

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 18-HIA 05

File: 17-241-6
December 4, 2018
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BACKGROUND

On December 12, 2017, the Complainant requested a review under the *Health Information Act* (HIA), saying that a specialist had sent his consultation report to a physician who had not originally requested the report. Prior to filing a complaint with my office, the Complainant obtained a copy of his full patient chart and provided a copy of the original consultation request and the consultation report. The Complaint's concern is based on the following sequence of events:

- The Complainant had previously seen Dr. A., a family physician at one of Yellowknife's primary care clinics.
- The Complainant decided not to seek further services from Dr. A., opting instead to see Dr. B.
- Dr. B., also a family physician at a Yellowknife clinic, referred the Complainant to Dr. C., a specialist at the Stanton Territorial Health Medical Clinic (STH Medical Clinic) for a consultation.
- Thirteen months later, Dr. C. examined the Complainant and wrote a consultation report.
- Rather than sending the consultation report to Dr. B., who had requested the consultation, Dr. C. sent the consultation report to Dr. A.

The Complainant stated, "[Dr. C. – the specialist] did not have my consent to send my personal information to [Dr. A.], nor did he even ask. I question as to why I was not notified of my personal information being sent to the incorrect doctor as well. The Stanton Territorial Health

Authority did not notify me, nor did [Dr. C.] or [Dr. A.] himself."

APPLICATION OF THE *HEALTH INFORMATION ACT*

The *Health Information Act* was proclaimed in force in September 2015. Dr. C. sent the Complainant's consultation report to Dr. A. in a letter dated September 25, 2017.

The Northwest Territories Health and Social Services Authority (NTHSSA) was established on August 1, 2016. The NTHSSA comprises the former Yellowknife Health and Social Services and Stanton Territorial Health Authorities, as well as 6 other former health authorities. NTHSSA is a "health information custodian" as defined in the HIA. Physicians A and B are both employed by Yellowknife clinics, which are part of the NTHSSA. Dr. C has a contractual relationship with the STH Medical Clinic, which is also a NTHSSA facility. As such, Drs. A., B., and C. are all "agents" of NTHSSA. Throughout this Report, I refer to various agents of NTHSSA individually for clarity, but the NTHSSA is the responsible health information custodian and the respondent in this matter.

The information in question, the Complainant's consultation report, is "personal health information" as defined in the HIA because it identifies the Complainant and includes information about his health and healthcare history.

Therefore, the HIA applies to this matter.

THE ISSUES

The Complainant's concern is that his personal health information was sent to the incorrect physician without his consent and that he was not notified of this apparent error. Therefore, the following questions are relevant to this matter:

- A. Did Dr. C. [the specialist] properly obtain the Complainant's consent before sending his personal health information to Dr. A.?

- B. Did Dr. C. disclose the Complainant's personal health information to the incorrect physician, Dr. A.?

- C. Did Dr. C. (and staff at the STH Medical Clinic) take reasonable measures to ensure the Complainant's information was accurate before sending it to Physician A?
- D. Did Dr. C. or the STH Medical Clinic use or disclose the Complainant's personal health information in contravention of the HIA?
- E. If the Complainant's personal health information was used or disclosed in contravention of the HIA, did Doctor C. or NTHSSA have a duty to notify the Complainant and my Office about the matter?

NTHSSA's SUBMISSIONS

I asked the NTHSSA to provide its views on what transpired in this case. NTHSSA made two submissions to my office in relation to this complaint, the first on January 30, 2018 and a second in response to my follow-up questions on March 12, 2018. Both submissions are summarized below.

When a specialist completes an examination, standard practice is to return the specialist report to the patient's family doctor, as recorded in MediPatient, NTHSSA's electronic health record system, which is accessible at the STH Medical Clinic and at both Yellowknife clinics (and most other NTHSSA facilities). NTHSSA says this practice allows specialist reports to be returned to the patient's assigned family doctor if a locum physician or a physician who is no longer at the clinic requests the report. This ensures the report is reviewed in a timely manner and that the patient's family doctor appropriately follows up with the patient.

Dr. A. is recorded as the Complainant's family doctor in MediPatient. Doctor B., who requested the consultation, is not listed as the Complainant's family doctor in MediPatient.

NTHSSA takes the position that no error or privacy breach occurred. In their view, the consultation report was returned to the Complainant's family doctor of record, Dr. A. NTHSSA says neither NTHSSA nor STH Medical Clinic received a request from the Complainant to not

share his personal health information with Dr. A, or other health care providers.

NTHSSA provided information which it says is available at its facilities that detail its policies on sharing health information among healthcare providers and how patients may exercise control over this sharing. This information includes the following statement, "You can ask us not to share your health information with a specific healthcare provider."

Because NTHSSA believes there was no error in this matter, it maintains there was no privacy breach. As such, in their view, the privacy breach reporting requirement under section 87 of the HIA was not triggered.

I asked whether every patient knows they may have been assigned a family doctor. NTHSSA provided a brochure that outlines "Clinic Team-Based Care" practiced at its YHSSA Clinics. The following statements appear in the brochure,

A team is made up of Clinic Assistants, Licensed Practical Nurses, Nurse Practitioners and Doctors. Your health care team represents your "Medical Home", your central "hub" or home base for your health care and information.

You will be booked to see your Family Doctor but if they are not available you may see another doctor or an NP on your team. Your Family Doctor is the person who knows you the best and coordinates your medical care.

Even if your doctor is not available there are always members of the team on site helping you with your needs. They also will communicate with your family doctor so that they can continue to coordinate your care.

The Clinic Assistant will book you a new patient appointment with a Family Doctor. Once you meet this doctor, and you mutually agree that they should be your Family Doctor, they will be identified on your chart as your Family Doctor.

NTHSSA provided a brochure on how it protects patient privacy in electronic health records systems, a copy of its HIA Notice to patients regarding the collection, use and disclosure of health information and a related poster, entitled "We Share Because We Care."

The NTHSSA material refers to information "sharing." The term "sharing" does not appear in the HIA. Since all of the information in question was sent between agents of NTHSSA, I interpret "sharing" in this context to mean use and disclosure of personal health information within NTHSSA and among its clinics.

NTHSSA also provided information on its Standard Operating Procedure for maintaining continuity of care when a patient's family doctor leaves NTHSSA, along with model letters that are intended to be sent to inform patients of this. As such, there is a policy to routinely advise patients when their family doctor of record leaves and let them know who their new assigned family doctor is. However, these processes do not seem to be relevant to the present matter as neither Physician A, nor Physician B had left NTHSSA at the material time.

COMPLAINANT'S RESPONSE

I shared NTHSSA's submissions with the Complainant and provided an opportunity to comment. I did not receive any responding communication from the Complainant, which is his prerogative.

DISCUSSION

Issue A: Did Dr. C. [the specialist] properly obtain the Complainant's consent before sending his personal health information to Dr. A.?

In a previous Review (16-HIA01) I interpreted the consent provisions in Part 3 of the HIA as follows:

- 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.

The Complainant says he did not consent to having Dr. C. disclose his personal health information to Dr. A. While NTHSSA has no record of the Complainant requesting any restrictions on sharing his personal health information, there is also no record or evidence to suggest that the Complainant was aware of his right to make such a request. They referred to pamphlets and posters that had been developed, but no information about how this information has been disseminated to the general public. In my Review Report 16 HIA01, I recommended that a brochure be developed to advise clients about the way in which their personal health information can be collected, used and disclosed under the HIA and outlining the rights of the patient to limit who can see their personal health information. I also recommended that every client of every clinic be provided with a copy of the brochure for a period of one year and that all new clients be provided a copy thereafter. This has not happened. Instead, there is a brochure about “Team Based Care” in which the benefits of team care is extolled, but nothing is said about the patient’s right to limit access to his/her medical records. There is also a poster that includes as one of six points that “You have the right to control how your information is shared”, but there is no guidance about how one might do that. Nor did NTHSSA provide any information about how these resources are disseminated or whether they are available to all clients or require a visit to a web site. In fact, these resources are difficult to find on line. They do not appear anywhere on the NTHSSA website and I could find them only on the Department’s website by doing specific searches for them. There was no intuitive place to find them or even a way to search them using obvious key words.

Any kind of consent, including implied consent must be knowledgeable. It appears NTHSSA, at best, met only part of criterion b) above regarding knowledgeable consent. I am not convinced that enough effort is being made in NTHSSA facilities to ensure that patients are cognizant of their role in the management of their own personal health information.

Section 14 of the HIA describes what constitutes a knowledgeable consent (whether implied, assumed or explicit):

14. For the purposes of sections 15, 17 and 18, a consent to the collection, use or disclosure of personal health information about an individual is knowledgeable if it is reasonable in the circumstances for the health information custodian to assume that the individual knows
 - (a) the purposes of the collection, use or disclosure; and
 - (b) that the individual may provide or withhold consent.

The above description refers to the individual knowing the purposes of the collection, use or disclosure. To further inform my examination of what would constitute a knowledgeable consent, I considered the definitions of "use" and "disclosure" in the HIA (collection is not at issue here).

The HIA defines use as,

"use", in relation to information, means to handle, deal with or apply information for a purpose, including to reproduce or transform it, but does not mean to collect or disclose information.

The HIA defines disclosure as,

"disclose", in relation to information, means to release information or make information available in any manner, including verbally or visually, to a person or organization.

In light of the above definitions, knowledgeable consent to use and disclose personal health information means the individual knows the purpose to which the information will be applied and knows what person or persons the information will be made available to. Because of the context, it is probable that the Complainant knew that his information was to be used and disclosed for the purposes of providing health care. Also because of the available information about Team-Based Care at YHSSA Clinics, the Complainant might have known that his consultation report would be shared within his Care Team at YHSSA Clinics. In contrast, it appears clear that the Complainant did not know or understand which physician would receive his consultation report.

I recognize that it is not possible for a disclosing custodian to know in advance and advise a patient about all the health services providers who might view or access that patient's personal health information at a receiving organization. However, it does seem reasonable to expect that custodians make a reasonable effort to explain where a patient's health information will be disclosed and to whom. For example, Dr. C. could have advised the Complainant that he was sending the consultation report to his family doctor, Dr. A. This would have alerted the Complainant to this potential flow of information and the Complainant could have provided instructions to send the information to Dr. B. instead.

The Complainant's assumed consent was based on an incomplete knowledge of the disclosure. The Complainant likely knew his personal health information would be shared with his Care Team at YHSSA Clinics but did not know who his family doctor was. This represents an area where NTHSSA could improve its practices to avoid similar incidents in the future.

I **recommend** that NTHSSA direct its health services providers to make a reasonable effort to inform patients to whom consultation reports and test results will be disclosed (or shared), whether within the NTHSSA or to outside agencies.

I repeat the **recommendation** made in my Review Report 16 HIA 01 that either the Department of Health and Social Services or the NTHSSA develop an informational brochure to outline the most important provisions of the HIA with respect to the collection, use and disclosure of personal health information, to be disseminated in as many as the official languages as possible. These brochures should include, in a broad way, how personal health information will be used within the organization (e.g. diagnosis, treatment, care, billing, etc.) and how and in what circumstances that information will be disclosed whether within the organization or to outside third parties, as well as information about the use of electronic records and how access to records is controlled within the electronic record system (i.e. audited roles based access), about the "team" approach to medical care and how that affects access to personal health information. Most importantly, the brochure needs to clearly and unequivocally inform readers that they have the right to limit who has access to their personal health information and how to ask that such a direction be placed on their file.

I **recommend** that this brochure be provided to every patient who seeks medical care at any facility operated by the NTHSSA for at least one year and thereafter that it be provided to all

new patients. The brochures should also be available in all clinic waiting rooms.

Issue B: Did Dr. C. disclose the Complainant's personal health information to the incorrect physician, Dr. A.?

NTHSSA has established a system of Team-Based Care designed to maintain continuity of care, as described in the brochure cited above. If a patient's family doctor is not available, they may see another physician or healthcare provider who will maintain the patient's health records under the responsibility of the patient's assigned family doctor. Further, NTHSSA has established a standard of practice to maintain continuity of care when the patient's family doctor leaves the NTHSSA. Finally, NTHSSA has established a process to confirm with a new patient who their family doctor will be. It is not clear, however, whether the practice conforms with the policy. NTHSSA, in fact, indicated that because of a relative shortage of physicians, there is often no choice given to a patient in terms of which physician will be "their" primary care or family physician and that most often physicians are simply assigned, without the "meet and greet" contemplated by the brochure (which suggests an element of choice for the patient).

None of the information provided by NTHSSA includes a process whereby a patient may request a change to his or her assigned family doctor. Further, none of this information includes a process to routinely confirm with a patient that they understand who their assigned family doctor is. There is only a policy to confirm a new patient's family doctor at initial registration.

From the Complainant's perspective, he changed family doctors. He stopped seeing Dr. A. and opted to see Dr. B. instead. It does not appear that he was aware that Dr. A. remained his family doctor of record. He was therefore surprised to learn that his consultation report had been sent to Dr. A., rather than Dr. B., who had requested the consultation. In my view, the Complainant's assumption that the physician who requested the consultation would receive the consultation report was entirely reasonable. I also acknowledge that NTHSSA did not know the Complainant's understanding of who his family physician was. The Complainant did not know that he had to take additional steps to confirm his choice of a family physician. It is to be noted that there is nothing any of the materials available from the NTHSSA that provides any direction or guidance on how to "change" which physician is indicated as a person's family physician.

This question can be boiled down to two conflicting points of view, each based on incomplete information and assumptions.

The Complainant did not request that any restrictions be placed on sharing his health information, so NTHSSA sent the Complainant's consultation report to his family doctor of record, Dr. A.

At the same time, it does not appear that Complainant understood his consultation report would be sent back to Dr. A. Further, it does not appear the Complainant understood that Dr. A. was his family doctor of record.

Based on the information available, it appears Dr. C disclosed the consultation report to the correct physician, the Complainant's family doctor of record, Dr. A. Certainly, the Complainant would not agree with this conclusion, because he did not understand who his family doctor was. It seems these conflicting points of view could have been reconciled and this complaint avoided if the Complainant had simply known who his family doctor of record was at the outset.

I **recommend** that NTHSSA implement a practice of having clinic assistants (and similar positions in its other facilities) confirm the identity of the patient's family doctor (or other primary provider) each time the patient makes an appointment. This would confirm the patient's understanding, give the patient an opportunity to voice any concerns or provide instructions regarding information sharing and make for a more knowledgeable consent.

Issue C: Did Dr. C. (and staff at the STH Medical Clinic) take reasonable measures to ensure the Complainant's information was accurate before sending it to Physician A?

Section 88 of the HIA says the following about the custodian's obligation to ensure personal health information is accurate before using or disclosing it:

88. A health information custodian shall take reasonable measures to ensure that personal health information is accurate and complete
 - (a) in collecting the information; and

(b) before using or disclosing the information.

"Personal health information" as defined in the HIA includes "prescribed information about a health service provider that provides a health service to an individual." In my view, this includes the identity of the individual's family physician of record. Custodians therefore have a duty to ensure information about a patient's family doctor is accurate before using or disclosing it.

There is frequent turnover in health service providers at NTHSSA and throughout the Northwest Territories. To ensure continuity of care, NTHSSA has implemented Team-Based Care, which means that a patient may not always see their family doctor when they need health care. Both of these factors contribute to the very likely scenario that the physician who requests a consultation may or may not be the physician that should ultimately receive the related report.

NTHSSA stated its standard practice is to send consultation reports to the patient's family doctor of record, as noted in MediPatient. This practice assumes the family doctor notation in MediPatient is accurate. From NTHSSA's perspective, the notation regarding the Complainant's family doctor was accurate. They had no information to indicate the Complainant had decided to no longer see Dr. A. The only information available was that the Complainant had seen Dr. B., instead of Dr. A.

Given the Team-Based Care model in place, it could be argued that it was reasonable for Dr. C. and staff at STH Medical clinic to assume the Complainant had seen Dr. B. simply because Dr. A. wasn't available at the time. Further, the Complainant had not provided any instructions to the contrary. At the same time, anyone looking at the Complainant's health records in MediPatient could have noticed an apparent discrepancy between the name of the physician requesting the consultation and the Complainant's family doctor of record. An observant user of MediPatient would also have noticed that 13 months had elapsed between Dr. B.'s referral request and the Complainant's appointment with Dr. C.

Current practice is to rely on the assumption that the family doctor information in MediPatient is accurate. However, the HIA says custodians must take reasonable steps to ensure information is accurate, which in my mind means taking some action to confirm the accuracy of information, rather than relying on an assumption. One could perhaps rely on this assumption more safely if it was standard practice at NTHSSA to regularly confirm with patients who their

family doctor is and to routinely inform patients who will receive shared information. However, I have already observed this is not standard practice. In this particular case, over a year had passed between the original consultation request and the consultation, during which period many things about the Complainant's circumstances and preferences could have changed. These uncertainties in the assumptions underlying current practice reinforce my previous recommendations that NTHSSA staff take reasonable steps to regularly inform patients about who their family doctor is and who will receive shared information.

Issue D: Was health information used in contravention of the HIA?

To determine whether health information was used or disclosed in contravention of the HIA, I considered the actions of the NTHSSA agents involved in this matter. Sections 10 and 11 of the HIA say that a custodian's agents must comply with the HIA and any policies or procedures the custodian has set under section 8, as follows:

8. (1) A health information custodian shall establish or adopt standards, policies and procedures to implement the requirements of this Act and the regulations, including the requirements under sections 85 to 88.

10. (1) An agent shall comply with this Act and the regulations in the collection, use and disclosure of personal health information and in the exercise of other powers of a health information custodian and the performance of other duties and functions of a health information custodian.

11. (1) An agent shall comply with standards, policies and procedures established or adopted by a health information custodian under subsection 8(1).

According to the records provided by the Complainant, Dr. C. dictated the consultation report. Staff at STH Medical Clinic then transcribed the report. According to NTHSSA, staff then reviewed the Complainant's record in MediPatient to determine the Complainant's family physician as they prepared Dr. C.'s consultation report. Staff then addressed Dr. C.'s consultation report to the Complainant's family doctor of record and sent it to Dr. A. As noted

by NTHSSA, staff followed standard process in sending the consultation report to Dr. A., after verifying that Dr. A. was the Complainant's family doctor of record. The Complainant's personal health information was used and disclosed for the purposes of providing health services to the Complainant. It does not appear that any agent of NTHSSA contravened the HIA.

I have already noted that the Complainant likely understood that his information would be used and disclosed to provide his health services but did not understand to whom the information would be disclosed. To have full knowledge of use and disclosure the individual needs to understand both the purpose and the destination of the disclosure. The HIA says disclosing means making personal health information available to an organization or to a person. In this case, the information in question was disclosed between agents of a single organization, the NTHSSA. The Complainant did not understand which health service provider within the NTHSSA would receive the information. It is, however, likely that the Complainant understood that his personal health information would be disclosed to his Health Care Team at the Yellowknife clinic. Therefore, because the Complainant likely understood his personal health information would be disclosed to his Health Care Team at the clinic (a business area within the broader NTHSSA organization), I cannot conclude the Complainant did not know which organization would receive it. Therefore, I find that NTHSSA did not contravene the consent provisions of the HIA. While this does not represent a contravention of the HIA, it does represent an area for improvement. I have already made a recommendation on how NTHSSA can improve patients' knowledge of who will receive disclosed personal health information.

Issue E: If the Complainant's personal health information was used or disclosed in contravention of the HIA, did Doctor C. or NTHSSA have a duty to notify the Complainant and my Office about the matter?

The HIA requires that custodians notify the affected individuals and my office about incidents involving personal health information that meet criteria set out in section 87:

87. Subject to any prescribed exceptions, a health information custodian shall give notice to an individual and, if applicable, to a prescribed person or organization, as soon as reasonably possible if personal health information about the individual is
 - (a) used or disclosed other than as permitted by this Act;
 - (b) lost or stolen; or

- (c) altered, destroyed or otherwise disposed of without authorization.

I determined above that the Complainant's health information was used and disclosed as permitted by the HIA. Further, none of the information in question was lost, stolen, altered, destroyed or disposed of without authorization. Therefore, the notification requirement under section 87 of the HIA was not triggered.

SUMMARY AND RECOMMENDATIONS

This case points to the danger of relying on assumptions. Each party made assumptions that weren't necessarily wrong from their own perspective but were wrong from the other's perspective.

The Complainant and NTHSSA each relied on assumptions about what the other party understood, which led to an unhappy result for the Complainant. The Complainant stopped seeing Dr. A. and went to Dr. B. The Complainant then assumed his family doctor was Dr. B. Because the Complainant hadn't provided any instructions, NTHSSA didn't know about the Complainant's desire to change who was designated as his family doctor.

When Dr. B. requested a consultant report, the Complainant was surprised and upset when the consultant at the Yellowknife clinic sent his report to Dr. A., rather than Dr. B. The clinic assumed the Complainant knew that his family doctor of record was Dr. A. The clinic also assumed that their information in MediPatient about the Complainant's family doctor of record was accurate. From NTHSSA's perspective the MediPatient information was accurate, while from the Complainant's perspective, it was not.

What appears to be missing in this case is the Complainant's knowledge of the full purpose of the use and disclosure (i.e. the sharing) of his personal health information. It is difficult to say that the actions of NTHSSA's agents represent a failure to comply with the HIA. The assumed consent relied on to share the Complainant's personal health information, while imperfect, met the letter of the law. It is also difficult to say that NTHSSA failed in its duty to ensure that information was accurate before it was used and disclosed. Based on the information available, the Complainant's report was sent to the Complainant's family doctor of record. I do believe,

however, that there is an onus on health information custodians to do more to inform and educate the public about how personal health information is collected, used and disclosed and how the team-based approach to health care expands the number of health care workers who potentially have access to the patient's records. Because family doctors are largely "assigned" as opposed to being "chosen" by the patient, it is just as important that there be transparency around the process of assigning a family doctor. This case points to a need for NTHSSA to take steps to ensure patients have better knowledge about who their assigned care providers are, which would give patients better knowledge of where their personal health information may be shared and with whom it may be shared. Therefore, I make the following recommendations.

I **recommend** that NTHSSA direct its health services providers to make a reasonable effort to inform patients to whom consultation reports and test results will be disclosed (or shared), whether within the NTHSSA or to outside agencies.

I **recommend** that either the Department of Health and Social Services or the NTHSSA develop an informational brochure to outline the most important provisions of the HIA with respect to the collection, use and disclosure of personal health information, to be disseminated in as many as the official languages as possible. These brochures should include, in a broad way, how personal health information will be used within the organization (e.g. diagnosis, treatment, care, billing, etc) and how and in what circumstances that information will be disclosed whether within the organization or to outside third parties as well as information about the use of electronic records and how access to records is controlled within the electronic record system (i.e. audited roles based access), about the "team" approach to medical care and how that affects access to personal health information. Most importantly, the brochure needs to clearly and unequivocally inform readers that they have the right to limit who has access to their personal health information and how to ask that such a direction be placed on their file.

I **recommend** that this brochure be provided to every patient who seeks medical care at any facility operated by the NTHSSA for at least one year and thereafter that it be provided to all new patients. The brochures should also be available in all clinic waiting rooms.

I **recommend** that NTHSSA implement a practice of having the clinic assistants (and similar positions in its other facilities) confirm the identity of the patient's family doctor (or other primary provider) each time the patient makes an appointment. This would confirm the patient's understanding, give the patient an opportunity to voice any concerns or provide

instructions regarding information sharing and make for a more knowledgeable consent.

I would like to thank the NTHSSA for its cooperation in answering my questions about this matter.

Elaine Keenan Bengts

Information and Privacy Commissioner