



INVESTIGATION REPORT 008-2017

eHealth Saskatchewan

June 23, 2017

Summary:

By means of a data sharing agreement, eHealth Saskatchewan (eHealth) routinely disclosed personal health information to Elections Saskatchewan (ESK) for the purpose of revising the voter registry. eHealth proactively reported a breach indicating that it had provided personal health information of those under the age of 16 to ESK. As a result, the Commissioner found that eHealth did not have legislative authority to provide any personal health information to ESK. He recommended a legislative amendment to allow this practice. In the event of a legislative change, the Commissioner also recommended that eHealth reconsider the disclosure of the health services number or ensure adequate safeguards are in place.

I BACKGROUND

[1] On January 18, 2017, eHealth Saskatchewan (eHealth) proactively reported a privacy breach to my office. eHealth indicated that it discloses personal health information of individuals over the age of 16 to Elections Saskatchewan (ESK) on a monthly basis for the purpose of establishing and maintaining a register of voters. eHealth advised this disclosure of personal health information was done pursuant to a data sharing agreement between eHealth and ESK. However, eHealth reported that within a 14 month period eHealth had disclosed the personal health information of between 50,624 and 83,403 individuals under the age of 16 to ESK without authority to do so.

[2] However, as a result, concerns were raised about eHealth's general practice of disclosing personal health information to ESK.

[3] On January 18, 2017, my office informed eHealth that this office would be monitoring this matter. On March 24, 2017, my office asked eHealth about its practice of disclosing personal health information to ESK. My office has also engaged ESK as part of its investigation.

II DISCUSSION OF THE ISSUES

1. Does HIPA apply in these circumstances?

[4] *The Health Information Protection Act* (HIPA) applies when three elements are present. The first element is personal health information, the second element is a trustee, and the third element is the personal health information in the custody or control of the trustee.

[5] Subsection 2(m) of HIPA defines personal health information as follows:

2 In this Act:

...

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

...

(v) registration information;

[6] Subsection 2(q) of HIPA defines registration information as follows:

2 In this Act:

...

(q) “**registration information**” means information about an individual that is collected for the purpose of registering the individual for the provision of health services, and includes the individual’s health services number and any other number assigned to the individual as part of a system of unique identifying numbers that is prescribed in the regulations;

[7] eHealth indicated that it provides name, date of birth, health services number (HSN), residential and mailing addresses and residency status of individuals in Saskatchewan to ESK pursuant to the data sharing agreement.

[8] At the time of the disclosure, this information was part of eHealth’s Personal Health Registration System (PHRS). The data elements were collected by eHealth for the purpose of registering individuals for the provision of health services. Therefore, the information qualifies as registration information pursuant to subsection 2(q) of HIPA and qualifies as personal health information pursuant to subsection 2(m)(v) of HIPA.

[9] Subsection 2(t) of HIPA defines trustee. The relevant parts are as follows:

2 In this Act:

...

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

(i) a government institution;

[10] Subsection 2(h) of HIPA defines trustee as a “government institution as defined in *The Freedom of Information and Protection of Privacy Act*”. Government institution is defined in subsection 2(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP) which provides:

2(1) In this Act:

...

(d) **“government institution”** means, subject to subsection (2):

...

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

[11] eHealth is prescribed as a government institution in Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*. As such, it qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP and as a trustee pursuant to subsection 2(t)(i) of HIPA.

[12] At the time of the disclosure, the personal health information held in the PHRS was in the custody or control of eHealth.

[13] All three elements are present, therefore, HIPA is engaged.

[14] ESK is not a government institution for the purposes of FOIP or a trustee for the purposes of HIPA. Although ESK is not a trustee, when my office carries out an investigation it is entitled to ask questions of any person in relation to the investigation. Thus, my office has asked questions of the staff of ESK in order to ensure my office understood the facts and circumstances. I appreciate their co-operation in this regard.

2. Does eHealth have authority to disclose personal health information to ESK?

[15] eHealth and ESK have entered into a data sharing agreement that was made effective on August 10, 2015. The agreement described an arrangement where eHealth provided a one time disclosure of personal health information for individuals aged 16 and over which included:

- Deaths that have occurred since January 1, 1998;
- Changes of name that have occurred since January 1, 1998; and
- Persons currently registered in PHRS.

[16] It also describes an arrangement where, on a monthly basis, eHealth would disclose personal health information of individuals aged 16 and over which include:

- Deaths that have occurred in the applicable month;
- The changes of names that have occurred in the applicable month; and
- Any new registrations or changes in registrations.

[17] For the purposes of this investigation, eHealth provided me with a copy of its data sharing agreement with ESK. Clause 2 of the agreement states:

Applicable Legislation. This information is being shared by eHealth pursuant to section 27(4)(1) of *The Health Information Protection Act* (Saskatchewan) and section 18.4(5) of *The Election Act, 1996* (Saskatchewan) (the "Election Act")...

[18] Subsection 27(4)(1) 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:

...

(1) where the disclosure is permitted pursuant to any Act or regulation;

[19] The data sharing agreement pointed to subsection 18.4(5) of *The Election Act, 1996* (the Election Act) as the subsection that permits the disclosure of personal health information. Section 18.4 of the Election Act provides:

18.4(1) In this section, “**government institution**” means a government institution as defined in *The Freedom of Information and Protection of Privacy Act*.

...

(3) The register of voters may be revised by any or all of the following methods:

...

(c) subject to subsection (5), using personal information held by a government institution if, in the opinion of the Chief Electoral Officer, the information is necessary for the purpose of revising the register;

...

(5) If the Chief Electoral Officer and a government institution have entered into an agreement for the purposes of this section, the government institution shall, at the request of the Chief Electoral Officer:

(a) for the purpose of clause (3)(c), provide personal information held by that government institution; and

(b) provide address, mapping, demographic or geographic information, including geospatial information.

[20] The Election Act permits government institutions to disclose personal information to ESK, but not personal health information. The Election Act does not define personal information, but does reference FOIP. Personal information is defined in subsection 24(1) of FOIP. Further, subsection 24(1.1) of FOIP specifically excludes information

that qualifies as personal health information from the definition of personal information as follows:

(1.1) “Personal information” does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

[21] eHealth acknowledged that the Election Act does not specifically permit it to disclose personal health information to ESK. It indicated, however, that it considered that the Election Act predates HIPA and therefore did not contemplate the notion of personal health information. It also submitted that the disclosure of the personal health information was consistent with the intent of the Election Act to allow the Chief Electoral Officer to establish and maintain a register of voters and to collect information from government institutions.

[22] I note that section 18.4 of the Election Act which allows government institutions to provide personal information to ESK was added to the Act in 2014, long after HIPA was enacted.

[23] While eHealth considered the intent of the Election Act, it did not indicate whether it considered the intent of HIPA. I note that subsection 4(1) of HIPA indicates that it prevails over other pieces of legislation where there is a conflict or inconsistency. It provides:

4(1) Subject to subsections (3) to (6), where there is a conflict or inconsistency between this Act and any other Act or regulation with respect to personal health information, this Act prevails.

[24] I also note that in previous reports, such as Investigation Report F-2010-001, this office has noted that HIPA falls into a quasi-constitutional category of privacy laws as recognized by the Supreme Court of Canada.

[25] As a result of the wording of the above sections, eHealth does not have the authority to disclose personal health information to ESK.

[26] I regret having to reach this conclusion because having an up-to-date register of voters is important for our democracy. eHealth is the trustee of valuable, current personal health information that can assist in maintaining an up-to-date register of voters. However, the legislation, as is, does not support the disclosure of this information.

[27] Section 6.4 of *The Health Information Protection Regulations* (the HIPA Regulations) lists specific circumstances where eHealth may disclose registration information without the consent of the subject individual. In order to rectify the situation, I strongly recommend an amendment to this section by adding the following clause to subsection 6.4(1) of the HIPA Regulations as follows:

6.4(1) For the purposes of subsection 28(8) of the Act, eHealth Saskatchewan may disclose registration information without the consent of the subject individual:

(d) who would be eligible to vote in an election if held in the following three months, to the Chief Electoral Officer for Saskatchewan for the purpose of revising the register of voters in accordance with a data sharing agreement between eHealth Saskatchewan and the Chief Electoral Officer;

[28] I strongly recommend eHealth promote and support the Ministries of Health and Justice in developing this change to the HIPA Regulations to allow the disclosure of personal health information for these registry purposes. I also encourage ESK to do what it can to have such an amendment made. Because it is important to keep the register of voters up to date, I ask the Government of Saskatchewan to move quickly to make this regulation change. I will do my part to facilitate this regulation change and I do ask the Ministry of Health and eHealth to consult my office as this regulation change is developed.

3. Should the HSN be used for revising the register of voters?

[29] I want to discuss eHealth's disclosure of the HSN to ESK. The HSN is explicitly captured by the definition of registration information pursuant to subsection 2(q) of HIPA. As such it qualifies as personal health information.

[30] Above I have concluded that eHealth currently does not have authority to disclose personal health information which includes the HSN and I have recommended an

amendment to section 6.4 of the HIPA Regulations which would allow eHealth to disclose registration information to ESK.

[31] I would ask that eHealth and ESK have discussions surrounding the need for disclosure of the HSN. If they conclude it is not required that would be consistent with the caution with which the HSN should be treated. If they conclude that the HSN is absolutely required, then I would ask that they take into account the following considerations and do all things possible to protect the HSN. Having an up to date register of voters is very important but having extra protections surrounding the HSN is just as important.

[32] Subsection 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] ESK has noted that the HSN is an integral part of its processing environment and helps track individuals in its database. It also clarified that it is not added to the register of voters or to the voters list – it is only used in the processing environment.

[34] Essentially, ESK uses the HSN to process information it receives from eHealth, which means in effect the HSN is used for data matching or data linking. Data linking means the linking or combining of personal health information in one database with personal health information in one or more other databases if the purpose of the linking or combining is different from the original purpose for which the personal health information was collected.

[35] My office has recently completed a paper entitled *Data Matching* which proposes standalone legislation to deal with an increasing trend in data matching and data linking. Part of our recommendation for new legislation dealing with data matching is to require that safeguards are in place before data matching occurs. These safeguards include:

- Requirements before starting a data matching project, including: 1) privacy impact assessment, 2) the definition of purpose and scope, 3) documenting in an agreement and 4) notifying the Commissioner of each project.

- Require destruction of data generated.
- Require information about data matching projects to be posted on website.
- Allow citizens to find out whether they are part of the data matching project.
- Require a report after data matching project is complete.

[36] I recommend that eHealth and ESK have discussions on the need for the HSN but if they conclude the HSN is essential, then eHealth should ensure most of these safeguards have been put in place. Because there is a data sharing agreement, some of these safeguards are there, so the recommendation is one to ensure that the discussion of safeguards continues.

[37] eHealth has also indicated that it is working on an initiative around patient identifiers. Its goals are to reduce and eliminate the sharing of the HSN as a unique identifier. It is also important that the above safeguards are in place if a different unique identifier is used. I recommend that eHealth consult with my office on this initiative.

4. Did eHealth follow best practices in its response to this privacy breach?

[38] I now turn my attention to the matter that eHealth proactively reported to my office. This is the unauthorized disclosure of personal health information under the age of 16 to ESK in the one time disclosure as well as monthly disclosures.

[39] I have reviewed the steps eHealth took to address the privacy breach that was reported to my office. Overall, I am satisfied with eHealth's response to the unauthorized disclosure of personal health information of individuals under the age of 16. This includes having developed procedures to routinely validate the personal health information disclosed to external stakeholders.

[40] However, I raised one outstanding matter. eHealth indicated that it discloses personal health information of individuals over the age of 16 to ESK on a monthly basis. However, the voting age in Saskatchewan is 18.

[41] Subsection 18.2(4) of the Election Act indicates that the register of voters consist of individuals who will be able to vote in the next election. It provides:

18.2(4) The register of voters may only contain the following voter data about persons ordinarily resident in Saskatchewan who are voters or who will be eligible to vote at the next general election after the date the information is collected:

[42] Although Saskatchewan has legislation regarding the timing of elections, general elections can end up at different times and by-elections must occur within six months after a vacancy in a constituency exists. Thus, there is a constant need to have the registry of voters up to date with the names of those eligible to vote at the time of the general election or by-election. This means that all persons 18 or older who are otherwise eligible need to be on that registry. It will be necessary for eHealth to design its programs so that ESK, on a monthly basis, gets the names of those turning 18 in three months.

[43] I have reviewed Schedule C of the data sharing agreement between eHealth and ESK that describes the monthly disclosure of personal health information. I recommend eHealth discuss with ESK the best methods of providing names of those individuals who will be 18 within three months and eligible to vote in the next election and incorporate it into the data sharing agreement. This would be in line with the need to know principle which means trustees and their staff should only collect, use or disclose personal health information needed for the an authorized purpose. An extension of this principle is that collection, use and disclosures should only occur when the personal health information is needed.

[44] I have attempted to provide for this in my recommendation to amend subsection 6.4(1) of the HIPA Regulations.

III FINDINGS

- [45] I find that eHealth qualifies as a trustee pursuant to subsection 2(t)(i) of HIPA.
- [46] I find that eHealth does not have authority to disclose personal health information, including HSN, to ESK.
- [47] I find that eHealth adequately responded to the breach of disclosing the personal health information of individuals under the age of 16 to ESK.

IV RECOMMENDATIONS

- [48] I strongly recommend an amendment to subsection 6.4(1) of the HIPA Regulations.
- [49] I strongly recommend that eHealth promote and support the Ministries of Health and Justice in processing this HIPA Regulation amendment to allow the disclosure of registry information for the purpose of revising the register of voters.
- [50] I recommend that eHealth and ESK have discussions on the need for HSN but if they conclude the HSN is essential, then eHealth ensure appropriate safeguards have been put in place.
- [51] I recommend that eHealth provide notification to individuals whose personal health information has been disclosed to ESK through its website and the media.
- [52] I recommend eHealth discuss with ESK the best methods of providing names of those individuals who will be 18 within three months and eligible to vote in the next election.

[53] Finally, I would like to encourage ESK, the Ministry of Health and the Ministry of Justice to support amendments to the *HIPA Regulations* as recommended above. Their support is necessary and essential to ensure that our province has an accurate and up-to-date voter registry and I would hope this amendment could be achieved quickly.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of June, 2017.

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