



Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 292-2016

No trustee

March 29, 2017

Summary:

The Complainant had rescinded his consent he gave to a doctor at CBI Health Group (CBI) to disclose his personal health information to the Saskatchewan Workers' Compensation Board (WCB). In spite of rescinding his consent, CBI still disclosed his personal health information to WCB. The Office of the Information and Privacy Commissioner (IPC) found that CBI does not qualify as a trustee under *The Health Information Protection Act* (HIPA). The IPC recommended that the Government of Saskatchewan amend HIPA to expand the definition of trustee. Further, the IPC recommended that CBI provide notification of its legal authority to collect, use, and/or disclose personal health information instead of seeking the individual's consent.

I BACKGROUND

- [1] The Complainant is an injured worker who was receiving benefits from the Saskatchewan Workers' Compensation Board (WCB). The Complainant was referred to a psychologist at the CBI Health Group (CBI).
- [2] On May 12, 2016, the Complainant met with the psychologist. The psychologist requested that the Complainant sign a form. The form was entitled "Consent to the Collection, Use, and Disclosure of Personal or Personal Health Information". The Complainant signed the consent form.

- [3] On May 25, 2016, the Complainant met with the psychologist again. At this meeting, the Complainant rescinded his consent. On the consent form, he wrote “I withdraw my consent as I was not properly informed of my rights.”
- [4] The psychologist completed a discharge report dated May 31, 2016.
- [5] In a letter dated May 31, 2016, WCB advised the Complainant that it had received communication from the psychologist indicating that the two sessions with the Complainant went poorly and that further appointments would not be possible. Since there would be no further appointments, WCB advised the Complainant that his benefits were being terminated.
- [6] In a letter dated October 5, 2016, the Complainant asked CBI why it submitted its discharge report to WCB without his consent. CBI responded in a letter dated November 1, 2016 by explaining that consent is not required for it to disclose personal health information. It explained that *The Workers’ Compensation Act, 2013* (WCA) obliged it to provide the information to WCB.
- [7] The Complainant was dissatisfied with CBI’s response. In a letter dated December 12, 2016, he requested that my office open an investigation. On December 15, 2016, my office notified the Complainant and WCB that it would be undertaking an investigation.

II DISCUSSION OF THE ISSUES

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

- [8] 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 CBI qualifies as a trustee.

a. Does CBI qualify as a trustee?

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

22 In this Act:

...

(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 Patient Choice Medical Imaging 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;

[10] In its submission, CBI referenced my office’s file 017/2012 where it determined that CBI did not qualify as a trustee under HIPA. No public report was issued on this matter.

[11] CBI is a national interdisciplinary network of health care and support professionals. Its head office is located in Toronto, Ontario but it has health centres located across Canada. When I consider the definition of trustee set out above, I find that CBI does not qualify as a stand-alone trustee as defined by subsection 2(t) of HIPA.

- [12] Furthermore, CBI does not have a contract with WCB to be a service provider. If it were a service provider under contract with WCB, then CBI would have to comply with the applicable parts of HIPA and *The Freedom of Information and Protection of Privacy Act* (FOIP) since WCB is a trustee under HIPA and a government institution under FOIP. In an email dated February 17, 2017, CBI confirmed with my office it does not have a contract but it is accredited by WCB to conduct assessments on workers.
- [13] Since CBI is neither a trustee under HIPA nor a service provider under contract with WCB, then I find that HIPA does not apply.
- [14] In its email dated March 21, 2017 to my office, CBI asserted that the psychologist (who is not an employee but an independent contractor) is a trustee pursuant to subsection 2(t)(xii) of HIPA. On March 27, 2017, it provided my office with a copy of the contract between the psychologist and CBI. According to the contract, CBI is responsible for file storage. This would suggest that CBI has custody of the records containing personal health information. Also, according to the contract, the psychologist agrees to provide services and reports to CBI so that CBI can meet its obligations to sponsors and customers. This suggests that CBI also has control over the personal health information. Furthermore, the contract requires that the psychologist abide by the policies and procedures of CBI in respect to the collection, use and disclosure of personal and personal health information. This also suggests that CBI has control over the personal health information.
- [15] So even if the psychologist is a trustee pursuant to subsection 2(t)(xii) of HIPA, she does not have custody or control over the personal health information. As noted at paragraph [8], the trustee must have custody or control over the personal health information. In this case, CBI has custody or control over the records. As I have already found CBI is not a trustee. In other words, a non-trustee has custody or control over the records.
- [16] I find it wrong that CBI - an organization that collects, uses, and discloses personal health information – does not qualify as a trustee under HIPA. In my office’s 2015-2016 Annual Report and in my office’s Investigation Report 183-2016, 186-2016, and 187-2016, my office proposed to expand the definition of trustee to the following:

(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.

[17] I recommend that the Government of Saskatchewan amend HIPA and expand the definition of “trustee” so that organizations like CBI would qualify as a trustee.

[18] Even though HIPA does not apply, the federal private sector privacy law *Personal Information Protection Electronic Documents Act* (PIPEDA) and Ontario’s *Personal Health Information Protection Act* (PHIPA) may apply. This is because CBI is an organization that engages in commercial activities whose head office is located in Ontario but has centres not only in Ontario but across Canada. My office does not provide oversight for either of these laws. Therefore, I recommend that the Complainant contact both the Office of the Privacy Commissioner of Canada (OPC) and the Office of the Information and Privacy Commissioner of Ontario (Ontario IPC) to determine if they can investigate his complaint.

2. Should CBI have requested consent from the Complainant?

[19] As noted in the background section, the psychologist sought the Complainant’s consent on May 12, 2016. The Complainant rescinded his consent on May 25, 2016. Then, in a letter dated October 5, 2016, CBI told the Complainant it did not need consent to disclose his personal health information to WCB.

[20] Then, in an email dated March 21, 2017 to my office, CBI asserted the psychologist is required to obtain consent pursuant to the *Health Care Consent Act* and the *Regulated Health Professionals Act*. These two Acts do not appear to be enacted by the Saskatchewan legislature. They appear to be provincial laws of Ontario. In this case, the psychologist appears to be registered with the Saskatchewan College of Psychologists. It is unclear as to why the psychologist would need to abide by Ontario Acts.

[21] Also in the same email dated March 21, 2017, CBI asserted that its clinicians are regulated health professionals and are required by law and their regulatory colleges to

obtain patient consent prior to assessment and treatment. It asserts it is “untenable” that a regulated health professional not collect consent prior to assessment and treatment and that a health professional could be at risk of losing her license should she do so.

[22] In contrast, though, in the same email dated March 21, 2017, CBI asserts that the *Workers’ Compensation Act* is “compulsory in nature. The regulated health care professional is obliged to provide information to WCB whether or not the worker has revoked his consent.”

[23] Then, CBI points to Ontario’s Office of the Information and Privacy Commissioner’s Frequently Asked Questions (FAQ) document on Ontario *Personal Health Information Protection Act* (ON PHIPA) that states that ON PHIPA permits the disclosure of personal health information without consent in certain circumstances. It then said that HIPA and the WCA operates “in the substantially the same way in the circumstances.”

[24] CBI’s position on whether it needs or does not need consent to disclose personal health information seems to change.

[25] My office’s position is that CBI did not need the individual’s consent to disclose. In its draft investigation report, my office had recommended that, instead of seeking consent, CBI should notify individuals of its legal authority under sections 55 and 57 of the WCA to disclose personal health information to WCB. In response, CBI said that WCB provides notification and CBI seeks consent. It said:

...the Complainant, by applying for WCB benefits, consented to CBI collecting his personal health information from WCB prior to his first visit. The WCB notifies the patient of these rights when a patient makes a claim for workers compensation benefits. In other words, the WCB at intake notifies the Complainant that his personal information will be disclosed and of its legal authority under s.55 and 57 of the WCA. Therefore, this notification does, in fact, take place prior to CBI collecting the Complainant’s personal health information. At the Complainant’s first visit, the clinician then obtains his consent for assessment and treatment.

[26] If an organization already has legal authority to disclose personal health information without consent, then it should only be providing notification of the legal authority for the disclosure. It should not be seeking the consent of the individual to disclose personal

health information. Seeking the consent from the individual when there's already legal authority for disclosure gives individuals a false sense of control over the collection, use, and/or disclosure of their personal health information. If the individual revokes his consent, which happened in this case, then it is understandable that the individual becomes upset when his personal health information is still disclosed.

[27] Since HIPA does not apply, my office does not have jurisdiction over CBI. However, subsection 52(e) of HIPA provides that the Commissioner may comment on the implications for protection of personal health information of any aspect of the collection, storage, use or transfer of personal health information. Therefore, I recommend that CBI provide notification, not seek consent, of its legal authority for disclosure of personal health information under the WCA. The notification should identify 1) the purpose for the collection of the personal health information, 2) the legal authority for collection, use, and/or disclosure of personal health information, and 3) the contact information of CBI's privacy officer if the individual has any questions about the collection, use, and/or disclosure of their personal health information.

IV FINDING

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

V RECOMMENDATIONS

[29] I recommend that CBI amend its practices so that it does not seek an individual's consent for the collection, use, and/or disclosure of personal health information when conducting assessments for WCB.

[30] I recommend that CBI provide notification to individuals as described in paragraph [27].

Dated at Regina, in the Province of Saskatchewan, this 29th day of March, 2017.

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