



INVESTIGATION REPORT 183-2016, 186-2016, 187-2016

No trustee

September 14, 2016

Summary: The Office of the Information and Privacy Commissioner (IPC) learned that a photocopier containing personal health information had been sold at an auction. The IPC undertook an investigation and found that *The Health Information Protection Act* (HIPA) does not apply to this situation because there is no trustee as defined by subsection 2(t) of HIPA. The IPC recommended that the Government of Saskatchewan amend HIPA to expand the definition of HIPA.

I BACKGROUND

- [1] On June 27, 2016, my office received a telephone call from the Office Manager from Gateway Alliance Medical Clinic (Gateway Alliance). She reported that staff at Gateway Alliance was contacted by an individual (Mr. Z) who purchased a photocopier from an auction and alleged that the photocopier had printed pages of paper that contained personal health information on the Midway Walk-in Healthcare Centre (Midway) letterhead, and the names of two physicians (Physician A and Physician B) that were working at Gateway Alliance. She reported that this individual said there were more documents still in the queue to be printed. Finally, she alleged that this individual inquired whether or not Gateway Alliance wished to purchase the personal health information for \$5000.
- [2] The Office Manager stated she was directed by Physician A at Gateway Alliance to contact the last known owner of Midway, herein referred to as Mr. X. When contacted by

the Office Manager, Mr. X advised that he had purchased the photocopier for \$850 from Mr. Z. Mr. X advised my office that he was simply trying “to do the right thing”.

- [3] To my office, Mr. X indicated he had purchased Midway in 2013 and the photocopier was already at Midway. When he sold Midway in 2014, he sent items, including the photocopier, to an auction. He was unaware that the photocopier had documents stored on the machine at that time. Mr. X advised my office that he had purchased the photocopier earlier this year from Mr. Z, and that he stored the photocopier in an office at his place of business.
- [4] On July 21, 2016, my office attended Mr. X’s place of business. Since the photocopier was a Toshiba photocopier, my office also engaged a Toshiba technician to attend as well. My office observed that there were no more documents in the queue for printing and that there were no documents stored on the hard drive for any of the other functions, including scanning and faxing.
- [5] The Toshiba technician provided my office with a document that showed Toshiba’s service history on this particular photocopier. The last service call was made on September 13, 2012, when a jam could not be cleared.
- [6] The Toshiba technician was also able to produce a print log that showed that many print jobs were sent to this photocopier on September 13, 2012. However, after that date, the photocopier was not used again until nearly two years later on June 2, 2014 to print one page. Then, the photocopier was not used again until two years after that, on June 24, 2016, where it printed or copied 30 pages of paper. Presumably, these 30 pages of paper were printed by Mr. Z.
- [7] Finally, the Toshiba technician produced a document that showed the settings of the hard drive. This document indicated that documents stored on the hard drive were to be deleted after 30 days. He indicated that it would be incredibly difficult for the average person to be able to obtain any information that had been stored on this hard drive.
- [8] My office requested the Toshiba technician to remove the hard drive from the photocopier for the purpose of my office’s investigation.

[9] On July 22, 2016, my office contacted Mr. Z, the individual who had purchased the photocopier at an auction. He indicated he had shredded the documents and no longer had the documents.

[10] On July 28, 2016, my office sent notifications to Mr. X, Physician A, and Physician B indicating that my office would be undertaking an investigation. It invited each of them to provide information that might pertain to the investigation.

II DISCUSSION OF THE ISSUES

1. Does *The Health Information Protection Act (HIPA)* apply?

[11] In order for HIPA to apply, there must be 1) a trustee, 2) personal health information, and 3) the trustee must have custody or control over the personal health information. Therefore, I must first determine if Mr. X, Physician A, or Physician B qualify as a trustee in this matter. If any of them qualify as a trustee, I then need to determine if personal health information was involved. If so, then I need to determine if the trustee had custody or control of the personal health information.

a. Is there a trustee?

[12] Subsection 2(t) of HIPA defines “trustee” as follows:

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

- (i) a government institution;
- (ii) a regional health authority or a health care organization;
- (iii) Repealed. 2002, c.R-8.2, s.77.
- (iv) a licensee as defined in *The Personal Care Homes Act*;
- (v) a person who operates a facility as defined in *The Mental Health Services Act*;
- (vi) a licensee as defined in *The Health Facilities Licensing Act*;
- (vi.1) a licensee as defined in *The MRI Facilities Licensing Act*;
- (vii) an operator as defined in *The Ambulance Act*;
- (viii) a licensee as defined in *The Medical Laboratory Licensing Act, 1994*;
- (ix) a proprietor as defined in *The Pharmacy and Pharmacy Disciplines*

Act;

(x) a community clinic:

(A) as defined in section 263 of *The Co-operatives Act, 1996*;

(B) Repealed. 2014, c.17, s.7.

(C) incorporated or continued pursuant to *The Non-profit Corporations Act, 1995*;

(xi) the Saskatchewan Cancer Foundation;

(xii) a person, other than an employee of a trustee, who is:

(A) a health professional licensed or registered pursuant to an Act for which the minister is responsible; or

(B) a member of a class of persons designated as health professionals in the regulations;

(xiii) a health professional body that regulates members of a health profession pursuant to an Act;

(xiv) a person, other than an employee of a trustee, who or body that provides a health service pursuant to an agreement with another trustee;

(xv) any other prescribed person, body or class of persons or bodies;

[13] Based on my office's correspondence with Mr. X, I understand that he is a business person and not a health care professional. While he was the owner of Midway, there is no clause in subsection 2(t) that states the owner of a health facility, or a clinic operator qualifies as a trustee. Therefore, Mr. X does not qualify as a trustee as defined by subsection 2(t) of HIPA.

[14] Next, I need to determine if Physician A or Physician B qualify as trustees under HIPA. On August 19, 2016, Physician A and Physician B's lawyer provided a submission that stated that both physicians could qualify as trustees under HIPA but argued that they did not have control over the patient records at Midway once they ceased working at Midway.

[15] Based on the above, I find that both physicians would qualify as a trustee pursuant to subsection 2(xii)(A) of HIPA.

b. Was there personal health information?

[16] Subsection 2(m) defines "personal health information" as follows:

2(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;
- (ii) information with respect to any health service provided to the individual;
- (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
- (iv) information that is collected:
 - (A) in the course of providing health services to the individual; or
 - (B) incidentally to the provision of health services to the individual; or
- (v) registration information;

[17] As mentioned in the background section, Mr. Z alleged that the photocopier had printed documents that contained personal health information, the two physician names, and Midway's letterhead. However, he asserted that he shredded the documents. Therefore, my office was unable to review the documents themselves to determine if they contained personal health information.

[18] However, my office is confident that personal health information is likely involved in this matter since the documents produced by the Toshiba technician indicate that the photocopier was once used by Midway. A photocopier located within a medical clinic is likely to copy and produce documents containing personal health information.

[19] Therefore, I find that personal health information is involved in this matter.

c. Was the personal health information in the custody or control of the trustees?

[20] Since I found that Physician A and Physician B qualify as trustees pursuant to subsection 2(xii)(A) of HIPA, I need to determine if the personal health information was in the custody or control of Physician A and Physician B.

[21] As mentioned earlier, Physician A and Physician B's lawyer provided a submission to my office. Within that submission, he stated the following:

- Both physicians were independent contractors with an agreement with Midway whereby they would pay to Midway a percentage of their collections in exchange for being able to work at Midway.

- That “throughout their time at Midway neither of them purchased, owned or maintained any electronic equipment used at Midway, including any photocopiers or fax machines.”
- That “they were able to arrange access [to personal health information] with Midway, however they never obtained physical possession or access to their patient records as Midway has always retained possession of all patient records at all times”
- That “throughout their time at Midway there were privacy policies in place that had to be followed and [Physician A] and [Physician B] relied on Midway to ensure patient information would be disclosed in appropriate circumstances.”
- That “neither of them ever had any ownership interest in Midway or in any assets that Midway may have owned.”
- That while both physicians could be defined as trustees under HIPA, they did not have any control over the patient records once they ceased working at Midway.

[22] Based on the above, Physician A and Physician B were contractors at Midway who would not have been in charge of managing office equipment, including the photocopier. Rather, it would seem as though the owner of Midway would have been in charge of managing office equipment. So while both physicians would have been able to access and use the photocopier, I am satisfied that neither of them would have had custody or control over the personal health information stored on the photocopier.

[23] Since neither trustee, Physician A or Physician B, had custody or control over the personal health information, I find that HIPA does not apply to this matter.

[24] There is a gap in the definition of “trustee” in HIPA. Mr. X gained ownership of the photocopier when he purchased Midway in 2013. As I have already found earlier, Mr. X does not qualify as a trustee under HIPA. Therefore, patients do not have the protection of HIPA when their personal health information is collected, used, and/or disclosed by a health facility where the owner is a non-trustee.

[25] I note, though, that the federal private sector privacy law, *Personal Information Protection and Electronic Documents Act* (PIPEDA), may apply to health facilities owned by non-trustees.

[26] I find the situation extremely frustrating and concerning. To think that my personal health information was given to and collected by a physician but when stored or

processed, my personal health information did not have the protection of HIPA. When my physician leaves a practice, my personal health information has less protection. When an owner (non-trustee) sells a facility, my personal health information has no protection. In other words, no one is protecting some of the most sensitive information regarding me. For these reasons, I ask the Ministry of Health, the College of Physicians and Surgeons and other health professional bodies to work on ways of giving my personal health information some protection.

[27] In my Annual Report (Striking a Balance), www.oipc.sk.ca, in making proposals to amend HIPA, I propose the definition of trustee be expanded. That proposed definition is the same as recommended below.

(xv) a person who operates a facility whose primary purpose is the provision of health services provided by health professionals licensed or registered pursuant to an Act.

IV FINDINGS

[28] I find that Mr. X does not qualify as a trustee under HIPA.

[29] I find that both Physician A and Physician B qualify as trustees under HIPA.

[30] I find that neither Physician A nor Physician B had custody or control of personal health information that was stored on the photocopier.

[31] I find that HIPA does not apply to this matter.

[32] I find that the definition of trustee is inadequate.

V RECOMMENDATIONS

[33] I recommend that the Government of Saskatchewan add the clause described in paragraph [26] to subsection 2(t) of HIPA.

[34] I recommend the College of Physicians and Surgeons study this matter and develop proposals, standards and definitions that would further protect personal information of patients in circumstances outlined in this report.

Dated at Regina, in the Province of Saskatchewan, this 14th day of September, 2016.

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