

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**  
Review Report 16-HIA02

File: 15-170-6  
August 3, 2016  
Citation: 2016 NTIPC HIA 02

## **BACKGROUND**

This privacy complaint arose when a patient staying at the Vital Able House (VAH) while in Yellowknife for medical tests found documents containing his personal health information in a public space within the boarding home. The date of the incident was late September, 2015, just days prior to the coming into effect of the *Health Information Act (HIA)*. The complaint was received in November, 2015, after the coming into force of the *Health Information Act*. While the Complainant used the privacy incident in September as the genesis of his complaint, he also questioned the policies and procedures in place to address patient privacy generally.

### **The Breach**

Most of the facts surrounding this complaint are not disputed. The Complainant was staying at Vital Abel House (VAH) for the purpose of completing a sleep study. VAH is a medical boarding home run by a private, third party company on contract with the Stanton Territorial Health Authority (STHA). The sleep study was done by another private sector company, North Cair Medical Supplies Inc. (North Cair), also under contract with the STHA to conduct sleep studies.

The Complainant had been referred to North Cair for the purpose of having the sleep study done. Generally, when patients are referred to North Cair, the company is provided with information about the patient and his or her medical history relevant to the purpose of the referral. A typical referral includes the patient's name, date of birth,

health care number, a brief medical history, the reason for the referral, current medications, height and weight. In this case, a two page physician referral letter was faxed directly to North Cair's office in Yellowknife by the physician in the Complainant's home town. Upon arrival in Yellowknife, the Complainant contacted North Cair to make arrangements for that company to come to VAH to conduct the study. North Cair attended VAH and set the patient up for the testing. The day following the testing, the Complainant says he found his referral paperwork on the front desk at VAH, where anyone could see it. In order to prevent it from being seen by anyone else, he picked it up, brought it back to his own room and contacted STHA about the breach. North Cair admits that its technician misplaced the referral documents, though the technician does not remember leaving the documents behind or where they were left.

### **The Applicable Legislation**

This incident happened a few days prior to the coming into effect of the *Health Information Act*. As such, the applicable legislation in determining whether or not there was a breach of the Applicant's privacy is the *Access to Information and Protection of Privacy Act (ATIPPA)*. That said, I have nonetheless decided to analyze the breach, and make recommendations based on the provisions of the *Health Information Act* for the following reasons:

- a) in this case, North Cair admits that it lost custody and control of the Complainant's referral which contained his personal information, including health information. There is, therefore, no question that a breach of Complainant's privacy happened, regardless of which Act applies.
- b) the breach happened mere days before the coming into force of the HIA and all health information custodians should have, by that time, been fairly much in compliance with the HIA;

- c) no breach can be “undone” and any recommendations I make can only be applied prospectively with a view to helping to prevent future breaches, which means any recommendations I make should be such as to ensure compliance with the HIA;

## **Personal Information v. Personal Health Information**

For the purpose of this review, it is important to understand the difference between personal information and personal health information. The former is any information about an identifiable individual. The *Access to Information and Protection of Privacy Act* provides for the protection of personal information. Personal health information is a subset of personal information in that it is any information about an identifiable individual that relates to his or her health. The *Health Information Act* applies only to personal health information.

## **The Contracts**

There are two contractual arrangements in place here. One is between the STHA and the company which owns VAH, We Le Dai Corporation Ltd.. This contract is to provide medical boarding home services for Yellowknife, including accommodations, meals and transportation for medical purposes. For these purposes, it collects and uses personal information for the purpose of administering the home. It would appear that VAH does not routinely collect personal health information, though the nature of its business means that it will come into possession of the personal health information of many of its customers.

The contract between We Le Dai Corporation Ltd. and STHA provides that each employee must provide a clean criminal records check. Further, the contract has a provision that states the following:

The Contractor and the Contractor's employees are privy to highly confidential information. Any information gained as a result of this contract is confidential and breach of confidentiality is a cause for immediate termination of the Contract. Therefore, each employee must sign an Oath of Confidentiality form, and submit the signed forms to STHA within a timeframe identified by STHA.

The second contract is between the STHA and North Cair. As discussed above, North Cair does receive (and therefore collects) some level of personal health information about the patients referred to them, and collects additional personal health information in conducting its sleep studies. Its contract with STHA contains the following provision:

The contractor shall treat as confidential all records and information provided to it in the course of performing the services it is contracted by Stanton to provide, and shall use the records and information only for the purpose for which they were provided, and the Contractor shall not disclose the information or records, or any portion thereof, to a third party unless the law provides that such disclosure must be made.

This is the only provision in the contract which STHA referred me to in terms of the privacy of patients.

## **THE ISSUES**

While the immediate issue which sparked the complaint to my office was the loss of the Complainant's medical records by North Cair, a number of additional questions were raised by the Complainant during the review process, including:

- a) do any of the employees of VAH undergo any training to address information management and privacy issues:
- b) are the common areas of this home under video surveillance, and if so how long are these images kept and is this a requirement under the contract?
- c) when VAH picks up and drops off clients at designated locations what kind of privacy assurance can each client expect. What is the basis for any basic assurance of protection of privacy? Is there an oath required? Is each employee required to pass a test on their privacy obligations?
- d) are there any means of monitoring a contractor in terms of confidential information management?
- e) what happens to confidential information collected by a contractor after the conclusion of a contract with the STHA? Does the STHA require the contractor to purge and return this information or is it the property of the contractor?
- f) is there a process/protocol for the transferring of confidential information from one location to another? Is there a process to verify receipt of information transferred?
- g) what is implied consent and how does this apply to the patient? What is the government's official requirement for disclosure?

On this last question, the Complainant writes:

I find implied consent a phrase that "The Truth and Reconciliation Commission" is trying to eradicate and that kind of draconian thinking”

## **DISCUSSION**

As I indicated above, my review and recommendations will focus on how the *Health Information Act* applies to the questions raised. Because it is new legislation and as yet largely untested in terms of its interpretation and application, it is to some degree understandable that there have been some delays in implementing the requirements imposed by the Act. We are now, however, ten months in and there does not seem to have been any real steps taken by STHA to evaluate what needs to change, let alone any steps to implement those changes mandated by the Act. STHA is not alone in its failure to take these steps. As far as I can determine, none of the Health Authorities in the Northwest Territories have really taken any of these steps. It may be that they have been waiting for the coming amalgamation of all the health authorities into one. It is not at all clear that the new, amalgamated entity, has taken any of these steps either.

For the purposes of this Review, it is therefore important to review some of the provisions of the *Health Information Act* to analyse what obligations health care providers have been given and whether STHA is compliant.

### **Health Information Custodian**

Under the scheme of the *Health Information Act*, Health Information Custodians are designated as being responsible for ensuring compliance with the responsibilities for protection of privacy imposed by the Act. By definition, the Stanton Territorial Health Authority is a Health Information Custodian. I am assuming that when the new, singular NWT Health Authority comes into being, it too will be designated a Health Information Custodian under the *Health Information Act*.

## **Agents**

An agent is a person or organization who may act in the place of a health information custodian if

- (a) the custodian is permitted or required to collect, use, disclose, manage, retain or dispose of the information; and
- (b) the collection, use, disclosure, management, retention or disposition of the information is in the course of the exercise of assigned powers or the performance of assigned duties or functions of the person or organization for the custodian.

By definition (section 9(2)) the term “agent” includes employees of the custodian and those who perform a service for the custodian under a contract. Therefore, both We Le Dai Corporation Ltd. and North Cair are agents of STHA insofar as they collect or receive the personal health information from STHA under contract.

## **The Responsibilities of a Health Information Custodian**

Section 8 of the Act requires Health Information Custodians to “establish or adopt standards, policies and procedures to implement the requirements of this Act and the regulations.” This includes policies to maintain administrative and physical safeguards for the protection of personal health information (sections 85-88).

From the beginning, the Complainant in this case asked for copies of these policies and procedures. STHA avoided responding to this request for many months. However, in April, 2016, they provided a letter with the following acknowledgment:

STHA has not yet developed standards, policies and procedures pursuant to section 8 of the HIA. However, many of our existing policies functionally achieve the same or similar requirements as set out in the HIA. Currently STHA has policies which speak to collection, use, disclosure and security of personal health information.”

They provided copies of five policies, developed prior to the implementation of the *Health Information Act* which address privacy matters, including:

- a) Release of Patient Information Policy;
- b) Security and Storage of Patient Personal Information Policy;
- c) Reporting Confidentiality/Privacy Breaches of Patient and/or Employee Information Policy;
- d) Facsimile Transmission of Patient Information Policy; and
- e) Retention of Hospital Records Policy.

While these may form the basis for new policies under the *Health Information Act*, they do not address many of the new obligations imposed by the Act and need to be reviewed and updated as soon as possible. For example, the “Release of Patient Information Policy” does not in any way address the disclosure of personal health information from one custodian to another or from the custodian to an agent of the custodian. What consent is necessary? Is implied consent enough? What does the Health Information Custodian need to do to satisfy itself that implied consent has been provided? Is a referral such as the one to North Cair in this case covered by the implied consent provisions, or would such a referral amount to a disclosure of personal health information under the Act? These and other questions must be answered and addressed in the form of the required written policies as required by section 8 of the Act



Section 10 of the Act also requires Health Information Custodians to “take reasonable measures” to ensure that its agents comply with the *Health Information Act* and its regulations. In my opinion, this means more than putting one paragraph in contracts with private sector agents about confidentiality (which is quite different from “privacy”). Rather, these contracts must be detailed and specific about how and in what circumstances the agent can collect, use and disclose personal health information (or personal information) within the terms of the contract, what should be done with the information once the agent no longer needs it or when the contract comes to an end and require the agent’s employees to receive basic training about their responsibilities pursuant to the *Health Information Act* and/or the *Access to Information and Protection of Privacy Act*. Contracts with private sector agents or other third parties should provide that the agents/contractors have adequate security measures and privacy policies and procedures in place such that they are compliant with the Act. Finally, these contracts should provide for some form of monitoring or auditing by the Health Information Custodian to ensure compliance.

## **Consent**

Understanding the consent requirements set out in the *Health Information Act* is clearly going to prove a challenge for Health Information Custodians. As noted in the first Review conducted by this office under the *Health Information Act*, it is necessary to give careful attention to the circumstances in which a health service provider can “assume implied consent”. In Review 16-HIA01, after analysing the provisions set out in Part 3 of the Act in relation to “Consent and Substitute Decision Makers” I concluded that:

- a) consent of any kind (implied, assumed, or explicit) is not a valid consent if it is not knowledgeable;
- b) in order for consent to be knowledgeable, the custodian must inform the patient how the information will be collected, used and disclosed **AND**

post relevant information about collection, use and disclosure in a prominent place or give notice to the individual describing the purposes of the collection, use or disclosure.

- c) the consent must not be obtained through deception or coercion
- d) the patient must know that he has the right to withhold consent.

As far as I know, none of the health authorities in the Northwest Territories, including the STHA have taken any steps to ensure that any consent to the collection, use and disclosure of patient information is knowledgeable consent. There has been very little public engagement about the coming into effect of the Act, and such public engagement as there has been as carefully avoided providing patients with information about their right to put conditions on how their personal health information is used and disclosed. I have yet to see a poster in any health facility which provides the public with relevant information about the collection, use and disclosure of personal health information. In short, it would be difficult at this point for any Health Information Custodian, to be able to rely on “assumed implied consent”. As demonstrated by the Complainant’s comments about this issue, a failure by medical practitioners and Health Information Custodians to educate their patients about how their information can and might be used will do nothing but engender distrust. This, above all, must be avoided.

## **RECOMMENDATIONS**

I make the following recommendations:

- a) that the STHA or the NWTTHA, as the case may be, immediately start the process of creating and implementing written standards, policies and procedures to ensure compliance with the *Health Information Act*, starting with those surrounding the issue of consent, with a view to having completed that review and implementation in all NWT run health facilities

within one year of the date of this Review and that they confirm with this office when this review has been completed;

- b) that the STHA or the NWTHA, as the case may be, review all of its contracts with third parties, particularly those in the private sector, and amend those existing contracts so as to include clear and specific obligations for those third party agents with respect to the collection, use, disclosure, security and disposal of personal health information and that any new contracts include such provisions. These should become standard term provisions and should, in addition to the above, mandate mandatory HIA training for all employees of those third party agents who might have contact with patients or patient information;
- c) that within three months, the STHA or the NWTHA, as the case may be, develop stepped informational materials which address:
- how and in what circumstances a patient's personal health information may be collected, used and disclosed;
  - information about the use of electronic records and how access to records is controlled within the electronic record system;
  - information about the "team" approach to medical care and how that affects the use of personal health information
  - the right of patients to place conditions or limits on how their personal health information is used and who has access to it;
  - the contact information for someone within the organization who is available to answer questions or help the patient with placing conditions on their consent
  - the right of the patient to find out who has had access to their electronic medical record and to request that an audit be done.

By “stepped” materials, I mean posters with basic information, which can be supplemented with more detailed brochures and even more detailed informational papers on a dedicated web site for patients. **The only materials currently available do not adequately address all of the necessary information which would allow a health professional to assume implied consent**, even if the patient had read them all. I suspect that most patients make certain assumptions about how their personal health information is collected, used and disclosed which is very different from reality. Educating the public is not something that SRHA can leave to the Department of Health and Social Services. SRHA and each of the other health authorities listed in the regulations have individual positive duties to prepare and provide the public with the information the patient needs to make “knowledgeable” decisions. Until each individual knows his or her rights under the HIA, or at the very least has been given obvious and easily available means to determine those rights, there can be no implied consent and most health care providers will be in non-compliance with the Act. When the current health authorities amalgamate into one, the responsibility to ensure that patients have the requisite knowledge to allow health care providers to rely on implied consent will fall to the new amalgamated entity.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**