



INVESTIGATION REPORT 027-2022

Ministry of SaskBuilds and Procurement

July 14, 2022

Summary:

The Ministry of SaskBuilds and Procurement (SaskBuilds) received a complaint alleging that SaskBuilds had, without proper authority, disclosed the Complainant's personal information to Transport Canada and the Complainant's physician. SaskBuilds responded to the Complainant, stating that it had authority to disclose the Complainant's personal information and personal health information to Transport Canada pursuant to sections 29(2)(i), (l) and (m) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and section 27(4)(a) of *The Health Information Protection Act* (HIPA). With respect to the alleged disclosure to the Complainant's physician, SaskBuilds stated that it was unclear whether an unauthorized disclosure took place. The Complainant requested that the Commissioner investigate. The Commissioner found that SaskBuilds had authority to disclose the Complainant's personal information to Transport Canada pursuant to section 29(2)(m) of FOIP and personal health information pursuant to section 27(4)(a) of HIPA. However, he found that SaskBuilds did not have the authority to disclose the Complainant's personal health information to the Complainant's physician under HIPA. The Commissioner recommended that SaskBuilds develop policies and procedures to meet its obligations pursuant to sections 24.1 of FOIP and 16 of HIPA.

I BACKGROUND

- [1] On August 27, 2021, the Complainant contacted the Ministry of SaskBuilds and Procurement (SaskBuilds) alleging that it had breached their privacy when it disclosed their information to (1) Transport Canada and (2) their physician.

- [2] The Complainant is an employee of SaskBuilds. According to SaskBuilds' internal investigation report, the Complainant's Manager was informed by two supervisors that the Complainant had a medical condition during two training sessions.
- [3] The Complainant alleges that information was disclosed about them to Transport Canada, including the Complainant's name, license number and information about their medical condition. The information allegedly disclosed about them to their physician was the Complainant's name and their medical condition.
- [4] On January 12, 2022, SaskBuilds responded to the complaint stating that the disclosure to Transport Canada was authorized pursuant to sections 29(2)(i), (l) and (m) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and section 27(4)(a) of *The Health Information Protection Act* (HIPA). With respect to the disclosure to the Complainant's physician, it stated that it was unclear as to whether an unauthorized disclosure had taken place. It added that there was no evidence that actions taken by the Manager were motivated by malicious intent.
- [5] On February 3, 2022, the Complainant requested my office investigate SaskBuilds' authority to disclose their personal information and personal health information. In addition to providing my office with a completed [Alleged Breach of Privacy Reporting Form](#), the Complainant provided a copy of their original complaint to SaskBuilds and a detailed response to SaskBuilds' January 12, 2022 letter.
- [6] On February 23, 2022, my office notified SaskBuilds and the Complainant of my office's intention to undertake an investigation. The notification to SaskBuilds requested that it complete our [Privacy Breach Investigation Questionnaire](#). The notification to the Complainant invited them to provide a submission with any further details regarding the alleged breach of privacy.
- [7] On March 15, 2022, SaskBuilds provided my office with its internal investigation report in lieu of the *Privacy Breach Investigation Questionnaire*. The Complainant did not provide my office with any further information.

II DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

(a) HIPA

[8] HIPA applies when three elements are present: (1) personal health information, (2) a trustee, (3) the personal health information is in the custody or under the control of the trustee.

[9] Personal health information is defined in section 2(m) of HIPA which provides:

2 In this Act:

...

(m) “personal health information” means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

[10] The Complainant alleged that the information disclosed by SaskBuilds was about their medical condition. I find that the information at issue qualifies as the Complainant’s personal health information pursuant to section 2(m)(i) of HIPA because it is identifiable information about the Complainant’s physical health.

[11] I now must determine if a trustee is involved. Section 2(t)(i) of HIPA provides:

2 In this Act:

...

(t) “trustee” means any of the following that have custody or control of personal health information:

(i) a government institution;

[12] I find that SaskBuilds is a government institution as defined in section 2(t)(i) of HIPA.

[13] Finally, I must determine if SaskBuilds had custody or control of the personal health information. SaskBuilds acknowledged that the Complainant's personal health information was collected by its staff during the Complainant's training. SaskBuilds does not dispute that it is a trustee with custody or control over the personal health information. I find that SaskBuilds had custody and/or control of the personal health information at issue here.

[14] As all three requirements for the application of HIPA are present, I find that I have jurisdiction to investigate this matter under that act.

(b) FOIP

[15] SaskBuilds qualifies as a "government institution" pursuant to section 2(1)(d)(i) of FOIP and is therefore also subject to that act. The privacy rules in FOIP only apply to personal information. Therefore, I must determine if the information at issue, namely the Complainant's license number and medical condition qualifies as personal information.

[16] Personal information is defined in section 24(1) of FOIP. Section 24(1)(d) of FOIP is relevant here and it provides:

24(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:

...

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual's health services number as defined in The Health Information Protection Act;

[17] The Complainant's license number is a number assigned to the Complainant to establish their authority to carry out the licensed activities. This qualifies as personal information pursuant to section 24(1)(d) of FOIP. As the requirements for the application of FOIP are present, I find that I have jurisdiction to investigate this matter under that act.

[18] With respect to personal health information, section 24(1.1) of FOIP provides:

24(1.1) Subject to subsection (1.2), “personal information” does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

[19] Applying section 24(1.1) of FOIP, I find that FOIP does not apply to the personal health information involved in the alleged disclosures.

[20] In summary, I find that the alleged disclosure of the Complainant’s:

- license number is governed by FOIP
- medical condition is governed by HIPA.

2. Did SaskBuilds have authority to disclose the Complainant’s personal information under FOIP and personal health information under HIPA to Transport Canada?

[21] A privacy breach occurs when personal information and/or personal health information is collected, used, and/or disclosed without legal authority. As noted above, SaskBuilds acknowledged it disclosed personal information, namely, the Complainant’s license number, and personal health information to Transport Canada. In both cases, I must consider whether the disclosures were authorized under FOIP and HIPA, respectively.

(a) Disclosure of Personal Information under FOIP

[22] “Disclosure” means to share personal information with a separate entity (see my office’s [Investigation Report F-2014-002](#) at para [53])

[23] SaskBuilds asserted that it had the authority to disclose the Complainant’s license number to Transport Canada pursuant to sections 29(2)(i), (l) and (m) of FOIP.

[24] Section 29(1) of FOIP establishes that a government institution may disclose personal information with the consent of an individual or without consent if one of the sections of 29(2) or 30 of FOIP apply.

[25] I will begin with a consideration of the possible application of sections 29(1) and (2)(m) of FOIP which provide:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

...

(m) where necessary to protect the mental or physical health or safety of any individual;

[26] In my office's [Investigation Report 107-2014](#), my office considered the application of section 29(2)(m) of FOIP and set out the following three-part test:

1. There must be a reasonable expectation of harm.
2. Harm must constitute damage or detriment and not mere inconvenience.
3. There must be a causal connection between use and the anticipated harm.

[27] In its internal investigation report, SaskBuilds provided some background information about the regulations that apply to it and the Complainant, and the role of the Manager. Following is a summary of the key points:

- Transport Canada is the primary Canadian authority overseeing the safety and security of the activity engaged in by the Complainant for SaskBuilds.
- SaskBuilds has an Operator's Certificate issued by the Minister of Transport Canada.
- The approvals of certification are technical processes focusing on the approval of manuals and maintenance procedures.
- Transport Canada also oversees the training and licensing processes for operators.
- The Manager is the individual responsible for SaskBuilds' Operator's Certificate and its Company Operations Manual, which are both approved by Transport Canada.

- The Manager is also responsible for safety of all operations, including:
 - liaison with the regulatory authority on all matters concerning its operations
 - ensuring that SaskBuilds' operations are conducted in accordance with current regulations, standards and operators' policy.

[28] In regard to the circumstances surrounding the alleged breach, SaskBuilds stated that following receipt of information from the two supervisors about the Complainant's medical condition, the Manager contacted Transport Canada to get advice about reporting requirements relating to medical conditions. Following is a summary of SaskBuilds' submission regarding the circumstances of the disclosure to Transport Canada:

- The Manager confirmed that they contacted Transport Canada to seek advice regarding the Complainant's health. They explained that an individual, the Complainant, had a medical condition that was observed during training sessions on more than one occasion and that the Complainant was sharing this information with co-workers seeking their advice and guidance and indicating to coworkers that they had received medical treatment.
- The Manager was asked to provide the Complainant's license number. The Manager initially resisted providing the Complainant's license number as he was conscious of the privacy component.
- Transport Canada staff explained that because of the medical condition during training that there was a potential safety issue, and they would require the Complainant's license number.
- Transport Canada staff indicated that they would have a manager contact SaskBuilds' Manager directly.
- The Transport Canada manager called SaskBuilds' Manager with additional questions and stated that they would issue a letter to the Complainant requiring testing and assessment as required by regulations to address the concern.
- During this conversation it was determined that the Complainant's physician would be the person who should conduct the evaluation. The SaskBuilds' Manager asked Transport Canada if they should contact the Complainant's physician directly and Transport Canada did not discourage the SaskBuilds' Manager from doing this and provided them with the Complainant's physician's contact information.

[29] SaskBuilds described the purpose of the disclosure to Transport Canada as follows:

- for the purposes of ensuring that the Manager was being compliant with the regulations
- to ensure the proper process was followed for issuing an employer request for a medical evaluation
- for the purposes of the management of human resources related to the duties and responsibilities of the Complainant
- to ensure the physical health or safety of program staff and others, and
- to ensure that the appropriate Transport Canada process was followed to request a medical evaluation.

[30] Following the discussion with Transport Canada, the Manager met with the Complainant and requested that they receive a medical evaluation by their physician. The Complainant was put on administrative leave with pay.

[31] Following an examination by the Complainant's physician, the physician stated that in their professional medical opinion the Complainant could return to their duties without any restrictions.

[32] With respect to the issue of whether the disclosure was authorized, SaskBuilds asserted the Complainant's medical condition posed a risk to the health and safety of other individuals. It added that the Manager had explicit obligations in both provincial and federal legislation to ensure the safety of individuals.

[33] The Complainant acknowledged in their complaint and in their request for an investigation by my office that they had a medical condition that was observed during training sessions. However, the Complainant appeared to suggest that there was no reasonable expectation of harm because despite having experienced this medical condition, it did not pose a risk to safety of other individuals.

[34] The Complainant provided my office with background information about some human resources issues involving them and the SaskBuilds' Manager. They disputed that the Manager was acting in good faith. They felt that the Manager should have spoken to them

about any health and safety concerns prior to making the disclosures about their medical condition. They added that the Manager should not have disclosed information that qualified as “hearsay” information about conversations they had with colleagues.

[35] The Complainant described the sensitivity of the information at issue and the impact of the disclosures of the information. They stated that Transport Canada and physicians have great power over their career and livelihood. Their evaluations and decisions determine the Complainant’s ability to work. They added that the fact that the Manager contacted their physician, prior to questioning them about what happened during training was a gross violation of privacy.

[36] SaskBuilds acknowledged that it needs more clarity on the obligations of the Manager with respect to reporting medical conditions. It stated that related procedures should be documented in the Operations Manual and privacy awareness training for its staff was required.

[37] Having carefully reviewed SaskBuilds’ submission and the information provided by the Complainant, I am satisfied that there was a reasonable expectation of harm to the Complainant and other individuals. I am also satisfied that the harm would constitute damage and not mere inconvenience, and that there is a causal connection between the release of the information to Transport Canada and the anticipated harm. Therefore, I find that the requirements for section 29(2)(m) of FOIP have been met and SaskBuilds had the authority to disclose the Complainant’s license number to Transport Canada.

(b) Disclosure of Personal Health Information under HIPA

[38] SaskBuilds acknowledged that the Manager disclosed the Complainant’s personal health information to Transport Canada. At issue here is whether the disclosure was authorized under HIPA.

[39] Section 27(1) of HIPA provides that a trustee may disclose personal health information with the consent of the individual. Where the trustee does not have consent, it must have authority for the disclosure under sections 27(2), (3), (4), (5), (6), 28 or 29 of HIPA. Section 27(4)(a) of HIPA is relevant here.

[40] Section 27(1) of HIPA provides:

27(1) A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

[41] Section 27(4)(a) of HIPA provides:

27(4) A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:

(a) where the trustee believes, on reasonable grounds, that the disclosure will avoid or minimize a danger to the health or safety of any person;

[42] My office's *Guide to HIPA* states:

This provision is meant to provide the ability to disclose personal health information if it could avoid or minimize a danger to the safety, physical or mental health of an individual.

...

In order to determine whether a threat to the safety, physical or mental health of any person exists, the trustee should apply the following test:

1. there must be a reasonable expectation of probable harm;
2. the harm must constitute damage or detriment and not more inconvenience;
3. must be a causal connection between disclosure and avoiding or minimizing the anticipated harm.

Generally, this means the trustee must make an assessment of the risk and determine whether there are reasonable grounds for concluding there is a danger to the health or safety of any person. That assessment must be specific to the circumstances of the case under consideration.

...

The trustee should be able to detail what the harm is and to whom the harm threatens before the personal health information is released.

(Guide to HIPA, “Limit on Collection, Use, and Disclosure of Personal Health Information by Trustees (Part IV of HIPA)”, December 2016, [Guide to HIPA], pp. 48-49)

[43] Similar to my earlier finding under section 29(2)(m) of FOIP, I find that there was a reasonable expectation of probable harm in this case that posed a risk to the Complainant and other individuals. I also find that there was a causal connection between the disclosure and avoiding or minimizing the anticipated harm. Therefore, I find that all three parts of the test for the application of section 27(4)(a) of HIPA have been met in relation to the disclosure of the Complainant’s personal health information to Transport Canada. As such, I find that no privacy breach has occurred in relation to the disclosures to Transport Canada under FOIP or HIPA.

3. Did SaskBuilds have authority to disclose the Complainant’s personal health information to the Complainant’s physician under HIPA?

[44] SaskBuilds acknowledged that the Manager contacted the Complainant’s physician and shared information about the Complainant’s medical condition during training. SaskBuilds asserted that the Manager contacted the Complainant’s physician to explain and to relay his concerns for the safety of the Complainant and other individuals. It asserted that the only information the Manager provided to the Complainant’s physician was the Complainant’s medical condition during training.

[45] The Complainant’s physician provided a written statement confirming that they had been contacted by the Manager. The physician stated:

...I was contacted by [the Manager] and we discussed his concerns regarding [the Complainant’s] self-reported symptoms [...] during [their] annual recurrent training. I stated I was very willing to see [the Complainant] urgently to assess any medical concerns. When I asked for additional information to help gain a fuller understanding of the situation, [the Manager] provided accounts from training Captains, and water cooler conversations [the Complainant] allegedly had with colleagues. When I asked

what [the Complainant] was reporting for symptoms, [the Manager] stated the matter had not yet been discussed with [the Complainant].

...

Since [the Complainant's] symptom only occurred during [specific events], I felt [the Complainant] was fit to exercise the privileges of [their license].

[46] Considering the statement provided by the Complainant's physician, I am satisfied that there was a disclosure of the Complainant's personal health information by the Manager to the Complainant's physician.

[47] With respect to the authority to make the disclosure without consent under HIPA, SaskBuilds asserted:

With respect to the information provided to [the Complainant's physician], it is unclear as to whether an unauthorized disclosure occurred by the [Manager]. It is clear from the investigation and the information provided by the Complainant that the call presented the opportunity for a breach under HIPA to occur. See statement of fact provided by [the Complainant's physician] (Appendix A).

[48] I find that SaskBuilds has not provided sufficient evidence or information to support a finding that this disclosure was authorized under HIPA. In particular, I find that the disclosure to the Complainant's physician is not authorized pursuant to section 27(4)(a) of HIPA because the circumstances do not meet the third part of the test for the application of that section.

[49] The disclosure to the Complainant's physician occurred following the disclosure to Transport Canada. During the Manager's conversation with Transport Canada, Transport Canada stated that it would issue a letter to the Complainant requiring that they undergo medical testing and assessment to address the health and safety concerns. This meant that actions were being taken by Transport Canada to mitigate the potential risk of harm that might arise from the Complainant's medical condition. In these circumstances, further disclosures of sensitive personal health information to the Complainant's physician were not necessary to reduce the risk of harm. Consequently, I find that there was no causal connection between disclosure to the Complainant's physician and avoiding or minimizing the risk of harm.

[50] As SaskBuilds has not established that it was authorized to make the disclosure of the Complainant's personal health information without consent under any other provisions in HIPA, I find that the disclosure to the Complainant's physician did not comply with HIPA and was a breach of the Complainant's privacy.

4. Did SaskBuilds have a duty to provide notice of the disclosure to the Complainant under FOIP and HIPA?

[51] FOIP does not have a provision requiring government institutions to inform individuals of anticipated disclosures made without consent. However, section 26(2) of FOIP requires government institutions to inform an individual of the purpose for which the information is being collected, unless the information is exempted by the regulations. Section 26(2) of FOIP states:

26(2) A government institution that collects personal information that is required by subsection (1) to be collected directly from an individual shall inform the individual of the purpose for which the information is collected unless the information is exempted by the regulations from the application of this subsection.

[52] HIPA includes a right to be informed about anticipated uses and disclosures of personal health information. Sections 9(1) and (2) of HIPA provide:

9(1) An individual has the right to be informed about the anticipated uses and disclosures of the individual's personal health information.

(2) When a trustee is collecting personal health information from the subject individual, the trustee must take reasonable steps to inform the individual of the anticipated use and disclosure of the information by the trustee.

[53] To comply with sections 26(2) of FOIP and 9(1) and (2) of HIPA, SaskBuilds should have had in place a specific policy informing staff about its practices regarding disclosures to Transport Canada. To comply with section 9(2) of HIPA, SaskBuilds should have provided the Complainant with notice of its intended disclosure to Transport Canada before it made the disclosure. I find that SaskBuilds did not comply with sections 26(2) of FOIP and 9(1) and (2) of HIPA, and I recommend that it develop policies and procedures and take steps to ensure compliance with these provisions in the future.

5. Did SaskBuilds comply with the duty to protect personal information and personal health information set out in section 24.1 of FOIP and section 16 of HIPA?

[54] Section 24.1 of FOIP states:

24.1 Subject to the regulations, a government institution shall establish policies and procedures to maintain administrative, technical and physical safeguards that:

- (a) protect the integrity, accuracy and confidentiality of the personal information in its possession or under its control;
- (b) protect against any reasonably anticipated:
 - (i) threat or hazard to the security or integrity of the personal information in its possession or under its control;
 - (ii) loss of the personal information in its possession or under its control; or
 - (iii) unauthorized access to or use, disclosure or modification of the personal information in its possession or under its control; and
- (c) otherwise ensure compliance with this Act by its employees.

[55] My office's *Privacy Breach Guidelines* state that section 24.1 of FOIP requires that a government institution have administrative, technical and physical safeguards in place to protect personal information. It defines these safeguards as follows:

Administrative safeguards are controls that focus on internal organization policies, procedures, and maintenance of security measures that protect personal information. Examples include written policies and procedures, annual training for employees, confidentiality agreements, agreements with information management service providers (IMSPs), auditing programs, records retention and destruction schedules, and access restrictions.

Technical safeguards are the technology and the policy and procedures for its use that protect personal information and control access to it. Examples include separate user identifications, passwords, firewalls, identification and authentication controls, virus scanners, and audit capabilities in digital systems.

Physical safeguards are physical measures, policies, and procedures to protect personal information and related buildings and equipment from unauthorized intrusion and natural and environmental hazards. Examples include locked filing cabinets, offices and storage rooms, alarm systems, and clean desk approaches.

[56] The *Privacy Breach Guidelines* also state that section 24.1(b) of FOIP requires that a government institution protect against any reasonably anticipated:

- threat or hazard to the security or integrity of the personal information in its possession or under its control;
- loss of the personal information in its possession or under its control; and/or
- unauthorized access to or use, disclosure or modification of the personal information in its possession or under its control.

[57] Similarly, section 16 of HIPA establishes requirements for policies and procedures to protect personal health information. It states:

16 Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:

- (a) protect the integrity, accuracy and confidentiality of the information;
- (b) protect against any reasonably anticipated:
 - (i) threat or hazard to the security or integrity of the information;
 - (ii) loss of the information; or
 - (iii) unauthorized access to or use, disclosure or modification of the information; and
- (c) otherwise ensure compliance with this Act by its employees.

[58] It is apparent that the Manager had no understanding of the privacy related rights and obligations applicable to the sensitive information about the Complainant's health. In my view, this is the root cause of the privacy breach in this case.

[59] My office has not been provided with any policies and procedures or information about other safeguards that would support compliance with section 24.1 of FOIP and section 16 of HIPA. SaskBuilds has acknowledged a need for policies and procedures to address the

handling of personal health information. It has also acknowledged that there is a need for privacy awareness training for involved staff.

[60] In particular, SaskBuilds asserted that it intends to consult with Transport Canada to develop a process for reporting medical conditions that impact work performance. It acknowledged that more clarity is needed as to the obligations of the Manager in this regard. Its privacy officer recommended that the SaskBuilds relevant staff with supervisory responsibility take privacy awareness training. The privacy officer also recommended that SaskBuilds develop a process to follow that will address medical concerns observed during training, which should be documented in the Operations Manual and reviewed on an annual basis.

[61] Considering these circumstances, I find that SaskBuilds has not complied with section 24.1 of FOIP and section 16 of HIPA. I recommend that, within 90 days, SaskBuilds develop and implement policies or procedures applicable to relevant staff that address the collection, use, disclosure and safeguarding of all personal information and personal health information to help ensure that it meets its obligations under FOIP and HIPA. This should include policies and procedures that address mandatory privacy awareness training for all staff involved in processing personal information and personal health information.

III FINDINGS

[62] I find that the Complainant's license number qualifies as their personal information pursuant to section 24(1)(d) of FOIP.

[63] I find that the Complainant's medical condition qualifies as their personal health information pursuant to section 2(m)(i) of HIPA.

[64] I find that SaskBuilds had authority to disclose the Complainant's personal information to Transport Canada pursuant to section 29(2)(m) of FOIP.

[65] I find that SaskBuilds had authority to disclose the Complainant's personal health information to Transport Canada pursuant to section 27(4)(a) of HIPA.

[66] I find that SaskBuilds did not have the authority to disclose the Complainant's personal health information to the Complainant's physician.

[67] I find that SaskBuilds did not comply with the notice requirements in section 26(2) of FOIP and sections 9(1) and (2) of HIPA.

[68] I find that SaskBuilds did not comply with section 24.1 of FOIP and section 16 of HIPA.

IV RECOMMENDATION

[69] I recommend that within 90 days SaskBuilds develop and implement policies and procedures applicable to relevant staff in compliance with section 24.1 of FOIP and section 16 of HIPA. The policies and procedures should address the collection, use, disclosure and safeguarding of all personal information and personal health information to help ensure that it meets its obligations under FOIP and HIPA. This should include policies and procedures that address mandatory privacy awareness training for all staff involved in processing personal information and personal health information.

Dated at Regina, in the Province of Saskatchewan, this 14th day of July, 2022.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner