



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## REVIEW REPORT 116-2018

### Saskatchewan Health Authority (formerly Sunrise Regional Health Authority)

November 14<sup>th</sup>, 2018

#### Summary:

The Applicant requested information surrounding the death of their parent from the Saskatchewan Health Authority (SHA). The SHA denied disclosure to the Applicant pursuant to subsection 27(4)(e)(ii) of *The Health Information and Protection Act* (HIPA). The Commissioner found that the SHA's policy in respect of discretionary disclosures pursuant to subsection 27(4)(e)(ii) of HIPA did not accurately interpret the requirements of this subsection. The Commissioner also found that when the SHA communicated its decision to the Applicant, the SHA did not correctly apply subsection 27(4)(e)(ii) of HIPA, nor consider whether other discretionary powers granted by section 27 of HIPA could apply. The Commissioner recommended that the SHA amend its policy to accurately capture the requirements of HIPA and that the SHA reassess the Applicant's original request and consider whether other discretionary powers under section 27 of HIPA could apply. Finally, the Commissioner recommended that as a best practice, the SHA develop and implement policies and procedures to guide all disclosures in accordance with section 27 of HIPA and ensure these policies contain a recordkeeping requirement.

#### I BACKGROUND

- [1] The Applicant's parent was admitted into palliative care at the Canora Hospital in February 2018, where the parent later died in March. The Applicant, the adult child of the parent, submitted a written request on March 22, 2018 to obtain information regarding the death of their parent to the Sunrise Regional Health Authority, now part of the Saskatchewan Health Authority (SHA). The Applicant's request stated that they were seeking "*patient information surrounding patient death.*"

- [2] The Applicant received a letter from the Sunrise Regional Health Authority, hereinafter referred to as the SHA, on April 6, 2018 advising them that:

Section 27(4)(e)(ii) of The Health Information Protection Act (HIPA) states that information related to the circumstances surrounding the death of the subject individual may be disclosed to immediate family members if there was a close personal relationship. The records that we have do not indicate a close personal relationship and therefore we cannot provide access to you.

- [3] In June 2018, the Applicant contacted the SHA to provide more information regarding why they were seeking information related to the circumstances of their parent's death. The Applicant mentioned that they had concerns related to the hereditary nature of the cancer that may have caused their parent's death.

- [4] On June 21, 2018, the Applicant requested a review of the decision by the SHA to my office. The Applicant's letter acknowledged that they had not spoken to their parent much in the last six years and that they needed to know what form of cancer their parent had, as they had concerns about whether the cancer could be hereditary.

- [5] In its submission to my office, the SHA indicated that a Community Social Work Referral form in the deceased individual's file stated that they were estranged from some of their children, including the Applicant. The SHA stated in its submission that they contacted the writer of the form who confirmed that the Applicant's parent had not mentioned the estranged children until they were asked about family. At that point, the parent noted that they had not "...spoken to [their children] in a while."

- [6] The SHA further stated that the writer of the referral form also advised the SHA that there was no activity during the parent's serious health event that was indicative of an active relationship with the estranged adult children. The SHA's submission to my office stated that "As per this estrangement, access could not be provided to the applicant...".

[7] During this review, my office asked the SHA if their office considered the Applicant's concerns related to the hereditary nature of cancers when deciding whether or not to provide the Applicant with information regarding their parent's death. The SHA confirmed that this was not a consideration in their decision. The SHA also confirmed that they did not consider whether the information the Applicant was seeking would benefit the Applicant in the provision of their own health care.

[8] During this review the SHA provided copies of policies used to guide the disclosure of personal health information without the consent of the subject individual.

## **II RECORDS AT ISSUE**

[9] The issues in this case relate to the Applicant's right to access their deceased parent's personal health information and whether the SHA properly exercised their discretion pursuant to section 27 of HIPA. As such, there are no records at issue.

## **III DISCUSSION OF THE ISSUES**

### **1. Is HIPA engaged and do I have jurisdiction to investigate this matter?**

[10] HIPA is engaged when three elements are present: 1) personal health information, 2) a trustee, and 3) the personal health information involved is in the custody or control of the trustee.

[11] On the first element, personal health information is defined by subsection 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;

- (ii) information with respect to any health service provided to the individual;
- (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
- (iv) information that is collected:
  - (A) in the course of providing health services to the individual; or
  - (B) incidentally to the provision of health services to the individual; or
- (v) registration information;

[12] Based on a review of the Community Social Work Referral form, which contains information in respect of the physical and mental health of the Applicant's parent and health services provided to them, I find that there is personal health information.

[13] In regards to the second element, "trustee" is defined by subsection 2(t)(ii) of HIPA, which provides:

**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

[14] I have previously found that the SHA qualifies as a trustee, as defined by subsection 2(t)(ii) of HIPA, which is also the case here.

[15] Finally, on the third element, the personal health information of the Applicant's parent was in the custody – in other words, the physical possession – of the SHA.

[16] As all three elements are present, I find that HIPA is engaged and I do have jurisdiction to review this matter.

**2. Did the SHA properly apply Part V of HIPA in denying access to the Applicant?**

[17] The personal health information involved in this case pertains to the Applicant's deceased parent. As such, any right of access to this information must be founded on a combination of section 32 and the surrogate provision in section 56. These sections provide:

**32** Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

...

**56** Any right or power conferred on an individual by this Act may be exercised:

(a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

(b) where a personal guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;

(c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustee, the individual understands the nature of the right or power and the consequences of exercising the right or power;

(d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the trustee, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;

(e) where the individual does not have the capacity to give consent:

(i) by a person designated by the Minister of Community Resources and Employment if the individual is receiving services pursuant to The Residential Services Act or The Rehabilitation Act; or

(ii) by a person who, pursuant to The Health Care Directives and Substitute Health Care Decision Makers Act, 2015, is entitled to make a health care decision, as defined in that Act, on behalf of the individual; or

(f) by any person designated in writing by the individual pursuant to section 15.

[18] In this case, given that sections 32, 56 or 15 of HIPA do not apply, the Applicant is not entitled to request access to their deceased parent's personal health information. While the records reviewed by my office do not indicate that the Applicant requested formal access to their deceased parent's information, it is important to consider whether these sections of HIPA would be engaged before proceeding with an analysis of the discretionary disclosures permitted under HIPA.

**3. Did the SHA properly exercise its discretion to deny disclosure to the Applicant pursuant to subsection 27(4)(e)(ii) of HIPA?**

[19] The relevant section of HIPA is as follows:

**27 (4)** A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:

...

(e) if the subject individual is deceased:

...

(ii) where the information relates to circumstances surrounding the death of the subject individual or services recently received by the subject individual, and the disclosure:

(A) is made to a member of the subject individual's immediate family or to anyone else with whom the subject individual had a close personal relationship; and

(B) is made in accordance with established policies and procedures of the trustee, or where the trustee is a health professional, made in accordance with the ethical practices of that profession;

[20] As mentioned in a previous report issued by my office, Report H-2006-001, the *discretion* to disclose is different from the *duty* to respond to a request for access, and a disclosure made pursuant to section 27 involves the exercise of discretion by the trustee. Therefore, in this case it is understood that the SHA *may* or *may not* disclose the personal health information of the deceased parent to the Applicant.

[21] Report H-2006-001 also stated that my office does not normally substitute my opinion for that of a trustee; however my office will make recommendations in cases where there is some basis to believe that discretionary power has been exercised for an improper purpose, or not exercised at all. In the present case, I believe the discretionary powers granted by section 27 to the SHA were not all considered and subsection 27(4)(e)(ii) was not properly applied.

[22] On the latter point, my office reviewed the SHA's information management policy entitled, *Access and Disclosure of Deceased Personal Health Information, Number 444.013*, to verify whether discretion was exercised in accordance with established policies and procedures, as required by HIPA. The policy was last revised on September 27, 2016 so it was in effect at the time the Applicant submitted their written request to the SHA. This policy states:

**2. Disclosure requests from immediate family or anyone else with whom the deceased had a close personal relationship**

...

2.2. In lieu of providing legal documentation as Authorized Representative, the Information Disclosed section of the request form will note that the disclosure is

being made to an immediate family member or other person with whom the deceased had a close personal relationship. In the following order, a close personal relationship may be verified by:

- If not otherwise known, requesting that the family members or close personal friends clarify the nature of their relationship with the patient.
- Checking the patient's health record for notations which would confirm the existence of a close personal relationship or information indicating that the patient does NOT wish information to be shared with that individual.

[23] The SHA's policy requires that staff verify that a close personal relationship exists when considering whether or not to disclose the circumstances surrounding the death of an individual to immediate family members. However, subsection 27(4)(e)(ii) of HIPA does not require that evidence exist, or evidence be collected, to prove or establish that a close personal relationship existed between the deceased individual and an immediate family member. This section of HIPA requires consideration of whether the disclosure of information is being made to a member of the subject individual's immediate family *or* to anyone else with whom the subject individual had a close personal relationship. Subsection 27(4)(e)(ii) of HIPA contemplates cases where an individual who is *not* part of the deceased individual's immediate family, like a common law partner or boyfriend/girlfriend, but is close to the deceased, may receive information related to the circumstances surrounding the death of the individual. As such, I find that the SHA's policy does not accurately interpret subsection 27(4)(e)(ii) of HIPA.

[24] While the SHA's internal policy requires staff to also verify whether there is "*...information indicating that the patient does NOT wish information to be shared with that individual*", none of the documentation provided and reviewed by my office indicates that such information existed on the deceased individual's file or record. As such, this would not factor into the final decision made by the SHA to deny disclosure to the Applicant pursuant to subsection 27(4)(e)(ii) of HIPA.

[25] My office also reviewed the response letter provided by the SHA to the Applicant. This letter states that:



Section 27(4)(e)(ii) of [HIPA] states that information related to the circumstances surrounding the death of the subject individual may be disclosed to immediate family members if there was a close personal relationship. The records that we have do not indicate a close personal relationship and therefore we cannot provide access to you.

[26] The SHA's response letter is consistent with the inaccurate interpretation found in the internal policy. The SHA's submission to my office also provides further indications that subsection 27(4)(e)(ii) of HIPA was not properly interpreted and applied by the SHA.

[27] Therefore, I find that the SHA did not properly apply subsection 27(4)(e)(ii) of HIPA. I recommend the SHA update its internal policy to ensure it accurately captures the requirements of subsection 27(4)(e)(ii) of HIPA. I also recommend that the SHA reassess the Applicant's original request in accordance with subsection 27(4)(e)(ii) of HIPA, and as described in this report, and provide the Applicant with another response letter to communicate the trustee's decision.

[28] In reconsidering the Applicant's original request, I also recommend that the SHA consider whether any of the other discretionary powers granted by section 27 of HIPA could apply in this case. Based on all the information in this case, I find that the SHA has not yet considered other discretionary powers. For instance subsection 27(4)(a) of HIPA provides that:

**27 (4)** A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:

(a) where the trustee believes, on reasonable grounds, that the disclosure will avoid or minimize a danger to the health or safety of any person;

[29] As stated earlier, the Applicant advised the SHA that they wanted to know what form of cancer their parent had, as they were concerned about whether the cancer could be hereditary. The SHA did not consider the Applicant's concerns related to the hereditary nature of certain cancers when deciding whether or not to provide the Applicant with

information regarding their deceased parent. The SHA also confirmed that they did not consider whether the information the Applicant was seeking would benefit the Applicant in the provision of their own health care.

[30] Unlike subsection 27(4)(e)(ii) of HIPA, subsection 27(4)(a), and other subsections in section 27, do not require that a disclosure be made in accordance with established policies and procedures of a trustee. As such, if a policy does not currently exist to guide these other discretionary powers, this should not preclude the SHA from considering these in this case.

[31] That said, having established policies and procedures serves to guide staff in exercising their discretion and aids in the consistent application of discretionary powers granted pursuant to section 27 of HIPA. Therefore, as a best practice, I recommend the SHA work toward developing and implementing policies and procedures to guide all disclosures in accordance with section 27 of HIPA, where they do not currently exist.

[32] Furthermore, and in line with best practices, I also recommend that the SHA ensure its policies and procedures contain a recordkeeping requirement for any disclosures made pursuant to section 27 of HIPA.

#### **IV FINDINGS**

[33] I find that the SHA's policy does not accurately interpret subsection 27(4)(e)(ii) of HIPA.

[34] I find that the SHA did not properly apply subsection 27(4)(e)(ii) of HIPA.

[35] I find that the SHA did not consider whether other discretionary powers granted by section 27 of HIPA apply in this case.

#### **V RECOMMENDATIONS**

[36] I recommend the SHA update its internal policy to ensure it accurately captures the requirements of subsection 27(4)(e)(ii) of HIPA.

- [37] I recommend that the SHA reassess the Applicant's original request pursuant to subsection 27(4)(e)(ii) of HIPA, and as described in this report, and provide the Applicant with another response letter to communicate its decision.
- [38] In reconsidering the Applicant's original request, I recommend that the SHA consider whether any of the other discretionary powers granted by section 27 of HIPA could apply in this case.
- [39] In line with best practices, I recommend the SHA work toward developing and implementing policies and procedures to guide all disclosures in accordance with section 27 of HIPA, where they do not currently exist, even if the law does not require it.
- [40] I recommend policies and procedures implemented as per the preceding recommendation should contain a recordkeeping requirement to ensure details of any disclosures made pursuant to section 27 of HIPA are kept.

Dated at Regina, in the Province of Saskatchewan, this 14<sup>th</sup> day of November 2018.

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