Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 221-2020

Saskatchewan Government Insurance

February 17, 2022

Summary: Saskatchewan Government Insurance (SGI) received an access to information request from the Applicant under *The Health Information Protection Act* (HIPA) for information provided to its Medical Review Unit. SGI denied the request claiming that the record was exempt pursuant to section 38(1)(f) of HIPA. In this review, the Commissioner recommends that SGI release the responsive record to the Applicant.

BACKGROUND

[1] The Applicant submitted an access to information request to Saskatchewan Government Insurance (SGI) on May 30, 2019. The Applicant's request stated:

> I wish to see the report posted with SGI's [Medical Review Unit]. I wish to see the specific complaint, and the private citizen who filed the complaint as I believe the complaint to be malicious in intent. Time frame ASAP.

[2] SGI initially responded to the request by refusing to confirm or deny the existence of a record pursuant to section 7(4) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review of that decision. My office conducted a review and issued Review Report 261-2019 on August 12, 2020. In that Report, I found that *The Health Information Protection Act* (HIPA) applied to the request and that SGI could not rely on FOIP to refuse to confirm or deny the existence of the record. I recommended that SGI provide the Applicant with a response to their request that complies with section 36 of HIPA.

[3] On September 9, 2020, SGI issued a response to the request denying access to the record pursuant to section 38(1)(f) of HIPA.

[4] The Applicant filed a request for a review with my office on September 11, 2020.

[5] On September 16, 2020, my office notified the Applicant and SGI of my office's intent to undertake a review of SGI's decision. Both parties were invited to provide submissions. The notification to SGI included a request that SGI file a submission on:

- How the record qualifies for exemption under section 38(1)(f) of HIPA and
- How SGI met its obligations under section 38(2) of HIPA.

[6] The Applicant provided their submission on September 16, 2020. SGI provided its submission on November 17, 2020.

II RECORD AT ISSUE

[7] The record is a one-page reporting form filed with SGI regarding the Applicant's ability to operate a motor vehicle.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] HIPA is engaged when three elements are present:

1. There is a trustee
2. There is personal health information; and
3. The personal health information involved is in the custody or control of the trustee.

[9] As noted above, the Applicant seeks access to a record from the Medical Review Unit (MRU) of SGI. The record at issue contains information about the Applicant which

qualifies as the Applicant's "personal health information" as defined in section 2(m)(i) of HIPA which states:

> **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;

[10] I also find that SGI qualifies as a "trustee" pursuant to section 2(t)(i) of HIPA which states:

> **2** In this Act:
>
> (t) "trustee" means any of the following that have custody or control of personal health information:
>
> (i) a government institution;

[11] As SGI has custody or control of the record, I have jurisdiction to conduct this review.

2. Has SGI properly applied section 38(1)(f) of HIPA?

[12] Section 32 of HIPA gives individuals the right to obtain access to personal health information about themselves that is in a record in the custody or control of a trustee. Section 32 of HIPA states:

> **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.

[13] Section 38 of HIPA sets out the limited circumstances where a trustee can deny access to personal health information. As noted above, SGI is relying on section 38(1)(f) of HIPA to deny the Applicant access. Section 38(1)(f) of HIPA states:

> **38**(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:

> …
> (f) disclosure of the information could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation.

[14] The Applicant's submission stated, among other things, that they believe that SGI acted in bad faith in this matter and in refusing to admit the existence of the record at first instance. They also claimed that SGI was not conducting a lawful investigation.

[15] SGI provided the following background information about the function and role of its MRU. SGI, as the administrator of *The Traffic Safety Act* (TSA), is empowered to regulate and enforce traffic safety within Saskatchewan. Its mandate includes the duty to regulate the issuance of drivers' licences. SGI also can refrain from issuing a licence where an individual refuses to produce a medical report under section 41(g) of the TSA, or if an individual has a medical condition that would affect their ability to operate a motor vehicle as per section 41(e) of the TSA. For existing licence holders, SGI can require an individual to provide a medical report under section 42(b) of the TSA and, if the report is not provided, then the licence may be cancelled, refused or suspended under section 48(2)(b) of the TSA.

[16] SGI stated that its MRU receives information from a variety of different parties, including individuals and medical practitioners about individuals' capacity to operate a motor vehicle. There is no legal requirement for non-medical practitioners to file reports with the MRU. However, there is a requirement in section 283(1) of the TSA for qualified medical practitioners to file reports in certain circumstances. Section 283 of the TSA provides, in part:

> **283**(1) Any duly qualified medical practitioner shall report to the administrator the name, address and clinical condition of every person who:
>
> > (a) is 15 years of age or over attending on the medical practitioner for medical services; and
> > (b) in the opinion of the medical practitioner, is suffering from a condition that will make it dangerous for that person to operate a vehicle.
>
> …
> (3) No action shall be brought against a medical practitioner or an optometrist who makes a report in good faith in accordance with subsection (1) or (2).

> (4) A report made pursuant to this section:
>
> (a) is privileged for the information of the administrator only;
> (b) is not open to public inspection; and
> (c) is not admissible in evidence in any trial, except to show that the report was made in good faith in accordance with this section.

[17] SGI's submission on the application of section 38(1)(f) of HIPA notes that my office has not issued any reports interpreting this section. However, it states that guidance can be found on the interpretation of this section from reports my office has issued interpreting section 15(1)(b) of FOIP which uses similar language to that used in section 38(1) of HIPA.

[18] Section 15(1)(b) of FOIP states:

> **15**(1) A head may refuse to give access to a record, the release of which could:
>
> …
> (b) be injurious to the enforcement of:
>
> (i) an Act or a regulation; or
>
> (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;

[19] My office's Guide to FOIP, states:

> Section 15(1)(b) is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could be injurious to the enforcement of an Act or regulation provincially or federally. The following two-part test can be applied:
>
> 1. Which Act or regulation is being enforced?
>
> 2. Could release of the record injure enforcement under the identified Act or regulation?
>
> (IPC *Guide to FOIP*, Chapter 4: "Exemptions from the Right of Access", updated: June 29, 2021, at p. 50 (*Guide to FOIP*, Ch. 4))

[20] To meet part two of the test, it is sufficient if the release of the information *could* have the specified result. However, there must be a basis for asserting that the harm could occur. If

the claim is fanciful or exceedingly remote, the exemption should not be relied on to withhold information. For this provision to be applied, there must be objective grounds for believing that disclosing the information could result in the harm alleged (*Guide to FOIP*, Ch. 4, pp. 50-51).

[21] "Injury" implies damage or detriment. Government institutions relying on section 15(1)(b) should describe the harm in detail to support the application of the provision. Government institutions should not assume that the harm is self-evident on the face of the records (*Guide to FOIP*, Ch. 4, p. 51).

[22] I agree that my office's approach to the application of section 15(1)(b) of FOIP should be followed and will apply the same two-part test in determining whether section 38(1)(f) of HIPA applies here.

[23] SGI claims that both parts of the two-part test have been met in this case. It states that it is responsible for administering and enforcing the TSA, and the record to which the Applicant seeks access was obtained by the MRU in the exercise of its powers and duties under the TSA. I find that the record is related to an enforcement matter that is specific to the TSA and therefore the first part of the test has been met.

[24] With respect to the second part of the test, SGI submits:

> It is SGI's position that the potential harm, if disclosure of the identity of the informant under the MRU system, regardless of [whether it is a medical practitioner, optometrist or a private citizen], would impair SGI's ability to keep drivers with unsafe medical conditions off the roads.

[25] SGI further submits that disclosure of "confidential informant information" could have a "cooling effect" and could have "an injurious effect" on SGI's ability to enforce the TSA.

[26] SGI claims that the release of the records would alter the relationship between the MRU and reporters of unsafe drivers because it would undermine the expectation of confidentiality. It adds that:

> …while there is significant value to allowing individuals access to their personal health information, it is a stretch to claim that the right to access would trump the right that other individuals possess to be safe from drivers with dangerous medical conditions.

[27] I recognize the important public safety role that SGI and its MRU staff have in helping to ensure that licensed drivers are fit to operate a motor vehicle. I accept that the reporting scheme administered by the MRU is a key to how it exercises this part of its mandate. Similar reporting requirements and mechanisms for medical practitioners exist in other Canadian provincial drivers' licensing regulatory frameworks. Options for individuals who elect to report medically unfit drivers also exist in other Canadian provinces.

[28] As noted above, the TSA includes a confidentiality clause in section 283(4) which may apply in this case if the reporter was a medical practitioner. I considered the impact of a similar confidentiality clause in section 39(5) of *The Police Act, 1990* (PA) in Review Report 059-2017. In that Report, I found that the confidentiality required by section 39(5) of the PA for information collected by the Police Complaints Commission (PCC) is not absolute because the PCC is subject to FOIP. I found that the PCC could only refuse access where it demonstrated that the information an applicant seeks access to falls within the criteria for an exemption set out in FOIP.

[29] Sections 4(1) to 4(3) of HIPA state that HIPA supersedes other laws unless a law specifically states otherwise. The only exceptions are the laws listed in section 4(4) of HIPA (IPC *Guide to HIPA*, Updated: December 2016, at p. 101 (*Guide to HIPA*)). I note that the TSA is not one of the listed exceptions and there is nothing in the TSA which states that it prevails over HIPA. Therefore, I find that HIPA prevails, and it applies to the record at issue here.

[30] I now turn to consider SGI's claim that it has met part two of the test because of the alleged impact of the record's release on its ability to enforce the TSA. My analysis below considers the impact of a potential release on reporters who qualify as medical practitioners and non-medical practitioners, or other individuals.

Medical Practitioners

[31] As noted above, if the reporter is a medical practitioner, there is a *requirement* for them to make reports to SGI under section 283 of the TSA in specific circumstances. For those medical practitioners who are unsure about whether to make a report, I note that there is guidance available to them through the Canadian Medical Protection Association (CMPA). The guidance advises that there have been cases where physicians were found negligent for failing to fulfill their reporting obligations. The guidance also appears to encourage transparency by recommending that medical practitioners advise patients of the obligation and intention to file a report.

[32] If the reporter was a medical practitioner, the findings in Review Report 059-2017, discussed above, would apply. That Report dealt with the application of section 15(1)(b) of FOIP to information obtained by the PCC from the police for an investigation under the PA. The PCC asserted that violating the expectation of confidentiality would undermine the PCC's ability to enforce the PA because its investigations depend upon the willing cooperation of the police. I noted in the Report that there was a legal requirement for the police to provide information to the PCC in the PA, and I found that the PCC had not demonstrated how the information at issue met the criteria for the application of section 15(1)(b) of FOIP.

[33] SGI has not provided any examples or circumstances where a medical practitioner expressed an unwillingness to report, or general concerns about reporting to the MRU. Given the legal requirement to file a report, the risks to medical practitioners who fail to fulfill obligations to report, and the absence of any examples or other information or evidence to support the claim, I am not satisfied that there would be a chilling effect on reporting by medical practitioners if this record were to be released. Even where a medical practitioner may be unsure of whether to report an incident, I find that SGI has not provided sufficient information or evidence to support its claim that the release of the record could be injurious to the enforcement of the TSA.

[34] Section 47 of HIPA places the burden of proof on the trustee during the review of an access decision. It states 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.

[35] Based on all the information before me, I am not satisfied that SGI has met its burden of proof pursuant to section 47 of HIPA. Therefore, if the reporter was a medical practitioner, I find that section 38(1)(f) of HIPA does not apply to the record.

Individuals

[36] As noted above, the MRU also receives reports from non-medical practitioners. This group of reporters are not legally required to provide information about medically unfit drivers, but they have the option of doing so. SGI states that these individuals are guaranteed by the MRU that their identities will be kept confidential.

[37] I am not persuaded that the release of the record at issue would have a cooling effect on individuals' willingness to file reports to the MRU. Having carefully considered the submission of SGI and the provisions of the TSA and HIPA, I find that, if the reporter was an individual, SGI has not established that release of the record could be injurious to the enforcement of the TSA. I am not satisfied that SGI has met its burden of proof pursuant to section 47 of HIPA. Therefore, if the reporter was an individual, I find that section 38(1)(f) of HIPA does not apply to the record.

[38] For all these reasons, I find that SGI has not met part two of the test for the application of section 38(1)(f) of HIPA to the record. I will recommend below that it release the record to the Applicant.

3. Did SGI comply with section 38(2) of HIPA?

[39] As I have found that the record at issue should be released to the Applicant, it is not necessary for me to consider whether SGI has complied with section 38(2) of HIPA.

IV FINDING

[40] I find that SGI did not have the authority under section 38(1)(f) of HIPA to withhold access to the record.

V RECOMMENDATION

[41] I recommend that within 30 days of issuance of this Report, SGI provide the Applicant with a copy of the requested record.

Dated at Regina, in the Province of Saskatchewan, this 17th day of February, 2022.

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