



INVESTIGATION REPORT 033-2022, 034-2022, 035-2022, 036-2022, 061-2022

Saskatchewan Health Authority

June 15, 2022

Summary: Five Complainants, who were employees of the Saskatchewan Health Authority (SHA), took issue with the SHA's Policy Directive entitled, "Proof of COVID-19 Vaccination" (Policy). The Complainants asserted that the SHA was willfully violating *The Health Information Protection Act* (HIPA). The SHA responded to the Complainants, but the Complainants were dissatisfied with the SHA's response. Therefore, they complained to the Commissioner. The Commissioner found that the SHA had authority to collect the vaccination status or test results of employees pursuant to section 24(3) of HIPA, section 3-8(a) of *The Saskatchewan Employment Act* and sections 4(1) and (1.1) of *The Employers' COVID-19 Emergency Regulations*. He recommended that the SHA take no further action.

I BACKGROUND

[1] On October 1, 2021, the Saskatchewan Health Authority (SHA)'s Policy Directive entitled, "Proof of Full COVID-19 Vaccination" (Policy) came into effect. The Policy required "team members", including employees, to provide proof of full COVID-19 vaccination or to participate in the SHA COVID-19 monitored testing program at the team member's own cost.

[2] In a letter dated October 31, 2021 to the SHA, an employee detailed her complaint regarding SHA's Policy. The employee also cited another policy entitled "SHA to Introduce Proof of Vaccination or Negative Test Policy in all Facilities". The employee cited sections 24(3), 26(3), 6(1), and 4(1) of *The Health Information Protection Act* (HIPA)

and asserted there was a conflict between HIPA and *The Employers' COVID-19 Emergency Regulations* (Emergency Regulations) and argued that HIPA prevailed. The employee asserted that the SHA's Policy was coercive and that SHA's Policy was a "clear violation of HIPA by SHA".

- [3] Then, the SHA received another five letters from five separate employees (Complainants) (These five Complainants includes the individual who sent the letter dated October 29, 2021 described above.) Two of the five letters were dated November 29, 2021 and the remaining three were dated November 30, 2021. With the exception of the employees' names and addresses, the contents of the letters were identical. The Complainants listed several members of the SHA's executive leadership team who they believed to have violated HIPA. Then, the letters said:

I am reporting all of the aforementioned individuals of willfully violating HIPA. The violation of HIPA being reported today is section 6(1)(d): obtaining voluntary consent with coercion.

- [4] Next, at length, the Complainants described how the SHA was obtaining employee consent through coercive means, which was in violation of section 6(1)(d) of HIPA. The Complainant went on to quote the offence provisions in section 64 of HIPA. They concluded as follows:

In my final plea and summation to you: Section 6(1)(d) of HIPA has clearly been violated by SHA and the individuals enforcing this Policy Directive, with willful neglect of this section of HIPA. This constitutes a serious intentional breach/violation of the terms of The Act and is subject to mandatory penalties under willful neglect of the terms and the applicable offences. I trust that you will take remedial action and impose sanctions accordingly.

- [5] The SHA responded to four of the five Complainants. Three of the five Complainants received the following response by email on December 8, 2021:

We have received your email and appreciate your concerns with the Proof of Full COVID-19 Vaccination Policy Directive and the changes made to the SHA Privacy & Confidentiality Policy.

It is important to keep in mind that the Proof of Full COVID-19 Vaccination program is voluntary for our team members. This program allows two options:

- provide proof of full COVID-19 vaccination, or
- participate in the SHA COVID-19 Monitored Testing Program (MTP).

Further, SHA staff who do not provide proof of full COVID-19 vaccination may request an accommodation via the process highlighted on the Proof of Full COVID-19 Vaccination policy directive intranet page.

The SHA is required by Occupational Health and Safety Regulations, 2020 to protect the health, safety and welfare of all SHA team members. Furthermore, as the province's healthcare provider, we are committed to doing everything we can to keep our patients, residents and families safe. The vaccination program is integral to ensuring that the SHA meets these obligations. The program is designed to collect the least amount of information necessary to meet its objective, the information collected will only be shared with those that need to know for the purpose of administering and enforcing the policy directive, and the information collected will be securely stored and destroyed as soon as it is no longer required.

With respect to your concerns regarding the vaccination program and The Health Information Protection Act ("HIPA"), it is important to understand that the SHA will not be accessing the vaccination status of its team members as trustee of that information. Rather, as employer / facility operator, the SHA is requesting that team members participate in the vaccination program and share their vaccination information. Team members who choose not to share their vaccination status can opt to participate in the testing program. The SHA will not access the vaccination status of team members who choose not to share that information.

In response to your question about the SHA Privacy & Confidentiality Policy directive, we can advise that the policy directive was initially approved on December 4, 2017, which is the date of the SHA formation. In accordance with the SHA Policy Framework, the policy was recently moved from a policy directive to a policy. Minor changes, completely unrelated to the vaccination policy, were made to the policy on October 27, 2021. We direct you to the SHA Policy Framework (found here: <https://documentfinder.saskhealthauthority.ca/en/viewer?file=%2fmedia%2fPolicies%2fSHA%2fSHA%20Policy%20Framework.pdf#search=policy&phrase=false&page mode=bookmarks>) which applies to all Saskatchewan Health Authority corporate and clinical policies and assists in creating organizational accountability by ensuring policies are up-to-date, regularly maintained and easily accessible.

We hope the information provided in this email will give you a better understanding of why the vaccination policy and these processes have been implemented, however, if you are still unsatisfied with the information regarding your privacy concerns, you can contact:

The Saskatchewan Privacy Commissioner's Office

#503-1801 Hamilton St.
Regina, SK S4P 4B4
306-787-8350

[6] The fourth Complainant who received a response from the SHA indicated that they had received an automated response from the SHA. The automated response indicated that the SHA received their email and that a typical response time for emails was two business days.

[7] Then four of the five Complainants each responded to the SHA by letter. One of the letters was dated December 9, 2021, while the remaining three were dated December 10. The contents of the letters were identical.

Thank you for your response to the reported violation of HIPA in regards to the “Proof of Full COVID-19 Vaccination Policy Directive” (Policy Directive) implemented October 1, 2021 by the Saskatchewan Health Authority (SHA). **However, you have not addressed the violation of Part II, Section 6(1)(d) of HIPA: obtaining voluntary consent with coercion, as was clearly brought forward in great detail within my letter.**

[Emphasis in original]

[8] The four Complainants expressed frustration at SHA’s response. The four Complainants requested that the SHA address the Complainants’ concern regarding section 6(1)(d) of HIPA.

[9] On February 10, 2022, after not receiving a response from the SHA, the four Complainants requested that my office undertake an investigation. On March 1, 2022, the fifth Complainant requested that my office undertake an investigation.

[10] Then, in letters dated March 7, 2022, the SHA responded to each of the five Complainants. The SHA’s response was similar to the contents of its email dated December 8, 2021 to the Complainants. The following are paragraphs that appeared in the March 7, 2022 letter that did not appear in the SHA’s email dated December 8, 2021 as follows:

The SHA is required to adhere to *The Saskatchewan Employment Act* and followed *The Employers' COVID-19 Emergency Regulations* (effective October 1, 2021). *The Saskatchewan Employment Act* requires the SHA to ensure the health, safety and welfare of its team members to the extent reasonably possible. *The Employers' COVID-19 Emergency Regulations* provided legal authority for the SHA to require employees to provide proof of vaccination or to provide a negative test at least every seven days before being allowed into the workplace. No one was required to be vaccinated or to provide proof of vaccination because the Policy Directive provided the option to be tested as described in *The Employers' COVID-19 Emergency Regulations*.

...

Employers have the right to implement policies within the workplace and require employees to follow those policies. The fact that policies have compliance clauses including discipline measures for not following the policy is not coercion. Discipline clauses for not complying with policies are universally accepted as a standard policy implementation practice. To say a policy is coercive because it contains the potential for discipline would render all workplace rules as unenforceable.

The monitored testing program was also not coercive; it was an acceptable and reasonable option provided to employees who chose to not provide proof of full COVID-19 vaccination. Furthermore, the ability to implement this procedure was a reinforced requirement in *The Saskatchewan Employment Act* and followed *The Employers' COVID-19 Emergency Regulations* (effective October 1, 2021).

With respect to your concerns regarding the vaccination program and *The Health Information Protection Act* (“HIPA”), it is important to understand that the SHA was requesting, and was not forcibly requiring, that team members participate in the vaccination program and share their vaccination information. Team members who chose not to share their vaccination status could opt to participate in the testing program. The SHA did not provide access or acknowledge your vaccination status to your team members. The SHA protects individual’s personal health information in accordance with the HIPA, and have numerous safeguards and Work Standards for the process. The Work Standards and Oversight are all available at the COVID Resource page.

- [11] Each of the five Complainants indicated to my office that they were not satisfied with the SHA’s response. Depending on when each of the Complainants indicated they were not satisfied with the SHA response, my office notified each Complainant and the SHA that it would be undertaking an investigation. On March 21, 2022, my office notified two of the Complainants and the SHA it would be undertaking an investigation. On March 22, my office notified one of the Complainants and the SHA that it would be undertaking an investigation. Finally, on April 6, 2022, my office notified two of the remaining Complainants and the SHA that it would be undertaking an investigation.

II DISCUSSION OF THE ISSUES

1. Is HIPA engaged?

[12] HIPA is engaged when three elements are present: (1) personal health information, (2), a trustee, (3) the personal health information is in the custody or control of the trustee. If HIPA is engaged, then my office is able to determine if privacy breaches have occurred under HIPA. A privacy breach occurs when personal health information has been collected, used, and/or disclosed without authority under HIPA.

[13] First, the personal health information is defined by 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;

[14] I find that a person’s vaccination status or the results of tests for COVID-19 would qualify as “personal health information” as defined by section 2(m)(i) of HIPA.

[15] Second, “trustee” is defined by section 2(t)(ii) of HIPA as follows:

2 In this Act:

...

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

...

(ii) the provincial health authority or a health care organization;

[16] The SHA qualifies as the “provincial health authority” as defined by section 1-2 of *The Provincial Health Authority Act*. I find that the SHA qualifies as a trustee as defined by section 2(t)(ii) of HIPA.

[17] Third, I must determine if the personal health information is in the custody or control of the SHA.

[18] The Complainants are alleging that SHA's Policy is violating section 6(1)(d) of HIPA. There is no evidence that the SHA obtained any of the Complainants' vaccination status or results of tests for COVID-19. As such, I find that the Complainants' personal health information at issue is *not* in the custody or control of the SHA.

[19] However, since the SHA was engaged in the practice of collecting personal health information in accordance with its Policy, I find that HIPA is engaged.

2. Did the SHA have authority under HIPA to collect the vaccination status or test results of employees?

[20] The Complainants alleged that SHA's Policy was in violation of section 6(1)(d) of HIPA. That is, the Complainants alleged that the SHA was obtaining consent to collect personal health information through coercive means.

[21] Below is my analysis to determine if the SHA had authority under HIPA to collect the vaccination status or test results of employees.

[22] I have found that a person's vaccination status or the results of tests for COVID-19 qualifies as "personal health information" as defined by section 2(m)(i) of HIPA.

[23] Section 24(3) of HIPA provides:

24(3) Nothing in this Act prohibits the collection of personal health information where that collection is authorized by another Act or by a regulation made pursuant to another Act.

[Emphasis added]

[24] Based on section 24(3) of HIPA, I need to determine if there was another Act or regulation that authorized the collection of employees' personal health information. Section 3-8(a) of *The Saskatchewan Employment Act* provides:

3-8 Every employer shall:

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;

[25] The Emergency Regulations came into effect on October 1, 2021, which applied to employers who were not a "public employer", pursuant to sections 2(2) and 3 of the Emergency Regulations:

2(2) For the purposes of the definition of "public employer" in subsection (1), public employer does not include the following:

(a) the provincial health authority, an affiliate, a health care organization or the cancer agency as those terms are defined in *The Provincial Health Authority Act*, except eHealth Saskatchewan;

...

3 These regulations do not apply to a public employer.

[26] Sections 4(1) and (1.1) of the Emergency Regulations provided:

4(1) On and after October 1, 2021, an employer may, for the purposes of clause 3-8(a) of the Act, require all of its workers to comply with one of the following:

(a) to:

(i) be fully-vaccinated; and

(ii) if requested by the employer, provide satisfactory evidence to the employer in relation to the worker's vaccinations;

(b) to provide a valid negative COVID-19 test result to the employer at least every 7 days.

(1.1) If an employer requires its workers to comply with one of the requirements set out in subsection (1), the employer shall give each worker the option to comply with either clause (1)(a) or (b), but the worker must comply with at least one of those requirements within the period specified by the employer.

- [27] Therefore, I find that the SHA had authority to collect the vaccination status or test results of employees pursuant to section 24(3) of HIPA, section 3-8(a) of *The Saskatchewan Employment Act* and sections 4(1) and (1.1) of the Emergency Regulations. In other words, the SHA was not obtaining consent through coercive means to collect personal health information simply because the SHA did not need consent. Section 24(3) of HIPA is sufficient authority under HIPA for the SHA to have collected personal health information for the purpose of SHA's Policy. Further, since the SHA did not need consent to collect personal health information, I do not need to consider section 6(1) of HIPA. Finally, since there is no conflict between HIPA and *The Saskatchewan Employment Act* and the Emergency Regulations, I do not need to consider section 4(1) of HIPA.
- [28] I note that the Emergency Regulations were repealed effective February 14, 2022. SHA's Policy expired on February 14, 2022. That is, it ceased the practice of collecting proof of full COVID-19 vaccination or COVID-19 test results on February 14, 2022.
- [29] In the course of my office's investigation, two of the five Complainants provided submissions to my office. The submissions were similar, but not identical. The two Complainants argued that section 26(3) of HIPA required that the SHA have consent to collect employees' personal health information and that section 6(1) of HIPA required that consent be given voluntarily and must not be obtained through coercion. They both argued that *The Saskatchewan Employment Act* and Emergency Regulations was inconsistent with HIPA and cited section 4(1) of HIPA that provides that HIPA would prevail:

There is clear conflict between the SEA legislation as amended and HIPA. As such, in all matters of conflict, HIPA prevails. The *Employers' COVID 19 Emergency Regulations* does not allow exemption of HIPA scrutiny and does not fall within the laws of subsection 4 (4).

...

Also important to note – the HIPA violations myself and other SHA employees have contested are in regards to CONSENT/COLLECTION of personal health information via appropriately required consent; NOT in regards to DISCLOSURE of personal health information by a health authority. These are two very different things. As such, section 26(3) of HIPA under restrictions of use states: "*Nothing in subsection (2) authorizes a trustee as an employer to use or obtain access to the personal health*

information of an individual who is an employee or prospective employee for any purpose related to the employment of the individual without the individual's consent." This clause reinforces that collection and/or use of the personal health information **must** be obtained with **true voluntary non-coerced consent**. Partial purpose of collecting vaccination status or COVID-19 test results was in direct relation to a condition of employment/related to the employment of the individual as contemplated in this section, and all personal health information that requires consent of the individual **must be voluntary and free of coercion in accordance with section 6(1)(d) of HIPA.**

[30] The Complainants appear to insist that the SHA must collect personal health information pursuant to section 26(3) of HIPA instead of section 24(3). The Complainants have failed to consider the wording of section 24(3) of HIPA. Section 24(3) of HIPA provides that "nothing in this Act" (which would include sections 26(3) of HIPA) prohibits the collection of personal health information where the collection is authorized by another Act or regulation made pursuant to another Act. Therefore, there is no need to consider sections 26(3), 6(1) and 4(1) of HIPA.

III FINDINGS

[31] I find that HIPA is engaged.

[32] I find that the SHA had authority to collect the vaccination status or test results of employees pursuant to section 24(3) of HIPA, section 3-8(a) of *The Saskatchewan Employment Act* and sections 4(1) and (1.1) of the Emergency Regulations.

IV RECOMMENDATION

[33] I recommend that the SHA take no further action regarding this matter.

Dated at Regina, in the Province of Saskatchewan, this 15th day of June, 2022.

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