



INVESTIGATION REPORT 319-2021

Saskatchewan Health Authority

June 15, 2022

Summary:

The Complainant, an employee of the Saskatchewan Health Authority (SHA), took issue with the SHA's Policy Directive entitled, "Proof of COVID-19 Vaccination" (Policy). The SHA had indicated to the Complainant that *The Employers' COVID-19 Emergency Regulations* authorized the collection of employees' personal health information. The Complainant disagreed and asserted that *The Health Information Protection Act* (HIPA) prevailed over *The Employers' COVID-19 Emergency Regulations*, that HIPA required the SHA to have consent to collect employees' personal health information, and that HIPA required that consent be given voluntarily and must not be obtained through coercion. The Complainant submitted a complaint to the Commissioner. The Commissioner found that the SHA had authority to collect the vaccination status or test results of employees pursuant to section 24(3) of HIPA, section 3-8(a) of *The Saskatchewan Employment Act* and sections 4(1) and (1.1) of *The Employers' COVID-19 Emergency Regulations*. He recommended that the SHA take no further action.

I BACKGROUND

[1] On October 1, 2021, the Saskatchewan Health Authority (SHA)'s Policy Directive entitled, "Proof of Full COVID-19 Vaccination" (Policy) came into effect. The Policy required "team members", including employees, to provide proof of full COVID-19 vaccination or to participate in the SHA COVID-19 monitored test program at the team member's own cost.

[2] On October 25, 2021, the Complainant submitted a letter to the Saskatchewan Health Authority (SHA) detailing their position that many aspects of the SHA's Policy violated

the collective bargaining agreement between the Saskatchewan Association of Health Organizations Inc. (SAHO) and the Saskatchewan Union of Nurses (SUN). Also, the Complainant asserted that SHA's Policy violated *The Health Information Protection Act* (HIPA). The Complainant cited various articles of the collective bargaining agreement (CBA) between SAHO and SUN as well as a portion of the preamble of HIPA, and sections 4(1), 6(1), 26(1), (2), and (3), 64(3.1), (3.2), and (3.3) of HIPA.

[3] On October 27, 2021, the SHA responded to the Complainant as follows:

Your concerns should be addressed with your SUN union representative. They would be able to answer your concerns regarding the SHA and SUN Collective Bargaining Agreement.

The Employers' COVID-19 Emergency Regulations give the Saskatchewan Health Authority the legal authority to require employees to be fully vaccinated, provide evidence of the vaccination or to provide valid negative COVID-19 test results to the employer at least every 7 days. The SHA will protect the information as per *The Health Information Protection Act* and the SHA Privacy & Confidentiality Policy. The link to the Regulations is here: [*The Employers' COVID-19 Emergency Regulations*](#)

The Saskatchewan Privacy Commissioner has also addressed proof of vaccination concerns in his blog: <https://oipc.sk.ca/sources-of-legal-authority-for-asking-for-proof-of-vaccination/>

[4] In a letter dated October 30, 2021, the Complainant provided greater detail to the SHA on their position on the SHA's Policy. The Complainant said the following:

It was brought to my attention that SHA feels legal authorized collection of Personal Health Information through another Act or Regulation, particularly the "Employees [sic] Covid-19 Emergency Regulations" is sustained at subsection 24(3) of The Health Information Protection Act (HIPA), and as such gives SHA authority to collect vaccination status of employees with or without consent.

[5] The Complainant went on to cite sections 4(1), 6(1), and 26(3) of HIPA to rebut the SHA's reliance on section 24(3) of HIPA in their letter. The Complainant argued that *The Employers' COVID 19 Regulations* (Emergency Regulations) conflicted with HIPA and that section 4(1) of HIPA provided that HIPA would prevail over the Emergency Regulations. The Complainant argued that section 26(3) of HIPA required that SHA have

consent to collect the employees' personal health information and that section 6(1) of HIPA required that consent be given voluntarily and must not be obtained through coercion.

[6] On November 19, 2021, the SHA responded to the Complainant as follows:

It is important to keep in mind that the *Proof of Full COVID-19 Vaccination* program is voluntary for our team members. This program allows two options:

- provide proof of full COVID-19 vaccination, or
- participate in the SHA COVID-19 Monitored Testing Program (MTP).

Further, SHA staff who do not provide proof of full COVID-19 vaccination may request an accommodation via the process highlighted on the *Proof of Full COVID-19 Vaccination* policy directive intranet page.

The SHA is required by *Occupational Health and Safety Regulations, 2020* to protect the health, safety and welfare of all SHA team members. Furthermore, as the province's healthcare provider, we are committed to doing everything we can to keep our patients, residents and families safe. The vaccination program is integral to ensuring that the SHA meets these obligations. The program is designed to collect the least amount of information necessary to meet its objective, the information collected will only be shared with those that need to know for the purpose of administering and enforcing the policy directive, and the information collected will be securely stored and destroyed as soon as it is no longer required.

With respect to your concerns regarding the vaccination program and *The Health Information Protection Act* ("HIPA"), it is important to understand that the SHA will not be accessing the vaccination status of its team members as trustee of that information. Rather, as employer / facility operator, the SHA is requesting that team members participate in the vaccination program and share their vaccination information. Team members who choose not to share their vaccination status can opt to participate in the testing program. The SHA will not access the vaccination status of team members who choose not to share that information.

In response to your question about the SHA Privacy & Confidentiality Policy directive, we can advise that the policy directive was initially approved on December 4, 2017, which is the date of the SHA formation. In accordance with the SHA Policy Framework, the policy was recently moved from a policy directive to a policy. Minor changes, completely unrelated to the vaccination policy, were made to the policy on October 27, 2021. We direct you to the SHA Policy Framework (found here: <https://documentfinder.saskhealthauthority.ca/en/viewer?file=%2fmedia%2fPolicies%2fSHA%2fSHA%20Policy%20Framework.pdf#search=policy&phrase=false&page%2fmode=bookmarks>) which applies to all Saskatchewan Health Authority corporate and clinical policies and assists in creating organizational accountability by ensuring policies are up-to-date, regularly maintained and easily accessible.

We hope the information provided in this email will give you a better understanding of why the vaccination policy and these processes have been implemented, however, if you are still unsatisfied with the information regarding your privacy concerns, you can contact:

The Saskatchewan Privacy Commissioner's Office
#503-1801 Hamilton St.
Regina, SK S4P 4B4
306-787-8350

[7] On November 29, 2021, the Complainant contacted my office and requested that my office undertake an investigation.

[8] On December 2, 2021, my office notified both the SHA and the Complainant that my office would be undertaking an investigation.

II DISCUSSION OF THE ISSUES

1. Is HIPA engaged?

[9] HIPA is engaged when three elements are present: (1) personal health information, (2), a trustee, (3) the personal health information is in the custody or control of the trustee. If HIPA is engaged, then my office is able to determine if a privacy breach has occurred under HIPA. A privacy breach occurs when personal health information has been collected, used, and/or disclosed without authority under HIPA.

[10] First, the personal health information is defined by section 2(m) of HIPA, which provides:

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;

[11] I find that a person’s vaccination status or the results of tests for COVID-19 would qualify as “personal health information” as defined by section 2(m)(i) of HIPA.

[12] Second, “trustee” is defined by section 2(t)(ii) of HIPA as follows:

2 In this Act:

...

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

...

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

[13] The SHA qualifies as the “provincial health authority” as defined by section 1-2 of *The Provincial Health Authority Act*. I find that the SHA qualifies as a trustee as defined by section 2(t)(ii) of HIPA.

[14] Third, I must determine if the personal health information is in the custody or control of the SHA.

[15] The Complainant’s concern is whether the SHA’s Policy is in line with HIPA. There is no evidence that the SHA obtained the Complainant’s vaccination status or results of tests for COVID-19. As such, I find that the Complainant’s personal health information at issue is *not* in the custody or control of the SHA.

[16] However, since the SHA was engaged in the practice of collecting personal health information in accordance with its Policy, I find that HIPA is engaged.

2. Did the SHA have authority under HIPA to collect the vaccination status or test results of employees?

[17] As summarized in the background of this Investigation Report, the Complainant does not accept the sufficiency of section 24(3) of HIPA as authority for the SHA to collect personal health information in accordance with the SHA’s Policy. The Complainant cited sections 4(1), 6(1) and 26(3) of HIPA to rebut the SHA’s reliance on section 24(3) of HIPA.

[18] Below is my analysis to determine if the SHA had authority under HIPA to collect the vaccination status or test results of employees.

[19] I have found that a person's vaccination status or the results of tests for COVID-19 qualifies as "personal health information" as defined by section 2(m)(i) of HIPA.

[20] Section 24(3) of HIPA provides:

24(3) Nothing in this Act prohibits the collection of personal health information where that collection is authorized by another Act or by a regulation made pursuant to another Act.

[Emphasis added]

[21] Based on section 24(3) of HIPA, I need to determine if there was another Act or regulation that authorized the collection of employees' personal health information. Section 3-8(a) of *The Saskatchewan Employment Act* provides:

3-8 Every employer shall:

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;

[22] The Emergency Regulations came into effect on October 1, 2021, which applied to employers who were not a "public employer", pursuant to sections 2(2) and 3 of the Emergency Regulations:

2(2) For the purposes of the definition of "public employer" in subsection (1), public employer does not include the following:

(a) the provincial health authority, an affiliate, a health care organization or the cancer agency as those terms are defined in *The Provincial Health Authority Act*, except eHealth Saskatchewan;

...

3 These regulations do not apply to a public employer.

[23] Sections 4(1) and (1.1) of the Emergency Regulations provided:

4(1) On and after October 1, 2021, an employer may, for the purposes of clause 3-8(a) of the Act, require all of its workers to comply with one of the following:

(a) to:

(i) be fully-vaccinated; and

(ii) if requested by the employer, provide satisfactory evidence to the employer in relation to the worker's vaccinations;

(b) to provide a valid negative COVID-19 test result to the employer at least every 7 days.

(1.1) If an employer requires its workers to comply with one of the requirements set out in subsection (1), the employer shall give each worker the option to comply with either clause (1)(a) or (b), but the worker must comply with at least one of those requirements within the period specified by the employer.

[24] Therefore, I find that the SHA had authority to collect the vaccination status or test results of employees pursuant to section 24(3) of HIPA, section 3-8(a) of *The Saskatchewan Employment Act* and sections 4(1) and (1.1) of the Emergency Regulations. In other words, I find that the SHA's Policy was in line with HIPA.

[25] I note that the Emergency Regulations were repealed effective February 14, 2022. SHA's Policy expired on February 14, 2022. That is, it ceased the practice of collecting proof of full COVID-19 vaccination or COVID-19 test results on February 14, 2022.

[26] I note that the Complainant's position was that the SHA's Policy was inconsistent with HIPA. As described in the background, the Complainant argued that section 26(3) of HIPA required that SHA have consent to collect employees' personal health information and that section 6(1) of HIPA required that consent be given voluntarily and must not be obtained through coercion. Therefore, the Complainant argued that *The Saskatchewan Employment Act* and Emergency Regulations was inconsistent with HIPA and cited section 4(1) of HIPA that provides that HIPA would prevail. In the course of my office's investigation, the Complainant provided a lengthy 24-page submission re-iterating their position:

There is clear conflict between [*The Saskatchewan Employment Act*] legislation as amended and HIPA. As such, in all matters of conflict, HIPA prevails. *The Employers' COVID 19 Emergency Regulations* does not allow exemption of HIPA scrutiny and does not fall within the laws of subsection 4 (4). This raises the concern that SHA in fact did not have the authority to ask for vaccination status or COVID 19 test results of its employees. As HIPA prevails in matters of conflict, it makes *The Employers' COVID 19 Emergency Regulations* act moot and cannot be relied upon or used as reference giving SHA legal authority to collect same as the terms of the regulation and HIPA were inconsistent in many ways. Hence we must look solely at HIPA and determine based on HIPA and HIPA alone if SHA truly had authority to request the vaccination status of its employers and require/mandate COVID 19 test results for those that did not disclose vaccination status under this Act in relation to employment status.

...

Also important to note – the HIPA violations myself and other SHA employees have contested are in regards to CONSENT/COLLECTION of personal health information via appropriately required consent; NOT in regards to DISCLOSURE of personal health information by a health authority. These are two very different things. As such, section 26(3) of HIPA under restrictions of use states: “*Nothing in subsection (2) authorizes a trustee as an employer to **use or obtain** access to the **personal health information** of an individual who is an employee or prospective employee for **any purpose related to the employment** of the individual **without the individual's consent**.” This clause reinforces that collection and/or use of the personal health information **must** be obtained with **true voluntary non-coerced consent**. Partial purpose of collecting vaccination status or COVID-19 test results was in direct relation to a condition of employment/related to the employment of the individual as contemplated in this section, and all personal health information that requires consent of the individual **must be voluntary and free of coercion in accordance with section 6(1)(d) of HIPA**.*

[Emphasis in original]

[27] The Complainant appears to insist that the SHA must collect personal health information pursuant to section 26(3) of HIPA instead of section 24(3). The Complainant has failed to consider the wording of section 24(3) of HIPA. Section 24(3) of HIPA provides that “nothing in this Act” (which would include section 26(3) of HIPA) prohibits the collection of personal health information where the collection is authorized by another Act or regulation made pursuant to another Act. Therefore, there is no need to consider sections 26(3), 6(1) and 4(1) of HIPA.

III FINDINGS

[28] I find that HIPA is engaged.

[29] I find that the SHA had authority to collect the vaccination status or test results of employees pursuant to section 24(3) of HIPA, section 3-8(a) of *The Saskatchewan Employment Act* and sections 4(1) and (1.1) of the Emergency Regulations.

IV RECOMMENDATION

[30] I recommend that the SHA take no further action regarding this matter.

Dated at Regina, in the Province of Saskatchewan, this 15th day of June, 2022.

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