



REVIEW REPORT 268-2019

Saskatchewan Health Authority

July 28, 2020

Summary:

A father made an access request for the personal health information of his adult child. The Saskatchewan Health Authority denied access because such decisions were under the exclusive authority of another parent. The Commissioner found that the father was not an authorized applicant and thus, was not eligible to make an access request on behalf of the subject individual. He recommended an amendment to HIPA to require a response to all access requests.

I BACKGROUND

- [1] On April 25, 2019, a father made an access to information request to the Saskatchewan Health Authority (SHA) for records related to the health of their adult child who is over the age of 18. I refer to the adult child as the subject individual in this Report. The father requested reports written by two specific physicians, as well as any emergency department records, ranging from 2014 to 2018. The request was made directly to the privacy and access department of the SHA in Saskatoon.
- [2] In making the request, the father filled out the SHA's *Health Record Services – Saskatoon Request for Access to Personal Health Information* form (the form). The access to information request form allows for circumstances where an individual makes an access request for the health records of another individual. On the form, it was clear that the father was making a request for the health records of the subject individual. The father indicated on the form that they were a parent of the individual who was the subject of the access

request. In the area of the form that allows an individual to request the health records of another individual, the form states “[a]ttach proof that you can legally act on behalf of the patient listed above... In certain circumstances, a *Consent for Disclosure of Personal Health Information* form completed by the patient will be required.” The father wrote “on file” next to this. In the email that transmitted the form to the SHA, the father wrote: “I believe my guardianship papers/order is on file here.”

- [3] On June 10, 2019, the SHA responded to the father’s request in a brief email which referred to a Court decision from February 2019. The SHA indicated that, as per the Court decision, access to the subject individual’s records is the “exclusive authority” of another parent and access to the subject individual’s records must be approved by that parent.
- [4] On July 9, 2019, the father challenged the SHA’s response. The father highlighted portions of the decision that indicated that he had access to the subject individual’s records in the past. The father also provided the other parent’s contact information and asked the SHA if it confirmed its understanding with the other parent.
- [5] The SHA responded the same day, the SHA suggested that the father contact the other parent if the father wanted access to the subject individual’s records. The father then forwarded the email string to the other parent asking that the other parent confirm that the father was entitled to the subject individual’s records. The other parent replied to the SHA and the father indicating that it was their wish that the father not have access to the subject individual’s records.
- [6] In replying to the father, the SHA indicated that it viewed the matter as “closed”.
- [7] On August 7, 2019, the father requested a review by my office. As a result of early resolution by my office, the SHA provided the father with a more detailed response to the access request on August 12, 2019.
- [8] On August 14, 2019, my office notified both the father and the SHA of my intention to undertake a review of the SHA’s response to the father.

II RECORDS AT ISSUE

[9] This review will consider the father's right to make an access request. Therefore, the SHA has not provided responsive records to my office for consideration.

III DISCUSSION OF THE ISSUES

1. Does HIPA apply in these circumstances and do I have jurisdiction?

[10] *The Health Information Protection Act* (HIPA) applies in full when three elements are present. The first element is personal health information, the second element is a trustee, and the third element is if the personal health information is in the custody or control of the trustee.

[11] Personal health information is defined in 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] The father has made a request for the reports of two physicians as well as emergency department records. This information would be information with respect to the physical or mental health of the subject individual and information with respect to a health service provided to the subject individual. The information described in the father's request would qualify as personal health information pursuant to subsection 2(m)(i) and (ii) of HIPA.

[13] Subsection 2(t) of HIPA defines trustee. In part, it 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] The SHA qualifies as a trustee pursuant to subsection 2(t)(ii) of HIPA.

[15] During my review, the SHA indicated that some of the personal health information in question would be under the custody and control of the physicians mentioned in the access request.

[16] The SHA also indicated that the records related to the emergency department, and a specific facility run by the SHA, would be under the custody and control of the SHA.

[17] As the primary issue in this Report is whether the father has the right to access the personal health information of his adult child, the SHA has not identified the responsive records. However, the SHA has indicated that there are responsive records that would be in its custody or control. I find HIPA applies in these circumstances and I have jurisdiction to undertake this review.

2. Was the father an authorized applicant who was eligible to make an access request on behalf of the subject individual?

[18] Part V of HIPA provides the right of access to personal health information. It also describes the process that individuals should follow to request personal health information and how trustees should respond to a request.

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

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.

[20] Section 31 of HIPA provides more guidance on the process for requesting personal health information:

31 In this Part:

(a) “**applicant**” means an individual who makes a written request for access to personal health information about himself or herself;

(b) “**written request for access**” means a request made pursuant to section 34.

[21] Section 34 of HIPA provides:

34(1) An individual may, in accordance with the regulations, make a written request for access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

(2) A written request for access must:

(a) be made to the trustee that the applicant believes has custody or control of the record containing the personal health information; and

(b) contain sufficient detail to enable the trustee to identify the personal health information requested.

(3) An applicant must prove his or her identity to the satisfaction of the trustee.

(4) The right to make an application for review pursuant to section 42 applies only to written requests for access.

[22] In accordance with sections 31 and 34, an access request pursuant to Part V of HIPA is only made when an individual requests personal health information about himself or herself. In this case, the father made a request for personal health information about the subject individual, not themselves.

[23] Section 56 of HIPA contemplates circumstances where the rights afforded by HIPA can be exercised by other persons. The potentially relevant portions of subsections of 56 of HIPA provide:

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

...

(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;

...

[24] The father asserted that they had the right to the subject individual's personal health information because of a Guardianship Order from over five years ago. The Guardianship Order appointed the other parent as personal and property guardian of the subject individual, but indicated that the father should have access to the subject individual's records. The Guardianship Order directed that the other parent was to provide the father with the names and telephone numbers of the subject individual's health care professionals, and that the father was entitled to receive information directly from those individuals with regard to the subject individual.

[25] Both the SHA and the father also provided my office with a more recent Court decision from February 2019, which acknowledged that detail of the Guardianship Order.

[26] The February 2019 Court decision was the result of a court application made by the father to, among other things, review the Guardianship Order and to be granted access. In the

end, the application to vary the Guardianship Order was dismissed and the Court declined to grant the father any access to the subject individual. The other parent was deemed the “sole gatekeeper” in relation to whether and how the father could have access to the subject individual.

[27] In its submission, the SHA indicated that in its opinion, the Court decision determined that the father has no right of access to the subject individual’s personal health information. The SHA’s submission also indicated that there are no provisions within section 56 of HIPA that would see the father as having the authority to act on behalf of the subject individual.

[28] I am of the opinion that the father is not a personal guardian that has been appointed for the subject individual as described by subsection 56(b) of HIPA. I am not aware of any other circumstances contemplated by section 56 of HIPA that would apply to the father. The father does not meet the definition of an applicant.

[29] I find that the father was not an authorized applicant and thus, was not eligible to make an access request on behalf of the subject individual.

3. Did the SHA adequately respond to the access request?

[30] Section 36 of HIPA describes how a trustee should respond to a written request for access. Relevant portions are as follows:

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

...

(c) by refusing the written request for access, in whole or in part, and informing the applicant:

(i) of the refusal and the reasons for the refusal; and

(ii) of the applicant’s right to request a review of the refusal pursuant to Part VI;

...

[31] The father did make a request regarding the subject individual but did not have the right to do so under section 56 of HIPA. Thus, the father could not make an access request on behalf of the subject individual in accordance with Part V of HIPA and section 34 of HIPA.

[32] Trustees must only provide a response in accordance with section 36 of HIPA if a written request is received as described in section 34 of HIPA. In other words, HIPA does not currently require a trustee to respond at all when an individual makes an access request for personal health information related to another individual without proving the authority to exercise those rights pursuant to section 56 of HIPA.

[33] I view this as a gap in HIPA. Best practice would suggest that any individual who makes a request for personal health information to a trustee should be entitled to a response from the trustee within 30 days that clearly explains why access is denied. There may be cases where an individual does have the authority to exercise rights on behalf of another individual, but may not understand what must be provided to the trustee to support the request. A formal written response to all access requests should be required from a trustee. Trustees should also take the opportunity to consider whether personal health information can be disclosed pursuant to subsections 27(2)(c) and 27(4) of HIPA; which provides as follows:

27(2) A subject individual is deemed to consent to the disclosure of personal health information:

...

(c) to the subject individual's next of kin or someone with whom the subject individual has a close personal relationship if:

(i) the disclosure relates to health services currently being provided to the subject individual; and

(ii) the subject individual has not expressed a contrary intention to a disclosure of that type.

...

(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;

(b) where, in the opinion of the trustee, disclosure is necessary for monitoring, preventing or revealing fraudulent, abusive or dangerous use of publicly funded health services;

...

(d) to 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 subject individual, where the personal health information is required to make a health care decision with respect to that individual;

[34] I recommend that the SHA support a recommendation to the Ministry of Health to consider an amendment to HIPA to require a response to all access requests. I recommend that the Ministry of Health, when HIPA amendments are considered, study an amendment that would require a response within 30 days to all access requests whether or not the applicant has authority.

[35] In the meantime, as a best practice, I urge the SHA, and all trustees, to respond to all access requests for personal health information in accordance with section 36 of HIPA and consider disclosure under subsections 27(2)(c) and 27(4) of HIPA, even if the written request does not conform to section 34 of HIPA.

IV FINDING

[36] I find that the father was not an authorized applicant and thus, was not eligible to make an access request on behalf of the subject individual.

V RECOMMENDATION

[37] I recommend that the SHA support a recommendation to the Ministry of Health to consider an amendment to HIPA to require a response to all access requests.

Dated at Regina, in the Province of Saskatchewan, this 28th day of July, 2020.

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