



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 333-2019

Saskatchewan Health Authority

May 27, 2021

Summary:

The Applicant submitted an access to information request to the Saskatchewan Health Authority (SHA) on August 8, 2019, requesting access to the pictures from the Applicant's 2011 and 2019 brain computed tomography (CT) scans and the 2011 brain CT scan report. On October 4, 2019, the SHA denied access to the request. The SHA's reason for denial was the Applicant's Powers of Attorney instructed the SHA that no information is to be released to the Applicant. The Commissioner found the SHA did not have the authority under *The Health Information Protection Act* (HIPA) to deny the Applicant access to a copy of their requested personal health information. Further, the Commissioner found the Applicant has the right to request and receive access to a copy of the requested personal health information. The Commissioner recommended that within 30 days of issuance of this Report, the SHA provide the Applicant with a copy of the requested record, subject to limited exemptions under section 38 of HIPA.

I BACKGROUND

[1] The Applicant submitted an access to information request to the Saskatchewan Health Authority (SHA) on August 8, 2019, requesting access to:

I would like the PICTURES for my 2011 and 2019 brain CT scans.
I would like the 2011 brain CT scan report.

[2] By email dated October 4, 2019, the SHA advised the Applicant's Adult Daughter, in part:

...Unfortunately, because the Powers of Attorney have instructed that no information is to be released to your [Applicant], I would be unable to comply with [Applicant]'s request....

[3] My office received a request for review that was signed and dated by the Applicant and witnessed by another individual on October 30, 2019. The Applicant's reason for the review was:

I am requesting that the [Office of the Information and Privacy Commissioner] review the SHA decision to deny my request to obtain copies of my 2011 and 2019 brain scan pictures.

[4] On October 31, 2019, my office notified the Applicant and the SHA of our intention to undertake a review of the SHA's decision to deny access. In the notification, my office asked the SHA to provide the following:

- How the [SHA] determined that [the Applicant] cannot access [their] personal health information under [*The Health Information Protection Act (HIPA)*]. Please include supporting documentation.
- What the [SHA] is relying on to deny access to the records and how the decision to deny access was reached, including any supporting correspondence, policy, procedure, legislation or other documentation; and
- Why the [SHA] did not issue [the Applicant] a formal response pursuant to section 36 [of HIPA], explaining the reason for denying access.

[5] Due to circumstances surrounding the review, I instructed my staff to only speak and correspond with the Applicant about the specific details of this review. My office did receive representations from the other engaged parties.

II RECORDS AT ISSUE

[6] Because this matter deals with the SHA not providing the Applicant with access to their personal health information at the request of the Power of Attorneys (POA 1 and POA 2), there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Does HIPA apply to this request for access?

[7] HIPA applies when there are three elements present:

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

[8] I will now consider if each of the three elements are present.

Is there personal health information involved?

[9] This matter involves the Applicant's computed tomography (CT) brain scans from 2011 and 2019 and the 2011 CT scan report. This type of information qualifies as "personal health information" pursuant to subsections 2(m)(i) and (ii) 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;

[10] Therefore, I am satisfied that personal health information is involved.

Is there a trustee involved?

[11] "Trustee" is defined in subsection 2(t) of HIPA. Subsection 2(t)(ii) of HIPA 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;

[12] Therefore, I am satisfied the SHA is a trustee.

Is the personal health information in the custody or control of the trustee?

[13] To have *custody* means a trustee has physical possession of records with a measure of control over them. *Control* means having the authority to manage the records, including storing, restricting and regulating their use. In this matter, the SHA appears to have custody or control of the Applicant’s 2011 and 2019 CT scans and the CT scan report.

[14] I am therefore satisfied that, for the purposes of HIPA, the SHA is a trustee and that the personal health information in question is in the custody or control of the SHA.

[15] The Applicant made their request in writing on the SHA’s form [*SHA*] *Request for Access to Personal Health Information*. From a review of that request, it met all of the requirements of a written request under HIPA. Subsection 34(2) of HIPA provides:

34(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.

[16] When an applicant submits a written request under HIPA a series of rights are triggered, including the right to request a review by my office if they are not satisfied with the outcome of the request. The process and my authority/power to conduct a review are found in Part VI of HIPA (Review and Appeal).

[17] Upon conclusion of a review, if an applicant is not satisfied with the decision of the trustee, they can appeal that decision to the Court of Queen's Bench.

2. Did the Applicant have the right to access their personal health information under HIPA?

[18] It appears the Applicant was attempting to access their personal health information with the assistance of the Applicant's adult child (Adult Child). Through the course of this review, my office has also been made aware of two additional adult children (POA 1 and POA 2) who have power of attorney for the Applicant.

[19] Before I begin my analysis, I would like to inform the parties that prior to my appointment as Saskatchewan's Information and Privacy Commissioner I served as Saskatchewan's Public Guardian and Trustee for almost 20 years.

[20] An individual's right to access their personal health information is a fundamental right. 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.

[21] There are limited circumstances that an individual can be denied access to their personal health information. Section 38 of HIPA provides:

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

(a) in the opinion of the trustee, knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the applicant or another person;

...

(2) Where a record contains information to which an applicant is refused access, the trustee shall grant access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

(3) Where access to personal health information is refused pursuant to clause (1)(d), a trustee must refer the applicant to the trustees from which the personal health information was collected.

[22] A Privacy Officer with the SHA responded to the request on October 4, 2019. That response read, in part:

...Unfortunately, because the Powers of Attorney have instructed that no information is to be released to [the Applicant], I would be unable to comply with [the Applicant's] request....

[23] The SHA based their denial of the Applicant's request upon the wishes of POA 1 and POA 2 who instructed the SHA not to release records to the Applicant.

[24] Subsection 36(1) of HIPA outlines the way in which a trustee must respond to a written access to information request. Subsection 36(1) of HIPA provides:

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:

(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;

(b) by informing the applicant that the information does not exist or cannot be found;

(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;

(d) by transferring the written request for access to another trustee if the personal health information is in the custody or control of the other trustee.

[25] The SHA did not cite a section under HIPA as authority for denying access such as section 38 of HIPA. Subsection 36(1)(c) of HIPA requires if a trustee is denying access to a request they must provide a reason for refusal. The reasons for refusal are only found under section

38 of HIPA. Therefore, the SHA was not compliant with section 36(1)(c) and 38(1) of HIPA when it denied access to the Applicant.

Power of Attorney

[26] POA 1 provided my office with a copy of a notarized *General Enduring Power of Attorney* (Power of Attorney). The Power of Attorney was granted and signed February 9, 2018, and was notarized May 1, 2018. The Power of Attorney appoints POA 1 and POA 2 as property and personal attorneys. The personal power of attorney section reads:

20. Personal Power of Attorney

To act as my personal attorney with general authority respecting all of my personal affairs, in accordance with The Powers of Attorney Act, 2002 [POA Act].

[27] When a Power of Attorney exists the basic principle is the Grantor – in this case the Applicant – has a right to ask for information and act on their own behalf.

[28] The Ministry of Justice published a guidance document *Duties and Powers of a Personal Attorney in Saskatchewan*, dated March 14, 2010. Page 3 of this guidance document in part states:

1. Power of Attorney

There are many circumstances where a person may wish to give someone the authority to manage their personal affairs and/or their property matters. This can be accomplished by signing a power of attorney...The power of attorney gives certain authority to the attorney, but **the grantor also retains that authority.**

[Emphasis added]

[29] The Applicant has granted power to POA 1 and POA 2 to act and make decisions on behalf of the Applicant.

[30] In its submission, POA 1 has provided several reasons as to why they feel it is not in the best interest of the Applicant to receive their personal health information from the SHA. However, as noted above it is the Applicant's right to obtain access to their personal health information and a trustee must grant that right, subject to limited exemptions to the right of access outlined in subsection 38(1) of HIPA.

Health Care Directives

[31] In its submission, the SHA provided my office with a copy of the health care directives signed by the Applicant on February 9, 2018. In it, the Applicant appoints POA 1 and POA 2 as the Applicant's proxy for the purposes of *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015* (Health Care Directives Act).

[32] Section 4 of the Health Care Directives Act outlines when a healthcare directive takes effect:

4(1) A directive takes effect when the person making the directive does not have the capacity to make a **health care decision** respecting a proposed treatment.

(2) A directive remains in effect until the person making the directive recovers his or her capacity to make a health care decision respecting a proposed treatment.

[Emphasis added]

[33] A health care directive only comes into effect when the person does not have capacity.

[34] In its submission, the SHA provided my office with a letter dated May 2, 2019, signed by two doctors, one with geriatric psychiatry and one with geriatric medicine in the Geriatric Assessment and Management Program of the SHA. The contents of this letter express, in part, the following:

...[The Applicant] has significant cognitive impairment, as a result of which [the Applicant] is incapable of making informed decisions about [the Applicant's] personal life, healthcare, or finances, except for very simple ones....

[The Applicant's] duly appointed substitute decision-makers and powers of attorney will need to take over decision-making as appropriate under Saskatchewan legislation.

[35] The problem here is that this is the opinions of the doctors. It is not a Court order declaring the Applicant lacks capacity under *The Adult Guardianship and Co-decision-making Act* (AGCMA) or a certificate of a psychiatrist under *The Public Guardian and Trustee Act* (PGT Act).

[36] Subsection 4(1) above, indicates when a health care directive is effective to make a health care decision. Subsection 2(1)(d) of the Health Care Directives Act defines “health care decision”, and provides:

2(1) In this Act:

...

(d) “**health care decision**” means a consent, refusal of consent or withdrawal of consent to **treatment**;

[Emphasis added]

[37] Subsection 2(1)(h) of the Health Care Directives Act defines “treatment:

2(1) In this Act:

...

(h) “**treatment**” means anything that is done for a therapeutic, preventative or palliative purpose related to the physical or mental health of a person;

[38] A health care decision as defined involves the giving of consent or the withdrawal of consent to treatment. Treatment does not appear to include requesting personal health information. Thus, the health care directive provided here does not become effective as no health care decision is being made. The Applicant is merely exercising the right to obtain personal health information.

[39] Section 56 of HIPA provides the circumstances where another person can exercise rights of another individual. Specifically, subsection 56(e)(ii) of HIPA provides:

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

...

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

...

(ii) by a person who, pursuant to [the Health Care Directives Act], is entitled to make a health care decision, as defined in that Act, on behalf on an individual;

[Emphasis added]

[40] The SHA has argued the following:

Section 56(e) of HIPA defines the trigger for the substitute decision maker to act on behalf of the applicant as “where the individual does not have capacity to give consent.” The language of this section does *not* require lack of capacity to be demonstrated by a court order or certificate of a psychiatrist.

[41] As emphasized above, subsection 56(e) of HIPA requires that an, “...individual does not have the capacity to give consent...” When an individual is requesting access to their own personal health information, there is no consent required by that individual to receive their own information. Therefore, subsection 56(e) of HIPA has no relevance in this matter.

Guardianship Order

[42] I would finally like to speak to AGCMA. Section 6 of AGCMA provides:

6 The following **may make an application to the court**, in the prescribed form, to be appointed as a personal co-decision-maker or personal guardian pursuant to section 14:

(a) any person who, in the opinion of the court, has a sufficient interest in the personal welfare of the adult;

(b) the public guardian and trustee;

(c) an individual, corporation or agency or a category of individuals, corporations or agencies designated by the minister in accordance with the regulations.

[Emphasis added]

[43] Through the course of this review, my office has not been provided with any evidence from the SHA or any individual that a personal co-decision-maker or personal guardian has been appointed by the Court under the AGCMA. As such, the Applicant has the right to act to request access to their own personal health information pursuant to section 32 of HIPA.

[44] I find the SHA did not have the authority under subsection 56(e)(ii) of HIPA to not provide the Applicant with a copy of the requested record. Further, I find the Applicant has the right to request and receive access to a copy of the requested personal health information. Therefore, I recommend that within 30 days of issuance of this Report, the SHA provide the Applicant with a copy of the requested record, subject to the limited exemptions under section 38 of HIPA.

[45] I would like to point out that in this matter, I can only comment on whether or not the Applicant has the right to access their personal health information. My legislated mandate does not extend to other issues.

IV FINDINGS

[46] I find the SHA did not have the authority under subsection 56(e)(ii) of HIPA to not provide the Applicant with a copy of the requested record.

[47] I find the Applicant has the right to request and receive access to a copy of the requested personal health information.

V RECOMMENDATION

[48] I recommend that within 30 days of issuance of this Report, the SHA provide the Applicant with a copy of the requested record, subject to limited exemptions under section 38 of HIPA.

Dated at Regina, in the Province of Saskatchewan, this 27th day of May, 2021.

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