



REVIEW REPORT 175-2022

eHealth Saskatchewan

April 19, 2023

Summary:

The Applicant sought access to their child's personal health information by submitting two access to information requests to eHealth Saskatchewan (eHealth). eHealth informed the Applicant that it was unable to process their requests as it cannot be sure that "it would not be considered an invasion of [the child's] privacy" since the child was over the age of 14. eHealth informed the Applicant what information it would require in order to grant the Applicant (or their child) access to the child's personal health information. The Applicant appealed to the Commissioner. The Commissioner found that eHealth addressed its obligations under section 56 of *The Health Information Protection Act* (HIPA). He found that eHealth sought the appropriate information from the Applicant and, based on the information that the Applicant provided (or did not provide), made the correct decision in not allowing the Applicant to exercise their child's right to access their personal health information. He also found that eHealth properly demonstrated it considered subsection 27(2)(c) of HIPA. Finally, the Commissioner found that eHealth did not properly meet its obligations pursuant to subsection 36(1) of HIPA. He recommended that eHealth ensure its procedures require that it responds to formal access requests are pursuant to subsection 36(1) of HIPA.

I BACKGROUND

- [1] On July 4, 2022, the Applicant filled out a "Form A" or the *Access to Information Request Form* from Part III of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) and dropped it off at eHealth Saskatchewan's (eHealth) front counter. The Applicant requested the following:

I, [sic] am [parent] of one your clinic patient [first and last name of child], Health card no. [Number]. I, [sic] am requesting his health record of 2020, 2021 and 2022, which includes

- Hospital admission
- Office visits
- Investigation, diagnosis

or any related health information from eHealth.

[2] Then, on July 6, 2022, the Applicant emailed eHealth's Privacy Service another form entitled, "Request for Access to Personal Health Information in the eHR Viewer". In their email, the Applicant said that a service desk representative at eHealth had informed them to complete this form in order to access personal health information in the eHR Viewer. The Applicant asserted they were the "next of kin" for their child and that they had provided "joint custody court orders" with their previous form. Attached to the email was a completed form that said:

I request copies of my personal health information available in the eHR Viewer between Jan 2020 to June 2022 for the following information:

- ✓ Laboratory Results
- ✓ Prescription Profile
- ✓ Clinical Documents (ex. Discharge Summary, Radiology Reports)
- ✓ Clinical Encounters
- ✓ Immunization Profile
- ✓ Chronic Disease Management Observations.

[3] The Applicant included their child's name, health services number and birth date on the form, but included their own (the Applicant's) contact information.

[4] In an email dated July 26, 2022, eHealth responded to the Applicant. eHealth said it was unable to process the Applicant's access request because their child was over the age of 14. eHealth provided details of how the Applicant could proceed. eHealth said:

I understand you have submitted two separate forms to request access to the information, and as I had mentioned the first form that was submitted is typically used

to request information that falls under *The Freedom of Information and Protection of Privacy Act*. This does not include personal health information and so you were asked to submit the Request for Access to Personal Health Information in the eHR Viewer Form. We ask that this form be submitted, since it was designed for the purpose of requesting personal health information in the eHR Viewer and asks for the necessary data-sets (such as date of birth, or applicable eHR Viewer section being requested). You have submitted this form to us on July 6, 2022.

We are unable to process your request for access to their personal health information due to the age of the individual. eHealth Saskatchewan cannot be sure that it would not be considered an invasion of their privacy to disclose their personal health information since they are over the age of 14. Therefore, they will need to submit their own request to our office or provide us with written authorization to disclose their personal health information to you.

I have attached the Authorization to Act for Person Between Age 14 and 17 Years of Age form, in case your child is not capable of making her own health care decisions. If this is the case, you would need to submit evidence of this to us and this form was developed to help parents do so. This form must be completed by their health care provider and submitted back to our office.

- [5] On September 9, 2022, the Applicant requested a review.
- [6] On October 14, 2022, my office notified the Applicant and eHealth that my office would be undertaking a review.
- [7] On October 27, 2022, the Applicant provided their submission to my office.
- [8] On November 17, 2022, eHealth provided its submission to my office.
- [9] I should note that at the time of the access request, the Applicant's child was 17.

II RECORDS AT ISSUE

- [10] At issue is whether the Applicant has authority to have access to their child's personal health information. Therefore, there are no records at issue in this review.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] *The Health Information Protection Act* (HIPA) is engaged when three elements are present: 1) personal health information, 2) a trustee, and 3) the trustee has custody and/or control of the personal health information.

[12] First, the Applicant has requested a copy of their child’s information in eHealth’s eHR Viewer, including laboratory results, prescription profile, clinical documents, clinical encounters, immunization profile and chronic disease management observations. The types of information requested qualifies as “personal health information” as 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;

[13] Second, eHealth qualifies as a “trustee” as defined by subsection 2(t)(i) of HIPA.

[14] Third, eHealth is the trustee with custody and control of the personal health information in the eHR Viewer (see [Investigation Report 413-2019, 414-2019, 415-2019](#) at paragraphs [16] to [17]).

[15] Since all three elements are present for HIPA to be engaged, I find that I have jurisdiction to conduct this investigation.

2. Did eHealth address its obligations under section 56 of HIPA?

[16] Section 56 of HIPA outlines the circumstances in which any right or power conferred upon an individual under HIPA may be exercised:

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

...

(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;

...

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

[17] In this case, the Applicant sought access to their child's personal health information. In an email dated July 26, 2022, eHealth indicated they were unable to process the Applicant's access request, because it could not be sure that the disclosure of the child's personal health information would not be considered an invasion of their privacy (subsection 56(d) of HIPA). eHealth informed the Applicant that their child would need to submit their own access request (subsection 56(c) of HIPA), or their child would need to provide a written authorization to disclose their personal health information to the Applicant (subsection 56(f) of HIPA), or that the Applicant would need to submit evidence that their child is not capable of making their own health care decisions (subsection 56(e) of HIPA). In other words, eHealth explained the different ways access may be granted to the Applicant (or to their child) pursuant to section 56 of HIPA.

a. Subsection 56(d) of HIPA

[18] Based on the partial court order that the Applicant provided to eHealth and to my office, it appears that the Applicant attempted to exercise their child's right to access their (the child's) personal health information pursuant to subsection 56(d) of HIPA.

[19] Earlier, I quoted subsection 56(d) of HIPA. Under subsection 56(d) of HIPA, the rights or powers of the individual can only be exercised:

- in relation to individuals who are less than 18 years of age;
- by the individuals' legal custodian; and
- where, in the head's opinion, the exercise of the right or power would not constitute an unreasonable invasion of privacy of the individual.

[20] Based on the information provided, the trustee must consider the above criteria before proceeding to process the access request.

[21] Below is an analysis of the above criteria and consideration of whether or not eHealth met its obligations under subsection 56(d) of HIPA.

1. The individual is less than 18 years of age

[22] The Applicant had provided eHealth and my office with a copy of a portion of a court order. The court order identifies the Applicant's child's date of birth. Based on the date of birth, the child was 17 years of age at the time of the access request. Therefore, I find that the individual was less than 18 years of age at the time of the access request.

2. The Applicant must be the individual's legal custodian;

[23] Subsection 3(3) of *The Children's Law Act, 2020*, provides as follows:

3(3) The parents of a child may enter into an agreement that may:

- (a) vary their status as joint legal decision-makers for the child;
- (b) specify the powers and responsibilities of each parent with respect to the child;
- (c) provide for parenting time with respect to the child by a parent or any other person;
- (d) authorize one of the parents to appoint, by written instrument, one or more other persons as the child's legal decision-maker for:
 - (i) any time specified in the instrument during the child's minority; or
 - (ii) the duration of the child's minority; and
- (e) provide for the decision-making responsibility with respect to the child after the death of either parent.

[24] As mentioned, the Applicant provided my office with a portion of a copy of the court order that specifies that the Applicant had joint custody of their child and the order provided:

The parties shall continue to enjoy joint custody of their son...

[25] Based on the court order, the Applicant was their child's legal custodian. They had joint custody of their child with their former spouse. In my office's [Investigation Report 083-2022](#), I dealt with a case where the complainant disagreed with the disclosure of their child's personal information to the child's stepmother. The complainant had joint custody of the child with the child's father. In that Investigation Report, I said that a public body is not required to canvass the views of every substitute decision-maker who is equally ranked to satisfy itself that it has requisite authority. However, where the public body is aware that one of the decision-makers does not agree with the request of another equally ranked decision-maker, the public body should not rely on the direction of only one of the decision-makers.

[26] The case before me is different than the case in Investigation Report 083-2022 in that there is no evidence that eHealth was aware that the Applicant's former spouse objected to the disclosure of the child's personal health information. Therefore, there was no obligation upon eHealth to canvass the view of the child's father in this case. Nevertheless, I find that the Applicant is the child's legal custodian.

3. Where, in the head's opinion, the exercise of the right or power would not constitute an unreasonable invasion of privacy of the individual.

[27] The right of a custodial parent to obtain access to an individual's personal health information is not unconditional ([Review Report 109-2020](#) at paragraph [23]). It must still be demonstrated that the release of the personal health information would not constitute an unreasonable invasion of privacy of the individual.

[28] In my office's [Investigation Report 083-2022](#), I discussed how HIPA allows for the guardian of a minor to exercise personal information rights or powers of the minor, but only if the minor is incapable of exercising those rights or powers. Subsection 56(c) of HIPA provides that an individual less than 18 years of age is able to exercise any right or power conferred upon them if the individual understands the nature of the right or power and the consequences of exercising the right or power. Subsection 56(c) of HIPA provides:

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

...

(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;

[29] If a child "understands the nature of the right or power and the consequences of exercising the right or power," pursuant to subsection 56(c) of HIPA, then the child may be considered a mature minor. For more on mature minors, see Alberta IPC Orders F2005-017 & H2005-001. As a mature minor, the child's wishes should be a factor taken into consideration by the trustee in determining the release of personal health information is an unreasonable invasion of privacy. As I have said in my office's [Review Report 109-2020](#) at paragraph [30], subsection 56(c) of HIPA requires the trustee to determine whether the individual understands the nature of the right or power and the consequences of exercising the right or power. Once it is established that the child (or youth) is capable of making their own decisions, their consent is required for disclosure if the trustee is unable to find authority otherwise in the statute (i.e., subsection 27(2) or 27(4) of HIPA).

[30] In determining whether the Applicant's child is a "mature minor", eHealth described its policy of determining when a minor is mature enough to establish their own "MySaskHealthRecord" account. "MySaskHealthRecord" is a website that gives individuals access to their own personal health information. Initially, eHealth only allowed individuals 18 years or older to register for their own account. However, eHealth indicated that the COVID-19 pandemic brought an increased need for access to MySaskHealthRecord, especially for minors. Therefore, after completing a jurisdictional scan, eHealth determined it would lower the "universal cut-off and self-registration age" to 14. eHealth explained:

Confidentiality concerns can be a critical barrier for minors in seeking and receiving sensitive health services. Establishing a universal cut-off and self-registration age ensures the parent/legal guardian does not assume the change in access to the minor's medical records is due to the minor accessing sensitive health services. However, a minor may not seek required sensitive health services if they are under the established cut-off age. Therefore, increasing the cut-off/self-registration to an age older than 14 may increase the risk of minors not seeking required health services.

[31] Similar to its policy for MySaskHealthRecord, when eHealth receives an access to information request from a parent or legal guardian for the personal health information of an individual aged 14 and older, eHealth will refuse based on an unreasonable invasion of the minor's privacy. However, eHealth will inform the parent or legal guardian that the minor may submit their own access request or sign up for access to their own MySaskHealthRecord account.

[32] eHealth noted that the child had already established his own MySaskHealthRecord. As I found earlier, the Applicant's child was 17 years of age at the time the Applicant submitted their access request. As such, based on the Applicant's child's age and the fact that the child established their own MySaskHealthRecord, I find that the child was a mature minor at the time of the Applicant's access request. In Investigation Report 083-2022, I said:

LA FOIP does not specifically address the question of a minor's capacity to exercise their own rights. In contrast, **HIPAA allows the guardian of a minor to exercise personal information rights or powers of the minor, but only if the minor is incapable of exercising those rights or powers.**

[Emphasis added]

[33] In this case, it appears the child is a mature minor and is capable of exercising their own rights and powers. Therefore, I find the Applicant does not have the ability to exercise their child's right of access pursuant to subsection 56(d) of HIPA. I find that eHealth has addressed its obligations pursuant to section 56 of HIPA.

[34] As detailed earlier in this Report, eHealth had invited the Applicant to provide additional information to demonstrate that the Applicant's child authorized the disclosure of their personal health information to the Applicant or that the Applicant provide evidence that the child is not capable of making their own health care decisions. The Applicant did not provide any such information to eHealth. Similarly, in the course of this review, the Applicant did not provide any information to my office to demonstrate that the child authorized the disclosure of their personal health information or that they were incapable of making their own health care decisions.

[35] Earlier, I noted that the child was 17 years of age at the time of the access request. In fact, the child was four and half months away from turning 18. When my office undertook its review of this matter, the child was a month away from turning 18. Now, at the time of the issuance of this Report, the child is now 18. The child is now an adult who is capable of making their own decisions.

3. Did eHealth properly consider subsection 27(2)(c) of HIPA?

[36] Subsection 27(2)(c) of HIPA provides:

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.

[37] In its submission, eHealth said in order for it to disclose personal health information pursuant to subsection 27(2)(c) of HIPA, it must know the following:

- Who the subject individual's next of kin is or individuals with whom the subject individual has a close personal relationship;
- The health services currently being provided to the subject individual; and
- Any wishes/directives expressed by the subject individual regarding the disclosure of their personal health information.

[38] In its submission, eHealth indicated it does not deliver health services to individuals. Therefore, it would not be able to determine what health services the subject individual was receiving. In the course of my office's review, my office confirmed with eHealth that it was not aware of any health services being provided to the subject individual at the time it received the Applicant's access request. As such, given that eHealth was not aware of any health services being provided to the subject individual at the time of the access request, there would have been no personal health information to disclose pursuant to subsection 27(2)(c) of HIPA. I find that eHealth properly considered subsection 27(2)(c) of HIPA.

4. Did eHealth properly meet its obligations pursuant to subsection 36(1) of HIPA?

[39] Subsection 36(1) of HIPA provides how a trustee must respond to written access to information requests:

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;

...

[Emphasis added]

[40] While I note that eHealth's response dated July 26, 2022 to the Applicant explained that eHealth was refusing the Applicant and the reasons for its refusal, its response did not inform the Applicant of their right to request a review of the refusal pursuant to Part VI of HIPA.

[41] In my office's past Reports of my office (see [Review Report 219-2020](#) at paragraph [34] and [Review Report 214-2020, 217-2020](#) at paragraphs [32] to [33]), I have said that a formal written response pursuant to section 36 of HIPA to all access requests should be required from a trustee.

[42] I find that eHealth did not meet its obligation to advise the Applicant that it could request a review from my office pursuant to subsection 36(1) of HIPA. I recommend that eHealth ensure its procedures provide that its responds to formal access to information requests are pursuant to subsection 36(1) of HIPA.

IV FINDINGS

[43] I find that I have jurisdiction to conduct this investigation.

[44] I find the Applicant does not have the ability to exercise their child's right of access pursuant to subsection 56(d) of HIPA.

[45] I find that eHealth addressed its obligations under section 56 of HIPA.

[46] I find that eHealth properly considered subsection 27(2)(c) of HIPA.

[47] I find that eHealth did not meet its obligation to advise the Applicant that it could request a review from my office pursuant to subsection 36(1) of HIPA.

V RECOMMENDATIONS

[48] I recommend that eHealth ensure its procedures provide that its responds to formal access to information requests are pursuant to subsection 36(1) of HIPA.

[49] I recommend that eHealth take no further action with regard to the access request discussed in this Report.

Dated at Regina, in the Province of Saskatchewan, this 19th day of April, 2023.

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