



## **REVIEW REPORT 261-2019**

### **Saskatchewan Government Insurance**

**August 12, 2020**

**Summary:** Saskatchewan Government Insurance (SGI) responded to an access to information request refusing to confirm or deny the existence of the requested record pursuant to subsection 7(4) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that *The Health Information Protection Act* (HIPA) prevails and FOIP does not apply. The Commissioner further found that as HIPA prevails, SGI cannot rely on subsection 7(4) of FOIP. Finally, the Commissioner found that SGI's response to the Applicant did not satisfy the requirements of section 36 of HIPA. The Commissioner recommended that SGI provide the Applicant with a proper response pursuant to section 36 of HIPA.

### **I BACKGROUND**

[1] On May 30, 2019, SGI received the following access to information request from the Applicant:

SGI Medical Review

I wish to see the report posted with SGI's MRO [Medical Review Office] Branch. I wish to see the specific complaint, and the private citizen who filed the complaint as I believe the complaint to be malicious in intent.

[2] By letter dated June 28, 2019, SGI responded to the request refusing to confirm or deny existence of the record. In this letter, SGI did not inform the Applicant which section of *The Freedom of Information and Protection of Privacy Act* (FOIP) it was relying on to deny access if the record existed.

- [3] On July 4, 2019, the Applicant requested a review of SGI's decision to refuse to confirm or deny if the record exists.
- [4] On July 19, 2019, SGI sent the Applicant an updated response letter. In this letter, SGI advised the Applicant that it is refusing to confirm or deny that the record exists or ever did exist. It further advised the Applicant that if the record existed it would be exempt from release pursuant to section 15 of FOIP.
- [5] On August 7, 2019, my office notified SGI and the Applicant of our intention to undertake a review and invited both parties to make a submission.
- [6] After receiving my office's draft report, SGI asserted that it believed the Applicant's requests were vexatious and not in good faith pursuant to subsections 43(2)(a) and (b) of *The Health Information Protection Act (HIPA)* and that I have grounds to reject this review. I will not consider whether the requests are vexatious or have not been made in good faith at the point that a review is nearly concluded. Therefore, this Report will not address that issue. If government institutions wish to claim an access request is vexatious or not in good faith, it should do so right away.

## **II RECORDS AT ISSUE**

- [7] SGI has neither confirmed nor denied that records exist pursuant to subsection 7(4) of FOIP. Therefore, through the course of the review I will be careful not to disclose whether or not the record exists.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction to conduct this review?**

- [8] SGI qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP. SGI qualifies as a trustee pursuant to subsection 2(t)(i) of HIPA. Therefore, I have jurisdiction to conduct this review.

**2. Is FOIP and/or HIPA engaged in this review?**

[9] SGI originally responded to the Applicant pursuant to FOIP. However, in communications with my office, SGI now agrees with me that HIPA is the prevailing statute in this situation.

[10] Therefore, I find HIPA prevails and FOIP does not apply.

**3. Can SGI refuse to confirm or deny that the record exists or ever did exist under HIPA?**

[11] As noted above, SGI agrees that HIPA prevailed in this case. Thus, FOIP was not applicable. Subsection 7(4) of FOIP provides:

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[12] HIPA does not include a similar provision to subsection 7(4) of FOIP. In short, a trustee cannot refuse to confirm or deny that a record exists or ever did exist under HIPA.

[13] Therefore, I find as HIPA prevails, SGI cannot rely on subsection 7(4) of FOIP.

**4. Did SGI provide the Applicant with the appropriate manner of access to the record?**

[14] In its submission, SGI advised my office the Applicant received a letter from the MRU on May 23, 2019, advising that they must have a family doctor complete a report that, “must address any underlying medical conditions and use of prescribed or non-prescribed treatments which could be causing impairment of functional ability to drive – such as medical marijuana.”

[15] In its submission, SGI advised that it has provided the Applicant with details of a complaint that the MRU received, without disclosing the confidential source from which the complaint was received. The written details were not a copy of an actual complaint.

[16] Once a written request for information is received, HIPA is very prescriptive in the way in which a trustee must respond to a request. Section 32 and subsections 36(1)(a) to (c) and 36(3) of HIPA provide:

**32** Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

...

**36(1)** Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;

(b) by informing the applicant that the information does not exist or cannot be found;

(c) by refusing the written request for access, in whole or in part, and informing the applicant:

(i) of the refusal and the reasons for the refusal; and

(ii) of the applicant's right to request a review of the refusal pursuant to Part VI;

....

(3) The failure of a trustee to respond to a written request for access within the period mentioned in subsection (1) or (2) is deemed to be a decision to refuse to provide access to the personal health information, unless the written request for access is transferred to another trustee pursuant to clause (1)(d).

[17] In its submission to my office, SGI advised, “[t]he MRU provided the applicant with a letter that indicated the nature of the complaint **which satisfies section 38(2) of HIPA...**” [Emphasis added]. Subsection 38(2) of HIPA provides:

**38(2)** Where a record contains information to which an applicant is refused access, the trustee shall grant access to as much of the record as can reasonably be **severed** without disclosing the information to which the applicant is refused access. [Emphasis added].

[18] In the context of access to information, severing is the exercise by which portions of a document are removed before that document is provided to the applicant.

[19] SGI is asserting that by providing a separate letter outlining the nature of the complaint, it has satisfied subsection 38(2) of HIPA. HIPA defines “record” in subsection 2(p), which provides:

2 In this Act:

...

(p) “**record**” means a record of information in any form and includes information that is written, photographed, recorded, digitized or stored in any manner, but does not include computer programs or other mechanisms that produce records.

[20] As noted above, the Applicant specifically asked for the following record:

I wish to see the report posted with SGI’s MRO [Medical Review Office] Branch. **I wish to see the specific complaint**, and the private citizen who filed the complaint as I believe the complaint to be malicious in intent. [Emphasis added].

[21] The Applicant asked for the “specific complaint”, which would be a separate record from the letter provided to the Applicant from the MRU summarizing the complaint. A summary is not the record the Applicant wished to access. An individual’s right of access is to copies of source documents. Therefore, the letter sent to the Applicant from the MRU does not satisfy the requirements of section 36 of HIPA.

[22] HIPA requires that SGI respond to this request in a way that complies with section 36 of HIPA. As it has not done so, SGI should now provide the Applicant with a proper response.

[23] I find SGI’s response to the Applicant did not satisfy the requirements of section 36 of HIPA.

#### **IV FINDINGS**

[24] I find HIPA prevails and FOIP does not apply.

[25] I find as HIPA prevails, SGI cannot rely on subsection 7(4) of FOIP.

[26] I find SGI's response to the Applicant did not satisfy the requirements of section 36 of HIPA.

**V RECOMMENDATION**

[27] I recommend that SGI provide the Applicant with a proper response to the request pursuant to section 36 of HIPA.

Dated at Regina, in the Province of Saskatchewan, this 12th day of August, 2020.

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