

SASKATCHEWAN

**OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER**

INVESTIGATION REPORT H-2013-003

**Dr. Diana Monea and Dr. Diana Monea
carrying on business under the name
Lakewood Eye Health Centre**

Summary:

As a result of an anonymous call, the Commissioner found personal health information in the custody or control of Dr. Diana Monea near a dumpster located beside Lakewood Eye Health Centre, Dr. Monea's clinic. Although, it was alleged that the personal health information was planted by a former employee, upon investigation, the Commissioner concluded that Dr. Monea did not have adequate safeguards to protect the personal health information. In particular, Dr. Monea's clinic did not have adequate policies and procedures or training for employees to achieve compliance with section 16 of *The Health Information Protection Act* (HIPA). Further, the clinic's procedure to dispose of personal health information was not compliant with section 17(2)(b) of HIPA and did not respect the 'need-to-know' or 'data minimization' principles inherent in section 23(2) of HIPA. Dr. Monea disagreed with the Commissioner's conclusions and refused to develop adequate policies and procedures or change the clinic's disposition procedures.

Statutes Cited:

The Health Information Protection Act, S.S. 1999, c. H-0.021, ss. 2(m), 2(q), 2(t), 9, 16, 17, 17(2)(b), 23(2), 42(1)(c), 46, 47, 52(b), 52(d), 52(e), 53; *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

Authorities Cited:

Saskatchewan OIPC Investigation Reports H-2011-001, LA-2013-001, LA-2010-001, F-2012-005.

Other Sources

Cited: SK OIPC, *Glossary of Common Terms: The Health Information Protection Act (HIPA)*, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, *Helpful Tips: Privacy Breach Guidelines*; Office of the Information and Privacy Commissioner for British Columbia, British Columbia Medical Association and College of Physicians and Surgeon of British Columbia, *Physicians & Security Of Personal Information* (June 2006); Eye Health Centres' Facebook page.

I BACKGROUND

- [1] My office received an anonymous call on April 8, 2011 indicating that there were documents containing personal health information found in and around a dumpster behind an eye health clinic in northwest Regina. A Portfolio Officer and I attended on the scene to investigate the incident and collect the personal health information.
- [2] We collected personal health information apparently linked to the Lakewood Eye Health Centre around the dumpster. We also found personal health information apparently linked to another trustee within the same vicinity from inside the dumpster. My office commenced two separate privacy investigations. This Investigation Report only involves the first.
- [3] On April 18, 2011, a Portfolio Officer attended Lakewood Eye Health Centre and interviewed the Office Manager and several administrative employees.
- [4] On or about April 20, 2011, my office provided Lakewood Eye Health Centre with an official notification letter advising of this investigation.
- [5] On May 17, 2011, a Portfolio Officer met with Dr. Diana Monea, the owner of Lakewood Eye Health Centre.
- [6] The Operations Manager of Lakewood Eye Health Centre provided a response which was received in my office on May 26, 2011. My office then provided a reply dated June 21,

2011. My office received another submission from the Operations Manager dated July 5, 2011.
- [7] My office then asked for more information in a letter dated November 15, 2011 and received a reply from Dr. Monea's lawyer dated December 11, 2011.
- [8] We then provided Dr. Monea's lawyer a preliminary analysis dated October 16, 2012 which included recommendations. We received a response from the lawyer dated November 16, 2012. The response indicated that Dr. Monea would not comply with the majority of our recommendations.
- [9] My office provided a further analysis on January 2, 2013. I was advised again by letter from Dr. Monea's lawyer dated February 4, 2013 that she would not follow the recommendations.
- [10] I note that the other trustee whose personal health information was found in the dumpster was eager to work with my office to ensure compliance with *The Health Information Protection Act* (HIPA)¹. As such, that matter was promptly dealt with by my office and the file has long since been closed. Dr. Monea was resistant to my office's recommendations and in the result, I am issuing this Investigation Report.

II ISSUES

- 1. Who is the responsible trustee?**
- 2. Was personal health information found around the dumpster?**
- 3. Was the personal health information disposal practice of the trustee compliant with *The Health Information Protection Act*?**

¹*The Health Information Protection Act*, S.S. 1999, c. H-0.021 (hereinafter HIPA).

- a. What appeared to be Lakewood Eye Health Centre's practices for the disposition of personal health information at the time of the incident?
 - b. Does Lakewood Eye Health Centre's personal health information disposal practice comply with section 17(2) of *The Health Information Protection Act*?
 - c. Was the personal health information disposal practice of Lakewood Eye Health Centre depicted in written policies and procedures that were compliant with sections 9 and 16 of *The Health Information Protection Act*?
 - d. Were Lakewood Eye Health Centre staff fully trained with respect to *The Health Information Protection Act* pursuant to section 16(c)?
 - e. Does Lakewood Eye Health Centre's personal health information disposal practice comply with section 23(2) of *The Health Information Protection Act*?
 - f. What physical safeguards were in place to protect the personal health information before it was found in/near the dumpster?
4. What does the trustee allege happened? How should I deal with these allegations?

III DISCUSSION OF THE ISSUES

[11] My authority for investigating these matters is found in the following sections of HIPA:

42(1) A person may apply to the commissioner for a review of the matter where:

...

(c) the person believes that there has been a contravention of this Act.

...

46(1) Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review, require to be produced and examine any personal health information that is in the custody or control of a trustee.

(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them to give oral or written evidence on oath or affirmation and to produce any documents or things that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

...

52 The commissioner may:

...

(b) after hearing a trustee, recommend that the trustee:

(i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and

(ii) destroy collections of personal health information collected in contravention of this Act;

...

(d) from time to time, carry out investigations with respect to personal health information in the custody or control of trustees to ensure compliance with this Act;

(e) comment on the implications for protection of personal health information of any aspect of the collection, storage, use or transfer of personal health information.

53 The commissioner may:

(a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(b) conduct public education programs and provide information concerning this Act and the commissioner's role and activities;

(c) receive representations concerning the operation of this Act.²

²*Ibid.* at sections 42(1)(c), 46, 52(b), 52(d), 52(e) and 53.

1. Who is the responsible trustee?

[12] When it appeared that Dr. Monea was unwilling to follow the recommendations of this office to achieve HIPA compliance and it was necessary for me to issue this Investigation Report, I needed to formalize who the responsible trustee in this situation was. In other words, who has custody or control of the personal health information in question? HIPA defines “trustee” as follows:

2 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*;
- (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 Act, 1996*;
- (x) a community clinic:
 - (A) as defined in section 263 of *The Co-operatives Act, 1996*;
 - (B) within the meaning of section 9 of *The Mutual Medical and Hospital Benefit Associations Act*; or
 - (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;³

...

[emphasis added]

[13] It is clear that the records originated from the Lakewood Eye Health Centre. I have determined that this is the business name for the clinic operated by Dr. Monea. This is consistent with the signage we have seen on the premises and the heading on various documents which contain personal health information and that were linked to the Lakewood Eye Health Centre. We were advised of no other owners or corporate entities that were involved with Lakewood Eye Health Centre and the records in question until March 12, 2013; the date of a letter from the lawyer for the trustee. That letter included the following statement:

With respect to your letter of February 25, 2013... we understand that [the Operations Manager] has previously advised you that the personal health information (“phi”) in question was actually generated by the optical dispensary side of their operation, not the optometrists working for the Lakewood Eye Health Centre.

...

Accordingly, we believe any report issued by the Privacy Commissioner should be with respect to [a different optical centre] and not the Lakewood Eye Health Centre.

[14] I might note that we had commenced our investigation in April 2011 and that we had been in discussions with the lawyer for Lakewood Eye Health Centre from that time until

³*Ibid.* section 2(t).

March 12, 2013 and had never been advised of any other owner of Lakewood Eye Health Centre other than Dr. Monea. Contrary, to the assertion in the March 12, 2013 letter, we were not advised by the Operations Manager that any entity other than Dr. Monea had custody of the records in question. In addition, a number of the records in question are entitled “Examination Record” and reflect health history and diagnostic tests that would appear to relate to the work of optometrists rather than that of the optical dispensers.

[15] I am satisfied that the trustee for purposes of HIPA and this investigation is Dr. Monea and that at all material times, she was carrying on her practice under the business name of Lakewood Eye Health Centre.

[16] Section 47 of HIPA places the burden of proof on the trustee during the review of an access decision as follows:

47 Where a review relates to a decision to refuse an individual access to all or part of a record, the onus is on the trustee to prove that the individual has no right of access to the record or part of the record.⁴

[17] I have already noted that this burden is assumed by a local authority with respect to a privacy breach investigation pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*.⁵

[26] The statute does not define burden of proof in a breach of privacy investigation in the context of an impugned disclosure. In these circumstances, I find that the burden must be borne by the local authority as only the local authority would have intimate knowledge of the circumstances surrounding the disclosure. That burden of proof is assessed on the basis of a balance of probabilities.⁶

[18] I adopt this reasoning for the purposes of investigations under HIPA.

⁴*Ibid.* at section 47.

⁵*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

⁶Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC), Investigation Report LA-2010-001 at [26], available at www.oipc.sk.ca/Reports/Report%20LA-2010-001%20FINAL%20COPY%20-%20May%2019,%202010.pdf.

[19] I have defined “control” and “custody” in my office’s resource *Glossary of Common Terms - The Health Information Protection Act (HIPA)* (HIPA Glossary) as follows:

CONTROL is a term used to indicate records that are not in the physical custody of the trustee but are still within the influence of that body via another mechanism (i.e. contracted service, trustee employees working remotely, etc.). See Report F-2008-002 (Ministry of Justice and Attorney General). The control question normally only arises if there is no ‘custody’ of the [personal health information] in question.

CUSTODY is the physical possession of a record by a trustee.⁷

[20] Given the circumstances described and the fact that all of the records appear to be linked with Lakewood Eye Health Centre, I have determined that these records were in the custody or control of Dr. Monea.

[21] As neither Dr. Monea, nor Lakewood Eye Health Centre have provided me with any persuasive arguments to the contrary; on the balance of probabilities, I find Dr. Monea to be a trustee and have custody or control of the records in question.

2. Was personal health information found around the dumpster?

[22] Section 2(m) of HIPA defines “personal health information” as follows:

2 In this Act:

...

(m) “**personal health information**” means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

(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;

⁷SK OIPC, *Glossary of Common Terms: The Health Information Protection Act (HIPA)* available at www.oipc.sk.ca/Resources/HIPA%20Glossary%20-%20Blue%20Box.pdf.

(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 information⁸

[23] Section 2(q) of HIPA defines “registration information” as follows:

2 In this Act:

...

(q) “**registration information**” means information about an individual that is collected for the purpose of registering the individual for the provision of health services, and includes the individual’s health services number and any other number assigned to the individual as part of a system of unique identifying numbers that is prescribed in the regulations;⁹

[24] The material that I found in the dumpster on April 8, 2011 consisted of several ripped pieces of papers as well as two full sheets.

[25] Most of the pieces found appear to be pieces of Examination Records. These pieces include names of patients, addresses, phone numbers, e-mail addresses, dates of birth, family histories and diagnosis and prescription information. All of these elements would qualify as personal health information pursuant to section 2(m) of HIPA.

[26] There are also pieces of what appears to be invoices for glasses or other products that include patient registration information and prescription information. These data elements would also qualify as personal health information.

[27] Finally, one of the sheets appears to be a print off of one of the Optometrist’s appointment schedules for April 1, 2011. It appears to list 16 patient names.

⁸*Supra* note 1 at section 2(m).

⁹*Ibid.* at section 2(q).

[28] In total, it appears that the personal health information of 23 identifiable patients as well as three other non-identifiable patients was discovered near the dumpster.

3. Was the personal health information disposal practice of the trustee compliant with *The Health Information Protection Act*?

a. What appeared to be Lakewood Eye Health Centre's practices for the disposition of personal health information at the time of the incident?

[29] When the Portfolio Officer attended Lakewood Eye Health Centre on April 18, 2011, she interviewed the Office Manager and two administrative employees.

[30] During that interview, the Office Manager informed the Portfolio Officer that he looks after the shredding which mostly occurs right in the office in the basement. He sorts through the bags of trash that the receptionists bring down to him. For any larger volume, he takes the material to a document destruction company himself and witnesses the shredding. One time, Lakewood Eye Health Centre called the document destruction company truck to come to its facility. The Office Manager reported that other than the shredding machine in the basement of the clinic, there is no shredder anywhere else in Lakewood Eye Health Centre. The Portfolio Officer asked whose responsibility it was to look after general disposition of old records. The Office Manager said that the administrative employees dispose of records, but he then does the shredding.

[31] The Portfolio Officer then interviewed an administrative employee who had worked at Lakewood Eye Health Centre for approximately eight years. The Portfolio Officer asked her what the practice of the administrative personnel was for disposing of records containing personal health information, as there was no shredder near their desks. She said that they cut or tear everything up and then place it in the regular garbage. Before they leave each night they take their garbage bag downstairs for the Office Manager to sort through and then take outside. However, she reported that on Thursday nights they take their bags straight outside at the end of the day.

[32] Our Portfolio Officer then interviewed the other administrative employee who had also worked at Lakewood Eye Health Centre for approximately eight years. She confirmed the first administrative employee's statements that any records containing personal health information gets ripped or cut up and disposed of in the regular garbage. Every day all garbage is collected and taken downstairs where the Office Manager and the Cleaning Staff Person sort through it. She also confirmed that Thursday nights they take their bags directly outside to a City of Regina dumpster.

[33] However, Dr. Monea's lawyer refutes what the employees had told our Portfolio Officer. The letter of November 16, 2012 stated:

The second employee [name of employee] was directly asked by [the Operations Manager] about what she told the Privacy Commissioner during the interview.

She confirmed that she had absolutely no recollection of telling [the Portfolio Officer] that she took [personal health information] directly to the curb for pick-up.

[34] The letter then went on to qualify the practice:

In [the Operation Manager's] June 10, 2012 letter [to the Office of the Saskatchewan Information and Privacy Commissioner (OIPC)], he took specific exception to the allegation that HIPA regulated information was taken to the curb by administration staff on Thursday nights.

Washroom garbage may have been directly taken to the curb on Thursdays but not [personal health information]. Further, the seized [personal health information] did not originate from the front desk used by the two administrative employees. As noted hereinbefore, it came from the shredding queue.

[emphasis added]

[35] The lawyer objected to the interviews performed by our Portfolio Officer. It stated:

The writer is aware that in previous investigations, Gary Dickson, Q.C., the Privacy Commissioner, allowed representatives of the Trustee to be present during the questioning of individual employees.

However, in this case [the OIPC Portfolio Officer] did not give Eye Health Centre the opportunity to have its lawyer and/or management personnel present during the

Portfolio Officer's interview of the Eye Health Centre employees. The interviews took place behind closed doors.

[36] Although there was opportunity to do so, an affidavit from the employee has not been offered to change or counter my understanding of the practices in place at the time of the incident.

[37] When asked about this record disposal practice, the Operations Manager of Lakewood Eye Health Centre stated the following in its letter, received by my office on May 26, 2011:

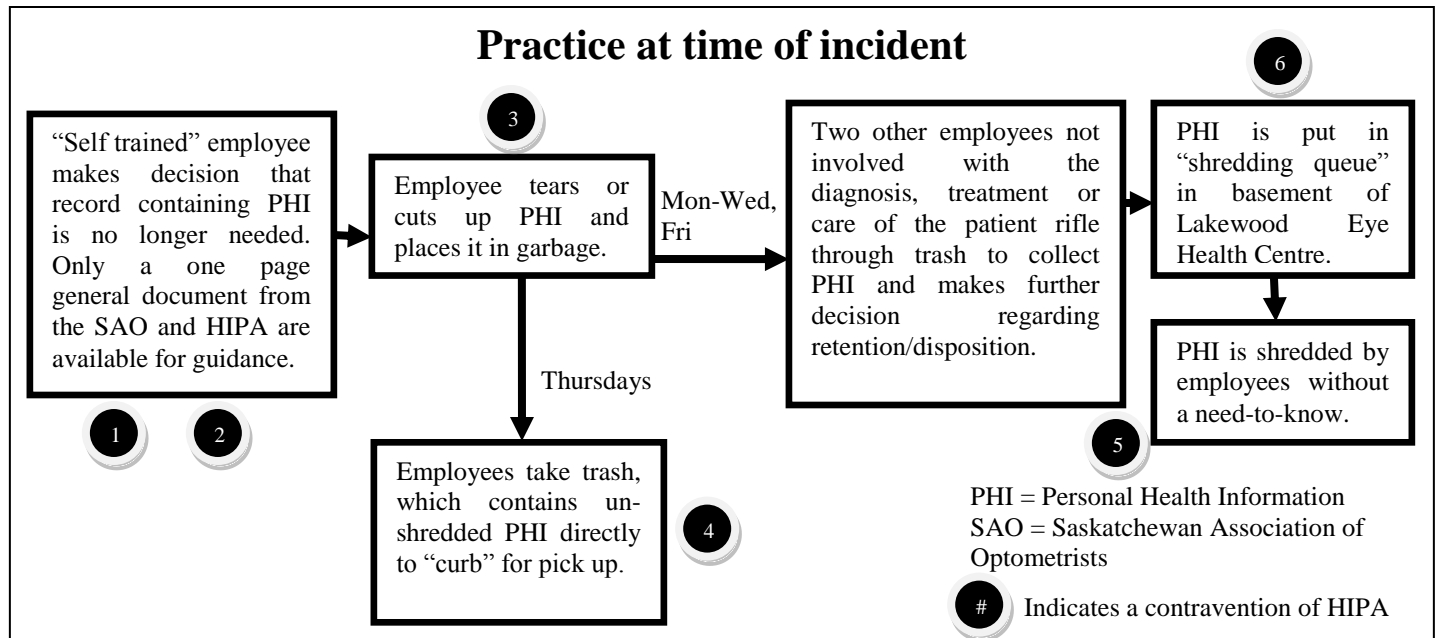
Despite whatever information you were given by the receptionist regarding the disposal of any information from this clinic, it is our strict policy that all trash is inspected by our local privacy compliance officer [the Office Manager], who also manages and maintains the shredding queue. There is no circumstance whatsoever where any other staff member is permitted to "take the last bag of garbage outside themselves." Only [the Office Manager and the Cleaning Staff Person] are authorized to take refuse to the curb, without exception.

Upon discussing this revelation of mismanagement of the refuse with you 3-weeks ago we immediately addressed the issue with the employee who told you that she had "sometimes taken front desk trash to the curb on Thursday nights." She indicated to us that this was something she had done in the past, though not recently. We reiterated our policy to her and advised her that she had no authorization to take refuse out to the curb. Our policy regarding the trash has also been reiterated to the rest of the staff, is posted in the staff room and will take all measures to insure that it is strictly complied with...

[38] As I have not been provided with any written policies and procedures regarding the disposal of personal health information that were in place at the time of the incident, there is no way to verify what the policy was at that time. I was advised that only a copy of HIPA is posted in the staffroom. I have not been provided with an explanation as to how the policy claimed to be in place at the time of the incident was communicated to staff. Therefore, it is not surprising that two staff people have both independently indicated that it was the policy of the clinic to dispose of personal health information in the regular trash, after ripping or cutting it and taking the trash to the dumpster on Thursday evenings. This is consistent with the incident. Ripped pages containing personal health information were found in bags of trash near the dumpster on a Friday. I note that this

confusion and lack of clarity is precisely the reason why policies and procedures need to be in writing.

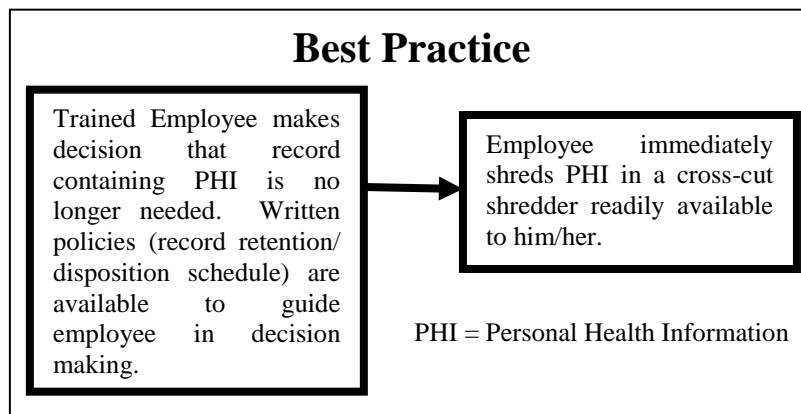
[39] The following diagram depicts what appears to have been the record disposition practice at Lakewood Eye Health Centre, at the time of the incident. Also noted on this diagram are contraventions of HIPA which are explained and discussed in detail below.



#	Contravention of HIPA
1	Indicates a contravention of section 16 of HIPA as there were no written policies or procedures at the material time.
2	Indicates a contravention of section 16 of HIPA as Lakewood Eye Health Centre's staff were not properly trained.
3	Indicates a contravention of section 17(2)(b) of HIPA as tearing or cutting records containing personal health information is not a disposal that protects privacy.
4	Indicates a contravention of section 17(2)(b) of HIPA as placing torn or cut pieces of personal health information in the trash is not a disposal method that protects privacy.
5	Indicates a contravention of section 23(2) of HIPA as this process does not respect the need-to-know or data minimization principles.
6	Indicates a contravention of sections 16, 17(2)(b) and 23(2) of HIPA as the physical and administrative safeguards were not adequate at this stage of the process.

[40] It appears that staff understood it to be their responsibility to take garbage to the curb on Thursday nights. It also appears that the staff put personal health information directly into the garbage. I have concerns with the lack of rigor in this procedure. As there is no apparent written policy describing the procedure for Lakewood Eye Health Centre, I must conclude that this practice, and the lack of clarity surrounding it, was a contributing factor to this privacy breach.

[41] The best practice, in terms of day to day record disposition, would be to have trained employees shred personal health information as soon as possible after the decision is made that a record should be disposed of. Written policies and procedures, including a record retention/disposition schedule, must be in place to guide employees on an ongoing basis. The diagram below depicts a best practice for day to day disposal of personal health information.



[42] However, Lakewood Eye Health Centre’s practice was much more convoluted and unclear. Again, the “Practice at time of incident” diagram outlines the practice, as deciphered through this investigation.

b. Does Lakewood Eye Health Centre’s personal health information disposal practice comply with section 17(2) of *The Health Information Protection Act*?

[43] Section 17 of HIPA states:

17(1) Not yet proclaimed.

(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.¹⁰

[44] Section 17(2)(b) of HIPA requires trustees to destroy personal health information in a manner that protects privacy. As such, in-house cross-cut shredding is the standard practice.¹¹ Lakewood Eye Health Centre's practice of tearing or cutting personal health information before placing it in a trash bin with other trash is insufficient to achieve this end, as personal health information can still be deciphered from the torn pieces. As such, it does not comply with section 17(2)(b) of HIPA.

[45] This contravention is compounded by the practice of sending unshredded personal health information in trash bins straight to the dumpster. The trustee denies that this was the practice at the time of the incident, even though two employees informed a Portfolio Officer otherwise. This again underscores the need for written policies which will be discussed below. Finally, this may have resulted in an unauthorized disclosure of personal health information pursuant to HIPA.

[46] In general, I find it to be a bizarre practice to have an employee rifle through trash at the end of each day. The trash potentially contains medical waste, discarded food and containers, used tissues, etc. More hygienic, efficient and secure methods of disposing of personal health information should be implemented.

¹⁰*Ibid.* at section 17.

¹¹Office of the Information and Privacy Commissioner for British Columbia, British Columbia Medical Association and College of Physicians and Surgeon of British Columbia, *Physicians & Security Of Personal Information* (June 2006), at p. 5, available at www.oipc.bc.ca/guidance-documents/1507.

c. Was the personal health information disposal practice of Lakewood Eye Health Centre depicted in written policies and procedures that were compliant with sections 9 and 16 of *The Health Information Protection Act*?

[47] Section 9 of HIPA provides as follows:

9(1) An individual has the right to be informed about the anticipated uses and disclosures of the individual's personal health information.

(2) When a trustee is collecting personal health information from the subject individual, the trustee must take reasonable steps to inform the individual of the anticipated use and disclosure of the information by the trustee.

(3) A trustee must establish policies and procedures to promote knowledge and awareness of the rights extended to individuals by this Act, including the right to request access to their personal health information and to request amendment of that personal health information.¹²

[48] Section 16 of HIPA reads as follows:

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.¹³

¹²*Supra* note 1 at section 9.

¹³*Ibid.* at section 16.

[49] In a number of my HIPA Investigation Reports, I have commented on the crucial role of section 16 of HIPA and what it takes to comply with it. For instance, in my Investigation Report H-2011-001, I stated:

[91] HIPA prescribes that the trustee must establish policies and procedures to maintain administrative, technical and physical safeguards. These safeguards must protect the integrity, accuracy and confidentiality of the information. They must also protect against any reasonably anticipated threat or hazard to the security or integrity of the information; and the loss of, unauthorized access to, use or disclosure of the information.

[92] My office has seven years of experience overseeing the compliance efforts of Saskatchewan trustees with HIPA. Based on this experience, I suggest that, in considering the reasonably anticipated threats or hazards, it is exceedingly unlikely that a medical clinic will be in compliance with HIPA requirements without:

- (a) A specifically tasked privacy officer with a clear mandate and appropriate training;
- (b) Extensive training of staff in HIPA requirements and provisions;
- (c) Comprehensive, clear and practical written policies and procedures that are reinforced through leadership and training of staff;
- (d) Written contracts with [information management service providers] that specifically address the requirements of section 17 and 18 of HIPA;
- (e) Audit of use and disclosures of the [personal health information]; and
- (f) Effective enforcement action to follow any breach.

[93] If a trustee fails to achieve satisfactory compliance with HIPA requirements, there is a greatly increased risk that patients' [personal health information] will fail to be protected from exposure to others who would have no legitimate need-to-know that [personal health information] without the consent of the patients. There is also a heightened risk that patient confidence in their health providers will be undermined and that this will negatively impact health outcomes. Such a lack of confidence could compromise the effectiveness of the electronic health record system now being rolled out in this province. These risks are a concern to the Canadian Medical Association (CMA). The CMA underscores the importance of privacy when it states:

1. Privacy, confidentiality and trust are cornerstones of the patient-doctor relationship.

Health information is highly sensitive and is confided or collected under circumstances of vulnerability and trust. Trust plays a central role in the provision of health care and treatment; fulfillment of physicians' fiduciary obligations

enables open and honest communications and fosters patients' willingness to share personal health information.¹⁴

[50] In the submission received by my office on May 26, 2011, Lakewood Eye Health Centre's Operations Manager indicated the following:

You indicate that you were told that our office did not have a written policy respecting the HIPA. Our office does now and at all times previous has had a written privacy policy in accordance with the [Saskatchewan Association of Optometrists] standards, and the Alberta College, and the Privacy Act.

We have posted HIPA in the staff room, as well as the Quick Reference Sheet. Any training that you could recommend to benefit HIPA compliance integrity of our clinic for any of our staff would be welcome.

[51] There appears to be confusion on the part of the Lakewood Eye Health Centre over what is contemplated by section 16, as well as section 9 of HIPA.

[52] During our Portfolio Officer's visit to the Lakewood Eye Health Centre, she observed three different posters:

- a) A poster entitled *Protecting Your Personal Information* apparently produced by the Saskatchewan Association of Optometrists (SAO),
- b) *Alberta College of Optometrists Privacy Policy Statement*, and
- c) A poster that states: "This Office is in Compliance with Government 'Privacy Legislation'".

[53] Dealing with each sequentially, I make the following observations:

- a) The SAO poster is deficient in a number of respects. It makes no reference to the applicable law (i.e. HIPA). It does not address the data minimization or need-to-know principles prescribed by section 23(2) of HIPA. It does not accurately reflect the access requirements. Finally, it does not use the term "personal health information".
- b) This poster begs the question: Why would a Saskatchewan trustee use a poster with the Privacy Policy Statement of the regulatory body in another province?

¹⁴SK OIPC, Investigation Report H-2011-001 at [91] to [93], available at www.oipc.sk.ca/Reports/IR%20H-2011-001.pdf.

What applicability is there? In my opinion, it serves only to confuse patients. In any event, this does not appear to have been intended for the collection, use and disclosure of personal health information for the purposes of diagnosis, treatment and care since that is not the mandate of the Alberta College. This is intended only for the limited personal health information collected, used or disclosed by the Alberta College not members. This poster does not assist Lakewood Eye Health Centre in complying with section 16 of HIPA in any way.

- c) The vagueness of this third poster suggests a troubling lack of awareness of HIPA on the part of the trustee and staff.

[54] Lakewood Eye Health Centre has not provided us with any other written policies or procedures regarding privacy and the specific functioning of its office.

[55] The intention of these resources would seem to be an attempt by Dr. Monea to meet the duties under section 9 of HIPA, not section 16. Although, as explained above, they do not achieve either purpose.

[56] I also note that on March 12, 2013, my office came across the following statement on Lakewood Eye Health Centre's public Facebook page:

Our Privacy Policy

All records, correspondence and communication on a patient is protected in our office.

NO release of patient information will occur without written consent from patient or legal guardian.

Our offices are in strict compliance of **the Government Privacy Act**.¹⁵

[emphasis added]

[57] This statement does not comply with section 9 of HIPA and is inaccurate with respect to disclosure of personal health information under HIPA.

¹⁵Eye Health Centres' Facebook page, retrieved March 12, 2013 from: www.facebook.com/media/set/?set=a.444078775637938.101397.108801979165621&type=3#!/pages/Eye-Health-Centres/108801979165621?id=108801979165621&sk=info.

[58] In its submission dated November 16, 2012, Lakewood Eye Health Centre again asserted that the SAO poster was a written privacy policy. It stated:

The Eye Health Centre's written privacy policy in April 2011 was contained in a "pink sheet" provided by our client by the Saskatchewan Association of Optometrists (SAO). It has been on display at the Eye Health Centre **since 2001**.

...

Admittedly, the text of the pink sheet provides that our client gives the specified undertaking to its patients, **rather than an official office policy**, but it is and was [Lakewood Eye Health Centre's] policy and all staff and associates were required to abide by its requirement contained therein.

[emphasis added]

[59] This policy is not compliant with HIPA for the many reasons outlined earlier. I further note that it was created before HIPA was enacted in 2003.

[60] In a letter dated December 11, 2011, the lawyer for Dr. Monea stated the following:

In previous dealings that the writer has had with Gary Dickson, Q.C. involving investigations of other HIPA trustees, we have pointed out to him that there is nothing in the *Health Information Protection Act* [sic] and/or the associated regulations which require that the trustee's policies have to be in writing.

We acknowledge Mr. Dickson has repeatedly emphasized that the "best practice" is to have written policies. We have in fact previously read the Commissioner's Investigation Report H-2011-001. However, it continues to be our opinion that "best practices" are not statutorily required.

[61] In fact, my office, in its statutory oversight mandate, has determined that a failure to have appropriate written policies and procedures for HIPA compliance means that a trustee has not complied with section 16 of HIPA. In other words, a failure to have written documents means a failure to satisfy section 16 of HIPA. It fails the reasonableness test which I have discussed in my Investigation Report H-2011-001 as follows:

[211] Section 18(3) clearly enjoins an [Information Management Service Provider] from using, disclosing, obtaining access to, processing, storing, archiving, modifying or destroying [personal health information] received from a trustee except for the purposes set out in section 18(1). Section 18 does not explicitly require a written agreement between the trustee and the [Information Management Service Provider]. I find however, that section 18 must be read in conjunction with both sections 16 and

17. It should also be read and interpreted mindful of the requirements of the CPSS in its Privacy Toolkit and the recommendations in the COACH Guidelines. Considering those resources, I have no hesitation in finding that a *reasonable* procedure to achieve the objectives of sections 16(a), 16(b) and 16(c) would be to ensure an appropriate written agreement between the trustee and the [Information Management Service Provider]. Failure of a trustee to put such an agreement in place would constitute a breach of section 16.¹⁶

[62] In the analysis of October 16, 2012, my office recommended the following to the trustee:

Eye Health Centre should prepare a comprehensive set of written policies and procedures for *The Health Information Protection Act* compliance. In particular, this should include:

- A written procedure for the disposal of personal health information.
- A written policy regarding the storage and safeguarding of personal health information.

[63] In its response of November 16, 2012, the lawyer for Dr. Monea stated:

In [the Operation Manager's] letter of June 10, 2011 to the Privacy Commissioner, he provided particulars of the Eye Health Centre's written policies with respect to (a) and (b) above which were based on the Saskatchewan Association of Optometrists Guidelines.

[The Portfolio Officer's] response was that the Guidelines were inadequate.

As a result, our client immediately indicated that it would post the appropriate HIPA notices including the HIPA Quick Reference Sheet and it would insure that all staff and optometrists took the time to read these documents.

All of this was done by June, 2011.

New employees are also required to read and become familiar with HIPA privacy requirements.

[64] My office then informed Dr. Monea that those resources were not adequate to comply with section 16 of HIPA. Policies and procedures must be specific to the organization and include a retention and disposition schedule that all employees can follow to ensure the timely and safe destruction of personal health information.

¹⁶*Supra* note 14 at [211].

[65] The response from Dr. Monea's lawyer dated February 4, 2013 advised as follows:

It has always been our client's policy that the Office Manager, who is also the Privacy Officer for the clinic, is solely responsible for the shredding of materials regulated under the HIPA. The written policy that had been posted for more than one year now reads as follows:

Lakewood Eye Health Centre

Procedure for the Handling of Trash for All Employees

Only [the Office Manager] is authorized to take trash outside the clinic. No other person is authorized to engage in any act of disposal of any kind that involved the removal of any material from the clinic.

Any employee who empties any waste receptacle, or otherwise commits any record to the waste stream by any means is advised to bag such material using the trash bags provided and deliver these materials to the designated area in the basement marked "Trash" for processing by [the Office Manager.]

[66] The February 4, 2013 letter from Dr. Monea's lawyer also provides the following in terms of storage and disposal of trash:

Lakewood Eye Health Centre

Procedure for the Storage and Disposal of Trash for [the Office Manager]

All trash generated by the clinic is to be delivered to the designated area for trash located in the basement of the clinic daily and [the Office Manager] will move it from that location to the shredding queue located in the basement utility room which is to be kept locked at all times. From that secure storage location, [the Office Manager] will review the contents of the trash bags and then he will personally bear witness to the shredding of the contents of all of this material at least once per week, excepting those trash materials deemed by him to be non-regulated (HIPA) materials such as washroom or staffroom garbage, which may be taken directly to the area outside the building designated for City of Regina pick-up.

[67] These written policies are for the disposal of trash and are not specific to personal health information. As such, it is not compliant with HIPA. Further, as explained, the process described in such policies is not compliant with HIPA.

[68] In my assessment, Lakewood Eye Health Centre, owned by Dr. Monea, does not have written privacy policies or procedures that are compliant with section 16 of HIPA.

d. Were Lakewood Eye Health Centre staff fully trained with respect to *The Health Information Protection Act* pursuant to section 16(c)?

[69] When the Portfolio Officer interviewed the Office Manager on April 18, 2011, she requested particulars of privacy training for staff. The Office Manager advised that the receptionists look after training themselves.

[70] The trustee made the following comment regarding our criticisms of the *Protecting Your Personal Information* document by the SAO:

Accepting your comment that the information sheet from the SAO is vague or otherwise inadequate, **we have posted the 36-page HIPA in the staff room at our clinic and we will insure [sic] that all employees take the time to read it.** Additionally, we will post the HIPA Quick Reference Sheet in the same location and insure [sic] that all employees take time to read that as well.

[emphasis added]

[71] 30 years of Canadian experience with access and privacy legislation has proven that asking someone to read a complicated privacy statute and not to provide more instruction through simple and accessible tools and resources is insufficient for HIPA compliance.

[72] In its letter of July 11, 2011, the Operations Manager for Lakewood Eye Health Centre stated “[i]nformation available to the staff now includes the information you had provided us with, in addition to our Privacy Policy and the HIPA information that I had previously described.”

[73] It appears that Dr. Monea does not have in place written policies regarding training of Lakewood Eye Health Centre staff.

[74] In our analysis of October 16, 2012, my office recommended the following:

Eye Health Centre should arrange for detailed training of optometrists and other support staff in its employ with respect to *The Health Information Protection Act* with particular emphasis on general duties of a trustee including the data minimization principle and the ‘need-to-know’ principle... In particular, employees should know:

- How to identify personal health information
- The rules for collection, use and disclosure
- How to adequately safeguard personal health information
- How to dispose personal health information in a way that respects privacy

Once staff is trained, all Eye Health Centre employees who handle personal health information should have easy access to a secure shredder.

[75] Dr. Monea’s November 2012 response written by her lawyer stated:

All Eye Health Centre staff are trained and in particular all of our client’s optometrists are fully trained and are conversant with HIPA requirements.

Prior to April 2011, our client had never had any complaints about the manner in which it handled confidential patient information.

However, it is respectfully submitted that no amount of vigilance could have protected the Eye Health Centre against the actions of a former disgruntled employee.

Our client submits that it does know how to manage and dispose of private information, and the office does not need any more additional secure paper shredders. (A more detailed explanation on this point is found under Recommendation 3.)

[76] I am unsure as to how Dr. Monea’s lawyer came to the conclusion that its staff is “fully trained and conversant with HIPA requirements”. Yet, the staff we interviewed were certainly not even familiar with what has been represented as the “policy” and “procedure” for HIPA compliance. In any event, simply requiring staff to read the statute is insufficient.

[77] Again, in the analysis of January 2, 2013, my office again recommended that Dr. Monea enhance the HIPA training for its staff. The lawyer’s response of February 4, 2013 reiterated the following:

All of the optometric associates and support staff have now been trained extensively with respect to the statutory requirements of the *Health Information Privacy Act* [sic].

Since April 18, 2011, Dr. Monea has personally undertaken the responsibility of insuring that all optometrists and staff are properly trained.

[emphasis added]

[78] These assurances from the lawyer representing Dr. Monea do not give me much confidence given the inadequacy of the training that has been previously described, the lack of detail to support those assertions and the inability to even describe the title of *The Health Information **Protection** Act* accurately.

[79] I am further concerned with the lack of HIPA training received by the Lakewood Eye Health Centre staff when I consider its reasoning for its unusual record disposal system and its reasons for not changing it.

[80] When my office asked about the inappropriate practice of having staff dispose of personal health information in the normal trash and then having the Office Manager sort through the trash to collect the personal health information, the Operations Manager for Lakewood Eye Health Centre offered the following explanation in his letter, received by my office on May 26, 2011:

In response to your final question, we have several reasons for having [the Office Manager and the Cleaning Staff Person] inspect all of the refuse from the office. I had mentioned some of those reasons previously, and in addition we had a single incidence in the past where [a former receptionist] had provided patient information to the former associate optometrist who had commenced working at another clinic. Records for a single patient were transmitted to the former associate without the proper authorization, and the incident was discovered when we were inspecting the refuse. Ultimately in that case we contacted the patient directly and asked them for an authorization to refer the record to the former associate, which she provided and the matter was closed. [The former employee] was duly chastised for her actions and instructed never to repeat the mistake.

[81] I have serious concerns about this incident; however, it is not a factor in this specific investigation. The recommendations made in this Investigation Report will also address some of these concerns.

[82] This explanation for this process suggests that employees are not trusted to make appropriate decisions regarding the handling and destruction of personal health information.

[83] In both of the analyses of October 16, 2012 and January 4, 2013, my office recommended the following:

Eye Health Centre should amend its procedures so that personal health information should be shredded immediately once it is determined that this is appropriate under a written record retention and disposition schedule.

[84] The lawyer's response of February 4, 2013 repeated its position as follows:

Our client's policy is that the trash is inspected before it is shredded and it will continue to follow this policy. As a result of the comparatively small size and nature of the operations of the Eye Health Centre, it does not generate a significant amount of paper each week.

The consequences with respect to professional liability regarding the erroneous disposal of health records dictate that this is appropriate for clinical reasons, and though its train [sic] the staff extensively, there have been occasions where it discovers something in the trash that should not be there. The maintenance of a high clinical standard is extremely important to our client.

Additionally, it has a specific requirement under the Optometrist's Standards of Practice to retain records for many years, and it is necessary to manage this responsibility in a way that systematically insured that all pertinent documents have been digitized before disposal.

As a result of the recommendations of the Commissioner, the Eye Health Centre has now implemented a written records retention and disposition schedule. In particular, the [personal health information] is shredded every week rather than once every two weeks.

[85] Again, underlying this response is, in my opinion, a clear mistrust of employees who are not adequately trained regarding the handling and disposal of personal health information.

[86] In addition, the lawyer makes vague reference to the "Optometrist's Standards of Practice" which apparently contains rules regarding the retention and disposition of

personal health information records. A copy of the Standards of Practice has not been provided to me. However, from the description given, the Standards of Practice and HIPA appear to work together to achieve the same goal. They are not contradictory. Further, HIPA is a statute and trumps the Standards of Practice, if they did contradict. The key is to ensure the staff understands the rules and that there are clear expectations under the law so that compliance can be achieved.

[87] Finally, a key to the adequate training of staff is to, as discussed, have fulsome written policies and procedures in place for support. This includes a written records retention and disposition schedule. I have not been provided with a copy of the schedule described by Dr. Monea’s lawyer. A proper records retention and disposition schedule should be detailed in describing all types of personal health information records and for how long they should be kept. This would include digital records. I have also stated in my Investigation Report LA-2013-001 that “policies and procedures should not remain unchanged and immutable over time but rather change and evolve along with the organization.”¹⁷

[88] I have not been provided with any evidence to show that Lakewood Eye Health Centre employees have had adequate training with respect to personal health information and Dr. Monea’s duties under HIPA. This is not compliant with section 16 of HIPA.

e. Does Lakewood Eye Health Centre’s personal health information disposal practice comply with section 23(2) of *The Health Information Protect Act*?

[89] Section 23(2) of HIPA states:

23(2) A trustee must establish policies and procedures to restrict access by the trustee’s employees to an individual’s personal health information that is not required by the employee to carry out the purpose for which the information was collected or to carry out a purpose authorized pursuant to this Act.¹⁸

¹⁷SK OIPC, Investigation Report LA-2013-001 at [67], available at www.oipc.sk.ca/Reports/Investigation%20Report%20LA-2013-001%20-%20April%2016,%202013.pdf.

¹⁸*Supra* note 1 at section 23(2).

[90] This section of HIPA embodies both the data minimization and need-to-know principles. I have previously defined these principles in my Investigation Report F-2012-005 as follows:

[65] For both the personal information and personal health information involved in the injury claim and [return-to-work] planning it appears that there are issues related to the ‘need-to-know’ and ‘data minimization’ principles.

[66] These two principles underlie section 28 of FOIP and sections 23 and 26 of HIPA. The need-to-know principle means that SGI should collect, use and disclose only on a need-to-know basis. As well, data minimization means that SGI should collect, use or disclose the least amount of identifying information necessary for the purpose.¹⁹

[91] I have concerns with the Office Manager and Cleaning Staff Person’s role in the disposal of personal health information. The Office Manager is the employee who goes through the trash each night to inspect discarded personal health information. He and the Cleaning Staff Person shred the personal health information. The letter my office received from the Operations Manager on May 26, 2011 for Lakewood Eye Health Centre explained their roles:

[The Cleaning Staff Person who is also the Office Manager’s wife] is an employee of our clinic with 15-years of tenure, and she does assist [the Office Manager] with many of his administrative and operational responsibilities. She has also operated the in-house shredder, and under [the Office Manager’s] supervision has long been responsible for inspecting trash to insure [sic] that nothing is shredded that shouldn’t be shredded. Documents such as referral letters, patient correspondence, and other information requests are sometimes put into the front-desk refuse. [The Cleaning Staff Person] removes these items from the trash and scans the documents into the respective computer file before the document is shredded. [The Office Manager and the Cleaning Staff Person] are also the cleaning staff.

[92] It appears that the Office Manager’s responsibilities are “administrative and operational”. The Cleaning Staff Person’s role is to clean the clinic. My office asked for a description of any role these individuals play in the diagnosis, treatment or care of individuals. The response of November 16, 2012 stated:

¹⁹SK OIPC, Investigation Report F-2012-005 at [65] to [66], available at www.oipc.sk.ca/Reports/Investigation%20Report%20F-2012-005.pdf.

The Eye Health Centre does not have any employees handling any information in a situation where that individual employee does not need the document for the purpose of diagnosis, treatment or care. The only exception is the office manager who is also in charge of shredding the information.

[93] My office disagreed with this assessment and made the following recommendation in January 2, 2013:

Eye Health Centre employees who do not have a need-to-know an individual's personal health information for the purpose of diagnosis, treatment or care should not handle personal health information.

[94] In response, the lawyer for Dr. Monea wrote the following in his letter of February 4, 2013:

As noted hereinbefore, our client has 8 full-time and 3 part-time employees. At any given time the Eye Health Centre is open, it will have as many as five employees or at the most eight employees present in addition to the optometrist(s).

By necessity therefore, many of the support staff are cross-trained to perform a variety of tasks. The "Cleaning Staff Person" referenced by the Commission has also substituted as a secretary receptionist and also as an optometric technician.

The office manager submits claims to Sask Health, private insurers and manages the sales and receipts.

Our client does not have any employees who have improper access to documents.

[95] The need-to-know and data minimization principles are transaction specific. That means that employees of Lakewood Eye Health Centre should only handle a specific piece of personal health information if it is for the specific purpose of diagnosis, treatment or care of individual or for other authorized uses.²⁰ Moreover, only the least amount of data needed for that transaction should be used.

²⁰*Supra* note 7 defines "use" as follows: "indicates the internal utilization of [personal health information] by a trustee and includes sharing of the [personal health information] in such a way that it remains under the control of that trustee. For example, in a regional health authority and its facilities, the sharing of information between employees, volunteers and contractors, including physicians with privileges, constitutes "use" of the [personal health information] since the sharing happens under the control of the regional health authority. It is also defined by section 2(u) of HIPA."

- [96] The process devised by the Lakewood Eye Health Centre gives the Office Manager and Cleaning Staff Person virtual free access to all of the personal health information that is disposed of without an apparent need-to-know in each case. It would be better if a trained employee with a need-to-know destroyed the record at the time the determination was made. The advantage of having someone who is involved in direct patient care overseeing record destruction is that such a person is better qualified to determine what should be destroyed and what should be retained. Further, the Office Manager and Cleaning Staff Person base their decisions by reviewing partial records that have already been torn, adding an extra challenge to adhering to a retention and disposition schedule. It is unclear what the procedure would be if the Office Manager and Cleaning Staff Person deemed that an already torn piece of paper should not be destroyed.
- [97] As such, the Lakewood Eye Health Centre's personal health information disposal practice does not comply with section 23(2) of HIPA.

f. What physical safeguards were in place to protect the personal health information before it was found in/near the dumpster?

- [98] From the written descriptions of the incident provided and as noted above, the personal health information ready to be shredded was situated in an unlocked "utility area" in the basement. It appears that all staff members, including cleaning staff, have access to the basement as that is where the staff room is located.
- [99] Again, Lakewood Eye Health Centre did not have appropriate written policies regarding physical safeguards of personal health information. I do, however, note that the *Protecting Your Personal Information* document by the SAO upon which Dr. Monea was relying as written policies stated, "[p]aper information is under supervision or stored in a locked or restricted area." This does not appear to have been followed in this clinic.
- [100] In its submission dated November 16, 2012, Lakewood Eye Health Centre asserted that personal health information was stored in a locked or restricted area. It stated:

There is no public access to the basement of the clinic. The office manager [name] and his wife [name] who shred the [personal health information] are also office cleaners. Access to the basement is open from the upstairs area of the building, though the shredding queue is located in a utility area which is normally locked except at the end of the day when the building is being cleaned.

[101] This step of Lakewood Eye Health Centre's record disposition process violates several sections of HIPA. Because the personal health information in the "shredding queue" is waiting to be disposed of when it could have easily been shredded by someone with a need-to-know, it violates section 17(2)(b) of HIPA. Further, section 16(b)(iii) of HIPA states that trustees should have safeguards to protect personal health information from "unauthorized access to or use, disclosure or modification of the information". In my opinion, Dr. Monea has none in place. Finally, this step is also a violation of section 23(2) of HIPA, as employees without a need-to-know also have access to this personal health information.

[102] I find there were not sufficient safeguards to protect the personal health information in the "shredding queue".

4. What does the trustee allege happened? How should I deal with these allegations?

[103] In its letter, received by my office on May 26, 2011, the Operations Manager of Lakewood Eye Health Centre stated:

We are certain that the records were not disposed of in the trash, and we do not use the dumpster in question whatsoever. We believe the theft of these records and their subsequent placement was a criminal act of retribution by [our Former Employee], in response to a perceived injustice regarding the terms under which her employment with us came to an abrupt end.

[104] His letter of July 5, 2011 continued with the allegation:

In closing I reiterate that it is our belief that we are the victims of sabotage with respect to the privacy breach that has occurred. I had mentioned that we cannot prove anything, other than motive, means and opportunity, but it is our belief that the combination of staff disgruntlement, misplaced semi-destroyed patient information documents, and a timely but anonymous tip to the office of the Privacy Commissioner

indicating the whereabouts of those misplaced documents are related events, not coincidental events.

[105] Finally, the letter from the lawyer of Dr. Monea dated December 11, 2011 also singles out the Former Employee. The letter raised the fact that personal health information was found in a dumpster outside a medical clinic in Regina a few weeks prior to the incident in question, which was the focus of much media attention.

[106] Upon review of the information collected during this investigation, it appears that the Former Employee of the clinic was not getting along with the Cleaning Staff Person, who is also the wife of the Office Manager. The Operations Manager of Lakewood Eye Health Centre offers the following explanation in its submission my office received on May 26, 2011:

[The Former Employee] was employed at our clinic from July 5, 2010 until April 6, 2011... She was employed as an optician. She had security clearance, a code for the alarm and a key to the clinic.

[The Former Employee] didn't get along very well with [the Cleaning Staff Person], and this culminated in an email [dated April 7, 2011] to Dr. Monea from [the Former Employee] which we interpreted as an ultimatum.

...

[The Cleaning Staff Person] is a valuable long term employee of the clinic, we have not had any issues with her performance, and we therefore accepted this email as [the Former Employee's] letter of resignation. [The Former Employee's] behavior about the office had become bizarre in the two days prior to the email, beginning with at incident after closing time on April 5.

After 5:00 o'clock closing [the Office Manager and Cleaning Staff Person] thought they were the only employees remaining in the building, but they were alerted to sounds coming from the utility area of the basement where the shredding queue is kept. [The Former Employee] emerged from the utility area with a plastic bag partially emptied under her right arm, and accused [the Cleaning Staff Person] of throwing out her lunch container, as if to indicate that this was the contents of the bag under her arm, and her reason for sifting through the trash. [The Former Employee] left the building at approximately 5:20 where she had punched out at 5:10. She left with the garbage bag under her arm.

On the morning of April 6th [the Former Employee] was scheduled to work at 8:30... [The Former Employee] arrived...at approximately 8:05 AM... [she] went downstairs where the staff room and time clock are located. This room is located down the hall

from the utility area and the shredding queue. [The Former Employee] was alone in the basement for 6 or 7 minutes... At approximately 8:25 [the Former Employee] advised [two staff members] that she wasn't feeling well and that she would be leaving. She then returned to the basement for another couple of minutes, and went out the back door at approximately 8:30. She never returned and she resigned the next day.

[107] It appears that the Former Employee left the employ of Lakewood Eye Health Centre on her own accord.

[108] Again in its letter of November 16, 2012, the lawyer for Dr. Monea asserted that it was the individual who left its employ who planted the personal health information near the dumpster. The letter implies that the fact that the personal health information was found next to the dumpster supports this assertion.

[109] I must then consider this possibility in this investigation. In my Investigation Report LA-2010-001, I discussed how I am to make determinations with respect to a privacy breach investigation:

[26] The statute does not define burden of proof in a breach of privacy investigation in the context of an impugned disclosure. In these circumstances, I find that the burden must be borne by the local authority as only the local authority would have intimate knowledge of the circumstances surrounding the disclosure. That burden of proof is assessed on the basis of a balance of probabilities.²¹

[110] The lawyer for Dr. Monea implied in his letter of December 11, 2011 that because a similar incident occurred a few weeks earlier that was reported widely in the media it gave the Former Employee the idea for the incident. The caller who informed us of the discovery was male and the Former Employee was female.

[111] The trustee alleges that this Former Employee had access to the personal health information on April 5, 2011 or April 6, 2011. It was reported that the Former Employee

²¹*Supra* note 6 at [26]. SK OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, at p. 9, "...The standard of proof is 'on a balance of probabilities' or 'on a preponderance of evidence.' A party will have proven its case on a 'balance of probabilities' if the Commissioner is able to say: 'I think it more likely, or more probable, than not.'...", available at www.oipc.sk.ca/Resources/Helpful%20Tips%20-%20Guidelines%20for%20Public%20Bodies%20+%20Trustees%20in%20Preparing%20for%20Review%20-%20September%202010.pdf.

did not return to the clinic after April 6, 2011. However, the email which the Former Employee sent to Dr. Monea complaining of the Cleaning Staff Person and threatening to quit was not sent until April 7, 2011. At that time the Former Employee presumably did not know if the owner would resolve her complaints. The suggestion of the trustee is that the former employee took personal health information before she raised her complaint.

[112] In its submission of November 16, 2012, Lakewood Eye Health Centre stated:

Fourthly, the [personal health information] that was found beside the dumpster appears to have been generated on April 1, 2012. The most informative pieces of trash in [personal health information] found by the Privacy Commissioner are a schedule printout from [one of the Optometrists] and a customer's credit card receipt which are both dated April 1, 2012

This would undoubtedly be the day that these materials were sent to the shredding queue for destruction.

[113] This assertion is not supported by any explanation of its relevance.

[114] Finally, in the letter my office received on May 26, 2011, it was reported that the Cleaning Staff Person and the Office Manager witnessed the Former Employee taking a bag of trash from the basement which may have contained personal health information. In the letter, Lakewood Eye Health Centre's Operations Manager confirmed that "[the Office Manager] is our Privacy Officer". Apparently, the Privacy Officer took no steps to stop the Former Employee from having access to the shredding queue or taking personal health information.

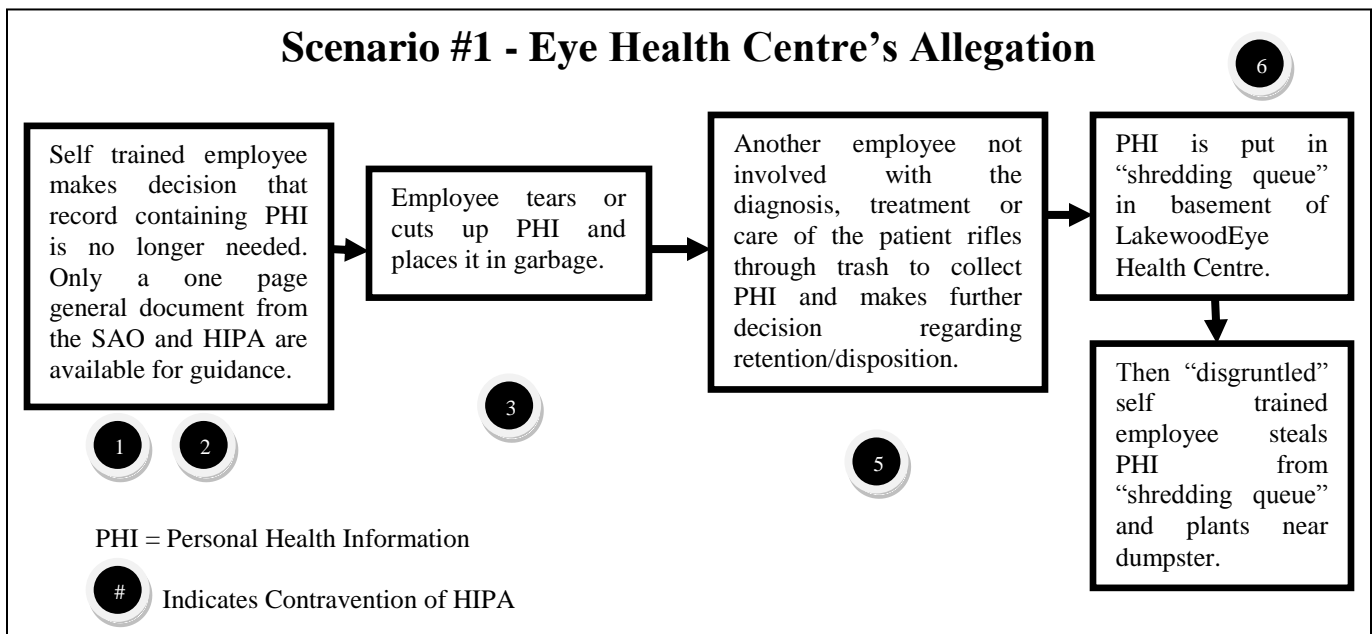
[115] In its submission of November 16, 2012, Dr. Monea's lawyer firmly believes that we should have interviewed the Former Employee to help support its allegations as detailed above. It stated:

The Commissioner's statutory powers listed in ss. 52 and 53 together with the protection given to the Commissioner and his staff in s. 61(2) of HIPA suggest that the legislature intended that the Commissioner's investigation would not be limited exclusively to the actions of individual HIPA trustees but rather it would extend to the trustee's current and past employees.

It is our clients respectful submission that [the Former Employee] should have been interviewed by the Privacy Commissioner’s Office.

[116] I have not interviewed the Former Employee about the incident as it appears there is no need since there is ample evidence that Dr. Monea did not have adequate safeguards in place to protect the personal health information. Even if what is alleged actually occurred, I still have serious concerns with the privacy regime of Lakewood Eye Health Centre.

[117] The following diagram depicts the events as described by Lakewood Eye Health Centre.

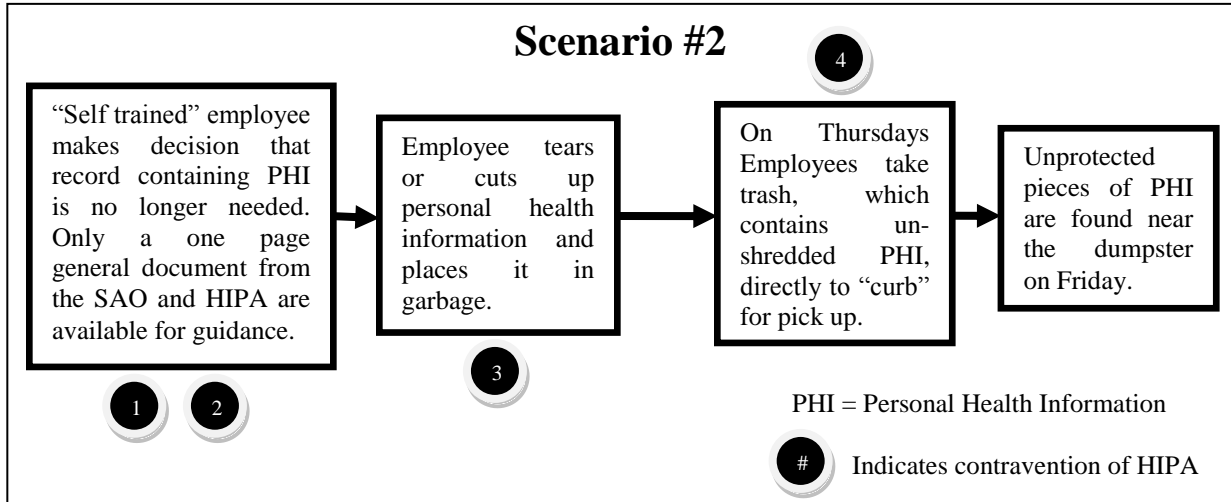


[118] This diagram also indicates the contraventions of HIPA as discussed at [39] that could have potentially enabled this scenario to come about. Lakewood Eye Health Centre did not have sufficient safeguards in place. In addition, it does not appear that the Former Employee had sufficient training to recognize that this action was a breach of privacy pursuant to HIPA.

[119] Because Lakewood Eye Health Centre did not have the appropriate safeguards in place to be compliant with HIPA, it did not adequately protect the personal health information from the actions of the Former Employee. The Best Practice diagram shown earlier

would have diminished the opportunity for the Former Employee to perform the allegations made by Lakewood Eye Health Centre.

[120] Based on my understanding of Lakewood Eye Health Centre’s procedures, there is also another plausible explanation for the discovery of personal health information near the dumpster. The diagram below describes this scenario.



[121] In this scenario as well, it was inadequate safeguards, such as a lack of clear policies and procedures, that could have accounted for the breach of privacy.

[122] I also note my office’s resource, the HIPA Glossary defines a privacy breach as an “unauthorized collection, use or disclosure of [personal health information], REGARDLESS OF WHETHER THE [PERSONAL HEALTH INFORMATION] ENDS UP IN A THIRD PARTY’S POSSESSION.”²²

[123] Therefore, it is unnecessary to make a determination as to which scenario is true. The personal health information was under the custody or control of Dr. Monea. The trustee’s procedures were not compliant with HIPA. In either scenario, best practises were not followed and the absence of sufficient safeguards contributed to the incident.

²²Supra note 7.

IV FINDINGS

- [124] Dr. Diana Monea is a trustee pursuant to section 2(t)(xii)(A) of *The Health Information Protection Act*.
- [125] Personal health information that was under the custody or control of Dr. Diana Monea was found around the dumpster.
- [126] Dr. Diana Monea has not ensured that Lakewood Eye Health Centre's personal health information disposal practice is compliant with section 16 of *The Health Information Protection Act*.
- [127] Dr. Diana Monea has not ensured that Lakewood Eye Health Centre's personal health information disposal practice is compliant with section 17(2)(b) of *The Health Information Protection Act*.
- [128] Dr. Diana Monea has not ensured Lakewood Eye Health Centre's personal health information disposal practice is compliant with section 23(2) of *The Health Information Protection Act*.
- [129] Dr. Diana Monea did not have adequate safeguards in place to sufficiently protect the personal health information in question.

V RECOMMENDATIONS

- [130] That Dr. Diana Monea prepare a comprehensive set of written policies and procedures for Lakewood Eye Health Centre that are compliant with *The Health Information Protection Act*. In particular, this should include a written procedure for the disposal of personal health information and a written policy regarding the storage and safeguarding of personal health information.
- [131] That Dr. Diana Monea prepare a comprehensive records retention and disposition schedule for Lakewood Eye Health Centre.
- [132] That Dr. Diana Monea arrange for detailed training of optometrists and other support staff in the employ of the Lakewood Eye Health Centre with respect to *The Health Information Protection Act* with particular emphasis on general duties of a trustee including the data minimization and need-to-know principles. In particular, employees should know how to identify personal health information, the rules for collection, use and disclosure, how to adequately safeguard personal health information and how to dispose of personal health information in a way that respects privacy.
- [133] That once staff is trained, Dr. Diana Monea ensure all Lakewood Eye Health Centre employees who handle personal health information and that have authorization should have easy access to a secure cross-cut shredder.
- [134] That Dr. Diana Monea ensure that Lakewood Eye Health Centre should amend its procedures so that personal health information is shredded in accordance with a written record retention and disposition schedule.

[135] That Dr. Diana Monea provide notification to affected patients, past and present of Lakewood Eye Health Clinic consistent with the Office of the Saskatchewan Information and Privacy Commissioner's *Helpful Tips: Privacy Breach Guidelines*.²³

[136] That Dr. Diana Monea confirm to my office the secure destruction of the personal health information in question within 30 days of receiving it from my office.

Dated at Regina, in the Province of Saskatchewan, this 13th day of September, 2013.

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

²³SK OIPC, *Helpful Tips: Privacy Breach Guidelines*, available at www.oipc.sk.ca/Resources/Helpful%20Tips%20-%20Privacy%20Breach%20Guidelines%20-%20September%202010.pdf.