

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT H-2004-001

Saskatchewan Government Insurance

Summary: **The Complainant asserted that SGI collected more of her personal health information than necessary and violated *The Health Information Protection Act*. The Complainant had made a claim for compensation arising from a motor vehicle accident. The Commissioner made a finding that, in the unusual circumstances of this claim, SGI did not collect more personal health information than necessary.**

Statutes Cited: ***Health Information Protection Act*, S.S. 1999, H-0.021, ss. 2(m), 4(4), 4(6), 16, 17(2)(a),(b), 19, 20; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, F-22.01, ss. 25, 26, 27, 28(b),(c); *Freedom of Information and Protection of Privacy Regulations*, S.R. c.F-22.01, s.18**

I BACKGROUND

[1] The Complainant complained to the Information and Privacy Commissioner that there had been an improper collection, use or disclosure of her personal health information by Saskatchewan Government Insurance (“SGI”).

[2] The Complainant alleged that, in April 2003, while in a crosswalk in a Saskatchewan community, a vehicle had come close to striking her. She was not physically hurt. The Complainant alleged that she had been traumatized by the incident and sought compensation from SGI. The incident is hereinafter described as “the motor vehicle accident”.

- [3] The Complainant subsequently initiated a claim for compensation against SGI. At the request of SGI she signed a document as follows:

***IMPORTANT!
PLEASE READ BEFORE YOU SIGN THIS FORM***

1. *I am applying to the Saskatchewan Government Insurance (SGI) for any benefits to which I may be entitled under The Automobile Accident Insurance Act and Regulations.*
2. *The information on this form is true and correct in every respect and I agree to let my Personal Injury Representative know right away if anything changes that may affect my claim, including any return to work or income earned from employment.*
3. *I understand that the Criminal Code makes it an offence, punishable by fine and/or imprisonment, to obtain, or attempt to obtain money or property (including benefits under The Automobile Accident Insurance Act) by deceit, falsehood or other fraudulent means; and that anyone who does so is also liable to reimburse SGI, in full, for any payment obtained this way.*
4. *I understand that holding back medical or income information, interfering with or delaying my recovery, or not cooperating with rehabilitation or with reasonable requests for medical examination may cause my benefits to be reduced or discontinued altogether.*
5. *I understand and agree that SGI may share the information regarding my claim for benefits with health care professionals, vocational rehabilitation professionals and Saskatchewan Social Services. I further understand and agree that to better facilitate the administration of my claim, medical or vocational information may be exchanged directly between health care professionals or vocational professionals and I hereby authorize such direct exchange or provision of information.*
6. *I authorize SGI to undertake whatever investigations are necessary with respect to my claim for compensation, including examination of any medical and employment information. This may include a record of services provided by the Medical Services and/or Drug Plan of Saskatchewan Health.*

SIGNED AT _____ THIS ____ DAY OF _____, 20 _____

YOUR SIGNATURE _____

PRINT YOUR NAME _____

WITNESS _____

If this form was completed by someone other than the injured person:

SIGNATURE _____

PRINT NAME _____

WITNESS _____

Note: A photocopy of this page is to be accepted as if it were an original.

Thank you for completing this application.

- [4] On December 11, 2003 an SGI personal injury adjuster wrote to the Complainant advising her that:

“I will also be requesting a report from the Medical Care Insurance Branch with respect to any doctors, specialists, etc. you have attended 3 years post motor vehicle accident to the present in order to obtain a complete history.”

- [5] From our review of the letter and the balance of SGI’s file, it is clear that SGI meant to refer to reports for the 3 years **preceding** the motor vehicle accident. In the same letter from SGI to the Complainant, the personal injury adjuster of SGI requested an address for a specific counselling service “...so that I may obtain a report from him regarding the treatment you received.” The Complainant understood that SGI would be soliciting medical reports from some care providers with respect to past treatment that antedated the incident of April, 2003.

- [6] SGI wrote the Complainant on December 12, 2003 as follows:

Please be advised that SGI has requested a copy of your Statement of Medical Services from the Medical Care Insurance Branch, Saskatchewan Health to assist in processing your claim. This letter is being sent to you so we can comply within Saskatchewan Health policy that you be made aware of this request. If you would like a copy of this report, please contact me at the above number.

Thank you.

[Personal Injury Representative]

- [7] SGI proceeded to write to 11 different health care providers as follows:

Dear Dr. _____

Re: [name of Complainant]

Our File:

Accident, April 15, 2003

Please be advised that we are in the process of reviewing a claim of [name of Complainant] with respect to injuries claimed in a motor vehicle accident. A review of the Saskatchewan Department of Health Medical Care Insurance Branch print-out indicates that you attended upon [name of Complainant] before and/or after the motor vehicle accident. In order to complete my review of [complainant’s] claim, I require a copy of your clinic notes for [date of treatment].

Please provide me with a copy of your clinic notes. A copy of authorization and release in this regard is enclosed. We, of course, will remit payment of your account associated with you providing this information to us. Thank you.
Yours truly,

Personal Injury Representative

- [8] Our office met with the SGI Access, Privacy and Ethics Officer and the Senior Claims Manager of SGI to review the relevant materials and records.
- [9] The Senior Claims Manager advised that the injuries claimed by the Complainant included severe emotional trauma, trauma headaches and a sore left middle finger. SGI advised that the Complainant was alleging a momentary blackout resulting from what had been described by the Complainant as a “near death experience”. The Complainant alleged that she could not do daily home activities as a consequence of the injury sustained in the motor vehicle accident.
- [10] SGI advised our office that, in view of the unusual circumstances of this case, it was determined necessary and appropriate to seek as much health information as possible. The unusual circumstances identified by SGI consist of the following:
- There was an allegation of serious injury including in the words of the Complainant that she was “severely traumatized”
 - According to the Senior Claims Manager, the serious injury alleged by the Complainant could not be reconciled with any of the other information SGI had about the motor vehicle accident
- [11] Since the Complainant had not been struck in the motor vehicle accident and in view of the allegation of serious ongoing injury, it was decided by SGI to seek medical reports from all health care providers that the Complainant had seen for a number of years prior to the date of the injury. This list of 11 different providers included general practitioners, medical specialists, physiotherapists, and a counsellor.

- [12] Reports were received by SGI from these health care providers. Most of the information was in fact not relevant to the claim but SGI asserts that it was unable to make this determination before it had received and perused the information.
- [13] Subsequent to the commencement of our investigation, copies of seven different medical reports were provided to the Complainant.
- [14] The Complainant stated to the Commissioner that she understood medical reports would be solicited but asserted that the collection of medical reports from all of these providers represented an excessive collection of her personal health information, much of which was not relevant to her claim and therefore exceeded anything that could be considered as information that SGI had a legitimate need to know.
- [15] SGI has advised our office that, when *The Health Information Protection Act* (HIPA) was in development in the late 1990's, an internal committee was created to consider what the impact would be of HIPA on the claims process. This resulted in extensive changes to the computer data systems to limit access within SGI to personal health information of claimants to those SGI employees who had a legitimate need to know. This also led to new security measures for personal health information in SGI branch offices throughout the province. SGI has not codified all of these measures and has not developed written policies and procedures for implementation of *The Health Information Protection Act* and for the collection, use and disclosure of personal health information.

II ISSUES

- 1. Has SGI offended the provisions in *The Health Information Protection Act* for the collection or use of personal health information?**
- 2. Has SGI offended the provisions in Part IV of *The Freedom of Information and Protection of Privacy Act* (FOIP) for the collection or use of personal information?**

III DISCUSSION OF THE ISSUES

1. Has SGI offended the provisions in *The Health Information Protection Act* for the collection or use of personal health information?

(a) Is SGI a “trustee” for purposes of *The Health Information Protection Act*?

[16] A trustee is defined in section 2(t) as “...any of the following that have custody or control of personal health information: (i) a government institution ...”.

[17] In section 2(h) of HIPA, a government institution is defined as “a government institution as defined in *The Freedom of Information and Protection of Privacy Act*.”

[18] In section 2(2)(d) of the FOIP Act, “government institution” means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat, or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

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

(C) in the case of:

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

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

[19] *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg 1, provides as follows:

3 For the purposes of subclause 2(1)(d)(ii) of the Act:

(a) the bodies set out in Part I of the Appendix; and

(b) subsidiaries of government institutions that are Crown corporations;

are prescribed as government institutions.”

- [20] Part I of the Appendix to the Regulation includes Saskatchewan Government Insurance in the list of “*Boards, Commissions, Crown Corporations and Other Bodies Prescribed as Government Institutions*”.
- [21] I find that Saskatchewan Government Insurance is a trustee for purposes of *The Health Information Protection Act*.

(b) Is this personal health information within the meaning of *The Health Information Protection Act*?

- [22] The definition of personal health information appears in section 2(m) 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;

(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;”

- [23] I find that the information involved in this complaint does constitute “personal health information” in that it relates to the physical and mental health of the Complainant, relates to health services provided to the Complainant and is information that was collected in the course of providing health services to the Complainant or incidentally to the provision of health services to that individual.

(c) Does HIPA apply in full or in part to the personal health information in question?

[24] Section 4 provides in part as follows:

4(4) Subject to subsections (5) and (6), Parts II, IV, and V of this Act do not apply to personal health information obtained for the purposes of:

(b) Part VIII of the Automobile Accident Insurance Act

...(6) The Freedom of Information and Protection of Privacy Act and The Local Authority Freedom of Information and Protection of Privacy Act apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

[25] The claim of the Complainant is founded under *The Automobile Accident Insurance Act*. As a result Part II (Rights of the Individual), Part IV (Limits on Collection, Use and Disclosure of Personal Health Information by Trustees) and V (Access of Individuals to Personal Health Information) of HIPA do not apply to the personal health information in issue. Those provisions of HIPA that do apply to the Complainant's personal health information relevant to this investigation include section 16:

16 Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:

(a) protect the integrity, accuracy and confidentiality of the information;

(b) protect against any reasonably anticipated:

(i) threat or hazard to the security or integrity of the information;

(ii) loss of the information; or

(iii) unauthorized access to or use, disclosure or modification of the information; and

(c) otherwise ensure compliance with this Act by its employees

[26] There are no regulations under *The Health Information Protection Act*, notwithstanding that the statute came into force on September 1, 2003.

17 (2) *A trustee must ensure that:*

(a) *personal health information stored in any format is retrievable, readable and useable for the purpose for which it was collected for the full retention period of the information established in the policy mentioned in subsection (1) and*

(b) *personal health information is destroyed in a manner that protects the privacy of the subject individual.*

19 *In collecting personal health information, a trustee must take reasonable steps to ensure that the information is accurate and complete.*

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 is 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.*

[27] Insofar as the collection and use of the Complainant's personal health information is concerned, these activities are not governed by *The Health Information Protection Act* and consequently the collection and use do not offend HIPA. The operative rules governing collection and use are under *The Freedom of Information and Protection of Privacy Act*.

[28] In addition to the specific collection and use activities, there are general requirements imposed by section 16 of HIPA on SGI. We commend SGI for the work described above in [15] but find this falls short of the very extensive obligation created by section 16.

2. Has SGI offended the provisions in Part IV of *The Freedom of Information and Protection of Privacy Act* for the collection or use of personal information?

[29] As noted above [25], *The Freedom of Information and Protection of Privacy Act* will apply to personal information obtained for purposes of Part VIII of *The Automobile Accident Insurance Act* unless exempted from the FOIP Act. Exemptions have been

created for a list of statutory provisions in section 23 of the FOIP Act and supplemented by a further list of statutory provisions in section 12 of the FOIP Regulation. There is no such exemption for Part VIII of *The Automobile Accident Insurance Act*.

[30] Clearly the concurrent application of provisions of the FOIP Act and HIPA makes it more difficult for persons affected by both laws to easily comprehend what they can and cannot do to comply with the two laws. For reasons not clear to our office, every “government institution” under the FOIP Act has also been made a trustee under HIPA regardless of whether they are involved in the provision of health services. For most of the more than 70 bodies defined as a “government institution” and therefore also a “trustee” under HIPA, the only personal health information they would have would relate to employees. Unlike Part IV of the FOIP Act, HIPA provides wide latitude for the sharing of personal health information without express consent of the individual. In our view, “trustees” should be limited to organizations directly involved in the delivery of diagnostic, treatment or care services or services necessarily incidental to diagnosis, treatment or care. This is the approach taken in the new Ontario *Health Information Protection Act* and in the Alberta *Health Information Act*. Manitoba has taken a similar approach to Saskatchewan. Nonetheless, we are required to apply the legislation as written to all government institutions.

[31] There is no clear contradiction between the relevant provisions of both statutes so that we need not address the question of paramountcy. The provisions can work together.

[32] Under *The Freedom of Information and Protection of Privacy Act*, SGI is obligated to comply with a number of relevant provisions including:

Section 25 provides as follows:

25 No government institution shall collect personal information unless the information is collected for a purpose that relates to an existing or proposed program or activity of the government institution.

26 (1) A government institution shall, where reasonably practicable, collect personal information directly from the individual to whom it relates, except where:

(a) the individual authorizes collection by other methods;..

(d) *the information is collected, and is necessary, for the purpose of:*
 (i) *determining the eligibility of an individual to:*
 (A) *participate in a program of; or*
 (B) *receive a product or service from;*
the Government of Saskatchewan or a government institution, in the course of processing an application made by or on behalf of the individual to whom the information relates; ...

(2) *A government institution that collects personal information that is required by subsection (1) to be collected directly from an individual shall inform the individual of the purpose for which the information is collected unless the information is exempted by the regulations from the application of this subsection.*

27 *A government institution shall ensure that personal information being used by the government institution for an administrative purpose is as accurate and complete as is reasonably possible.*

28 *No government institution shall use personal information under its control without the consent, given in the prescribed manner, of the individual to whom the information relates, except:*

- (b) *for the purpose for which the information was obtained or compiled, or for a use that is consistent with that purpose; or*
- (c) *for a purpose for which the information may be disclosed to the government institution pursuant to subsection 29(2).*

The Freedom of Information and Protection of Privacy Regulation describes consent as follows:

18 *Where the Act requires the consent of an individual to be given, the consent is to be in writing unless, in the opinion of the head, it is not reasonably practicable to obtain the written consent of the individual.*

[33] SGI satisfied the requirement of section 25 in that the purpose of collection of the Complainant's personal information was the administration of *The Automobile Accident Insurance Act*.

[34] The collection of the Complainant's personal information was indirect in that it was obtained from a number of third party health providers but this was done in conformity with section 26 (1)(a). SGI obtained written consent of the Complainant to the indirect collection of personal information from the various health care providers. This met the requirements of the FOIP Regulation.

- [35] Aside from the question of what is an “administrative purpose”, there is no evidence that SGI failed to discharge its obligation under section 27.
- [36] As noted above, consent was given in the prescribed manner to satisfy the requirement of section 28.
- [35] Information about our personal health is usually considered some of the most sensitive and prejudicial information. We are particularly mindful of the sensitivity of mental health information. Allegations of mental illness and treatment for mental illness may invoke prejudice and stigmatization. In our view, it is critically important that any Saskatchewan government institution that collects, uses or discloses mental health information must take particular care to ensure that such information is collected cautiously and prudently, is accessible only by those employees who have a clear “need-to-know”, and that it is properly destroyed when it is no longer required for any appropriate purpose. This necessitates written policies and procedures and appropriate training of staff.

IV RECOMMENDATIONS

- [37] I find that the information in question is personal health information within the meaning of *The Health Information Protection Act* and also personal information within the meaning of Part IV of *The Freedom of Information and Protection of Privacy Act*.
- [38] I find that Saskatchewan Government Insurance is a trustee for the purpose of *The Health Information Protection Act*.
- [39] I further find that *The Health Information Protection Act*, in part, applies to the personal health information of the Complainant. In particular this includes sections 16, 17, 19 and 20, as well as Part VI and VII.
- [40] I further find that the collection and use of personal health information in this case is in conformity with Part IV of *The Freedom of Information and Protection of Privacy Act*.

- [41] I further find that apart from the particular collection, and use of the personal health information, SGI has not complied fully with section 16 of *The Health Information Protection Act*.
- [42] I recommend that Saskatchewan Government Insurance, within 30 days, provide the Complainant with copies of any medical reports disclosed to SGI by health care providers or counsellors who have provided services to the Complainant and that have not already been disclosed to her.
- [43] I recommend that Saskatchewan Government Insurance forthwith confirm to the Complainant and our office that all medical information not directly relevant to making an entitlement decision regarding the injuries claimed by the Complainant has been removed from its records.
- [44] I recommend that Saskatchewan Government Insurance develop comprehensive written policies and procedures in compliance with section 16 of *The Health Information Protection Act*
- [44] I further recommend that Saskatchewan Government Insurance provide the Complainant and our office with a copy of those written policies and procedures within 90 days of this Report.
- [45] Dated at Regina, in the Province of Saskatchewan, this 12th day of July, 2004.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for
Saskatchewan

Postscript

We have omitted considerable detail that might have the effect of identifying the complainant.