Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 109-2016

Saskatchewan Registered Nurses' Association (SRNA)

August 30, 2016

Summary: The Saskatchewan Registered Nurses' Association (SRNA) posted a Notice of Hearing on its website containing one of its member's grandmother's personal health information. Further, it shared the books of exhibits with the member's legal counsel that contained the grandmother's personal health information. The grandmother's representative complained to the SRNA and to the Office of the Information and Privacy Commissioner (IPC). The IPC found that subsection 27(4)(i) of *The Health Information Protection Act* (HIPA) and section 30 of *The Registered Nurses' Act, 1988* (RNA) authorizes the disclosure of the personal health information to the member but not to any person who accesses SRNA's website. The IPC also found that SRNA did not abide by the data minimization principle as outlined in section 23 of HIPA, that HIPA does not authorize the disclosure of personal health information on the basis of the open court principle, and that SRNA had not sufficiently amended its policy regarding posting Notice of Hearings on its website. However, the IPC did find that subsection 27(4)(i) of HIPA authorizes the disclosure of personal health information, without consent, for the purpose of conducting a proceeding before a tribunal.

I BACKGROUND

[1] On December 10, 2015, a member of the Saskatchewan Registered Nurses' Association (SRNA) was served with a Notice of Hearing, charging her with professional misconduct. Included in the charges was that the member had posted her grandparents' personal health information on her personal Facebook page. The Notice of Hearing included the excerpt from the member's Facebook page.

[2] On December 22, 2015, the SRNA posted the Notice of Hearing on its website. The Notice of Hearing was posted in its entirety without any redactions.

[3] In his letter dated August 9, 2016 to my office, SRNA's legal counsel stated a pre-hearing occurred prior to the discipline hearing. Within that pre-hearing, SRNA's legal counsel stated that:

> a discussion was held to ensure that full disclosure had been done and that there were not any concerns about the contents of the exhibit books or the content of the Notice of Hearing or any other relevant matter. No issues were raised at that time about the content of the Notice of Hearing or of the book of exhibits and, particularly, about the disclosure of personal health information.

[4] The Discipline Hearing occurred on February 10, 11 and 12, 2016.

[5] In his letter dated August 9, 2016 to my office, SRNA's legal counsel said it suggested that the grandparents' health chart extracts be de-identified in the exhibit book at the beginning of the discipline hearing. He asserted that the member's counsel objected to the de-identification. The Discipline Committee ordered that the health chart extracts be de-identified.

[6] On February 11, 2016, the second date of the hearing, SRNA's legal counsel asserted that member's counsel had raised concerns over the Notice of Hearing on SRNA's website was not de-identified. The Discipline Committee ordered that the Notice of Hearing on SRNA's website be de-identified.

[7] On February 23, 2016, the grandmother's representative (Representative) submitted a complaint to the SRNA. Her complaint was that the SRNA violated *The Health Information Protection Act* (HIPA) by posting the Notice of Hearing on its website in December 2015. Further, the Representative also alleged that the SRNA had not sought permission from the grandmother to include the grandmother's personal health information in the books of exhibits used in the hearing.

[8] The SRNA responded to the Representative in a letter dated April 8, 2016. It stated that it has done the following three things to address the Representative's concerns:

1) It redacted the Notice of Hearing and re-posted the Notice of Hearing on February 12, 2016. SRNA informed the Representative that it has amended its policy to redact patient names and other identifiable information, prior to posting a notice.

2) It implemented a step to redact identifiable information, where appropriate, prior to sharing exhibits with a member's legal counsel.

3) It was advised by its legal counsel that the documents that the Representative was concerned about had been destroyed.

[9] The Representative was not satisfied with SRNA's response so she requested that my office investigate the matter. On May 17, 2016, my office notified both the Representative and the SRNA that it would be undertaking an investigation.

II DISCUSSION OF THE ISSUES

1. Does the information at issue qualify as "personal health information" as defined by subsection 2(m) of HIPA?

[10] The SRNA is a trustee as defined by subsection 2(t)(xiii) of HIPA:

> 2 In this Act:
> ...
> (t) "trustee" means any of the following that have custody or control of personal health information:
> ...
> (xiii) a health professional body that regulates members of a health profession pursuant to an Act;

[11] 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:
> (i) information with respect to the physical or mental health of the individual;

[12] The unredacted Notice of Hearing was posted on SRNA's website in December 2015 and contained the grandmother's last name and the facility where she received treatment. I find that such information qualifies as personal health information as defined by subsection 2(m) of HIPA.

[13] The Representative also alleged that the grandmother's personal health information, including the grandmother's Minimum Data Set (MDS) Quarterly Assessment, was included in the books of exhibits that was shared by SRNA with the member's legal counsel. Based on the Ministry of Health's website, a MDS is an assessment tool used for Home Care. I find that information collected through an MDS would qualify as personal health information pursuant to subsection 2(m) of HIPA.

2. Does subsection 27(4)(i) of HIPA authorize SRNA to post personal health information on its website?

[14] As noted earlier, SRNA is a trustee under HIPA. Therefore, SRNA must only disclose personal health information pursuant to HIPA.

[15] In his letter dated August 9, 2016 to my office, SRNA's legal counsel asserted that subsection 27(4)(i) of HIPA authorized the publication of the personal health information contained within the Notice of Hearing on SRNA's website. Subsection 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

[16] Where a discipline hearing is to take place, section 30 of *The Registered Nurses' Act*¸*1988* (RNA) provides that the member (or nurse) is to be notified of the date, time and place of the hearing. It provides:

> 30(1) Where a report of the investigation committee recommends pursuant to section 28 that the discipline committee hear and determine a complaint, the executive director shall, at least 30 days prior to the date the discipline committee is to sit:
>
> (a) send a copy of the complaint contained in a written report prepared pursuant to subsection 28(3) to the nurse who is the subject of the complaint; and
>
> (b) notify the nurse mentioned in clause (a) of the date, time and place of the hearing.

[17] Therefore, subsection 27(4)(i) of HIPA and section 30 of RNA would authorize SRNA to serve the Notice of Hearing, that contains personal health information, on the member. Serving the Notice of Hearing on the member would be for the purpose of commencing a proceeding before a tribunal.

[18] However, in addition to serving the member, SRNA published the Notice of Hearing on its website. By doing so, it effectively disclosed personal health information to any person who accessed its website. In other words, the public.

[19] There is a difference between serving the member with a Notice of Hearing that contains personal health information and publishing the Notice of Hearing that contains personal health information on SRNA's website. Serving the Notice of Hearing on the member means that SRNA is disclosing personal health information to the member. Such a disclosure is for the purpose of commencing a proceeding before a tribunal. Publishing the Notice of Hearing on the website is a disclosure to the general public.

[20] I find that subsection 27(4)(i) of HIPA and section 30 of RNA authorizes the disclosure of personal health information to the member, but not to any person who accesses the SRNA website.

3. Does HIPA authorize SRNA to publish the grandmother's personal health information on its website in accordance with the open court principle?

[21] In his letter dated August 9, 2016 to my office, SRNA's legal counsel stated that it must be remembered that the open court principle "is a constitutional principle and therefore it overrides any legislation if necessary." SRNA's legal counsel asserted that SRNA was abiding by the open court principle when it published the personal health information in the Notice of Hearing on its website. However, he acknowledged that there needs to be a balance between the open court principle and privacy. He asserted he considered factors for de-identifying the personal health information and for publishing the personal health information. He concluded that SRNA should publish the personal health information because of the following reasons:

- publishing the personal health information would help the public have a proper understanding of the charge laid against the member,
- the personal health information had already been widely circulated to the public through the member's Facebook page, and
- the personal health information was published in the local newspaper.

[22] The open court principle provides that the courts should be open to public scrutiny to ensure the proper administration of justice. There are cases, though, where openness is limited to protect the privacy, including publication bans which protect complainants, victims, and/or witnesses. Further, in *Patient 0518 v RHA 0518*, 2016 SKQB 175, the Court of Queen's Bench for Saskatchewan noted that the open court principle is not absolute. There are circumstances in which public access to legal proceedings should be restricted.

[23] Applying the open court principle to a discipline committee is fine in relation to the public having access to the hearing but that does not necessarily mean that all personal health information needs to be distributed to the public or made available on a website.

[24] Courts are not subject to access and privacy laws. However, the SRNA is. It is a trustee under HIPA. Further, its discipline committee is not a court but a tribunal. Therefore, it must only collect, use, and/or disclose personal health information according to HIPA. SRNA has chosen to abide by the open court principle (which is laudable) but it has no choice but to also abide by HIPA.

[25] In this case, the personal health information at issue belongs to the grandmother of the member being charged. The open court principle does not require the grandmother be the subject of public scrutiny and, as I have already found earlier, HIPA does not authorize the disclosure of her personal health information on SRNA's website.

[26] Therefore, I find that HIPA does not authorize the disclosure of personal health information on SRNA's website.

4. Did the SRNA abide by the data minimization principle?

[27] SRNA published the Notice of Hearing on its website without de-identifying or redacting the personal health information. In his letter dated August 9, 2016 to my office, SRNA's legal counsel asserted that it took a common sense approach when it quoted the exact text from the member's Facebook page in its Notice of Hearing. SRNA's legal counsel asserted the following:

> It would be going contrary to common sense to state the Investigation Committee could not repeat the core of the charge facing [the member]. The same common sense approach is used in defamation actions. If a person files a civil action alleging defamation, the rules of pleading require that he or she specifically state what words were spoken as part of the defamation. The mere restating of those words is not in and of itself a new defamation. It is simply meeting the requirements of the rules of pleading to specifically state what words are alleged to be defamatory.

[28] At issue is the posting of the personal health information on SRNA's website, not the Notice of Hearing that was served on the member. As I already found earlier, subsection 27(4)(i) of HIPA does not authorize SRNA to publish personal health information on its website. Therefore, if SRNA wishes to publish the Notice of Hearing on its website, it should have considered the data minimization principle in section 23 of HIPA. Specifically, it should have considered subsection 23(4) of HIPA, which provides that trustees must use or disclose only de-identified personal health information if the de-identified information will serve the purpose. Subsection 23(4) of HIPA provides:

> 23(4) A trustee must, where practicable, use or disclose only de-identified personal health information if it will serve the purpose.

[29] I find that SRNA did not abide by the data minimization principle.

[30] To inform the public, on its website, the SRNA could have only advised of the date, time, and place of the hearing and the member involved. Using de-identified information in accordance with subsection 23(4) of HIPA, the SRNA could have advised its membership and the public that the professional misconduct the member was being charged with was that she published a patient's personal health information on her Facebook page.

5. Does HIPA authorize the disclosure of personal health information in the books of exhibits shared with the members' legal counsel?

[31] The Representative alleged that by including the grandmother's personal health information, such as the grandmother's MDS assessment, in the books of exhibits provided to the member's legal counsel was a breach of privacy. She stated that the SRNA did not seek her consent to have the grandmother's personal health information shared in the books of exhibits.

[32] Subsection 27(4)(i) of HIPA provides that trustees may disclose personal health information without consent for the purpose of conducting a proceeding before a court or a tribunal. Subsection 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...

[33] A proceeding is an action or submission to a court, judge, or other body (such as a tribunal) having authority, by law or by consent, to make decisions. The Discipline Committee, established pursuant to RNA, is a tribunal that makes disciplinary decisions regarding members of the SRNA. The submission of evidence is a part of conducting a proceeding before the Discipline Committee, according to subsection 30(2) of RNA:

> 30(2) The investigation committee shall submit to the discipline committee evidence respecting the complaint, but its members shall not participate in any other manner in the hearing of the complaint, except as witnesses when required.

[34] In his letter dated August 9, 2016 to my office, SRNA's legal counsel advised my office that it included personal health information in its books of exhibits to establish that the member's grandparents were indeed residents within the named facility.

[35] I find that submitting evidence to the discipline committee is a part of the proceeding and therefore, subsection 27(4)(i) of HIPA authorizes the SRNA to disclose personal health information, without consent, to the discipline committee.

[36] As a best practice, I would recommend the SRNA or the professional body and their legal counsels, carefully review the evidence submitted and redact or de-identify as much of that personal health information as is possible. This may have to be done with the consent of the members' legal counsel. I would encourage members' legal counsel to be cooperative and helpful in this process. Occasionally members' legal counsel may have to review the actual personal health information before agreeing to it being redacted or de-identified. I believe this is a good practice for all tribunals and all legal counsel. As noted in the background section, SRNA's legal counsel noted in his letter dated August 9, 2016 that he had asked that the health chart extracts in the books of exhibits be de-identified at the opening of the hearing. I commend him for doing so.

6. Has the SRNA sufficiently amended its policy or processes to prevent similar occurrences?

[37] To minimize the posting of personal health information on its website in the future, SRNA provided my office with its amended policy (policy number AS-9.3) to read as follows:

> Notice of Hearing and the Stage 1 Hearing dates will be posted on the SRNA website....Identifiable patient names, facility names and complainant names **may be redacted at the discretion of the Association**.
>
> [emphasis added]

[38] Since SRNA is a trustee, it must have authority under HIPA to disclose personal health information. The de-identification of identifiable information should not be at the discretion of the SRNA but it should be done in accordance with HIPA. In its letter dated August 9, 2016 to my office, SRNA's legal counsel asserted that "the word 'may' was used to reflect the balancing of factors that go into a decision to redact or not redact the core of a charge." It is not optional for SRNA to determine if it will disclose personal health information in accordance with HIPA or not. It must only disclose personal health information in accordance with HIPA. Therefore, I find that the SRNA has not sufficiently amended its policy AS-9.3. I recommend that SRNA amend its policy to state that SRNA personal health information will only be posted on its website in accordance

with HIPA and all efforts will be exercised to redact and de-identify personal health information.

[39] In regards to personal health information within its books of exhibits, the SRNA advised my office in an email dated July 5, 2016 that it has directed its legal counsel to review the contents to determine what, if any, personal health information will be included.

[40] I find that while it is appropriate that SRNA give its legal counsel such direction, it is SRNA who is ultimately responsible for the collection, use, and/or disclosure of personal health information in its custody or control. Initially, my office recommended that SRNA insert a step in its procedure so that both SRNA staff and SRNA legal counsel review the books of exhibits for personal health information prior to sharing the books of exhibits with a member's legal counsel in the discipline process. However, in his letter dated August 9, 2016 to my office, SRNA's legal counsel advised that the council of the SRNA cannot become involved in establishing policies that would govern the procedure of the Investigation Committee or the Discipline Committee. He said that the council can only adopt a bylaw governing either committees' procedures pursuant to subsection 15(2)(g) of RNA. He suggested that the Investigation Committee and the Discipline Committee could adopt internal procedures to remind the two committees of the competing principles that are at play when deciding what needs to be done to meet the requirements of Bylaw 9, Section 4, paragraphs 5, 6 and 7, subsection 27(4)(i) of HIPA and section 2(b) of the Charter of Rights and Freedoms regarding the open court principle.

[41] I find that SRNA's legal counsel's suggestion should be adjusted so that the Investigation Committee first determines if de-identified information can be disclosed within the books of exhibits pursuant to subsection 23(4) of HIPA. If identifiable personal health information must be disclosed, then the Investigation Committee should ensure that the disclosure is in accordance with subsection 27(4)(i) of HIPA.

[42] Having agreed that this the responsibility of both the Investigation and the Discipline Committees, I continue to encourage legal counsel for the SRNA and any member to work cooperatively to either redact or de-identify personal health information and if the

personal health information is needed for the hearing to further cooperate to minimize the risk of the personal health information becoming public.

III FINDINGS

[43] I find that the information at issue qualifies as personal health information as defined by subsection 2(m) of HIPA.

[44] I find that subsection 27(4)(i) of HIPA and section 30 of RNA authorizes the disclosure of personal health information to the member, but not to any person who accesses SRNA's website.

[45] I find that SRNA did not abide by the data minimization principle as outlined in section 23 of HIPA.

[46] I find that submitting evidence to the Discipline Committee is a part of the proceeding and therefore, subsection 27(4)(i) of HIPA authorizes the SRNA to disclose personal health information, without consent, to the Discipline Committee.

[47] I find that the SRNA has not sufficiently amended its policy AS-9.3.

[48] I find that SRNA's direction to its legal counsel to review the contents of the books of exhibits and to determine what, if any, personal health information will be included in the materials is appropriate.

IV RECOMMENDATIONS

[49] I recommend that SRNA further amend the policy to state it will only disclose personal health information on its website if the disclosure is authorized by HIPA. If the Notice of Hearing served on the members contains personal health information, then I recommend that SRNA redact or de-identify the personal health information prior to posting it on its website.

[50] I recommend that SRNA's Investigation Committee insert a step so that it determines if de-identified information can be disclosed in the book of exhibits in accordance with subsection 23(4) of HIPA. If personal health information must be disclosed, then it should ensure it does so in accordance with subsection 27(4)(i) of HIPA.

Dated at Regina, in the Province of Saskatchewan, this 30th day of August, 2016.

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