

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 12-105

12-112-4

May 4, 2012

THE COMPLAINT

In early January, I received a letter from the Complainant (who will be referred to in this report as “A.B.” for ease of reference) who felt that his personal information had been improperly used or disclosed by the Beaufort-Delta Health and Social Services Authority (BDHSSA). A.B. is (or was) an employee of the BDHSSA. He sought medical assistance from the health authority as a member of the public and was concerned when records of that incident were apparently used, without his consent, in a disciplinary matter involving his employment. Immediately after the disciplinary meeting, A.B. wrote a letter to the CEO of BDHSSA as a patient of the authority, asking for an explanation as to how his personal health information came to be used in the disciplinary meeting. He alleges that, in response, he received an email warning him that he should be communicating “through the chain of command” and that he should have addressed his request to his manager rather than to the CEO and advising him that if he refused to do so, further disciplinary action would be taken. Approximately a month later, he received an email from the Acting Director of Client Services advising him that an investigation into his complaint had been done and no evidence had been found to support his allegation of a breach of confidentiality. A.B. expressed a number of concerns about the “investigation” and how it was done and the lack of any explanation other than that no evidence had been found to support his allegation. As a result, BDHSSA hired an independent investigator to conduct a second review of the situation. Again, all that A.B. received with respect to the second investigation was a short email indicating that an investigation had been done and no evidence had been found that his allegations of an inappropriate use of his personal information were well founded. Again, no details or explanation were provided. Once again, A.B. expressed concerns that he had not been contacted by the investigator nor had he been provided with any details of the investigation done. A.B. was even more upset that a copy of

the email from the second investigator had been copied to his supervisors, once again breaching his privacy as a patient of the BDHSSA. According to A.B.:

This serious breach of my patient confidentiality combined with the BDHSSA's inability to separate their role as my employer from my health care provider effectively prevents me from seeking healthcare for the reasonable fear that my employer will access and use that information against me to further harass or discipline me.

He asked me to review the matter.

THE PUBLIC BODY'S RESPONSE

In order to complete my review, I asked the public body to provide me with their explanation and the answer to a number of specific questions which A.B.'s complaint raised for me. I also asked them to provide me copies (if any) of the reports prepared by the two investigators and a detailed description of the information management system in place with respect to patient information as well as any policies and procedures in place specifically to ensure that employee's personal health information is not used for purposes other than providing medical services to the employee as a patient.

The public body responded and provided me with a number of documents. With respect to the allegation that A.B. was warned not to communicate his concerns with the CEO, a statement was provided from the person alleged to have written that email. The allegation was that the version of the email which A.B. provided to me was "cut and pasted" and taken out of context. They have not, however, provided me with the original chain in which this email was sent so as to place it into context for me.

With respect to the alleged breach itself, I was provided with a copy of the second report prepared which was completed by the independent party. No formal report was prepared by the person who did the internal investigation. The second report says, in

part, that Jane Smith, the Acting CEO at the time of the incident advised that she “was aware from the travel arrangements made for [A.B.] by the BDHSSA that he arrived in Inuvik about 1900 or 1930”. It was noted that A.B.’s sick note, which was faxed to Ms. Smith by A.B. himself, was signed by the physician on call in the ER on the date in question. Based on these two facts, Jane Smith arrived at certain conclusions about the time of the emergency room visit and commented on it in the disciplinary meeting. Ms. Smith denied ever looking at or having access to A.B.’s patient record, though she did admit that when she received the sick note, she called the ER department to see if a message had been left in his chart for her, either from A.B. or from the physician, again because she had assumed from circumstances that he must have been seen in the ER the night before. It was suggested that “it is not unusual for physicians to put notes for staff into the chart, confident that the staff will find it and pass it on”. The report came to the following conclusion:

I can find no evidence that a breach of confidentiality occurred. [A.B.] voluntarily disclosed that he had received medical treatment at [time] [date] and the sick note faxed to Jane Smith confirms that he was seen on that date. I find Jane Smith’s conclusions around the times [A.B.] was in the ER to be reasonable and see no reason she would need to access his chart to come to those conclusions. While Jane Smith might have exercised extra caution before deciding to call the ER clerk and ask the clerk to look in the file.....I have no reason to believe Jane Smith and the clerk when they say the only inquiry related to the record was whether a message or note had been left for Jane in the chart.

With respect to the issue of whether A.B.’s privacy was breached by providing a copy of the report of the independent investigator to various other employees of BDHSSA, the public body noted:

Due to the nature of the complaint [A.B.] had made regarding the allegation that Jane Smith had breached his patient confidentiality specifically related to an employee disciplinary action, I wanted to ensure

that the human resources and labour relations specialists who had been involved in all complaints and grievances of [A.B.] were made aware of this further allegation being made against Jane Smith.As there was no patient health information that had been used or disclosed....the purpose of copying the email response to Human Resource Superintendent Tammy Rogers and Senior Labour Relations Advisor, Mike Johnston was for information only.

With respect to the records system itself, I was advised that BDHSSA has a partial electronic and full hard copy system limited to the Inuvik Regional Hospital site only, while community health centers still maintain only hard copy records. Within the Inuvik Regional Hospital Client Record's Department, day nursing staff have full access to hard copies of charts without limits or boundaries. After hours nursing staff will obtain patient charts and sign them off. Client Records then checks the sign-out sheet in the morning and retrieves the client file. There was an indication that an increasing number of staff had been requesting to have their personal charts at BDHSSA secured and, as a result, they were working on improvements for "lock box" privacy practices to protect the privacy of clients and staff.

DISCUSSION

While I appreciate that the public body in this case has clearly taken this complaint seriously, I am somewhat concerned about the fact that there appears to be somewhat of a disconnect with respect to the privacy of employees as patients.

I am satisfied that Ms. Smith did not, at any time, physically look in A.B.'s patient file. That said, however, physical access to the file is not necessarily a condition precedent to the inappropriate use or disclosure of personal information. If information was used in an employment disciplinary procedure which was available only because it was in the medical patient file of the employee, it would be an inappropriate use or disclosure of that information, no matter how it had been obtained, unless it was with the consent of the patient. If an individual who also happens to be an employee seeks medical

attention, he or she must be able to trust that whatever information is collected for his/her medical purposes is not used for any purpose other than for that which it was collected - to provide the patient with medical attention needed. In this case, it would appear that A.B. himself provided Ms. Smith with the medical note indicating that he had seen a doctor on a particular date. As I have not been provided with that note, it is not clear to me whether it included anything about the time of the consultation. As I understand it, timing became an issue in the discipline meeting so this is of some importance. If there was nothing on the note about the time of the consultation, Ms. Smith had to have used her knowledge as an employee of BDHSSA and A.B.'s supervisor to draw certain conclusions. Extreme care has to be taken when combining information obtained from the employee as employee and information received or obtained about the employee as a patient. Based on the information provided in this case, it appears that Ms. Smith did not use any information not provided by A.B. himself in reaching her conclusions about the time of his visit to the ER. She drew on her knowledge as an employee of BDHSSA of A.B.'s schedule and on the information in the sick note that A.B. himself provided and, based on that, reached certain conclusions. Whether or not those conclusions were accurate is another issue entirely. But I am satisfied that she did not improperly use any information other than what she knew as A.B.'s supervisor, together with the information that A.B. himself provided to reach those conclusions, right or wrong.

There are, however, a couple of issues that this review brought to light that I am concerned about. The first of these is the fact that it appears to be common practice to leave notes for supervisors and managers about employees on their medical charts. This is a completely inappropriate use of a medical chart which will inevitably lead to an inappropriate use or disclosure of personal health information and further complaints. I recommend that this practice cease immediately.

Secondly, it causes me some significant concern that the report resulting from the independent review of A.B.'s complaint about what he considered to be a breach of his personal health information records was shared with individuals within the public body whose job it was to deal with disciplinary issues. It seems that the fact that A.B.

complained about what he considered to be an inappropriate use or disclosure of his personal health information was, in itself, considered a matter for disciplinary consideration. No person should ever feel constrained, for any reason, from standing up for his or her right to insist on the absolute privacy of his or her personal health records. I cannot think of a situation in which an employee should be disciplined for making such an inquiry or filing such a complaint. It should never be something that finds its way into an employee's employment record or history, nor should it be used to bolster an allegation that the employee is "difficult" or not following the rules. The *Access to Information and Protection of Privacy Act* makes it clear that individuals have the right to insist on the protection of their personal information. The fact that A.B. first tried to handle the matter through channels other than the ATIPP Commissioner's office does not change this. There was no reason whatsoever for the investigator's report, which was prepared as a result of a patient's concern about the security of his health file, to be provided to anyone other than the CEO and the patient with the concerns.

Finally, I also think that it is important that I comment on the suggestion that it was inappropriate for A.B. to be asking the CEO of the BDHSSA directly to investigate a complaint about a possible breach of privacy. This request was made as a patient, not as an employee. As a patient, A.B. had no "manager" and no "appropriate channels" to follow. He was entirely within his rights to seek a response, as a patient, from the CEO directly, no matter what his history of not following appropriate lines of communication as an employee. Again, BDHSSA needs to clearly separate their dealings with employees as employees and their dealings with employees as patients. While BDHSSA denies that A.B. was threatened with disciplinary action if he continued to pursue his request for an investigation as to whether or not his privacy was breached, they have not provided me with proof that that did not happen. Furthermore, it appears that the matter was, in fact, considered to be worthy of disciplinary attention because, as noted above, the resulting report was shared with the Human Resources personnel within the public body dealing with A.B.'s disciplinary issues within the workplace. Whether or not the public body threatened disciplinary action for failing to follow the "proper channels" is not really the main point to be made, however. The point is that it should never be considered a disciplinary issue at all. I would encourage

BDHSSA to take steps to ensure that this does not happen in the future, either by way of written policies or the creation of appropriate procedures to be used in these cases.

CONCLUSIONS

I conclude that, in this case, the reference made by Jane Smith to the timing of A.B.'s attendance at the ER in his disciplinary meeting was not an inappropriate use of A.B.'s personal health information. Rather, I have to conclude in this case that she used information she had as a result of her position as employer and information which was given to her by A.B. and she drew certain conclusions as a result of the combination of those two sets of knowledge. A.B. had submitted the note for the purpose of justifying his absence from work (a work issue) and it was, therefore, being used in the discipline meeting for the purpose it was collected and intended.

I do, however have concerns about other aspects of this case as noted above. I therefore recommend that BDHSSA take steps to review their policies and procedures as they relate to the privacy of the health records of employees and how and when those records can and should be used. I further recommend that clear policies be created that will allow a patient who is also an employee to file a privacy complaint without it becoming a disciplinary issue for the employee and those policies should make it clear that an employee's complaint about a breach of privacy will be treated no differently than any other such complaint. It should be absolutely clear that no employee will be penalized or disciplined for filing such a complaint or seeking redress for any breach of his/her personal health information.

Elaine Keenan Bengts
Information and Privacy Commissioner