



INVESTIGATION REPORT 345-2019

Highway Traffic Board

October 21, 2021

Summary:

The Commissioner received a complaint from the Complainant alleging the Highway Traffic Board (HTB) disclosed their personal information and personal health information to Saskatchewan Government Insurance (SGI) without their consent. Upon investigation, the Commissioner found that the HTB had authority to disclose the Complainant's personal information and personal health information without consent pursuant to section 29(2)(u) of *The Freedom of Information and Protection of Privacy Act*, section 16(f) of *The Freedom of Information and Protection of Privacy Regulations* and section 27(4)(i) of *The Health Information Protection Act (HIPA)*. The Commissioner also found that the HTB was not in compliance with section 9 of HIPA due to its failure to inform the Complainant of the anticipated disclosure of their personal health information. The Commissioner recommended the HTB develop policies and procedures that promote knowledge and awareness of the rights extended to individuals under HIPA.

I BACKGROUND

- [1] On November 8, 2019, my office received a complaint from an individual (Complainant) alleging that the Highway Traffic Board (HTB) disclosed their personal information and personal health information to Saskatchewan Government Insurance (SGI) without their consent. The Complainant also indicated that the HTB did not inform them prior to release that the information would be disclosed.
- [2] The Complainant first raised their privacy concerns with the HTB on November 4, 2019. The HTB responded to the Complainant on November 8, 2019, indicating that it had authority to disclose the Complainant's personal information to SGI pursuant to sections 4(c) and 29(2)(u) of *The Freedom of Information and Protection of Privacy Act (FOIP)*

and section 27(4)(i) of *The Health Information Protection Act* (HIPA). The HTB also advised the Complainant that it was changing its process to better inform individuals in the future in order to avoid similar misunderstandings. The Complainant was not satisfied with this response and requested that my office investigate.

[3] On November 12, 2019, my office notified the HTB and the Complainant of its intention to investigate the matter. My office requested that the HTB provide an internal investigation report to my office. The HTB provided its report on December 6, 2019.

II DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[4] The HTB is a “government institution” pursuant to section 2(1)(d)(ii)(A) and section 3, Part 1 of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). This is also consistent with my findings at paragraphs [8] to [9] of Review Report 064-2020.

[5] As there appears to be “personal health information” involved in this matter, I must also determine if I have jurisdiction under HIPA. HIPA is engaged when three elements are present:

1. There is “personal health information” involved as defined at section 2(m) of HIPA;
2. There is a trustee as defined in section 2(t) of HIPA; and
3. That trustee has custody and control of the personal health information at issue.

[6] First, some of the information that is involved appears to include photographs of injuries the Complainant sustained in a motor vehicle accident. The HTB asserted it was likely not personal health information as SGI would have already known this information and it would have been visible to any observer who had seen the Complainant following the accident. However, these factors are not relevant in the determination. Regardless of what

others may know, the information either qualifies as personal health information under section 2(m) of HIPA or it does not. Photographs of the Complainant's injuries would constitute the "personal health information" of the Complainant as defined by section 2(m)(i) 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;

[7] Second, as I have already found that the HTB qualifies as a government institution, it would thereby also qualify as a "trustee" pursuant to section 2(t)(i) of HIPA.

[8] Lastly, based on the internal investigation report received from the HTB, it is clear the HTB had custody or control of the personal health information at the time it disclosed it to SGI.

[9] Therefore, I find that the HTB is a trustee with custody or control of the personal health information. As such, I have jurisdiction to conduct this investigation.

2. Is the Complainant's personal information and personal health information involved?

[10] In order for the privacy provisions under FOIP and HIPA to be engaged, the data elements at issue must constitute personal information and/or personal health information. I have already found that the Complainant's personal health information is involved in these matters. I will now consider whether there is also personal information involved.

[11] According to the HTB's internal investigation report, it did not conclude that personal information was involved. It listed the information provided by the Complainant to the HTB (later disclosed to SGI) as the following:

- 10 maps of the area of the accident including google maps;

- 51 pictures of the accident, the intersection etc.;
- 3 pictures that include the bump on the Complainant's head and 1 of a smear on the Complainant's windshield;
- 9 documents regarding the City of Saskatoon's bylaws and speed limits; and
- Copies of 9 documents either from or to SGI regarding the collision.

[12] According to the original complaint to the HTB, the Complainant identifies the following as having been in the original package:

- An 18 page letter from the Complainant; and
- 105 appendices that included photos and video links.

[13] Based on the above, it appears there is also "personal information" involved in this case. The Complainant's name is contained in the package of documents and the name is associated to several things in this package including: (1) a home address; (2) that the Complainant was clearly associated or involved in a motor vehicle accident; and (3) there is an appeal hearing occurring involving the Safe Driver Program with SGI through the HTB. Again, regardless of who may already know this information, it does not change the information's constitution. However, I do acknowledge that some of the data elements above, on their own, would not constitute personal information. For example, google maps, pictures of intersections, copies of the City of Saskatoon's bylaws and speed limits.

[14] Section 24(1) of FOIP defines what qualifies as "personal information". Sections 24(1)(e) and (k)(i) of FOIP provide that the home address of an individual is personal information and where a name of an individual appears with other personal information, the name can also qualify as personal information. Sections 24(1)(e) and (k)(i) of FOIP provide:

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:

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual;

[15] Therefore, it is clear that there is also personal information involved in this case.

3. Did the HTB have authority to disclose the Complainant's personal information and personal health information to SGI?

[16] Based on the original complaint made to the HTB, the issue appears to be that the HTB disclosed to SGI the package the Complainant provided it. The HTB acknowledged to my office that it disclosed the Complainant's package to SGI so there is no dispute on this fact.

[17] "Disclosure" is not defined in FOIP or HIPA. "Disclosure" is the exposure of personal information or personal health information to a separate entity, not a division or branch of the government institution or trustee in possession/custody or control of that information.

[18] Section 29(1) of FOIP provides that a government institution may disclose personal information with the consent of the individual. Where a government institution does not have the consent of an individual, it must have authority under section 29(2) or section 30 of FOIP for its disclosures. In this case, the HTB did not have the consent of the Complainant to disclose the package to SGI.

[19] Section 27(1) of HIPA also 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. As noted above, the HTB did not have consent.

[20] In its internal investigation report to my office, the HTB asserted that the disclosure to SGI was for the purpose of an appeal hearing and that it was "empowered as a tribunal, and charged with hearing these appeals, pursuant to *The Traffic Safety Act* and *The Automobile Accident Insurance Act*." The HTB asserted that it had authority to disclose the Complainant's personal information and personal health information to SGI pursuant to

sections 4(c) and 29(2)(u) of FOIP and sections 16(a) and (f) of the FOIP Regulations. In addition, section 27(4)(i) of HIPA.

[21] Section 29(2)(u) of FOIP provides for disclosures of personal information without consent in situations prescribed in the FOIP Regulations. Section 16(f) of the FOIP Regulations provides for disclosures without consent in situations involving proceedings before courts and tribunals. Section 29(2)(u) of FOIP and section 16(f) of the 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:

...
(u) as prescribed in the regulations.

16 For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:

...
(f) for the purpose of commencing or conducting a proceeding or possible proceeding before a court or tribunal;

[22] HIPA's section 27(4)(i) is intended to cover disclosures without consent in similar situations involving proceedings before courts and tribunals. Section 27(4)(i) 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:

...
(i) where the disclosure is being made for the purpose of commencing or conducting a proceeding before a court or tribunal or for the purpose of complying with:

- (i) an order or demand made or subpoena or warrant issued by a court, person or body that has the authority to compel production of information; or
- (ii) rules of court that relate to the production of information;

[23] A "proceeding" means a proceeding authorized by another Act, a civil proceeding or a grievance under a collective agreement (*The Saskatchewan Human Rights Code, 2018*, Chapter S-24.2, s. 30(1))

[24] A “tribunal” is a body or person that exercises a judicial or quasi-judicial function outside the regular court system (British Columbia Government Services, *FOIPPA Policy Definitions*, at gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions).

[25] On the Government of Saskatchewan website, it describes the HTB as follows:

The Highway Traffic Board is an independent quasi-judicial administrative tribunal responsible for hearing appeals for a number of programs administered by Saskatchewan Government Insurance (SGI), as well as administering other transportation regulatory functions.

Hearings are regarding decisions made by SGI under *The Traffic Safety Act* and *The Automobile Accident Insurance Act*, and are related to penalties such as licence suspensions, vehicle impoundments, SGI program ratings and commercial vehicle safety ratings. ...

(saskatchewan.ca/government/government-structure/boards-commissions-and-agencies/highway-traffic-board)

[26] Therefore, I find that the HTB is a “tribunal” for purposes of section 16(f) of the FOIP Regulations and section 27(4)(i) of HIPA.

[27] Both the Complainant and the HTB have advised my office that there was a Safe Driver Recognition appeal hearing occurring at the time of the disclosure, which concluded October 1, 2019. As such, there is no dispute that there was a tribunal proceeding occurring at the time.

[28] It appears the package provided to the HTB by the Complainant, was evidence for the HTB panel to consider for a Safe Driver Recognition appeal hearing. According to the HTB, it disclosed the Complainant’s package to the SGI Auto Fund Rate Administrator who was responsible for Safe Driver Recognition appeal hearings for SGI. The package was provided to SGI in preparation for the October 1, 2019 telephone hearing. According to the HTB, the panel completed the hearing and made its decision that the SGI sanction placing six points against the Complainant’s Safe Driver Recognition rating would remain in place. Further, since October 1, 2019, the Complainant has raised numerous concerns with the

hearing process. The HTB advised my office that it is rare for it to receive much documentation in these appeals, beyond the Safe Driver Recognition form from SGI.

[29] In its internal investigation report to my office, the HTB asserted that it is a matter of procedural fairness for parties of an appeal to have access to any written information the other party has provided to the adjudicator (the HTB) and to be present at the appeal hearing. It should be noted that according to the HTB, the Complainant also received the information the HTB received from SGI for the appeal hearing.

[30] I am satisfied that the purpose for the disclosure was conducting a proceeding before a tribunal consistent with section 16(f) of the FOIP Regulations and section 27(4)(i) of HIPA. Before concluding that the HTB had authority under FOIP and HIPA for the disclosure, I must consider two underlying principles of FOIP and HIPA: (1) need-to-know; and (2) data minimization.

[31] In order for a government institution or trustee to be able to rely on any provision in FOIP or HIPA for its disclosure of personal information or personal health information, it must also abide by the “need-to-know” and “data minimization” principles. Authority to disclose only exists when these principles are abided by. These two important principles underlie Parts IV of FOIP and HIPA. “Need-to-know” requires a government institution or trustee to disclose only on a need-to-know basis. “Data minimization” requires a government institution or trustee to disclose the least amount of personal information or personal health information necessary for the purpose.

[32] Although FOIP does not have an explicit provision requiring these principles be met, HIPA does have such a provision. Section 23(1) of HIPA provides:

23(1) A trustee shall collect, use or disclose only the personal health information that is reasonably necessary for the purpose for which it is being collected, used or disclosed.

[33] Based on the evidence before me, I find that the HTB’s disclosure to SGI abided by the need-to-know and data minimization principles. SGI was a party to the Safe Driver

Recognition appeal hearing and had a need-to-know the case before the tribunal. The Complainant's 18 page letter, along with the 105 appendices, were relevant to the case involving SGI. As such, the HTB has complied with section 23(1) of HIPA and with these underlying principles in FOIP.

[34] In conclusion, I find that the HTB had authority to disclose the Complainant's personal information and personal health information to SGI without the consent of the Complainant pursuant to section 29(2)(u) of FOIP, section 16(f) of the FOIP Regulations and section 27(4)(i) of HIPA.

[35] As I have found the HTB had authority under these provisions, I do not need to consider section 4(c) of FOIP or section 16(a) of the FOIP Regulations.

4. Was the HTB required to provide notice of the disclosure to the Complainant?

[36] In the complaint to my office and to the HTB, the Complainant took issue with the fact that the HTB did not "advise" them in advance that their personal information and personal health information would be disclosed to SGI. In addition, the disclosure occurred despite the email with the attached package having a confidentiality statement on it.

[37] FOIP does not have a provision requiring government institutions to inform individuals of anticipated disclosures made without consent. However, FOIP does set obligations on government institutions that collect personal information directly from individuals. 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.

[38] HIPA does have an explicit provision that speaks to the right to be informed. Section 9 of HIPA provides:

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.

(3) A trustee must establish policies and procedures to promote knowledge and awareness of the rights extended to individuals by this Act, including the right to request access to their personal health information and to request amendment of that personal health information.

[39] In its internal investigation report submitted to my office, the HTB advised:

... The HTB has updated its website to include information that SGI may attend [Safe Driver Recognition] hearings by phone and the HTB will be required to provide SGI with any written information supplied by the appellant if so requested. Additionally, the HTB will be advising future appellants of this possibility when their appeals are filed.

[40] It appears the HTB has acknowledged the need for a change in practice in terms of informing individuals when disclosures of their personal information or personal health information may occur. This is a very positive step.

[41] My office confirmed what was on the HTB's website. It has been amended to state the following:

How to File an Appeal:

- ...
- Provide the HTB with supporting documents at least two business days before your hearing date. Supporting documents include such items as diagrams, photographs, weather reports, garage invoices, witness statements, police reports, court documents and more. These should show the unusual or out of the ordinary circumstances you are trying to prove. Any supporting information provided to the HTB will also be given to SGI if they attend the hearing. ...

What to Expect at the Hearing:

- ...
- As part of the appeal process, a representative from SGI is entitled to attend the hearing and may or may not attend. ...

[42] However, at the requisite time, this was not the practice and it did not inform the Complainant of the anticipated disclosure to SGI. As such, I find that the HTB was not in compliance with section 9 of HIPA.

[43] In my offices notification email to the HTB on November 12, 2019, my office requested any relevant policies and procedures in this matter. None were received. In order to be compliant with section 9(3) of HIPA, the HTB should develop policies and procedures to promote more knowledge and awareness of the rights extended to individuals under HIPA.

IV FINDINGS

[44] I find that there was personal information and personal health information of the Complainant involved.

[45] I find that in making the disclosure to SGI, the HTB abided by the need-to-know and data minimization principles.

[46] I find that the HTB had authority to disclose the Complainant's personal information and personal health information to SGI pursuant to section 29(2)(u) of FOIP, section 16(f) of the FOIP Regulations and section 27(4)(i) of HIPA.

[47] I find that at the requisite time, the HTB was not in compliance with section 9 of HIPA.

V RECOMMENDATION

[48] I recommend the HTB develop policies and procedures to promote knowledge and awareness of the rights extended to individuals under HIPA pursuant to section 9(3) of HIPA.

Dated at Regina, in the Province of Saskatchewan, this 21st day of October 2021.

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