was exercising his rights under the HIA, and nothing the Custodian did or said suggested that there was some other process at work. The Applicant first learned of the Custodian's "informal request" process from its initial submission in this Inquiry. The Applicant summarizes his position on whether the HIA governs his access requests as follows:

> Accordingly, it cannot have been the intention of the legislature that Section 17, namely a right given to the individual (and not the custodian) to be able to choose to use alternate access procedures to obtain their health information if available, be interpreted to permit the AHS, by far the largest custodian in the Province of Alberta, to create a department named "Access and Disclosure" and to enable that department to unilaterally choose, without the knowledge or consent of the applicant, to process their access requests by way of an "Informal Request" procedure that materially diminished the rights otherwise provided to the Applicant under the HIA (such as the right to receive electronic copies of their health record and the right to receive an estimate of fees prior to the processing of their request).

[para 24] As to the significance of the decision in Order H2004-005 to this Inquiry, the Applicant states,

> Murji (Re) (AB OIPC) 2005, acknowledges that alternate procedures may exist, but does not stand for the position that the AHS can adopt alternate access procedures that diminish the rights and protections created under the HIA. To do so would permit the AHS to side-step the intent and purpose of the HIA.

[para 25] I find some merit in the arguments of both parties.

[para 26] I agree with the Custodian that section 17 of the HIA permits a custodian to provide individuals with their own health information through processes other than those laid out in the HIA. Indeed, under section 33 of the HIA a Custodian may disclose health information to the individual it is about without any procedural requirement at all. Custodians thus have wide latitude to create other processes for individuals to request access to their own health information. Alternate processes may be as far or close to the procedure set out in part 2 of the HIA as a Custodian sees fit.

[para 27] I agree with the Applicant's argument that section 17 of the HIA does not permit the Custodian to unilaterally impose other access procedures with the effect of diminishing the access rights provided in part 2 of the HIA. Whether an entity can respond to an access request other than through a legislated process has been considered with regard to access requests under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 C. F-25 (FOIP). FOIP provides an access right substantially similar to that provided under the HIA. In Order F2021-36 at para. 15 the Adjudicator stated,

> In this case, the Applicant's request was made using a FOIP request form and was, on its face, a request made under the FOIP Act for records in the Public Body's custody and control that fall within the scope of the FOIP Act. Therefore, the analysis in Order F2013-20 is applicable: the Public Body cannot transfer the request to an alternate process outside the FOIP Act without informing the Applicant that the Public Body's obligations under the FOIP Act, and the right of review afforded to the Applicant, would no longer apply.

[para 28] The same approach described in Order F2021-36 applies equally to access requests under the HIA. The wording of section 17 of the HIA permits *an individual* to pursue access to health information through procedures other than those in the HIA. The wording does not include any language that can be reasonably interpreted to provide a custodian with the power to vitiate an individual's access rights under the HIA by *imposing* upon the individual a process other than the one under the HIA. The right of access to one's own health information is enshrined in section 7 of the HIA and is always available to an individual seeking that information regardless of the existence of other processes.

[para 29] As to whether the processes in part 2 of the HIA, or other available procedures, govern a particular access request, the HIA does not contain provisions explicitly addressing that issue. However, the wording of sections 7 and 17 indicate that

the right of access is that of the individual seeking information, and that the individual is the one who is "not limited" to procedures under the HIA. Accordingly, it is for the individual seeking their own health information to determine which process to use. Given that the right of access in section 7 and the procedures laid out in part 2 are immutable, once an individual elects to exercise their section 7 right of access, unless the individual subsequently chooses another process, the process in part 2 of the HIA will govern the access request.

[para 30] As to how a custodian is to inform an individual of procedures other than those in the HIA, and how an individual is to inform a custodian of their choice of process, the HIA is silent as well. These details are left to custodians and individuals to sort out among themselves. Unfortunately, in this case there was no communication between the parties on the matter. The Applicant was completely unaware of the "informal process" until the Custodian mentioned it during Inquiry, and therefore had no opportunity to choose between it and the process under the HIA. Given that the choice of process is the Applicant's, I consider whether the facts of the case indicate that he exercised his rights under the HIA, and thus engaged its process. As discussed below, I find that he did.

[para 31] The Applicant states that he made the access requests under the HIA.

[para 32] The Applicant made both access requests using a form titled "Request to Access Health Information" (the Form). He obtained the form from the following website:

> https://www.albertanetcare.ca/GetYourEHR.htm

[para 33] The website is in the domain of the Government of Alberta, and, as of the time I write this Order, opens with the large-font, bolded header: Alberta Health – Health Information Act (HIA) – Access. As of the time I write this Order, the Form is still available at the website.[1]

[para 34] The form contains several references to the HIA. The first line on the Form states,

> The information on this form is collected under Alberta's Health Information Act and will be used to respond to your request for your own health information. Instructions for completing this form are on the back.

[para 35] Where the individual completing the Form is prompted to describe what information is requested, the Form asks,

[1] I note that rather than merely referring to the website as the location from where he obtained the Form, the Applicant included a print-out of it in his submissions and confirms that the one included is the one that he used when he made the access requests.

> What records do you want to access? Please give as much detail as possible. Indicate if you also want access to records about the disclosure of your information. (Be sure to give all your previous names. If you are requesting access to another individual's information, you must include information to identify the individual (in the box below) and attach proof that you can legally act for that individual (under section 104 of the Act). If you need more space, please attach a separate sheet of paper.)

[para 36] While the Form does not explicitly state that the term "the Act" used in the above quote refers to the HIA, the HIA is the only act mentioned on the form. As such, it stands to reason, and anyone reviewing the Form would reasonably conclude, that "the Act" refers to the HIA.

[para 37] The reference to "section 104 of the Act" in the above quoted passage is undoubtedly a reference to section 104 of the HIA. That section addresses the topic of legal authority needed to exercise access rights under the HIA on behalf of some else.

[para 38] On the back of the Form are the instructions for completing it. Under the heading "How to complete the form" the instructions open with the following paragraph:

> You may be able to access your own health information without making a request under the Health Information Act. To determine whether you need to make a request under the Act or if you need help completing the form, contact the HIA Coordinator or the person responsible for processing requests in the organization to whom you are making the request.

[para 39] The wording of the above paragraph indicates that completing the Form on the other side is how to request health information under the HIA, whereas accessing health information other than by making a request under the HIA involves discussion with the organization to whom the request is made.

[para 40] After reviewing the correspondence between the Custodian and the Applicant regarding his access request, it appears, as stated by the Applicant, that the Custodian did not alert him to the fact that it was handling his access requests as "informal requests" or via any other particular procedure. Under these circumstances, I do not see that the Applicant can be understood to have engaged any process other than the one in the HIA. Nor do I see how the Custodian could have understood anything other than that the Applicant was exercising his rights under the HIA when he made the access requests.

[para 41] In reaching the above conclusion, I have considered that the Custodian posits that if both parties had followed the fee process set out in the *Health Information Regulation*, Alberta Regulation 70/2001 (the HIR), which is part of access to information process under the HIA, it is unlikely that the access requests would have been processed on an expedited fashion, or even at all, until the Applicant provided a $25.00 fee up front and then half of any further estimated fees. Sections 10(1)(c) and (h), 10(2), 10(3), 11 and 12 of the HIR state,

10(1) An applicant who makes a request for access to a record containing health information may be required to pay a basic fee of $25 for performing one or more of the following steps to produce a copy of the information:

...

(c) locating and retrieving the records;

...

(h) photocopying a record.

(2) Processing of a request will not commence until the basic fee has been paid, if applicable.

(3) In addition to the basic fee, additional fees in accordance with the Schedule may be charged for producing a copy of a record.

* * *

11(1) An estimate provided under section 67(3) of the Act must set out

(a) the time and cost required

(i) to prepare the record for disclosure, including severing time, and

(ii) to retrieve records from another location;

(b) the cost of copying the record;

(c) the cost of computer time involved in locating and copying a record or, if necessary, re-programming to create a new record;

(d) the cost of supervising an applicant who wishes to examine the original record, when applicable;

(e) the cost of shipping the record or a copy of the record, other than by mail or fax.

(2) An applicant has up to 20 days to indicate if the fee estimate is accepted or to modify the request to change the amount of fees assessed.

* * *

12(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on the receipt of an agreement to pay the fee, and on the receipt of at least 50% of any estimated fee.

(2) The balance of any fee owing is payable at the time the information is delivered to the applicant.

(3) Fees or any part of those fees will be refunded if the amount paid is higher than the actual cost of the service.

[para 42] Section 12(1) of the HIA sets timelines for a custodian to respond to an access request. Section 12(1) states,

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

[para 43] The Custodian's responses to the requests were swift, well inside of the time it had to respond to them under the process set out in the HIA. Considering the amount of time that the Custodian was permitted to process the requests, and the inevitable delays that preparing estimates, sending them to the Applicant, and then awaiting his approval and partial fee payments would create, it could easily have been the case that following the process in the HIA and the HIR may have delayed the responses to the requests past the Applicant's departure dates. However, this is a risk that the Applicant took by exercising his rights under the HIA so close to his departure date. Under the HIA, it would have been no fault of the Custodian if the Applicant had not received any records prior to his departure date.

[para 44] In respect of these circumstances, I consider whether once the Custodian agreed to the Applicant's request to process the requests in time to meet his travel deadlines, the parties essentially dispensed with the procedure under the HIA in favour of a more expedient one. For the reasons that follow, I do not find that they did.

[para 45] While the Custodian agreed to expedite processing the requests with the commendable intention to be responsive to the Applicant's needs, it did not indicate to the Applicant it would be engaging in a different process other than the one in the HIA. It appears that the Applicant understood that the Custodian would respond to the requests, which were made under the HIA, as quickly as possible through that process, and not engage in another, different process. I find that the Applicant made his access requests pursuant to his rights under the HIA, and did not elect another process by asking if the responses could be completed by specific dates. Accordingly, the HIA processes continued to govern the response to the requests at all times.

[para 46] Since I have concluded that the process in the HIA governs the access request, I consider the remaining issues about whether the Custodian had custody and control of the records and complied with sections 10 and 67 of HIA when it responded to the requests.

Issue C: Are the electronic records requested by the Applicant in the custody or under the control of the Custodian, as set out in section 7(1) of the HIA

[para 47] Under section 7(1) the HIA, an Applicant has access rights only to information that is in the custody or under the control of a Custodian. Section 7(1) states:

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

[para 48] The Custodian's position on this issue is that Alberta Health has custody or control of the records as a function of its role as Information Manager of Netcare, and that in responding to an applicant, the Custodian is acting on the direction of Alberta Health.

> Accordingly, AHS has incorporated a policy of responding to requests for access to health information contained in Netcare where there is a current care relationship between AHS and an applicant. However, responding to an access request does not mean AHS has authority to manage the health information contained in the record, or the ability to restrict regulate or administer its use, disclosure or disposition. Rather, AHS is simply complying with the direction of Alberta Health as provided in the IEP to release Netcare records to individuals when there is an existing care relationship. Therefore, AHS cannot be said to be in control of the health information contained within Netcare.
>
> Accordingly, AHS submits that the electronic health information requested by the Applicant are records which are not under the custody or control of AHS. AHS accesses and uses records under Netcare solely as an authorized custodian, and provides reproductions of health information therein subject to the specific guidelines provided by Alberta Health. Therefore custody and control of the EHR remains at all times with Alberta Health.
>
> Notwithstanding AHS' position above, AHS does not contest that it was permitted by Alberta Health to produce a record of the Applicant's EHR for the purposes of responding to the Access Request

[para 49] The meaning of "in the custody or under the control" has been explored at length as the terms are used in the FOIP. The term is used in the same context of prescribing access rights under FOIP as it is in the HIA. Section 6(1) of FOIP states:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[para 50] In Order 2000-021 at para. 30, former Commissioner Clark described custody and control in general terms:

> Although I have not previously considered what "control" means in the specific context of section 14(1)(c), I have considered the meaning of that word as it is used elsewhere in the Act, and my interpretations are consistent with the definitions set out above. In Order 98-019 I considered the meaning of the words "custody" and "control" in the context of section 4(1)(m) of the Act. In that Order, I indicated that "custody" referred to the physical possession of the actual records at issue, while "control" referred to the authority to manage records, whether or not they are in the physical possession of the public body claiming a right of control.

[para 51] As described in Order 2000-005, "custody" and "control" are separate concepts. For the purposes of section 7 the HIA, a custodian may have either custody or control.

[para 52] A non-exhaustive list of factors that may indicate custody or control was given in Order F2018-37 at paras. 19 to 21. I do not repeat the list here, as I find that consideration of those factors is not particularly germane to the question of custody or control over Netcare records. Netcare is unique under the HIA as a database of health information created, uploaded, accessible, and usable by numerous custodians from all facets of the health care system. No one custodian is responsible for all of the information on it, and access to and use of information accessible through Netcare is expressly regulated under Part 5.1 of the HIA and the *Alberta Electronic Health Record Regulation*, Alberta Regulation 118/2010 (AEHRR). Custody or control over health information on Netcare thus arises as a matter of authority to access and handle the information thereon.

[para 53] Which custodian or custodians has or have custody or control over electronic Netcare records is not expressly stated in the HIA. However, the provisions of the HIA discussed below indicate that custody or control can rest only with authorized custodians. Under the provisions of the HIA, only authorized custodians may use Netcare. Authorized custodians are split into two classes under section 56.1(b) of the HIA.

> *(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 54] Custodians who are authorized custodians under section 56.1(b)(ii) are subject to the terms of section 3(1) of the AEHRR. Among those terms is are requirement to enter into an "Information Manager Agreement" with Alberta Health in section 3(1)(d). Additionally, under section 3(1)(e) of the AEHRR, custodians seeking to become custodians under section 56.1(b)(ii) are subject to the approval of Alberta Health.

[para 55] In contrast, the Custodian and Alberta Health are both part of a small number of custodians who are authorized custodians by definition under section 56.1(b)(i) of the HIA. The Custodian is an authorized custodian pursuant to section 1(1)(f)(iv) and Alberta Health is as well, pursuant to section 1(1)(f)(xii) as the Department. The other custodians who are authorized custodians under section 56.1(b)(i) of the HIA are provincial health boards under section 1(1)(f)(iii) and the Health Minister under section 1(1)(f)(xiii). These Custodians' ability to access Netcare is not limited by an Information Manager Agreement, or subject to approval by Alberta Health. Indeed, the Custodian could not locate an information manager agreement between itself and Alberta Health.

[para 56] Similarly, authority to use information on Netcare is divided between the two classes of authorized custodians. Section 56.5(1) 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.*
>
> [emphasis added]

[para 57] I note that section 56.5(1)(b) contemplates that an authorized custodian under section 56.1(b)(ii) could have access to Netcare, but have neither custody nor control over the information thereon. The underlined portion of 56.5(1)(b) could sensibly be interpreted to confer custody or control where that is not otherwise the case, thus enabling the permitted uses under section 27(1).

[para 58] Section 56.5(1)(a), which applies to the Custodian and Alberta Health, is less clear. Its wording may be taken to mean that custody or control is simply not a factor when section 56.1(b)(i) authorized custodians wish to use information on Netcare, or, given the requirement for custody or control to use information under section 27, it could be taken to indicate that they are intended to always have custody and control.[2] It seems to me that given the purpose of the HIA in section 2(d), there is virtue in ensuring that one authorized custodian or another always has custody or control over records on Netcare. Given that the access right in section 7 depends on custody and control, if, somehow, there were no authorized custodian with custody or control, the access right would be defeated. Section 2(d) suggests that this result is not intended; it states,

> *2 The purposes of this Act are*
>
> *…*
>
> *(d) to provide individuals with a right of access to health information about themselves, subject to limited and specific exceptions as set out in this Act,*

[2] The header of section 27(1) states,

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

[para 59] However, while the notion of a permanent authorized custodian with *de jure* custody and control is appealing, the terms of the HIA do not clearly indicate whether that is the case. If it is what the legislature intended, clarification is needed. As it is, the legislature explicitly recognized that the HIA does not clarify the full extent of how information on Netcare is handled.

[para 60] Section 56.7(1) of the HIA mandates the creation of a multi-disciplinary data stewardship committee (the Committee), with the purpose to create rules related to Netcare.

> *56.7(1) The Minister shall establish a multi-disciplinary data stewardship committee whose function is to make recommendations to the Minister with respect to rules related to access, use, disclosure and retention of prescribed health information that is accessible via the Alberta EHR.*

[para 61] The result of the Committee's work is the Alberta Netcare Electronic Health Record Information Exchange Protocol (IEP), to which the Custodian is a party. As described below, while the terms of the HIA leave unclear whether the Custodian has custody or control, the IEP fills in the gaps and makes clear that it does. While the IEP is not a legislative document, it nevertheless sets out binding terms which participating custodians (those permitted access to Netcare) are obliged to carry out. Indeed, the Custodian itself notes that under the IEP, it is authorized to respond to access requests made under section 7 of the HIA.

[para 62] As described in article A.4 of the IEP, it is a product of the Committee created under section 56.7(1) of the HIA. The current version of the IEP was finalized in 2007, and, as such, was applicable when the Custodian responded to the first access request. It is a comprehensive document, covering all aspects of responsibility for collecting, using, and disclosing health information on Netcare between Alberta Health as the Information Manager and other authorized custodians, including the Custodian. It specifically addresses the practical need to sort out which among multiple authorized custodians will respond to access requests and under what circumstances. This purpose is reflected in section A.2 of the IEP:

> **A.2 Why Rules Are Required**
>
> The *Health Information Act* establishes the legal authority and limits for the exchange of health information. It makes each custodian in the health system responsible for the collection, use and disclosure of health information. However, the *Health Information Act* recognizes that a wide variety of circumstances exist in the delivery of care. While the *Health Information Act* establishes general guidelines, it provides custodians considerable latitude within those guidelines for discharging their responsibilities.
>
> Alberta Netcare is one of many information tools shared by a large number of health services providers in the exchange of information across the Alberta health system. The nature of shared tools is such that they do not easily accommodate variation. To be effective, Alberta Netcare must narrow the latitude of options and engage users in a consistent manner.

> Rules therefore, such as those comprised within this Protocol, are required to define the expected use of Alberta Netcare within the larger context of participating custodian activity and obligations under the *Health Information Act*.

[para 63] The pertinent sections of the IEP relates to how an authorized custodian is to respond to access requests involving health information on Netcare are reproduced below.

[para 64] Section B.1 of the IEP defines the terms "Individual", "Information Manager", "Non-specific Formal Request", "Secondary Disclosure", and "Specific Formal Request" which are used in the sections relating to access requests:

> Individual: The person who is the subject of the information, or any other person appropriately authorized by section 104 of the *Health Information Act* including the individual's legal guardian, agent or trustee, a person with appropriate powers of attorney for the person who is the subject of the information, or the executor of a will or administrator of the estate of the person who is the subject of the information.
>
> Information Manager: Alberta Health and Wellness when acting in the capacity of an information manager as defined in the *Health Information Act* section 66(1) for purposes of managing Alberta Netcare. The Information Manager is a signatory to the Information Manager Agreement. Notwithstanding that the role of information manager also exists where the operator of an independent clinical data repository performs similar functions for purposes of that repository, references to the Information Manager within this Protocol refer only to Alberta Health and Wellness. Note that in some circumstances however Alberta Health and Wellness may function in its capacity of participating custodian instead of Information Manager.
>
> Non-specific formal request: A request for information from an individual who does not specifically stipulate information from Alberta Netcare.
>
> Secondary disclosure: The provision of individually identifying Alberta Netcare information accessed directly from the Alberta Netcare system by a participating custodian, participating affiliate or the Information Manager to any other person or organization.
>
> Specific formal request: A request for information from an individual who specifically stipulates information from Alberta Netcare.

[para 65] Section 4.1 of the IEP is applicable to access requests for an individual's own health information:

> 4.1.5 A participating custodian will, subject to the *Health Information Act*, release information in response to a request from an individual who is the subject of the information if
>
> a) they have an established current care relationship with that individual[3],
>
> b) the information can be provided using normal technology within the possession and control of the participating custodian,
>
> c) provision of the requested information would not unreasonably interfere with the participating custodian's normal operation of business, and

[3] In this case, the Custodian acknowledges in its initial submission that at the time of the access request it had an "established and current" care relationship with the Applicant.

d) they are not prevented from doing so by sections 11(1) or 11(2) of the *Health Information Act*, nor any other legislation intended to control the disclosure of information to individuals.

[para 66] Sections 4.7 and 4.8 of the IEP dictate when authorized custodians may and must access Netcare in order to respond to an access request.

4.1.7 If an individual makes a non-specific formal request to a participating custodian under section 7 of the *Health Information Act* for access to their health information, the participating custodian may, at their discretion, access Alberta Netcare for the purpose of secondary disclosure to the patient.

4.1.8 If an individual makes a specific formal request to a participating custodian under section 7 of the *Health Information Act* for a copy of their information from Alberta Netcare, the participating custodian must access Alberta Netcare to provide the information.

[para 67] Section 4.1.3 and 4.1.11, of the IEP state when Alberta Health will respond to an access request:

4.1.3 The Information Manager may disclose any information from Alberta Netcare to the individual who is the subject of that information if

a) the health services provider from whom the individual would normally make such a request is a non-participating custodian,

b) the participating custodian, or the participating custodian of a participating affiliate from whom the individual has made or would normally make the request does not have access to the complete record, or

c) there is no other participating custodian with whom the individual has a current care relationship.

* * *

4.1.11 An individual must make the request for their Alberta Netcare information to a participating custodian in the form that the participating custodian has defined and may include submission of a written request.

a) Where the individual makes a request to Alberta Health and Wellness, the Information Manager will direct the individual to request that information from another participating custodian with whom the individual has a current care relationship.

b) Under circumstances defined by section 4.1.3 where the Information Manager agrees to provide information to the individual, Alberta Health and Wellness will be bound by the requirements and rules for providing information as would any other participating custodian under this Protocol.

c) Prior to disclosing any Alberta Netcare information to a requesting individual, the Information Manager must

> i. obtain a written and signed declaration from the individual stating that the individual has not been previously denied the information by a participating custodian with whom they have a current care relationship,
>
> ii. engage, in order of priority
>
> > A. the participating custodian to whom the individual would normally make the request, as identified by the individual, or
> >
> > B. the participating custodian most frequently consulted by the individual according to the Access Report, or
> >
> > C. a participating custodian or participating affiliate who is a qualified health services provider retained by the Information Manager
>
> to conduct an evaluation of the requested Alberta Netcare information and determine whether it would reasonably be subject to suppression from the individual under sections 11(1) or 11(2) of the *Health Information Act*, or any other legislation intended to control the disclosure of information to individuals.

[para 68] In this case, the Custodian states that it responded to the access request pursuant to section 4.1.5 of the IEP. In my view, the fact that the Custodian had specific authority to respond to the access request demonstrates that it had sufficient control over the Applicant's Netcare to do so. I cannot conceive any clearer circumstances indicating control over information subject to an access request than specific authority to provide a response to an access request under the terms of the HIA and the IEP. Sufficient control is implicitly and necessarily conferred.

[para 69] In reaching the above conclusion on this Issue, I note that the Custodian argues that the terms of the IEP amount only to instructions from Alberta Health, and as such do not transfer custody or control of information on Netcare to the Custodian. Besides this assertion, I have no basis on which to conclude that the relationship between Alberta Health and the Custodian within the terms of the IEP is such that when the Custodian is complying with its terms, it is following the instructions of Alberta Health. Even if the IEP should be properly construed as instructions to custodians from Alberta Health, this would not detract from the foregoing conclusion about custody and control arising under the terms of the HIA and IEP. The instructions to respond to an access request would confer control sufficient to do so, as an extension of authority to manage health information.

[para 70] As to the Custodian's argument that Alberta Health has exclusive custody or control by virtue of its role as information manager of Netcare, I do not agree that is the case.

[para 71] Section 2 of the AEHRR designates Alberta Health as Information Manager:

> *2 The Department is designated the information manager of the Alberta EHR.*

[para 72] There is nothing further in the AEHRR or the HIA that indicates Alberta Health has custody or control of Netcare records to the exclusion of the Custodian. While under section 3(1) of the AEHRR, Alberta Health has a gatekeeping function in respect of custodians wishing to become authorized custodians under section 56.1(b)(ii) it has no such role vis-à-vis the Custodian. Indeed, both Alberta Health and the Custodian become authorized custodians, and are authorized to use health information, by virtue of the same provisions: sections 56.1(b)(i), 56.5(1)(a), and 27(1). Nothing in the HIA suggests that no more than one entity could have custody or control over electronic Netcare records. Control over records on Netcare provided under the HIA and IEP remain undisturbed. Indeed, both the Custodian and Alberta Health have roles to play in responding to access requests, such that control may be vested in one, the other, or both depending on the circumstances.

[para 73] I note that a conclusion similar to the one I have stated above appears in a document relied on in the Custodian's submissions. The document is titled An Overview of Alberta's Electronic Health Record Information System (2015); it is a joint publication of Alberta Health and the Custodian.[4] On page 37 it states,

> "Authorized custodians" who contribute to or access health information made available through the ANP are participating in the integrated electronic health information system established to provide shared access to health information. Custody and control of this information, and the duties to use, disclose and protect the information in the AB EHR is shared amongst all participating custodians.[5]

[para 74] As I have concluded that both requests are governed by the access process under section 7 of the HIA (including fees), and that the Custodian had control over Netcare records, I now consider the remaining issues.

Issue A: Did the Custodian properly charge fees for services, pursuant to section 67(1), (2) and (6) of the HIA?

Burden of Proof

[para 75] The Custodian has the burden of proving that it properly estimated the fees assessed to the Applicant. (Order H2005-002 at para. 21)

[para 76] Sections 67(1), (2), and (6), state,

> *67(1) A custodian may charge the fees provided for in the regulations for services provided under Part 2.*
>
> *(2) Subsection (1) does not permit a custodian to charge a fee in respect of a request for access to an applicant's own health information, except for the cost of producing the copy.*

[4] Available on line at: https://www.albertanetcare.ca/documents/An_Overview_of_Albertas_ERHIS.pdf
[5] The Custodian provided the URL and excerpts of this document. The information from page 37 was obtained by reviewing the full document on-line.

...

(6) The fees referred to in subsection (1) must not exceed the actual cost of the services.

[para 77] Sections 10(1)(c) and (h), 10(2) and (3), and 12(3) of the HIR (above) are relevant to this issue. Sections 1, 2(a), 2(q)(i) of the Schedule to the HIR (the Schedule) also apply. Those sections state,

1 The amount of the fees set out in this Schedule is the maximum amount that can be charged to applicants.

2 The following fees for producing a copy of a record may be charged if the cost of photocopying a record under section 10(1)(h) of this Regulation, calculated at $0.25 per page, exceeds $5, and then only the amount that exceeds $5 may be charged:

(a) photocopies, hard copy laser print and computer printouts	*$ 0.25 per page*
(q) other direct costs:	
(i) charges to retrieve records or to return records, or both, from another location	*contracted fee or average past costs*

[para 78] The Custodian argues that it complied with the HIA and the HIR when it calculated the fees invoiced to the Applicant. Its calculations in respect of the fee for $84.25 are as follows:

• Basic Fee	$25.00
• Photocopying Expense	
○ 257 pages *$0.25	$64.25
○ Only amount exceeding $5.00	-$5.00
First Request Total	**$84.25**

[para 79] The Custodian's calculation in respect of the fee for $195.96 are as follows:

• Basic Fee	$25.00
• Photocopying Expense	
○ 640 pages * $0.25	$160.00
○ Only amount exceeding $5.00	-$5.00
• Other Direct Costs	
○ Charges to retrieve records from another location	$15.96
Second Request Total	**$195.96**

[para 80] With regard to the cost to retrieve records from another location included in the fee for $195.96 , the Custodian's explains that the amount of $15.96 was the cost it incurred from retrieving records from another location, apparently run by a third party that provides off site storage services. The third party is identified as Iron Mountain.

[para 81] For the reasons that follow, the Custodian's calculations fall short of demonstrating that the Custodian complied with sections 67(2) and (6) of the HIA.

[para 82] Section 67(2) limits the fees a Custodian may charge for responding to an access request for an applicant's own health information to the costs of producing a copy of the requested health information. Section 67(6) limits those fees to the actual cost of providing the service of producing a copy of the requested health information. Section 12(3) of the HIR also specifies that any amount of fees paid in excess of the actual cost of providing the service of responding to an access request must be refunded to an applicant.

[para 83] Accordingly, if it wishes to charge fees, it must determine the actual cost of providing the services and settle the fees with an applicant accordingly.[6]

[para 84] In the present case, the Custodian has not provided any evidence of what the total actual costs of responding to the access requests were, or that it took steps to determine if the Applicant was owed a refund. Other than stating that the actual cost of retrieving records from Iron Mountain was $15.96, the Custodian only explains how it *calculated* the fees it charged.

[para 85] Rather than determine actual costs, the Custodian appears to have charged whatever fees were mentioned in the HIR and the Schedule. Under section 10(1) of the HIR, it charged the basic fee in respect of photocopying and retrieving records without determining whether that amount was the actual cost. It also proceeded to charge further fees for those services under section 2 of the Schedule, without determining whether those further fees were the actual costs. Thus, the Custodian has not demonstrated that the fees charged comply with the HIA by not exceeding the actual cost of responding to the access requests, as required by section 67(2) and (6) of the HIA.

[para 86] In reaching the above conclusion, I have considered whether simply charging the maximum amount for photocopying is a reasonable way for a custodian to determine its actual photocopying costs.

[para 87] The issue of whether charging the maximum allowable amount of $0.25 per page was thoroughly reviewed in Order F2020-24. In that Order, the Adjudicator considered fees charged for photocopying by a public body under section 3(a) of

[6] This is not to say that a custodian would have to determine the actual costs for each access request it receives and wishes to charge a fee for. A custodian might determine a set of costs for services commonly performed in responding to an access requests (such as photocopying and retrieving records) and, erring on the side of caution, limit fees for those services in any particular access request to an amount that is certain not to exceed actual costs. This approach was discussed in Order F2019-18 at paras. 65 - 67.

Schedule 2 of the *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008 (the FOIP Regulations). Section 3(a) states,

> *3 For producing a paper copy of a record:*
>
> *(a) photocopies and computer printouts:*
>
> *(i) black and white up to 8 1/2" x 14"* — *$0.25 per page*
>
> *(ii) other formats* — *$0.50 per page*

[para 88] Like the HIR, Schedule 2 to the FOIP Regulations stipulates that the fees in that schedule are maximum allowable amounts. The opening words of that schedule, preceding its section 1, are,

> *The amounts of the fees set out in this Schedule are the maximum amounts that can be charged to applicants.*

[para 89] Section 93 of the FOIP Act contains provisions that limit fees for an access request under the FOIP Regulations to actual costs; they are essentially the same as those in the HIA. Sections 93(1), (2), and (6) state,

> *93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*
>
> *(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.*
>
> *(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.*

[para 90] The Adjudicator in Order F2020-24 reviewed the history of orders considering rates for photocopying. She concluded that if the Public Body wished to charge $0.25 per page, it had to establish that the amount did not exceed its actual costs for photocopying. She stated at paras. 63 and 64,

> Likewise, in the matter before me, the Public Body has not established that the costs to it for photocopying are properly reflected by the statutory maximum. It has not submitted any evidence to support that its use of $0.25 per page does not exceed its actual cost for photocopying.
>
> Given the lack of evidence provided by the Public Body to support that its use of $0.25 per page to provide photocopies of responsive records complies with the Act and the Regulation, I am unable to confirm the Public Body's fee estimate and am disallowing the Public Body's costs for photocopying and reducing the Public Body's fees for photocopying responsive records to zero.

[para 91] I reach a similar conclusion to that of the Adjudicator in Order F2020-24, in this case.

[para 92] I acknowledge that read in isolation, section 2(a) of the Schedule to the HIR might be taken to permit a custodian to charge $0.25 per page if the conditions of the subsection are met. However, because a regulation cannot override a limitation found in the act that enables it, the HIR cannot be read as authorizing a fee that exceeds actual costs; that would be contrary to section 67(6) of the HIA. While the Custodian calculated photocopying fees with reference to the $0.25 per page rate mentioned in section 2(a) of the Schedule, that rate does not determine the actual cost of producing the requested information. Rather, the provisions in the Schedule are merely the maximum that a custodian can charge for photocopying in response to an access request. Since I have no evidence from the Custodian about the actual costs of photocopying, I cannot conclude that it complied with section 67(2) and (6) of the HIA when it charged photocopying fees based upon the maximum amount permitted under the Schedule.

[para 93] Similarly, the Custodian did not explain the actual costs for any activities associated with the basic fee of $25.00. Under section 10(1)(c) and (h) of the HIR, the basic fee may only be charged with respect to certain activities, including includes the costs of photocopying and locating and retrieving the records. The Custodian has charged for these services separately from the basic fee, and has not explained if the basic fee represents any part of the actual costs of processing the access request.

[para 94] In conclusion, I find that the Public Body failed to comply with sections 67(2) and (6) of the HIA.

Issue B: Did the Custodian comply with section 67(3) of the HIA?

[para 95] Section 67(3) states,

> *(3) A custodian must give an applicant an estimate of the total fee for its services before providing the services.*

[para 96] Section 11(1) of the HIR (above) describes the required content of a fee estimate under section 67(3).

[para 97] Section 11(2) of the HIR (above) allows an applicant 20 days to accept a fee estimate, or modify an access request to change the amount of the fees.

[para 98] The Custodian admits that since it was handling the requests as informal requests, it did not observe sections 11 and 12 of the HIR.

[para 99] Regarding the second request, the Custodian describes a telephone call between the Applicant and the "Specialist" assigned to that request. During the call, the Applicant indicated that he required the records requested in the second request in time to travel on December 28, 2017. According to the Custodian, the Specialist informed the

Applicant that the fees for the second request were expected to exceed $100.00, to which the Applicant replied, "cost doesn't matter."

[para 100] The Custodian's assertion that the Applicant stated "cost doesn't matter" is based on notes purportedly written by the Specialist on the Custodian's copy of the second request. The Applicant responds that there is no evidence of who wrote the notes, on what basis, or at what time, but does not deny making the statement. As I have no reason to doubt the Custodian's assertion that its notes indicate that the Applicant stated, "cost doesn't matter", and the Applicant does not deny making the statement, I find on balance of probabilities, that the Applicant made the statement.

[para 101] The Custodian argues that the Applicant waived his right to a fee estimate when he stated, "cost doesn't matter." I do not agree. The statement indicates that the Applicant was, perhaps, ready to pay whatever the cost of processing the second request was, but nothing in statement indicates that he was waiving any right under the HIA. Further, section 67(3) of the HIA is a mandatory provision that requires a custodian that intends to charge fees to provide an estimate of them; an applicant has no authority to relieve a custodian of its responsibility under the section.

[para 102] It is clear that the Applicant did not receive an estimate that meets the requirement of section 11(1) of the HIR, as required by section 67(3) of the HIA. I recognize that the Custodian argues that the fee invoice could serve as an estimate. It is conceivable that an invoice could serve as an estimate if it contained the information required by section 11(1) of the HIR, in advance of processing an access request as required by section 67(3) of the HIA. That was not the case here, however. Prior to processing the access request the Custodian only notified the Applicant that the cost of processing the second request would likely exceed $100.00. Instead of proper estimates at the required time, the Applicant received notices of forthcoming invoices along with the records in response to his requests.

[para 103] I find that the Custodian did not comply with section 67(3) of the HIA.

What is an appropriate order in respect of failure to comply with section 67(3)?

[para 104] Section 80(3)(c) of the HIA describes my power to make an order with respect to fees:

> *(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*
>
> *...*
>
> *(c) confirm or reduce a fee required to be paid under this Act or order a refund, in the appropriate circumstances, including if a time limit is not met;*

[para 105] In making this Order, I am aware that although the Applicant made the access requests under the HIA, if the Custodian had no alternative procedures to those in

the HIA, the Applicant would likely not have received responses to the requests as swiftly as he did. Section 12(1) of the HIA only requires a Custodian to make "every reasonable effort" to respond to a request within 30 days, and allows for extensions; a custodian is under no obligation to expedite a request under the HIA. It was only by virtue of the Custodian's good will that the requests were responded to when they were. By making the requests under the HIA despite the short timelines he was facing, the Applicant ran the risk of having to travel without his health information.

[para 106] However, I also consider that the issues in this Inquiry might have been avoided if the existence of the "informal process" had been made known to the Applicant at some point. Doing so would have afforded him the opportunity to choose if he wished to engage a process that, while more efficient, operates outside of the purview of the HIA.

[para 107] Lastly, I consider that the Custodian was not required to charge the Applicant any fees at all. Section 67(1) of the HIA, as well as the applicable sections of the HIR and the Schedule *permit* the Custodian to charge fees; they do not, however, require it to charge fees for every access request. Second, even where a Custodian elects to charge fees, the legislation only provides maximum amounts that may be charged, there is no minimum. Even though it charged fees, the Custodian failed to provide a calculation of the actual costs of processing the access requests, and has not provided any evidence that it endeavored to determine whether it owes a refund to the Applicant as required under section 12(3) of the HIR.

[para 108] In respect of these circumstances, I find a reduction of the fees for both access requests is appropriate. Though the Custodian had good intentions when it expedited the response to the access request, it did not, and has not, attempted to meet the responsibilities that apply when it elects to charge fees. The Applicant has long since had the records provided and any opportunity to refuse a fee estimate has passed, and the opportunity for the Custodian to charge fees has passed with it.

[para 109] I now consider the final issue, Issue E, of whether the Custodian met its duty under section 10(a) of the HIA when it responded to the first request.

Issue D: Did the Custodian make every reasonable effort to assist the Applicant and to respond to the Applicant openly accurately and completely, as required by section 10(a) of the HIA?

[para 110] This issue arises only in regard to the first request, which was specifically for records in electronic form.

[para 111] Section 10(a) of the HIA states,

> *10 A custodian that has received a request for access to a record under section 8(1)*
>
> *(a) must make every reasonable effort to assist the applicant and to respond to each applicant openly, accurately and completely,*

[para 112] The Applicant's argument is that the Custodian failed to meet its duty under section 10(a) since it provided him with a paper, rather than electronic, copy of his Netcare file as he specifically requested and despite that he explicitly stated in his access request that a paper copy was not acceptable. The Complainant also takes issue with the fact that he did not receive diagnostic images that he had expected would be included in his Netcare file. I will deal with both concerns, in turn.

Paper copy instead of electronic copy

[para 113] The Custodian explains that access requests are handled through its Access and Disclosure Department (A & D). The Custodian explained that A & D does not have the capability to produce an electronic copy of the Applicant's Netcare File; accordingly, per policy, it issued a paper copy. It did not tell the Applicant in advance of issuing the paper copy, and requesting fees for responding to the access request, that an electronic copy was not available.

[para 114] The Applicant questions whether the Custodian is truly incapable of producing an electronic copy of a Netcare file.[7] The Applicant states that he has acquired electronic copies of diagnostic images directly from the Diagnostic Imaging department at the Rockyview Hospital, which is part of the Custodian.

[para 115] In response to the Applicant, the Custodian stated that simply because one of its other departments is able to provide electronic copies, does not mean that A & D has the same capability.

[para 116] In turn, the Applicant argues that,

> … it cannot have been the intention of the legislature to permit the AHS, by far the largest custodian in the Province of Alberta, to create a department named 'Access and Disclosure', to fail to provide such department with the resources required to enable copies of electronic health records (notwithstanding that such equipment is available and used for that very purpose by other AHS departments) to permit that department to say that the AHS has met its duty to assist by searching for the requested records in only one system when it clearly knows that material portions of those records are available in other systems within its custody and control, and then to claim that it had no obligation in respect of such request because it was not the custodian of the one system searched but was the custodian of the systems that provided such information to the system searched.

[para 117] Finally, the Custodian notes that the terms of section 10(b) of the HIA clearly contemplate that a custodian's response to an access request is subject to the technological limits of its hardware and software. Section 10(b) states,

> *10 A custodian that has received a request for access to a record under section 8(1)*

[7] Neither party addressed the matter of whether an electronic version of the information could have been created by either of them simply by scanning the paper copy. As discussed further, I find it was reasonable for the Custodian to provide a paper copy. Accordingly, I do not consider this point.

...

(b) must create a record for an applicant if

(i) the record can be created from information that is in electronic form and is in the custody or under the control of the custodian, using its normal computer hardware and software and technical expertise, and

(ii) creating the record would not unreasonably interfere with the operations of the custodian,

[para 118] For the following reasons, I find that the Custodian did not fail to meet its duty under section 10(a) by providing a paper, rather than electronic, copy.

[para 119] First, I note that under section 8(3) of the HIA the Applicant is specifically entitled to ask for a copy of his health information, although that section is silent regarding the format of the copy. Section 8(3)(a) states,

(3) In a request, the applicant may ask

(a) for a copy of the record, or

However, though the Applicant had the right to ask for a copy, as discussed below, that did not mean that the Custodian was obliged to provide one in any particular format.

[para 120] Providing information in a particular format in response to an access request has been discussed in prior orders of this Office with regard to sections 10(1) and 10(2) of FOIP (which prescribe the duty to assist), and with regard to the relation of these provisions to section 13 of FOIP (which prescribes a separate duty to provide a copy of a record). The Adjudicator in Order F2011-R-001 stated at para. 19,

> The phrase, "created from a record from a record that is in electronic form" as it appears in section 10(2), could, in the abstract, refer to any of the following actions:
>
> - Making a copy (reproducing) in the same medium (e.g. electronic to electronic) to give to the applicant
>
> - Making a copy in a different medium (converting) - (e.g. electronic to paper) to give to the applicant
>
> - Converting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist. (The applicant may ultimately be given all such records, only a part, or none, if no responsive records exist among the converted ones.)
>
> - Electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants.

> Thus, in the abstract, section 10(2) could be taken to limit the duty to produce copies for an applicant, as well as the duty to search for responsive records, if fulfilling either of these duties could not be done within the terms of section 10(2)(a). In my view, as explained below, the better interpretation of the legislative scheme in the FOIP Act is that section 13, (but not section 10(2)), speaks to the first two bullets, section 10(1), (but not section 10(2)), speaks to the third, and section 10(2) speaks only to the last bullet.

[para 121] The Adjudicator F2011-R-001 further stated at para. 23,

> In contrast, section 10(2), which is a subclause under the heading "the duty to assist", specifies one particular way in which assistance is to be given to the applicant. This particular duty is, in my view, superadded to the duty to provide access to records to which applicants have a right (which is to be done by providing copies). Even in situations in which there is no duty to give this particular type of assistance, because the terms of section 10(2) are not met, I do not believe this is meant to obviate the duty of public bodies to provide copies under section 13. If it were, the legislature would have made section 13 subject to section 10(2) – which it did not do. I do not believe the use of the term "create a record" in section 10(2) can be taken as intended to limit the separate duty in section 13 to reproduce copies just because the words "create a record" could be used to refer to reproduction of an original. The fact that "create a record" was used in one of the provisions and "reproduce a copy" was used in the other further supports the idea that there was no intention for the provisions to overlap.

[para 122] However, while sections 10(1) and 10(2) of FOIP are substantially similar to sections 10(a) and (b) of the HIA the HIA does not include a duty to provide a copy as in sections 13(1) and (2) of FOIP; those sections state,

> *13(1) If an applicant is told under section 12(1) that access will be granted, the head of the public body must comply with this section.*
>
> *(2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,*
>
> *(a) a copy of the record or part of it must be provided with the response, or*
>
> *(b) the applicant must be given reasons for any delay in providing the copy.*

[para 123] Accordingly, here, I am considering whether section 10 of the HIA requires a Custodian to provide records in the Applicant's requested format, in the absence of any provision in the HIA that requires the Custodian to provide a copy of records when requested.

[para 124] Under the HIA, the manner of how access, if granted, must be provided to an applicant is discussed only in section 12(2)(b):

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

> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*

[para 125] In my view the term "how" as used in section 12(2)(b) would include whether access would be given by providing a copy or facilitating in-person review. There is nothing in the HIA that *strictly obligates* a custodian to provide access in any particular manner, even if a specific means of access is requested by an applicant. This conclusion would also apply to a record that a custodian is obligated to create under section 10(b) of the HIA. While a custodian may have an obligation to create a record under section 10(b), it retains discretion as to how access to the record will be provided.

[para 126] However, the discretion provided under section 12(2)(b) must be understood in light of sections 8(3)(a) and 10(a). Section 8(3)(a) specifies that an applicant may ask for a copy of records, while section 10(a) states a custodian must make every reasonable effort to respond to an access request, openly, accurately, and completely. In my view, since obtaining a copy of records is a specifically contemplated form of access under section 8(3)(a), making every reasonable effort to provide access via a copy where one is requested is part of the responsibility to respond accurately and completely under section 10(a). Thus, the fact that there is no *obligation* to provide a copy does not permit a custodian to simply ignore a request for a copy.

[para 127] Having concluded that the duty to assist may include a duty to provide a copy, I now turn to whether it also includes providing a copy in a requested format.

[para 128] While health information may exist in many mediums and formats, the HIA is silent on the matter of whether there is any particular format in which a copy of information may be requested or must be provided. The result is that an applicant's right to request a copy is unlimited; it may be a request for a copy in any format. The custodian's responsibility in light of such a request is again to respond accurately and completely.

[para 129] In this case, I find that producing a copy in electronic format as requested by the Applicant was beyond the reasonable efforts required under section 10(a). The Custodian's A & D department simply does not have the ability to provide an electronic copy of Netcare records. As explained by the Custodian, records on Netcare are viewed through the Alberta Netcare Portal (ANP) and diagnostic images on Netcare are viewed through a Diagnostic Image Viewer (DI Viewer). Regarding the ability of those applications to reproduce electronic copies, the Custodian states,

> As identified above, the DI Viewer does not have print or export functions. The ANP also lacks the general functionality to create electronic records, providing a print function as the only method for reproduction of an applicant's Netcare file. For clarity, it is not possible to save or export information from within the ANP in response to a Netcare access request.
>
> As such, there are technical limitations which deny the reproduction of an applicant's Netcare file in electronic format, whether on CD or otherwise, using normal computer

> hardware and software and technical expertise. This limitation applies across AHS, as well as to all other authorized custodians who have access to the ANP.

[para 130] As to why records in electronic format may be available from parts or departments within the Custodian other than A & D, the Custodian states,

> In any event, it is correct that the Access and Disclosure Department may not have the same record producing capabilities enjoyed by other departments of AHS. The reason is that it is common for health information to exist in source repositories in formats which require specialized software, training and user permissions that Access and Disclosure does not have. For example, Access and Disclosure does not have the software necessary to view or reproduce diagnostic imaging files in their original format. Similar technical limitations would apply with records contained in other departments which utilize specialized software or hardware in the delivery of clinical services.

Under these circumstances, providing a paper copy of the records is a reasonable means of providing access by copy.

[para 131] For clarity, I note that the above discussion is germane to only section 10(a) of the HIA, and does not concern creating a record under section 10(b). Here the records requested - "…a complete, electronic copy, including all diagnostic imaging, of my Alberta Netcare file from January 1, 2010 to present."- already exist. Creating a record involves manipulating data to create a record of piecemeal information not otherwise in an accessible or useful arrangement. For example, the Adjudicator in Order F2019-09 ordered a Public Body to create and provide records to an applicant in electronic searchable format, as the applicant specifically requested. She stated with regard to section 10(2) of FOIP which is substantially similar to 10(b) of the HIA,

> In my view, the above-cited orders come to a very similar conclusion. Where a public body can create a record from information currently existing in electronic form by essentially manipulating the data, it has an obligation to do so in response to an access request, as long as it can be done using the public body's normal hardware, software and technical expertise and where creating the record would not unreasonably interfere with the public body's operations. Some incidental manual input may be required in order to do this, but such incidental input does not necessarily negate the duty.

[para 132] To address the Applicant's argument that the legislature could not have intended the creation of the A & D department with less ability to produce records than other departments, I note that section 10(a) requires a Custodian to make "every reasonable effort...to respond…" Given the size and complexity of the Custodian, and that its many parts have disparate means of manipulating health information, creation of a central unit to handle access requests (with a standardized ability to handle health information on Netcare) meets the "reasonable efforts" requirement.

[para 133] Accordingly, I find that the Custodian did not fail to meet its duty under section 10(a) by providing a paper copy of the records rather than an electronic one.

[para 134] While providing a paper copy does not amount to a failure to meet the duty under section 10(a) of the HIA, I find that the Public Body failed to meet its duty in another way: by failing to tell the Applicant that it was unable to provide the requested information in an electronic format.

[para 135] The duty in section 10(a) includes a duty to respond to an access request openly. In my view, the duty to respond openly includes a duty to inform an applicant if information provided in response to an access request cannot be provided in a format that has been specifically requested. That is to say that the Custodian should have been open about its limitations, thereby affording the Applicant the opportunity to withdraw or modify the request in light of them, and avoid paying fees for information in a format not useful to him.

[para 136] I now consider whether the fact that certain diagnostic images were not provided to the Complainant in response to the access request amounts to a failure to meet the duty in section 10(a).

Absence of Diagnostic Images

[para 137] When records that an applicant expected would be provided in response to an access request are not provided, the question of whether a custodian met its duty under section 10(a) becomes a question of whether it conducted a proper search for records. The considerations that typically go into such an analysis are stated in Order H2015-01 at para. 9:

> In general, evidence of an adequate search should include:
>
> - The specific steps taken by the Public Body [custodian] to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

[para 138] The Applicant makes two arguments that the Custodian failed to meet the duty to assist regarding his first request. The first relates to the first three bullet points above, and engages questions about whether the Custodian took reasonable steps to locate responsive records, locate repositories of responsive records, and whether the scope of its search was broad enough. Specifically, the Applicant argues that the Custodian should have searched other locations besides Netcare in order to locate diagnostic images responsive to the request. The Applicant notes that the Rockyview General Hospital, from where he was able to obtain diagnostic images directly, is also

part of the Custodian. The Applicant argues that since his request was made to the Custodian, the Custodian could have obtained his diagnostic images from the Rockyview General Hospital if they were not present on Netcare.

[para 139] Regarding the Applicant's first argument, the Custodian argues, and I agree, that it was only required to search in locations specified in the first access request in order to properly respond to it. As the access request was specific to Netcare, that is the only place that the Custodian was required to search. I note that it appears to be the only place that the Custodian did, in fact, search.

[para 140] Previous orders of the Office have considered whether the scope of a search was adequate in light of the terms of the request. In Order 2001-013, a decision regarding the access provisions of FOIP which are substantially similar to those in the HIA regarding the duty to assist, the Applicant made a request for the following information:

> *Therefore, I am making a formal request under section 83 of the Freedom of Information and Protection of Privacy Act (FOIP) to get FULL DISCLOSURE.*
>
> Order 2001-013 at para. 12.

[para 141] Former Commissioner Clark stated in Order 2001-013 at paras. 20 and 21,

> I agree with the LERB that it was reasonable to understand from the Applicant's request that he wanted information available to the public pursuant to section 83 of the Act and to the Board Policy No. 5. He had appeals before the LERB and this policy was created for this type of disclosure. Consequently, I find that it was reasonable for the LERB to respond in accordance with its policy.
>
> Section 9(1) does not require a public body to request clarification of a request when the request is, on its face, very clear. The Applicant's request was very specific. While I encourage public bodies to assist applicants by clarifying requests, I find that in processing the Applicant's request in this manner, the LERB did not contravene section 9(1) of the Act.

[para 142] I reached a similar conclusion in Order F2020-34. In that Order, the applicant was seeking records related to a specific topic, but did not mention the topic in his access request, only raising it in his submissions during inquiry. The applicant's request was for,

> E-mails from one Thorhild County councilor to another, with remaining councilors cc'd.
>
> Order F2020-34 at para. 2

[para 143] I concluded in Order F2020-34 at para. 14,

> I note that the Public Body tailored its search for records to the "very specific parameters" of the access request, which did not mention the issue about which the Applicant was seeking information. In light of the Applicant's statements that there are e-mails that are

> responsive to the access request that were not provided by the Public Body, it seems to me that there is a possibility that the parameters of the access request were narrower than the Applicant might have intended. However, the parameters of the request are clear, and as such, the Public Body had no duty under section 10(1) to consult with the Applicant to determine if he was seeking a broader category of records. This point was addressed in Order 2001-013 at para. 21…

[para 144] Given the similarities between the duty to respond to an access request under FOIP and under the HIA, I see no reason why the reasoning in the Orders above would not apply equally in this case. Accordingly, I find that the scope of the Custodian's search for records, where it searched, and the steps it took to locate responsive records were adequate in this case. In reaching this conclusion I have considered that the Applicant specifically referenced diagnostic images in the first access request; nevertheless the wording of the request indicates that the entire request is confined to records on Netcare. The Custodian had no reason to believe that the Applicant was interested in records located anywhere else.

[para 145] In addition to the Custodian's obligation to respond to the access request only within its clear terms, I observe that there are other reasons that also support a finding that the scope of the Custodian's search was reasonable.

[para 146] The Custodian provides information that explains why such a limited search is reasonably necessary. The Custodian explains in its rebuttal submission:

> Notwithstanding the above, and the specific direction to search Netcare, the Applicant has submitted that AHS *"should have searched the available systems for the requested record (i.e. where parallel systems exist, then searches of each is required, especially where there may be asymmetry of data)*". Respectfully, to expand the search requirements under the general duty to assist in the manner suggested by the Applicant is both contrary to HIA, and would create an untenable burden, devoid of any recognition of operational realities faced by custodians.
>
> For example, from April 1, 2019 through to March 31, 2020, over 110,000 access requests were received by AHS A&D department, an average of approximately 302 per day. That represented a reduction in average volume from prior years [**Tab 2**]. Nevertheless, to comply with the significant expansion of the duty to assist proposed by the Applicant, AHS would have had to review each record in the Applicant's Netcare file for a period of approximately eight (8) years (given the data range he specified), determine the custodian for each record therein, and where AHS was a custodian of Source Information, request electronic reproduction of that information from the sites which maintain them. Further, AHS would have been required to direct the Applicant to other custodians for additional access requests. Respectfully, such measures are not reasonable in light of the Applicant's direction to his Netcare file. Further, it would create a precedent that would severely impede AHS A&D ability to respond in a timely manner to the significant volume of access requests it receives each year.
>
> Given the above, AHS A&D department, as directed by the Applicant to search for his health information in Netcare, acted both reasonably and as required by HIA in limiting its

> search to only those specific records contained within the provincial EHR (Netcare), regardless of whether or not the Source Information was within the custody of AHS.

[para 147] I agree with the Custodian's reasoning. A requirement to search parallel systems that might also house information that is located on Netcare, where an access request is specific to Netcare, is an unreasonable burden to place upon the Custodian. Such a requirement would transform a request for information from Netcare to a request for the Custodian to search whatever databases any custodian who has uploaded health information to Netcare may be using. That the Custodian itself may be in control of parallel systems, such as the Rockyview Hospital Diagnostic Imaging Department, makes no difference in my mind. The burden of the extra searching remains the same.

[para 148] The Applicant's second argument relates to the fifth point above. The Applicant argues that the Custodian failed to provide all of his Netcare records, contrary to the Custodian's assertions at paragraphs 3, 25, and 27 of its initial submission that it did, and that there is nothing to suggest that the records are incomplete. Specifically, the Applicant argues that Netcare includes diagnostic images as contemplated by sections 56.1(c) of the HIA and sections 4(k) and (l) of the AEHRR; these sections set out "prescribed health information" that may or must be made available through Netcare, and include diagnostic imaging and diagnostic imaging reports. The Applicant further asserts that he has seen a physician access his diagnostic images through Netcare first-hand. The Applicant concludes that his Netcare file would have included diagnostic images, and, as such, they should have been provided in response to his access request.

[para 149] I now consider whether the Custodian has adequately explained why no diagnostic images were provided in response to the access request.

[para 150] The Custodian does not dispute that viewing diagnostic images is possible through Netcare, and that the Applicant could have witnessed a physician accessing his images. I also note that the Custodian nowhere states definitively whether or not the Applicant's Netcare file actually includes any diagnostic images, and does not deny the Applicant's assertion that it does. While not disputing the Applicant's points, the Custodian provides several arguments and explanations regarding the absence of diagnostic imaging in the responsive records.

[para 151] The Custodian argues that the Applicant has not made clear whether or not any particular diagnostic images that he was seeking were actually provided in response to his access request. It states,

> …Regardless, on page 12 of the Applicant's rebuttal submissions, when referring to his diagnostic imaging results (presumably inclusive of those he alleges to have reviewed with his family physician), he states "*[t]hey were either not provided (diagnostic imaging)* ***or if provided****, not provided in the format requested (paper not electronic)"*

[para 152] The Custodian has taken the Applicant's rebuttal submission out of context. The portion of the Applicant's rebuttal submission quoted by the Respondent is one of

several summary statements, wrapping up his position on the handling of the access request. The Applicant states,

> The AHS was asked to provide certain records. They were either not provided (diagnostic imaging) or if provided, not provided in the format requested (paper not electronic).

[para 153] It seems to me that what the Applicant is stating is that there were two problems with the response to the access request: 1) diagnostic images were not provided; and, 2) the records that were provided - which did not include diagnostic images - were in the wrong format. Indeed, throughout the Applicant's submission, he maintains that he did not receive copies of any diagnostic images in response to his request for Netcare records.

[para 154] The Custodian has provided an explanation that, in large measure, explains the absence of diagnostic images. In the course of this Inquiry, I asked the parties for further information, including an answer from the Custodian to the following question:

> Regardless of the answers to the preceding question[8], please clarify and explain why the diagnostic images sought by the Applicant would not be included in the responsive records in light of sections 4(k) and (l) of the *Alberta Electronic Health Record Regulation* and the following statement from https://www.albertanetcare.ca/GetYourEHR.htm
>
> > The Alberta Netcare EHR is a secure summary of important information that includes lab test results, prescription dispensing information and diagnostic imaging.

[para 155] In answer to that question, the Custodian explained,

> Diagnostic images are accessed in the ANP [Alberta Netcare Portal] via an integrated tool known as the Xero Image Viewer, or as otherwise identified on albertanetcare.ca, the Diagnostic Image Viewer (the "**DI Viewer**"). The DI Viewer enables review of X-rays, MRIs, ultrasounds and CT Scans. As stated on albertanetcare.ca, *"The DI Viewer has been specifically designed for general physician use, providing fast and simple access to images and results. The user interface is easy to learn and will launch directly from ANP."*
>
> However, as further noted, the DI Viewer has limited functions within the ANP. Those functions include zoom and pan, magnify, invert, rotate and flip, take measurements, side-by-side image comparison, and CINE. Printing and saving are not available functions. As such, there is no ability to reproduce diagnostic images contained in the EHR through the Netcare portal. Consequently, when an applicant seeks their entire Netcare file via an access request, they will be provided with diagnostic imaging reports associated with their diagnostic imaging, but not the image files.

[8] The previous question was,

> Is AHS the custodian of a Diagnostic Imaging archive, which is a separate repository from Netcare. If so, is this repository where the diagnostic images sought by the Applicant are located? If so, does the Custodian regard this repository as outside of the scope of the Applicant's access requests?

> Considering the above, it is understood that the Applicant would have received only diagnostic image reports, and not reproductions of diagnostic image files in AHS' response to the First Request.
>
> AHS submits that this expanded understanding of the ANP, and specifically the DI Viewer conclusively explains why the diagnostic images sought by the Applicant would not be included in the responsive records. This is not a matter of withholding or failing to complete a satisfactory review of the Applicant's Netcare file, but rather a technical limitation which all custodians, not only AHS, would face.
>
> [footnotes omitted.]

[para 156] In short, the Custodian could not have provided the diagnostic images because it could not print them, and is unable to provide Netcare records in an electronic format.

[para 157] While the Custodian explains why the Applicant did not receive diagnostic images, there is still the matter of its assertions that the Applicant received all of his records from Netcare. If indeed the Applicant's diagnostic images are on Netcare, an assertion which the Custodian does not contradict, it seems that it would have been impossible for the Custodian to provide them, and hence impossible that it could have provided all of the Applicant's health information from Netcare, since the A & D department cannot produce Netcare records in electronic format, and diagnostic images cannot be printed.

[para 158] On the evidence before me, a satisfactory explanation is still lacking regarding whether or not the Custodian made every reasonable effort to respond completely to the access request. In particular, the Custodian has not described whether it took any steps to confirm that the Applicant received all of his Netcare records despite that it could not have provided diagnostic images.

[para 159] I note that the wording of the Custodian's letter of December 12, 2017 provided to the Applicant in response to the first access request does nothing to clarify this matter. Its wording regarding whether the Applicant actually received all of his information in ambiguous. The letter states,

> Please find attached 257 page(s) of the following documents available at the time of processing:
>
> - All Alberta Netcare records from January 2010 to the present date (257 pages)

[para 160] The above wording can mean either: that the Applicant's Netcare records consist of 257 pages all of which were being provided, or: that there were 257 pages of Netcare records that could be and were made available for responding to his access request, but there were other Netcare records that could not be and hence were not made available for responding to his access request.

[para 161] I note that that the Custodian appears to regard records that it cannot reproduce as non-responsive. It states,

> However, responsive records to a Netcare access requests are only those records contained in Netcare which can be reproduced using the normal software and technical expertise of the authorized custodian, and subject to the software constraints of the ANP.

[para 162] The Custodian's view is incorrect. Responsive records include all records under the custody or in the control of a custodian that fall within the parameters of the requested information. The fact that a custodian may not be able to reproduce records may mean that it is unreasonable for it to have to provide them in response to the access request, but the records remain responsive all the same and must be accounted for in the response to the access request.

[para 163] In my view, the lack of clarity regarding whether the Applicant received all of the records he requested, including whether diagnostic images existed on Netcare but could not be provided because of the Custodian's technological limitations constitutes a failure on the part of the Custodian to make reasonable efforts to respond openly and completely to the access request, as required by section 10(a).[9] It seems that the Custodian provided the Applicant with what it was able to produce and left the Applicant in the dark about whether it actually had or provided everything he requested.

[para 164] Additionally, in the event that there were diagnostic images on Netcare that the Custodian was unable to provide, the duty to assist obliged it to notify the Applicant of other custodians, or other parts of its own operations, from where the images could be obtained, if doing so was reasonable. This aspect of the duty to assist under section 10(a) was recently discussed in Order H2021-11 at para. 47:

> Unlike the FOIP Act, the HIA does not have a provision that addresses when a custodian can transfer an access request to another custodian that has custody or control of the requested record. However, the HIA does not require an applicant to make an access request to the correct custodian in order for it to be an access request made under the Act; rather, an applicant need only make the request to the custodian they believe has custody or control. This indicates that a custodian receiving an access request under the HIA has some obligations under the Act even if they are not the custodian having custody or control of the requested records. Specifically, the duty to assist under section 10 is triggered, such that the custodian is obliged to respond to the applicant and provide reasonable assistance. What is encompassed by 'reasonable assistance' will depend on the particular circumstances of each case. That said, it seems reasonable to expect that when a custodian is aware that the requested records are in, or likely in, the custody or control of another custodian, the duty to assist includes informing the applicant of this fact so that the

[9] I note that the Custodian observes that it sent the Applicant an e-mail on December 6, 2017 in response to his contacting its disclosure helpline. In the e-mail, the Applicant was advised that "All personal information may not be available on Netcare." I find that such a general notification was inadequate to inform the Applicant in any meaningful way that diagnostic images could not be provided in response to his access request.

applicant can make the request to the other custodian. This is consistent with the Orders describing the 'informational aspect' of the duty to assist.[10]

[para 165] I also observe that the possible failure of the Custodian to provide access to diagnostic images at all in response to the access request raises the issues of whether it constitutes a refusal within the terms of section 12 of the HIA, and if so, whether the Custodian complied with sections 11 and 12(2)(c) of the HIA. Section 11 prescribes circumstances under which a custodian may or must refuse access to health information; section 12(2)(c) prescribes what steps a custodian must take upon refusal. As the application of those sections has not been an issue in this Inquiry to date, I do not address them. I will retain jurisdiction in this matter in the event that the Applicant wishes to raise them after the Custodian has provided an explanation to him about the response to the first request as ordered below.

IV. ORDER

[para 166] I make this Order under section 80 of the HIA.

[para 167] Since the Custodian elected to charge fees, but did not fulfill its duty to ensure that the fees reflected the actual costs of responding to the requests, I reduce the fees for the first request to $0.00. I reduce the fees for the second request to $0.00, save for the $15.96 fee for cost for retrieving records from Iron Mountain. This fee reflects the actual cost of that retrieval service.

[para 168] Since the Applicant has already paid the fees charged by the Custodian, I order the Custodian to refund all fees charged for processing the first request, and all fees for processing the second request, save for the $15.96 retrieval fee.

[para 169] Regarding the Custodian's failure to meet its duty to assist under section 10(a) of the HIA, I order it to provide an explanation to the Applicant addressing the following points:

- Whether there were diagnostic images on the Applicant's Netcare file.
- If there were diagnostic images on the Applicant's Netcare file, provide the Applicant a list of them indicating the health information about the Applicant that they contain, and, if reasonable to do so, inform the Applicant of the custodian, or other part of itself, from which they can be obtained.
- An explanation of why the images were not included in the response to the Applicant's first access request.

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[10] The observation of the Adjudicator in Order H2021-11 that the HIA permits an applicant to make an access request to a custodian that the Applicant believes has custody or control is a reference to section 8(1) of the HIA, which describes how applicants must make requests.

> *8(1) To obtain access to a record, an individual must make a request to the custodian that the individual believes has custody or control of the record.*

- An explanation of how it concluded that the Applicant was provided with all of his health information on Netcare in response to the first request.

[para 170] I do not order the Custodian to provide any further records to the Applicant, since it seems that the only records missing from the response, if any, were diagnostic images which the Custodian cannot provide from Netcare. I also consider that the Applicant has since obtained the images he was after from the Rockyview General Hospital.

[para 171] I order the Custodian to confirm to me in writing within 50 days of receiving this Order that it has complied with this Order.

[para 172] As stated, I retain jurisdiction in this matter to consider whether the Custodian complied with sections 11 and 12(2)(c) of the HIA if the circumstances place those sections in issue, and the Applicant wishes to seek a review of them.

[para 173] If the Applicant wishes to seek review of whether the Custodian complied with sections 11 and 12(2)(c) of the HIA, the Applicant must provide a written request to me, with a copy to the Custodian, within 30 days of receiving the Custodian's explanation ordered above.

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John Gabriele
Adjudicator
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