



Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 255-2017 & 256-2017

Dr. Christina Ames Saskatchewan Health Authority (formally Regina Qu'Appelle Regional Health Authority)

March 2, 2018

Summary:

Dr. Christina Ames' briefcase, which contained personal health information, was lost or stolen while she was on a trip. The Commissioner found that Dr. Ames was trustee of some of the personal health information and Regina Qu'Appelle Regional Health Authority (RQRHA) was trustee of the rest. He found that Dr. Ames properly investigated the situation and made recommendations to her regarding safeguards of personal health information in her custody and control. The Commissioner found that the RQRHA did not investigate. In light of recent legislative amendments and the creation of the Saskatchewan Health Authority (SHA), the Commissioner made several recommendations to the SHA regarding the use of personal health information by contracted physicians and potential disclosures among trustees where appropriate.

I BACKGROUND

- [1] On December 4, 2017, the Regina Qu'Appelle Regional Health Authority (RQRHA) became part of the Saskatchewan Health Authority (SHA).
- [2] On September 20, 2017, Dr. Christina Ames proactively reported a privacy breach to my office. While attending a medical conference in Ontario, Dr. Ames' briefcase, which contained patient information, was either lost or stolen. This occurred on September 29, 2016.

- [3] At the time of the breach, Dr. Ames was an emergency room physician at RQRHA. Some of the patient information was related to treatment and care of individuals who were injured at work. As such, Dr. Ames was in the process of completing forms for submission to the Saskatchewan Workers' Compensation Board (WCB). The other information related to responses to patient care concerns.
- [4] My office called in to question whether the patient records were under the custody and control of Dr. Ames or RQRHA. On October 19, 2017, my office provided notification to both Dr. Ames and RQRHA of my intention to investigate this matter.
- [5] In the time that has passed between the breach and the date of this Report, there has been many changes. As noted, RQRHA has been merged into the SHA. Additionally, there have been amendments to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). As such, I will first discuss the breach under the legislation in effect at that time. I will then discuss how recent changes have impacted the relationship between the SHA and emergency room physicians and make recommendations regarding how the SHA should proceed.

II DISCUSSION OF THE ISSUES

1. Does HIPA apply in these circumstances?

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

A. Personal Health Information

[7] Personal health information is defined in subsection 2(m) of HIPA which provides:

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;

[8] Dr. Ames indicated that some of the information in her briefcase at the time it was lost/stolen was the “pink sheets”. RQRHA provided me with a blank copy of the “pink sheet”. It is a four layer carbon copy form entitled *OUTPATIENT/EMERGENCY*. Some of the data items that could be collected on the form includes:

- Name, address, health services number, next of kin, date of birth and gender which qualifies as registration information pursuant to subsection 2(q) of HIPA and as personal health information pursuant to subsection 2(m)(v) of HIPA;
- Vital signs, medication, allergies, complaint which would qualify as personal health information because it is information with respect to the physical or mental health of the individual pursuant to subsection 2(m)(i) of HIPA;
- Name of physicians, procedures, physicians’ orders which qualify as personal health information pursuant to subsection 2(m)(ii) of HIPA because it describes health services provided to the individual.

[9] I note that the four copies of the carbon paper form indicate who each form is intended for: health records, finance, family physician and attending physician.

[10] Dr. Ames also indicated that she had the letter of concerns from the patients as well as her responses to patient care concerns on her laptop. This information included her notes of the care received by the affected individuals and her written responses to the concerns. Based on Dr. Ames' description of these records, it appears the records contain information with respect to the physical or mental health of the individuals and information with respect to any health service provided to the individuals. These records qualify as personal health information pursuant to subsections 2(m)(i) and (ii) of HIPA.

B. Trustee

[11] Subsection 2(t) of HIPA defines a trustee. The relevant provisions are as follows:

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

...

(ii) the provincial health authority or a health care organization;

...

(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;

...

[12] At the time of the privacy breach, subsection 2(t)(ii) of HIPA provided:

2(t)(ii) a regional health authority or a health care organization;

[13] At the time of the breach, RQRHA qualified as a trustee pursuant to subsection 2(t)(ii) of HIPA.

[14] Dr. Ames is a physician licenced by the College of Physicians and Surgeons pursuant to *The Medical Profession Act, 1981*. As such, she can qualify as a trustee pursuant to subsection 2(t)(xii)(A) of HIPA if she is not an "employee of a trustee", namely RQRHA.

I will discuss this in detail when I consider if the personal health information in question was in the custody and/or control of Dr. Ames or RQRHA.

C. Custody or Control

[15] Simply because an individual or an organization qualifies as a trustee, it does not mean they would qualify as ‘the’ trustee of personal health information in this circumstance. In order to determine who is ‘the’ trustee the individual must also have custody or control of the personal health information in question.

[16] Custody is the physical possession of a record by a trustee with a measure of control. Control connotes authority. A record is under the control of a trustee when the trustee has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition. Custody is not a requirement.

[17] The relationship between Dr. Ames and RQRHA at the time of the privacy breach was complex. Both RQRHA and Dr. Ames asserted in their submissions that Dr. Ames had custody and control of the personal health information at the time it was lost or stolen. However, I will consider whether RQRHA also had custody or control of the personal health information.

i. The relationship between Dr. Ames and RQRHA

[18] In their submissions, RQRHA and Dr. Ames indicated that Dr. Ames was a contractor working for RQRHA, not an employee.

[19] Dr. Ames has provided me with copies of two contracts she signed with RQRHA. The first is a letter of understanding that was signed in December of 2012. It specifically states that Dr. Ames is an “independent contractor”. It does not contain provisions that address personal health information. The second is an agreement for services which refers to Dr. Ames as a “Contractor”. It was signed in November 2016, less than two months after the privacy breach. However, section 5.1 of the agreement states:

5.1 Subject to the provisions of section 6 of this Agreement, and unless renewed by mutual agreement prior to the expiration of the term, the term of this Agreement will commence on January 1st 2014 and will end on December 31st, 2018.

ii. What was the data flow for the personal health information in the pink sheets?

[20] As the personal health information in question has not been recovered, I cannot discuss the specifics of each case. However, I will outline the general data flow of personal health information recorded on the pink sheets in question when individuals let staff know in the emergency room at RQRHA.

[21] RQRHA had legislative responsibility for providing emergency room services in its health region. Section 27 of *The Regional Health Services Act*, in force at the time of the breach, provided:

27(1) A regional health authority is responsible for the planning, organization, delivery and evaluation of health services it is to provide:

(a) within its health region; and

(b) within any other area that may be directed by the minister.

(2) In carrying out its responsibilities pursuant to subsection (1), a regional health authority shall:

...

(d) co-ordinate the health services it provides with those provided by other providers of health services;

(3) A regional health authority shall comply with this Act and the regulations.

[22] RQRHA entered a contract with Dr. Ames to assist in providing emergency services in an RQRHA facility. RQRHA equipment, materials and support staff are also used to provide those services. If RQRHA had not contracted the services of Dr. Ames, she would not be involved in those particular emergency services that were provided to the affected individuals who let the emergency room know it was a WCB issue and the subsequent personal health information that was generated on the pink sheets.

- [23] For all patients that she saw in the emergency room, Dr. Ames would assess and provide care to the patient. She would document the details of the injury/illness and the care and treatment she provided to the patient on the pink sheet. Whether the patient was an injured worker, or not, she would document these details on a pink sheet.
- [24] As such, I conclude that RQRHA initially had custody and control of the personal health information on the pink sheets.
- [25] As noted, both the submissions of RQRHA and Dr. Ames contend that Dr. Ames also had custody and control of the personal health information in question. Therefore, I must consider whether Dr. Ames also had custody and control and how this occurred.
- [26] Section 8.5 of the agreement between RQRHA and Dr. Ames provides:
- 8.5 The Authority agrees to give the Contractor access to any patient record (that is the property of the Authority) which is necessary for the delivery of Emergency Room Services pursuant to this Agreement. The Authority also agrees, subject to privacy legislation and RHA policies and procedures, to give the Contractor reasonable access, including the right to copy any patient record in which an entry has been made by or on behalf of the Contractor.
- [27] This clause appears to have given Dr. Ames a lot of ability to collect personal health information from RQRHA, even though the authority for these uses and disclosures are not clear. I also note the agreement does not use terms consistent with those in HIPA. The agreement does not specify what personal health information is the “property of the authority”. HIPA instead relies on the concept of ‘custody and control’. Further, the agreement does not specify whether “reasonable access” refers to uses or disclosures.
- [28] The pink sheets in question all related to injured workers, as such *The Workers’ Compensation Act, 2013* (WCA) was engaged. The WCA placed an obligation on Dr. Ames to provide personal health information related to these individuals to the WCB. This will be discussed in more depth later in this report. Further, WCB pays Dr. Ames directly for this work.

[29] The contract between RQRHA and Dr. Ames indicates that Dr. Ames must not use RQRHA's facilities, personnel or equipment, or invoice RQRHA for any time spent, performing administrative tasks related to her duties in the emergency room.

3.7 The Contractor acknowledges that, as an independent contractor, the Contractor will not make use of any of the Authority's facilities, personnel or equipment, or invoice the Authority for any time spent, in performing any administrative functions with respect to the delivery of the Emergency Room Services, including, but not limited to: scheduling, invoicing, arranging for replacement Physicians, attending continuing medical education courses, bookkeeping, accounting, banking and all other administrative functions that are in any way connected with, or related to, the Emergency Room Services provided by the Contractor.

[30] Dr. Ames was required to provide personal health information to WCB, who pays her for her services. Further, Dr. Ames' contract indicates she is not able to do this work in RQRHA facilities. Therefore, when Dr. Ames took or received the "attending physician" copy of the pink sheets, a disclosure of personal health information occurred.

[31] I find that, after the disclosures took place, Dr. Ames then had custody of the personal health information on the pink sheets.

iii. *What was the data flow for the personal health information related to the patient concerns?*

[32] Dr. Ames also indicated that copies of letters of concerns by patients, notes related to the patient concerns and her responses to the concerns were also lost or stolen.

[33] Dr. Ames provided service to these patients as part of her duties as a contractor for RQRHA. Dr. Ames said that the patient concerns were raised through RQRHA. RQRHA forwarded these concerns to Dr. Ames. She had responded to these concerns related to her work as a contractor of RQRHA.

[34] While still in a facility of RQRHA, Dr. Ames made notes on her laptop regarding the care the patients received. She then took those notes home and worked on the responses on her personal laptop. This constituted a disclosure. The notes were now in the custody and

control of Dr. Ames. Her laptop which was in her briefcase was subsequently lost or stolen. I note again that Dr. Ames' contract does not allow her to perform the administrative function of responding to complaints in RQRHA facilities.

2. Was the disclosures of personal health information by RQRHA to Dr. Ames authorized by HIPA?

[35] When a trustee discloses personal health information, there must be authority for doing so. Authority for disclosures is described in sections 27 to 29 of HIPA. The authority to disclose would be linked to the reason the trustee would disclose it.

[36] With respect to the specific personal health information that was lost or stolen, Dr. Ames indicated that the disclosure of personal health information was made for these two reasons:

- Providing personal health information regarding a worker's injury to WCB; and
- Responding to concerns of patients made through RQRHA.

[37] My office asked RQRHA what authority it had to disclose personal health information to Dr. Ames.

A. Did RQRHA have authority to disclose personal health information to Dr. Ames for the purpose of a WCB claim?

[38] In response, to the disclosures related to a worker's injuries, RQRHA indicated it relied on section 20 of HIPA and subsection 12(1) of *The Hospital Standards Regulations*.

[39] Section 20 of HIPA provides:

20(1) Where one trustee discloses personal health information to another trustee, the information may become a part of the records of the trustee to whom it is disclosed, while remaining part of the records of the trustee that makes the disclosure.

(2) Where personal health information disclosed by one trustee becomes a part of the records of the trustee to whom the information is disclosed, the trustee to whom the

information is disclosed is subject to the same duties with respect to that information as the trustee that discloses the information

[40] I note that this section of HIPA does not authorize a trustee to disclose personal health information to another trustee. It only serves the purpose of describing actions that must occur when a trustee makes a disclosure authorized by sections 27, 28 or 29 of HIPA.

[41] Subsection 12(1) of *The Hospital Standards Regulations* provides:

12(1) Subject to subsection (2), within 48 hours of the admission of a patient to a hospital, the board shall require the attending physician, a physician designated by the attending physician, the attending midwife or a midwife designated by the attending midwife to:

- (a) take and record a medical history of the patient;
- (b) make and record a physical examination of the patient; and
- (c) make and record a provisional diagnosis of the patient's condition.

[42] This provision requires that a physician must create certain records. It does not authorize a health authority to disclose those records to a physician.

[43] As a physician, Dr. Ames has a duty under the WCA to provide the WCB with information about an injury to a worker. Sections 55 and 57 of the WCA provide:

55 Any health care professional who attends to or is consulted with respect to an injury to a worker shall:

- (a) furnish the board with any reports with respect to the examination or treatment of the worker that are relevant to the injury for which compensation is claimed;
- (b) give all reasonable and necessary information, advice and assistance to the injured worker or the worker's dependants in making an application for compensation; and
- (c) furnish any certificates and proofs that the board may require.

...

57 Every health care professional or hospital official who attends to, is consulted with respect to or has care of an injured worker:

(a) shall furnish the board with any reports that:

(i) deal with the examination or treatment of the worker that are relevant to the injury for which compensation is claimed; and

(ii) are required by the board; and

(b) may charge a fee for a report furnished pursuant to clause (a) in an amount that the board may determine.

[44] Subsection 2(1)(p) of the WCA defines “health care professional” as follows:

2(1) In this Act:

...

(p) “health care professional” means a physician, dentist, chiropractor, optometrist, psychologist, occupational therapist, physical therapist, nurse or any other person who is registered or licensed pursuant to any Act to practise any of the healing arts;

[45] The WCA does not define “hospital official”, however, I note this would refer to an individual and not an organization such as RQRHA or the SHA. With respect to sections 55 and 57 of the WCA, the duty is on an individual not an organization.

[46] Because the duty was on Dr. Ames as an individual, and not RQRHA, to provide personal health information regarding a worker’s injury to WCB, it is not part of Dr. Ames duties as a contractor or employee of RQRHA to do so. Further, the WCB compensates physicians directly for the care provided to an injured worker in an emergency room. Under her contract, Dr. Ames was not able to perform the administrative tasks of submitting personal health information to WCB and arranging for payment using RQRHA resources.

[47] When an injured worker appears at the emergency room, he/she is asked to indicate that the injury or illness is work related. The individual is seeking both medical services and engages the WCA.

[48] I found in Investigation Report 124-2017 and 135-2017 that disclosures for billing purposes was authorized by subsection 27(2)(a) of HIPA because billing is an activity consistent

with the purpose the personal health information was collected. Subsection 27(2)(a) of HIPA provides:

27(2) A subject individual is deemed to consent to the disclosure of personal health information:

(a) for the purpose for which the information was collected by the trustee or for a purpose that is consistent with that purpose;

[49] The disclosure of personal health information between RQRHA and Dr. Ames for these purposes is authorized pursuant to this provision.

B. Did RQRHA have authority to disclose personal health information to Dr. Ames for the purpose of responding to patient concerns?

[50] The personal health information that was on Dr. Ames' laptop which was lost/stolen related to concerns of patients of RQRHA.

[51] RQRHA indicated that the disclosures of the personal health information in question to Dr. Ames were authorized through consent by the affected individual and pursuant to subsection 27(4)(k)(ii) of HIPA.

[52] In response to my office's draft report, RQRHA advised that its patient advocates always ask for to "share" personal health information with care providers. My office asked RQRHA to provide more details about the express consent given by the patients in question to RQRHA to disclose personal health information. This included when and how it was communicated specifically that the personal health information would be disclosed to Dr. Ames. RQRHA indicated that it could not identify the affected individuals during my investigation. It later noted that its patient advocates ask patients with concern to complete an intake form. The form includes the collection of consent to continue the advocacy on behalf of the patient but nothing was provided to demonstrate what consent was sought and provided in these cases with respect to the disclosure of personal health information. I am not persuaded that the affected individuals in question consented to the disclosure of their personal health information to Dr. Ames.

[53] Subsection 27(4)(k)(ii) 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:

...

(k) where the disclosure is being made for the purpose of:

...

(ii) planning, delivering, evaluating or monitoring a program of the trustee;

[54] I determined in Investigation Report 021-2017, 067-2017 & 068-2017 that responding to complaints about past service provided would fall under subsection 27(4)(k)(ii) of HIPA because it would qualify as evaluation. However, the evaluation must be a program of the trustee. In this case, RQRHA was the trustee of the information before it was disclosed to Dr. Ames. Therefore, the program that is being evaluated must be that of RQRHA.

[55] All of the patient concerns were received by RQRHA. Dr. Ames was asked to respond to the concerns by RQRHA because of her role in providing care to the patients as a contracted physician of RQRHA. Dr. Ames provided my office with copies of e-mails from RQRHA providing instructions to her. The following are observations from reviewing these e-mails:

- It appears that all, but one, of the concerns were initially received by one of RQRHA's client representatives. The other she received in her RQRHA mailbox. Dr. Ames worked with RQRHA to respond all of the concerns.
- RQRHA was not consistent with who asked Dr. Ames to respond to the concerns. Different individuals within RQRHA asked Dr. Ames to respond to the different concerns, such as different client representatives, the head of the emergency physicians and the Confidential Administrative Assistant for Emergency Room Administration, Emergency Medical and Ambulatory Care Administration.
- Only one of the requests made to Dr. Ames provided instructions with respect to accessing personal health information of the individuals with concerns. It stated that a chart had been pulled and Dr. Ames could access it in the health information management services department. None of the instructions indicated if Dr. Ames could use the personal health information or if RQRHA would disclose personal health information to her.
- Only one of the six concerns was focused solely on care provided by Dr. Ames. The other five concerns appeared to relate to care that was provided at RQRHA in which Dr. Ames was involved. In all cases, Dr. Ames was providing care as a contracted physician of RQRHA.

- [56] After reviewing this material, it is apparent that the individuals in question took their concerns to RQRHA. For the most part, the concerns dealt with care provided by RQRHA. Therefore, the program being evaluated is that of RQRHA.
- [57] I must then consider whether the disclosure of personal health information in this case was necessary for the evaluation of the program.
- [58] RQRHA indicated that one of two things occurred when a physician is asked to respond to patient concerns with respect to access to personal health information. One possibility is that RQRHA's Health Information Management Services (HIMS) would copy the documentation which was generated by that physician and send them to a patient advocate. Alternatively, the physician is given access to records related to the episode of care while on site so the physician can make notes from that paperwork to formulate a response.
- [59] RQRHA has indicated that it does not have a specific policy that deals with the disclosure of personal health information to emergency room physicians. In other words, there is no formal policy or procedure to clarify what was described above. Further, none of the instructions received by Dr. Ames addressed the issue of the disclosure of personal health information for the purpose of addressing the concerns.
- [60] My office asked Dr. Ames how she knew she was authorized by RQRHA to take the personal health information in question. Dr. Ames indicated that when she received her first patient care concern, she was informed by her department head that she needed to respond to the letter of concern directly. Her recollection is that she was told to pull the relevant charts at the health records department and draft her responses. However, she notes sometimes the chart had been pulled for her by the health records department. She noted that, to her knowledge, all other emergency room physicians follow this practice when a patient care concern is forwarded to them. She indicated that she was not supervised when she accessed the personal health information. The procedure described by Dr. Ames is not the same as the procedure that RQRHA described.

[61] It is troublesome that RQRHA would allow those involved in specific episodes of care free, unsupervised access to personal health information when concerns about that care has been raised. This gives an opportunity for these individuals to alter or erase personal health information if they are so inclined. I note that there is no suggestion that Dr. Ames has done so and it has not been a focus in our investigation. I am talking in general terms here and flagging possible risks.

[62] It does not appear that the disclosure of personal health information to contracted physicians for the purpose of responding to concerns is an issue that has been formally considered or addressed by RQRHA.

[63] I note that the decision to disclose personal health information pursuant to subsection 27(4)(k)(ii) of HIPA is discretionary. I also note trustees are also authorized to use personal health information for the purpose of evaluating programs of the trustee pursuant to subsection 26(2)(a) of HIPA which provides:

26(2) A trustee may use personal health information:

(a) for a purpose for which the information may be disclosed by the trustee pursuant to section 27, 28 or 29;

[64] Disclosure is the exposure of personal health information to a separate entity, not a division or branch of the trustee in custody or control of that information. Use includes reference to or manipulation of personal health information by the trustee that has custody or control of the information, but does not include disclosure to another person or trustee.

[65] The contract between Dr. Ames and RQRHA, which was in effect when Dr. Ames was asked to respond to three of the six patient concerns, indicates that she must participate in evaluation activities. Some examples from the contract include:

3.8 The Contractor agrees to participate in, and provide any reasonably requested information that is required for any evaluation which the Authority may undertake regarding the provision of Emergency Room Services in the Region, related to effectiveness, efficiency and patient care.

The Authority and the Contractor agree that the Emergency Room Services shall include the following:

Participation in departmental meetings, morbidity and mortality rounds, peer and/or chart reviews and reasonable participation in any departmental and Authority quality improvement and utilization evaluation and initiatives, on reasonable notice.

[66] As noted above at paragraph 29, pursuant to clause 3.7 of the same agreement, Dr. Ames could not make use of any of the RQRHA's facilities, personnel or equipment for performing any administrative functions with respect to the delivery of the emergency room services.

[67] RQRHA passively allowed the disclosure of the personal health information in question to Dr. Ames. However, an internal use of the personal health information in this case would have also met the needs of RQRHA because Dr. Ames was required to respond in her role as a contracted physician of RQRHA.

[68] If the RQRHA was required to share the personal health information related to the patient concerns to Dr. Ames for the purpose of responding to the concerns, RQRHA should have had formal, established procedure to follow. If a physician is required to review personal health information in order to respond to a concern, RQRHA should have written policies and procedure that facilitate a controlled environment for this use of this personal health information. This use of the personal health information for these purposes would be authorized pursuant to subsections 26(2)(a) and 27(4)(k)(ii) of HIPA.

[69] In addition, Dr. Ames intended to give notification to these patients after her briefcase was lost/stolen. She was unable to do so because she did not have contact information for the individuals. RQRHA, now SHA, does have the contact information of these patients. I recommend that the SHA provide notification of the breach to the affected individuals.

3. Did RQRHA respond appropriately to the privacy breach?

[70] My office recommends that trustees take the following five steps when responding to a privacy breach:

- Contain the breach;
- Notify affected individuals;
- Investigate the breach;
- Prevent future breaches; and
- Write a privacy breach report.

[71] When my office initiates an investigation, the trustee is asked to do an internal investigation and provide a copy of its investigation report to my office. In response to the notification of my investigation to this matter, RQRHA indicated that it “reviewed but declined to investigate” this matter. It noted that “Dr. Ames is the responsible trustee for the PHYSICIAN copies of medical records she as the physician presided over.” As such, RQRHA did not follow best practices in response to this matter.

[72] While I have found that Dr. Ames did have custody and control of the personal health information in question at the time it was lost/stolen, I also found that RQRHA’s disclosure of this personal health information to Dr. Ames was not authorized in all cases.

[73] Although RQRHA did not provide my office with a formal investigation report as requested, it did answer many of my office’s questions during the investigation. As a result, I have noted some concerns with what seemed to be the general practices of RQRHA with respect to disclosing personal health information to physicians contracted to provide services in its emergency rooms.

[74] First, my office asked RQRHA how often it disclosed personal health information on the “pink sheets” to emergency room physicians. RQRHA responded that its understanding was that pink sheets were collected by emergency room physicians on every encounter with a patient. It also advised that if the sheet were not collected, its health records department may mail this sheet to the physician. In the course of my office’s investigation, Dr. Ames indicated that this was not her experience. She noted that pink sheets were only collected for the purposes of complying with the WCA.

[75] My office also asked RQRHA if it tracks disclosures of the pink sheets to emergency room physicians. RQRHA indicated it was impossible to determine if the pink sheet was removed on every visit. Section 10 of HIPA provides:

10(1) A trustee must take reasonable steps to ensure that the trustee is able to inform an individual about any disclosures of that individual's personal health information made without the individual's consent after the coming into force of this section.

(2) This section does not apply to the disclosure of personal health information for the purposes or in the circumstances set out in subsection 27(2).

[76] Although the disclosures of pink sheets to Dr. Ames for the purposes of WCB claims was authorized by subsection 27(2) of HIPA, RQRHA indicated that it disclosed all pink sheets to physicians and did not track the disclosures without knowing the authority for disclosure. These disclosures were not tracked. This is contrary to section 10 of HIPA. Further, it is best practice to track all disclosures.

[77] RQRHA does not have a policy addressing the disclosure of personal health information to its contracted physicians.

[78] Subject to HIPA, all disclosures of personal health information made by RQRHA, should be transaction specific. Every disclosure should have clear authorization by HIPA and respect the data minimization and need-to-know principles.

[79] Personal health information should only be available to those employees in an organization that have a legitimate need-to-know that information for the purpose of delivering their mandated services. A trustee should limit collection and use of personal health information to what he/she needs-to-know to do his/her job, not collect or use information that is nice to know.

4. Did Dr. Ames respond appropriately to the privacy breach?

[80] Dr. Ames took many steps to respond to this breach.

[81] **Contain the breach** – On the day that Dr. Ames' briefcase was missing, Dr. Ames took several steps to try and recover it. Her efforts are detailed in her investigation report. This includes driving 90 minutes back to the location where she had last seen her briefcase.

Although it was not recovered, I am satisfied that she took appropriate steps to try to contain the breach.

[82] **Notify affected individuals** – Dr. Ames intended to notify the affected individuals whose personal health information was on her laptop. However, as discussed earlier, she did not have contact information for these affected individuals. Further, Dr. Ames was unable to identify the affected individuals with respect to the pink sheets. As such, she was unable to notify any affected individuals about the breach.

[83] **Investigate the breach** – Dr. Ames acquired professional assistance to investigate the breach. A report was provided to my office. I am satisfied that she has adequately investigated the breach.

[84] **Prevent future breaches** – Dr. Ames provided a list of measures she has implemented to prevent future breaches of a similar nature. They include:

- leaving all paper copies of patient records at the two Regina hospitals where she is contracted to work;
- not retaining personal health information on her laptop except if absolutely necessary;
- enabling password-protected encryption on her laptop to ensure personal health information is inaccessible to anyone other than her;
- deleting all personal health information from her laptop immediately after it is no longer needed;
- enabling password-protected encryption on the external hard drive used to back-up her laptop; and
- storing her external hard drive in a fire and water proof safe in her home.

[85] I am concerned with Dr. Ames plans to leave all personal health information disclosed to her at a SHA facility. If personal health information is disclosed to her and she uses it for an authorized purpose, it is her duty to protect that personal health information. I question her ability to do this in another trustee's facility. I recommend that she arrange a space somewhere outside of the SHA to securely store personal health information that has been disclosed to her.

[86] I also recommend that Dr. Ames develop written policies and procedures addressing the personal health information that has been disclosed to her, including a detailed record retention and disposition schedule.

[87] **Write a privacy breach report** – Dr. Ames provided my office with a copy of her report.

[88] I am satisfied with Dr. Ames’ response to this breach.

5. How does the current legislation apply?

[89] In December 2017, *The Regional Health Services Act* was repealed and replaced with *The Provincial Health Authority Act*. The SHA now has responsibility to provide emergency room services pursuant to section 4-1 of *The Provincial Health Authority Act*. Further, subsection 3-4(3) of *The Provincial Health Authority Act* provides:

3-4 (3) Notwithstanding any other Act, regulation, agreement or law, all assets, liabilities, rights and obligations of each former regional health authority continue as the assets, liabilities, rights and obligations of the provincial health authority.

[90] The SHA now qualifies as a trustee pursuant to subsection 2(t)(ii) of HIPA as amended.

[91] I also note that on January 1, 2018, amendments to LA FOIP also came into effect. The SHA also qualifies as a local authority for the purposes of LA FOIP.

[92] Dr. Ames qualifies as a trustee pursuant to subsection 2(t)(xii)(A); however the qualifier is that she cannot be an employee of another trustee. The term employee is not defined by HIPA. However, subsection 2(b.1) of LA FOIP now defines employee as follows:

2 In this Act:

...

(b.1) “employee” means an individual employed by a local authority and includes an individual retained under a contract to perform services for the local authority;

- [93] On a go forward basis under LA FOIP, employees will include individuals on contract. Thus, I recommend that the SHA adopt this definition of employee and consider the definition to include contracts with physicians for the purposes of all access and privacy matters in both LA FOIP and HIPA.
- [94] To facilitate this shift in the SHA's relationship with its contracted physicians, I recommend that the SHA change its contracts with physicians in the following ways:
- Add a clear statement that all personal health information collected or used during the performance of their contractual duties is under the custody and control of the SHA;
 - Indicate that all disclosures of personal health information to the contracted physician be approved by the SHA;
 - Amend clause 3.7 to allow a physician to complete documentation requiring the use of personal health information within the facility and using the SHA's resources. This would prevent the need to remove documents containing patient information and would reduce the risk of such information going astray. I note section 16 of HIPA and section 23.1 of LA FOIP which imposes on a trustee and local authority a duty to protect personal health information and personal information.
- [95] Further, I recommend that the SHA create policies and procedures which describe the process in which the SHA considers and approves disclosures of personal health information to contracted physicians. This procedure should include a method to track all disclosures of personal health information.
- [96] I also recommend that the SHA facilitate a way for physicians to provide the requisite personal health information to WCB and receive payment for those services in the most secure manner possible. I recommend that the SHA promote an amendment to the HIPA Regulations regarding the disclosure of personal health information to physicians for the purpose of complying with the WCA.
- [97] I recommend that the SHA assist Dr. Ames in determining who the affected individuals were related to the pink sheets so that she can provide notification.

III FINDINGS

- [98] I find RQRHA first had custody and control of the personal health information in question.
- [99] I find that Dr. Ames had custody and control of the personal health information at the time it was lost or stolen.
- [100] I find that RQRHA was authorized to disclose personal health information on the pink sheets to Dr. Ames pursuant to subsection 27(2)(a) of HIPA.
- [101] I find that RQRHA did not have the authority to disclose the personal health information related to the patient concerns to Dr. Ames.
- [102] I find that Dr. Ames responded appropriately to this breach.

IV RECOMMENDATIONS

- [103] I recommend that the SHA and Dr. Ames work together to determine if it is possible to identify the affected individuals related to the WCB claims. If so, I recommend that Dr. Ames provide notification to the affected individuals.
- [104] I recommend that the SHA provide notification to the affected individuals who had the concerns.
- [105] I recommend that Dr. Ames arrange a space somewhere outside of the SHA to securely store personal health information that has been disclosed to her.
- [106] I recommend that Dr. Ames develop written policies and procedures addressing the personal health information that has been disclosed to her, including a record retention schedule.

[107] I recommend that the SHA change its contracts with physicians in the following ways:

- Add a clear statement that all personal health information collected or used during the performance of their contractual duties is under the custody and control of the SHA;
- Indicate that all disclosures of personal health information to the contracted physician must be approved by the SHA;
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[109] I also recommend that the SHA facilitate a way for physicians to provide the requisite personal health information to WCB and receive payment for those services in the most secure manner possible.

[110] I recommend that the SHA promote an amendment to the HIPA Regulations regarding the disclosure of personal health information to physicians for the purpose of complying with the WCA.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of March, 2018.

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