Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 087-2020

Saskatchewan Government Insurance

November 24, 2021

Summary: A personal injury representative (PIR) at Saskatchewan Government Insurance (SGI) contacted a customer (Complainant). The PIR required pre-existing medical information about the Complainant and sought the contact information of the Complainant's life coach. The Complainant did not provide written consent for the PIR to disclose any of the Complainant's personal health information to the life coach. The PIR contacted the life coach and disclosed the Complainant's personal health information to the life coach. The Complainant complained to the Commissioner. The Commissioner found that Part IV of *The Health Information Protection Act* does not apply to the personal health information in this matter. He found that *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Freedom of Information and Protection of Privacy Regulations* would authorize the disclosure of certain types of personal information of an employee. Therefore, the Commissioner recommended that SGI adjust its policies or procedures so that it gives a complete accounting of its investigation to affected individuals of privacy breaches. This may include disclosing disciplinary action taken against an employee. He also recommended that SGI request that the Minister of Justice amend section 24(1.2) of FOIP to also include personal health information in the possession or control of SGI.

I BACKGROUND

[1] In a letter dated March 13, 2020, the Complainant submitted a complaint to Saskatchewan Government Insurance's (SGI) Chief Privacy Officer. A summary of the complaint is as follows:

- On March 10, 2020, the Complainant was contacted by a personal injury representative (PIR) at SGI requesting that they (the Complainant) sign a "release"

form so that the PIR could contact a life coach that the Complainant had been seeing on and off for the past few years.

- The Complainant was unclear as to why the PIR required such information.
- The Complainant understood that the PIR was requiring psychology reports for the past five years.
- However, as the Complainant explained to the PIR, the life coach was not a registered psychologist, so they (the life coach) is unable to treat or diagnose any physical or mental condition.
- The PIR requested the life coach's telephone number anyway and the Complainant provided the life coach's telephone number to the PIR.
- The Complainant did not receive or sign a release form from SGI.
- On March 12, 2020, the life coach contacted the Complainant indicating that SGI had contacted them (the life coach).
- According to the Complainant, the life coach had said that:
    - The PIR had not asked the life coach for their (the life coach's) title or qualifications. The PIR only knew the life coach's first name.
    - The PIR said they had a signed consent form from the Complainant for the PIR to speak to the life coach.
    - The PIR disclosed to the life coach that the Complainant suffered from anxiety and depression.
- The Complainant expressed concern about the lack of regard for their private information and the intent behind the PIR's telephone call to the life coach.
- Further, the Complainant expressed concern over the PIR lying to the life coach about having a release form and proceeding to disclose the Complainant's private information with the life coach.
- The Complainant said that this situation has left them feeling deterred from wanting to continue speaking to a psychologist under the supervision of SGI as such a situation could occur again.

[2] In an email dated April 6, 2020, SGI responded to the Complainant. SGI said:

- "Tertiary treatment recommendations" for the Complainant included a recommendation for psychological treatment. The recommendations were sent for review to a medical consultant.

- The medical consultant required pre-existing medical information in order "to assist".

- During a telephone call on March 9, 2020, a PIR asked the Complainant if they had seen anyone for counselling.

- The Complainant advised the PIR that they had seen a life coach, but not a counselor or psychologist.

- The PIR advised the Complainant that the medical consultant needed prior information from the life coach, but did not explain why and did not mention a "release" being required.

- The PIR contacted the life coach.

- SGI apologized for the concern that this situation has caused the Complainant.

- SGI acknowledged that the reason for the PIR contacting the life coach was not properly explained to the Complainant.

- SGI also acknowledged that the PIR should not have contacted the life coach without the Complainant's written consent.

- SGI indicated that the PIR's immediate supervisor has addressed this matter with the PIR.

- SGI offered to have another PIR handle the Complainant's file if that would make the Complainant feel more comfortable.

[3] On April 9, 2020, the Complainant submitted a complaint to my office indicating they were not satisfied with SGI's response to their complaint. They requested that my office investigate the matter. The Complainant asserted that SGI did not address "the most important parts of their complaint", including how: (1) the PIR allegedly disclosed their personal health information to a third party (the life coach); and (2) that the PIR allegedly lied about having the Complainant's written consent to seek information from the life coach. In their correspondence with my office, the Complainant said they simply wanted SGI to fully acknowledge their complaint.

[4] On May 26, 2020, my office notified both the Complainant and SGI that it would be undertaking an investigation into this matter.

II DISCUSSION OF THE ISSUES

1. Does Part IV of *The Health Information Protection Act* (HIPA) apply to this matter?

[5] SGI is a "government institution" as defined by section 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and is therefore subject to FOIP as it relates to "personal information".

[6] SGI is also a "trustee" with custody or control of personal health information as defined by section 2(t)(i) of *The Health Information Protection Act* (HIPA).

[7] In the course of my office's investigation, SGI admitted that the PIR indeed disclosed the Complainant's personal health information to the life coach.

> In SGI's view, a disclosure of medical information took place during the phone call between the PIR and the life coach, namely, that the customer suffers from anxiety and depression. SGI agrees that this should not have occurred and does not rely on any provisions of HIPA to justify the disclosure.

[8] However, also in the course of my office's investigation process, SGI explained that information at issue was obtained during the administration of the Complainant's injury file. SGI said it was information that was sought pursuant to Part VIII of *The Automobile Accident Insurance Act* (AAIA). Therefore, it asserted that pursuant to section 4(4)(b) of HIPA, Parts II, IV, and V of HIPA do not apply to the information at issue.

[9] Section 4(4)(b) of HIPA removes Parts II, IV and V of HIPA from applying to personal health information that has been collected, used or disclosed where that information was obtained for the purpose of Part VIII of the AAIA. Section 4(4)(b) of HIPA provides:

> **4**(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:
>
> ...

(b) Part VIII of *The Automobile Accident Insurance Act*;

[10] As described in the background of this Report, the Complainant is concerned about the PIR allegedly disclosing personal health information to a third party (the life coach). I should note that Part IV of HIPA contains the disclosure provisions that trustees are to follow when disclosing personal health information.

[11] The AAIA is the primary enabling legislation for SGI. Part VIII of the AAIA sets out the process for SGI to deal with managing compensation claims arising from motor vehicle accidents.

[12] Since the information at issue was obtained by SGI for the purpose of Part VIII of the AAIA, then I find that Part IV of HIPA does not apply to the personal health information at issue in this matter.

[13] Here is a situation where SGI has admitted there has been a privacy breach in that the PIR disclosed personal health information to a third party without written consent. In such a case, legislation or not legislation, I would expect that a corporation wanting to gain the trust of its customers would not rely on a provision that suggests it is not responsible, but take the stance that a wrong occurred and it has set out to correct that wrong.

[14] I will consider SGI's actions to correct this wrong in the next issue.

2. Is SGI in compliance with section 16 of HIPA?

[15] Section 16 is found in Part III of HIPA. Therefore, even though the information at issue was obtained pursuant to Part VIII of the AAIA, Part III of HIPA remains engaged.

[16] Section 16 of HIPA imposes a duty upon trustees to establish policies and procedures to maintain administrative, technical and physical safeguards that will protect personal health information. Section 16 of HIPA provides:

> **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:
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> (a) protect the integrity, accuracy and confidentiality of the information;
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> (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.**
>
> [Emphasis added]

[17] When a privacy breach occurs, a government institution must review what happened, identify root causes, and take steps to prevent similar privacy breaches in the future. This ensures that the government institution remains accountable to the people it serves.

[18] In the course of this investigation, SGI admitted that the PIR's disclosure was not in accordance with SGI's internal policies and procedures. It said that it has addressed the mistake with the PIR.

[19] Also, during the intake stage of my office's investigation process, SGI had explained to my office it had disciplined the PIR and it had audited the PIR's files to ensure that they: (1) were providing adequate explanations to customers about obtaining information from health care providers; and (2) were obtaining informed consent.

[20] I note that in SGI's email dated April 6, 2020 to the Complainant, SGI did not inform the Complainant that it had disciplined the PIR. SGI indicated it was not willing to share such information with the Complainant since "[any] issues relating to employee performance, conduct, discipline etc. is a matter internal to SGI (and is the employee's personal information)".

[21] While I take SGI's point that disciplinary information qualifies as "personal information" as defined by section 24(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP), I note that section 29(2)(u) of FOIP and section 16(g)(i) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) provide:

> **29**(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:
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> ...
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> (u) as prescribed in the regulations.

> **16** For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:
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> ...
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> (g) to any person where the information pertains to:
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> (i) the performance of any function or duty or the carrying out of any responsibility by an officer or employee of a government institution;

[22] Where the head deems it appropriate, I find that FOIP and the FOIP Regulations would authorize the disclosure of certain types of personal information of an employee.

[23] Indicating there was disciplinary action would demonstrate that SGI held the employee accountable. Even if it was a mistake and the disclosure was unintentional, disclosing that there was disciplinary action would communicate that SGI expects their employees to take their customers' privacy seriously. When an employee does not follow SGI's policies and procedures and breaches a customer's privacy, that employee's expectation of privacy should be diminished. The employee should be held accountable. Without accountability, SGI cannot foster trust with its customers.

[24] I recommend that SGI adjust its policies or procedures so that it gives a complete accounting of its investigation to affected individuals of privacy breaches. This may include disclosing disciplinary action taken against the employee.

3. Should there be amendments to FOIP?

[25] In Review Report 169-2020, I noted that Part VIII of the AAIA is not listed as an enactment or part there of that prevails over FOIP at section 23(3) of FOIP. However, I noted that section 24(1.1) of FOIP provides that "personal information" does not include information that constitutes personal health information as defined in HIPA. The practical effect of section 24(1.1) of FOIP is that if personal health information is in the custody or control of a trustee and therefore subject to HIPA, it cannot simultaneously be personal information subject to FOIP. The purpose of the Legislative Assembly in enacting section 24(1.1) was presumably to avoid duplication in legislative coverage and not to create a void where no privacy law applied to the information collected, used and disclosed by SGI in the course of its work under the AAIA.

[26] Also in Review Report 169-2020, I noted a similar long-standing issue existed with personal information and personal health information collected by the Saskatchewan Workers' Compensation Board (WCB) for purposes of sections 172 and 174 of *The Workers' Compensation Act, 2013*. However, this issue was resolved by the Legislative Assembly when it amended FOIP and included a provision, which clearly provides that personal health information in the possession or control of the WCB is personal information for the purposes of FOIP (section 24(1.2) of FOIP).

[27] In Review Report 169-2020, I made two recommendations. First, I recommended that SGI request that the Minister of Justice amend section 24(1.2) of FOIP to also include personal health information in the possession or control of SGI. Second, I recommended that the Minister of Justice amend section 24(1.2) of FOIP to include personal health information in the possession or under the control of SGI.

[28] In response to my recommendations, SGI said that it was "always willing to collaborate with [the Ministry of Justice] on any amendments to FOIP they bring forward". The Ministry of Justice said it, "will take this recommendation into consideration at such time that the legislation is next amended".

[29] Since SGI did not respond to my recommendation in Review Report 169-2020 directly, I reiterate my recommendation. I recommend that SGI request that the Minister of Justice

amend section 24(1.2) of FOIP to also include personal health information in the possession or control of SGI.

III FINDINGS

[30] I find that Part IV of HIPA does not apply to the personal health information at issue in this matter.

[31] I find that FOIP and the FOIP Regulations would authorize the disclosure of certain types of personal information of an employee.

IV RECOMMENDATIONS

[32] I recommend that SGI adjust its policies or procedures so that it gives a complete accounting of its investigation to affected individuals of privacy breaches. This may include disclosing disciplinary action taken against the employee.

[33] I recommend that SGI request that the Minister of Justice amend section 24(1.2) of FOIP to also include personal health information in the possession or control of SGI.

Dated at Regina, in the Province of Saskatchewan, this 24th day of November, 2021.

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