

Report

On

The Health Information Protection Act **Draft Regulations**

September 10, 2004

**Saskatchewan Information and Privacy
Commissioner**

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Response to *The Health Information Protection Act Regulations* – DRAFT for Consultation

Introduction

On August 11, 2004 our office received from Saskatchewan Health a set of proposed regulations under *The Health Information Protection Act* (HIPA)¹. Saskatchewan Health has requested our comments on the proposed regulations.

In addition, our office has a statutory mandate to provide advice and commentary on proposed legislation. Section 52 provides in part as follows:

52. The Commissioner may: (a) offer comment on the implications for personal health information of proposed legislative schemes or programs of trustees;..."

Our office is pleased to see the publication of the draft regulations. In our Annual Report for 2003-2004 we expressed a concern that the absence of regulations was creating problems for trustees and compromising full compliance by trustees with HIPA.²

We applaud the initiative of the Department to publish the draft regulations on its website and to provide an opportunity for public input. HIPA and any subordinate legislation such as these regulations impact the personal health information of all Saskatchewan residents. For many, no other type of personal information is as sensitive and as prejudicial as information about our health and diagnosis, treatment and care. For these reasons, the publication of the draft regulations is a very positive development.

Overview

Our perspective is that when considering any health information legislation we must consider what the impact will or may be on the people of Saskatchewan. How will the proposed regulations impact the confidence that provincial residents need to have when they interact with health care providers? We believe it is fundamentally important that citizens have confidence that their privacy will be protected and that their personal health information will be treated carefully and respectfully by health information trustees.

Many of the proposed regulations would sanction disclosures of personal health information without consent.

¹ S.S. 1999, c. H-0.021

² Available online at www.oipc.sk.ca under Annual Reports, page 15

Section 5 of HIPA provides as follows:

5(1) Subject to subsection (2), an individual has the right to consent to the use or disclosure of personal health information about himself or herself.

(2) A trustee shall use or disclose personal health information about an individual only:

(a) with the consent of the subject individual; or

(b) in accordance with a provision of this Act that authorizes the use or disclosure.

We note that the “right to consent” described in section 5 of HIPA is already circumscribed by more than 20 different provisions which allow disclosure of personal health information without consent. In considering proposed Regulations # 4,5,6, 7 and 8, our view is that the threshold for expanding that list of disclosures without consent should require more rigour.

In several cases we have recommended that Privacy Impact Assessments (“PIA”) be done before certain proposed regulations be resolved. A PIA is a self-audit tool in the form of a questionnaire. It canvasses an organization’s general privacy regime as well as how personal information is collected, used, disclosed, accessed and corrected. The PIA also addresses questions of security and destruction of records. A form of PIA is available on our website, www.oipc.sk.ca.

We note that PIAs are statutorily prescribed in Alberta where a custodian has the following obligation:

s. 64(1) Each custodian must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of the individual who is the subject of the information.

(2) The custodian must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).

The Ontario legislation does not explicitly require PIAs but does require that the Information and Privacy Commissioner must be consulted by the Minister of Health and Long Term Care and approve a number of different types of disclosures.³

Although HIPA does not require PIAs we believe that this is an appropriate measure that Saskatchewan Health should undertake prior to enacting legislation that expands the permitted disclosures of personal health information without consent.

³ S. 45

We have compared the proposed regulations with the provisions in the only other Canadian jurisdictions with a stand-alone health information law namely, Manitoba, Alberta and Ontario.⁴ The Ontario law is scheduled to go into force November 1, 2004. Draft regulations for that law are available for public comment.⁵

In the Ontario and Alberta legislation, a “custodian” is equivalent to a “trustee” as described in Saskatchewan and Manitoba legislation although there are some differences in the list of bodies that qualify for that designation.

Proposed Regulation #1 raises the very important question of the scope of HIPA. Since our office was not engaged in the development of HIPA we take this opportunity to offer comments on the specific regulation and also the related larger question of the purpose of the legislation.

Proposed Regulation #2 addresses an item of particular importance to trustees attempting to meet the requirements of HIPA.

Proposed Regulations #3 and 4 are appropriate but we have suggested modifications.

This office is opposed to proposed Regulation #5.

We recommend that Privacy Impact Assessments should be undertaken and reviewed by our office before enactment of proposed Regulations #6 and 8.

We are unclear as to the need for proposed Regulation #7

We have suggested modification of proposed Regulation #9.

With proposed Regulation #10, we suggest that since it does not concern personal health information it ought to be enacted as a regulation or statutory amendment to a law that specifically regulates health professionals. We do not think it is appropriate as an amendment to a law that deals exclusively with personal health information and privacy issues.

With respect to proposed Regulation #11 we have a clear preference for Option Two.

HIPA does not expressly mandate a review of this relatively complicated law after some fixed period of time. That is a common feature of the health information laws in Manitoba, Alberta and Ontario.⁶ In the absence of such a review procedure, we have offered some comments that relate more to the statute than the regulations. We have

⁴ The applicable statutes are Manitoba’s Personal Health Information Act, S.M. 1997, c. 51 (“PHIA”), Alberta’s Health Information Act, R.S.A. 2000, c. H-5 (“HIA”) and Ontario Bill 31, Personal Health Information Protection Act, 2004

⁵ Available online at http://www.health.ov.on.ca/english/public/updates/archives/hu_03/priv_legislation/proposed_regulations.html

⁶ Ontario s. 73; Alberta s. 109; Manitoba s. 67

done this since the statute and the regulations must operate together and they do constitute the foundation for Saskatchewan's health information regime.

Proposed Regulation #1

Exempting the Saskatchewan Archives Board from the rules of HIPA where the personal health information collected by the Saskatchewan Archives Board is not from a prescribed trustee under HIPA, where records have been publicly available through the Archives, etc.

Our Commentary

This regulation attempts to partially redress what we regard as a difficulty with HIPA. HIPA classifies every body that is a "government institution" within the meaning of *The Freedom of Information and Protection of Privacy Act* as a "trustee" even though virtually none of these government institutions are in the business of delivering health services. For example, our office recently addressed the obligations of Saskatchewan Government Insurance in Report H 2004-001⁷.

Like the Saskatchewan Archives Board, many government institutions may currently collect, use or disclose personal health information but typically this relates to employee health information or information incidental to other types of personal information collected, used or disclosed by that organization.

HIPA is not a typical privacy law such as one finds in Part IV of *The Freedom of Information and Protection of Privacy Act* or Part IV of *The Local Authority Freedom of Information and Protection of Privacy Act*.

HIPA, like its counterparts in Manitoba, Alberta and Ontario, has been carefully designed to facilitate existing information sharing practices among traditional providers in the health care sphere. All four laws have been developed to accommodate the transition to electronic health records. This has meant that express consent is not required for most usual kinds of collection, use or disclosure among health information trustees. HIPA was designed to reflect the historic and important role assigned by health provider training and ethical standards to issues of privacy and confidentiality. In other words, there is a pre-existing culture of privacy sensitivity that pervades hospitals, clinics and other health care settings.

Most government institutions have not operated within that same culture. Their involvement with health information has been quite limited. Under the FOIP Act those government institutions have quite broad powers to use personal information but are limited in disclosing such information to other organizations without written consent. In our view, it is not prudent to permit more than 70 different government institutions including such diverse organizations as Saskatchewan Telecommunications, the Milk

⁷ Available online at www.oipc.sk.ca under Reports, [25] to [28]

Control Board, the Law Reform Commission and the Wascana Centre Authority, a relaxed opportunity to use or disclose personal health information without consent.

I am mindful that there are other restrictions in HIPA that would limit disclosure on a ‘need-to-know’ basis but in a practical sense it is largely up to trustees to police themselves. Our office, with only three staff, simply does not have the resources to adequately monitor the activities of the many thousands of health information trustees in Saskatchewan. We can and will respond to complaints and queries but are not currently in a position to audit the need-to-know disclosure rules for all physicians’ clinics, laboratories, acute and long term care facilities and for all members of more than a dozen different health professions and disciplines plus more than 70 government institutions including very large Crown Corporations.

I suggest that there are practical reasons why it may be advantageous for the list of trustees to exclude government institutions other than the Department of Health. All of those other government institutions will remain subject to the FOIP Act and more particularly Part IV of that Act. If the FOIP Act is amended as our office suggested in our Annual Report to impose an express duty to protect personal information and safeguard that information, then there should be no privacy protection gap.⁸

Making all government institutions subject to HIPA as well as the FOIP Act imposes a considerable administrative burden on those organizations. Not only must they ensure that they scrupulously follow Part IV of the FOIP Act, but they are also required to train staff to a comfortable understanding of HIPA. In addition, since September 2003 those government institutions that are part of Executive Government are required to also adhere to the Privacy Framework for Executive Government. Our office is concerned that overly complex and conflicting rules for the protection of personal information may frustrate and overtax the normal capacity of these organizations. The result may be diminished privacy protection.

Also, failure to prune the list of trustees in this suggested fashion will likely lead to many future requests from different government institutions for some kind of carve out.

We are mindful that Manitoba in its *Personal Health Information Act* has an expansive definition of “trustee” that is similar to Saskatchewan although it is even broader and includes local government bodies. We do not know at this time whether the 5 year statutorily mandated review of that law will change the scope of PHIA.

In Ontario and Alberta, the only government department classified as a trustee is the Department of Health and Long Term Care (Ont.) and the Department of Health and Wellness (Alta.) This leaves other government departments and bodies in Ontario and Alberta subject only to the *Freedom of Information and Protection of Privacy Acts* in those two jurisdictions.

⁸ Page 21

Proposed Regulation #2

Retention of records containing personal health information

Commentary

This proposed Regulation would set out definitions for transitory records, secondary records and scheduling records and then fix a minimum retention period for those classes of records.

This provision is important for trustees that are required to comply with section 16 of HIPA. That section provides as follows:

16 Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:

(a) protect the integrity, accuracy and confidentiality of the information;

(b) protect against any reasonably anticipated:

(i) threat or hazard to the security or integrity of the information;

(ii) loss of the information; or

(iii) unauthorized access to or use, disclosure or modification of the information; and

(c) otherwise ensure compliance with this Act by its employees.

Scheduling records is reasonable however it should be made clear that if the scheduling records include diagnostic, treatment and care information or health history of a patient, the particular record will not be classified as a scheduling record and subject to early destruction.

We understand that the common retention period in government is six years. We expect that was influenced to a large extent by the typical six year limitation period in the *Limitation of Actions Act*. We note however that *Bill 51, The Limitations Act*, received Royal Assent on June 10, 2004. Since the applicable limitation period is always an important consideration in determining the appropriate record retention period, it will be important to consider what changes that would require in this regulation. The adoption of the 'discovery plus 2 year rule' and the 15 year outside limit by the Legislative Assembly must be addressed in the determination of what retention period is appropriate.

Our office has recommended that when a public body uses or discloses personal information and makes a decision based on that information, the information ought to be retained for at least one year to allow an access request by the individual⁹. We therefore recommend that this requirement be accommodated in this Regulation.

⁹ Report # LA 2004-001, [54], available online at www.oipc.sk.ca under Reviews

Proposed Regulation #3

Designation of appropriate archives

Commentary

We think this regulation is appropriate.

It has come to our attention that retiring physicians have delivered boxes of patient records to their local regional health authority without seeking prior consent from the authority. It will be important to ensure that regulations and codes of ethics for health service providers ensure that a trustee remains a “trustee” in respect of personal health information of patient unless and until a properly designated archive accepts responsibility for those records. Physical delivery of patient records to a regional health authority should not in and of itself operate to relieve the trustee of its obligations under HIPA.

It may be helpful to codify that requirement in this regulation.

Proposed Regulation #4

Disclosure of personal health information without consent for the purpose of professional disciplinary hearings.

The need for professional regulatory bodies to enforce their ethical standards and codes of practice is imperative. The proposed regulation enables the disclosure of personal health information for that purpose.

We suggest however that, absent the express consent of the individual patient, the identity of the patient should be masked in any disciplinary proceedings that may be accessible to the public. Otherwise there is the risk that an individual may have a great deal of their personal health history disclosed to “the world” simply because they happened to be the particular patient when their health care professional is alleged to have done something unprofessional.

At the very least, before this regulation goes into force steps should be taken by the Department of Health to ensure that all Saskatchewan health profession regulatory bodies have internal policies to mask the identity of the patient. We note that (1)(a)(iii) does not go as far as our recommendation.

We note that in Alberta’s HIA, section 35(4) provides that

(4) A custodian may disclose individually identifying diagnostic, treatment and care information to a health professional body for the purpose of an investigation, a discipline proceeding, a practice review or an inspection if

(a) the custodian has complied with any other enactment authorizing or requiring the custodian to disclose that information for that purpose; and (b) the health professional body agrees in writing (i) not to disclose the information to any other person except as authorized by or under the Act governing the health professional body, and (ii) to destroy the information.

The proposed Regulation (1)(a)(iii) is unhelpful as to what should be covered by the “*written policy concerning the disclosure of personal health information*”. It should either be replaced or supplemented with direction as to how the privacy of individuals will be protected when personal health information is disclosed in a hearing. This would include the masking of the identity of an individual, the safeguarding of personal health information by the regulatory body and the appropriate and timely destruction of that personal health information at the earliest possible opportunity.

Proposed Regulation #5

Disclosure of personal information without consent regarding condition reports of individuals by a trustee.

Commentary

We are opposed to this regulation. This is clearly a disclosure for a secondary purpose that has nothing to do with the diagnosis, treatment or care of a particular patient. We do not think that seeking consent is impractical or unreasonable if a media request is received by a trustee. The suggestion that this would be used “*only when the trustee believes it is necessary or is important to do so*” is disappointing. On what possible basis would we think that the trustee is more appropriate than the individual to make a decision about broadcasting that individual’s personal health information? This assertion is paternalistic and disturbing.

We are concerned with the suggestion that since this is “*current practice in many institutions*” it should be codified in the regulations to HIPA. We do not view this as good enough. One could probably find a number of privacy invasive practices that exist in one or more trustee organizations. This is an excellent opportunity to ‘raise the bar’ and to eliminate past practices that do not meet contemporary legislated privacy standards.

It is presumptuous to assume that the conditions from *The Canadian Press Stylebook* would not be invasive of an individual’s privacy. For some individuals, just the fact that they are a patient of an acute care facility might be particularly sensitive information they would not wish disclosed to anyone. Next of kin may be anxious to notify all family members of a traffic accident injury before they hear it on television, radio or the Internet. Just a suggestion that a business leader has gone to hospital because she was experiencing chest pain could, if public, frighten investors or partners and prejudice the

business. For a woman that has entered a hospital for an abortion or a man that attends a laboratory as a semen donor for artificial insemination purposes, any public reference to their attendance at a trustee's facility may cause them discomfort.

We note there already exists authority for disclosure without express consent to next of kin or to someone with whom the subject individual has a close personal relationship. This effectively ensures that next of kin of a patient can be given appropriate information about a patient.

There is already a long list of sanctioned disclosures without the consent of the individual. To add this proposed disclosure would, in our view, devalue the other meritorious exceptions to the consent requirement.

Further, we note that the preamble to the Act includes the following declarations:

That personal health information is private and shall be dealt with in a manner that respects the continuing interests of the individuals to whom it relates;

That individuals provide personal health information with the expectation of confidentiality and personal privacy;

That trustees of personal health information shall protect the confidentiality of the information and the privacy of the individuals to whom it relates;

That the primary purpose of the collection, use and disclosure of personal health information is to benefit the individual to whom it relates;

That, wherever possible, the collection, use and disclosure of personal health information shall occur with the consent of the individuals to whom it relates

We submit that this proposed regulation is not consistent with these declarations or with the reasonable expectations of Saskatchewan residents. If there is no explicit consent there should be no disclosure.

Proposed Regulation #6

Disclosure of registration information without consent to the Saskatchewan Cancer Agency

Commentary

Our office is currently reviewing the cervical cancer program operated by the Saskatchewan Cancer Agency. We will address this proposed amendment in our report on that program.

We would expect that planning, delivering, evaluating or monitoring most programs would not normally require identifiable patient information.

It appears that one of the reasons for this proposed regulation is data matching. At the very least the Agency should be required to complete a privacy impact assessment before such a proposed regulation is considered.

Proposed Regulation #7

Disclosure of registration information without consent to ambulance operators for the purpose of obtaining payment for services provided to an individual

Commentary

It is not clear to our office that this is not already permitted by HIPA. Section 28(1) permits disclosure without consent "... (a) to a trustee in connection with the provision of health services by the trustee". The definition of "trustee" includes an operator as defined in *The Ambulance Act*. Can payment for services be considered "in connection with the provision of health services by the trustee"? We note that a similar question is posed in the PIPEDA Awareness Raising Tools (PARTs) Initiative For the Health Sector:

22. Is consent implied for the disclosure of personal health information to private insurance companies or third party payers for the purposes of reimbursement of health services rendered?

In certain circumstances, yes. In circumstances where the current practice is to obtain written consent by making the patient sign a reimbursement form, the practice should continue. Where no form is signed, implied consent is acceptable provided patients understand that this is happening and have not behaved in a way that may indicate refusal of consent.¹⁰

Reasoning by analogy, it seems reasonable to take the view that necessary registration information could be provided without consent to ambulance operators to enable them to recover the cost of service.

¹⁰ Available online at <http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/vwGeneratedINterE/gv00211e.html>

Proposed Regulation #8

Disclosure of registration information without consent to the Department of Learning for the purpose of administering the Student Tracking Program.

Commentary

We were surprised and disappointed that Order-in-Council 594/2004 was issued some three weeks before the published deadline for public input on this proposed Regulation #8.

Our office was not consulted on this Order-in-Council. At this time, we are not able to confirm whether due diligence has been done from a privacy perspective. We understand that no privacy impact assessment was undertaken. We further note reference in the Order-in-Council to policies, procedures, and protocol agreements and to disclosure to “approved agencies”. We have not seen any of those materials nor have we been provided with a list of approved agencies.

Clearly, it is important to identify children at risk and to promote full attendance in school. From the explanatory notes produced by Saskatchewan Health however it appears that there may be many ways that the registration information can or may be used by the Department of Learning. This appears to include disclosing the information to outside agents. Our view is that some or all of these uses are wholly collateral to the provision of health care services. The material produced by Saskatchewan Health is inadequate to assess whether this proposal is a reasonable balance between privacy interests of students and their families on the one hand and the province’s interest in identifying children who may be at risk and allow the targeting of remedial actions.

We recommend that a privacy impact assessment be done by Saskatchewan Learning and Saskatchewan Health of the proposed disclosure of registration information without consent before such a regulation is made.

Proposed Regulation #9

Fees that can be charged for providing access to records containing personal health information.

Commentary

(a) Quantum of Fees

This proposed regulation warrants careful examination since access fees tend to be a problematic area for most privacy/access regimes. The basic fees proposed by Saskatchewan Health appear for the most part to be in line with those charged in such provinces as Alberta and Manitoba.

The Manitoba Regulation does not address fees although the enabling legislation authorizes such a fee regulation. The *Personal Health Information Act* provides as follows:

10. A trustee may charge a reasonable fee for permitting examination of personal health information and providing a copy, but the fee must not exceed the amount provided for in the regulations.

On July 3, 2004 Ontario published draft regulations under the *Personal Health Information Protection Act, 2004* but these draft regulations do not address fees. The Act provides as follows:

52 (9) A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part or provides a copy of it to an individual under clause (1)(a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.

(10) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed.

The Alberta HIA regulation permits a basic fee of \$25 for one or more the following steps to produce a copy of the information:

- (a) receiving and clarifying the request;
- (b) obtaining consent if necessary;
- (c) locating and retrieving the records;
- (d) preparing the record for copying, including removing staples and paper clips;
- (e) preparing a response letter;
- (f) packaging copies for shipping or faxing, or both;
- (g) postage and faxing costs;
- (h) photocopying a record.

In Alberta the photocopy charge is \$0.25 per page over and above \$5.00. Other charges include \$6.75 per ¼ hour for supervision of applicant's examination of original records and for severing time to determine whether a record requires severing. The custodian may charge health services provider time at \$45 per ¼ hour to a maximum of 3 hours for "severing time". Also direct costs such as charges "to retrieve records or to return records, or both, from another location" allow the actual cost to the custodian to be charged to the applicant.

We note that there is no ceiling or maximum in the case where a trustee in Saskatchewan "incurs additional costs in providing access to the records or in providing professional consultation in regard to information contained within the records". In other words, if a trustee decides to hire a lawyer who charges say \$750 for reviewing the patient's file, studying HIPA and providing written advice to the trustee on a "rush" basis, it appears that the applicant could be presented with that bill for \$750 plus the fee calculated on the basis of \$15 per half-hour by staff of the trustee.

The Department of Health asserts that the proposed Regulation #9 is “*intended to enable the trustee enough flexibility to recover costs associated with providing access while still establishing a ceiling to keep fees reasonable*”. The flexibility is apparent from a trustee perspective but the ceiling only appears to relate to the hourly rate charged by the trustee. There is no ceiling in terms of a maximum number of hours as there is in Alberta’s HIA.

A genuine ceiling also provides a significant inducement to a trustee to spend some time and effort improving their information management processes. A trustee that does not have good information management will not be able to pass on large costs to an applicant resulting from undue or unreasonable searches for responsive information.

We note that the fee section in HIPA qualifies the fee with the adjective “reasonable”. Our office will have the opportunity, over time, to interpret the expression “reasonable fee”. In the meantime, we think there is value in giving more direction to trustees as to what is and is not acceptable.

(b) A Fixed Time to Respond

Independent of the quantum of fees, it may be useful to include a 60 day requirement for persons to respond to a fee estimate. In other words, if the applicant does not respond within 60 days after receiving the estimate, the request may be treated by the trustee as abandoned.

(c) Fee Waiver

We note that section 39 of HIPA provides as follows:

39. A trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information.

The use of the discretionary “may” suggests that a trustee may also choose to charge no fee for access to someone’s personal health information.

We suggest that the regulation include an explicit power to waive all or part of the fees.

This could be a provision similar to Alberta Regulation s. 13. That states:

For the purposes of section 67(4) of the Act, a custodian may excuse an applicant from paying all or part of a fee if in the opinion of the custodian it is fair to excuse payment.

The comparable provision in Ontario is:

A health information custodian mentioned in subsection (9) may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so.¹¹

Proposed Regulation #10

Preventing the disclosure of provider information by trustees (i.e. pharmacists).

Commentary

We are mindful that section 57 and 63(w) of HIPA provide as follows:

57. Where information about a trustee or the activities of a trustee is collected in conjunction with the collection of personal health information and regulations are made pursuant to clause 63(1)(w) governing that information, no person shall use or disclose the information about the trustee or the trustee's activities except in accordance with the regulations.

63. (1) For the purpose of carrying out this Act according to its intent, the Lieutenant Governor in Council may make regulations: (w) for the purposes of section 57, governing the use and disclosure of information respecting trustees and their activities.

We understand that our office was not engaged in discussions with respect to these provisions at the time the bill was under consideration. We do not understand why this provision was included in HIPA.

Our analysis of this proposed regulation is organized around the following questions:

- (a) Is the prescribing practices information of a physician “*personal health information*” within the meaning of HIPA?
- (b) If not, is the prescribing practices information of a physician “*personal information*” as defined in the federal *Personal Information Protection and Electronic Documents Act* or the Saskatchewan *Freedom of Information and Protection of Privacy Act*?
- (c) If neither “*personal health information*” nor “*personal information*”, is it appropriate to include such a provision in HIPA?

¹¹ Bill 31, s. 52(11)

(a) Is the prescribing practices information of a physician “personal health information” within the meaning of HIPA?

In our view, the answer is NO. HIPA is focused on identifiable personal health information of patients. This focus is underscored by the preamble to the statute. Health provider information is not included in the definition of “*personal health information*” that appears in s.2(m) of HIPA. The definition appears focused on diagnosis, treatment and care information in respect of an identifiable individual.

We understand that at this time Saskatchewan licensed pharmacies or at least some of them sell certain information about the prescribing practices of Saskatchewan physicians. Our understanding is that there are no personal identifiers of patients in the prescribing information sold by Saskatchewan pharmacists.

(b) If not, is the prescribing practices information of a physician “personal information” as defined in the federal *Personal Information Protection and Electronic Documents Act* or the Saskatchewan *Freedom of Information and Protection of Privacy Act*?

It is important to address the question of whether information about the prescribing information of physicians is “*personal information*”. We have indicated above that this would not be personal information of patients. Could this be personal information of physicians?

In our view, prescribing practices information of a physician is not the “personal information” of the physician.

We base this opinion on a number of authorities. In terms of the *Personal Information Protection and Electronic Documents Act*, we reference the findings of the former Privacy Commissioner of Canada in PIPEDA Case Summaries #14 and 15¹². At issue was whether the prescribing practices information of the aggrieved physician was the “personal information” of that physician and whether it could be collected, used or disclosed without his consent. Mr. Radwanski concluded that the prescribing information was ‘work product’ and not ‘personal information’. That decision of the Commissioner is currently under appeal to the Federal Court Trial Division.

¹² Available online at www.privcom.gc.ca

Work product has been specifically defined in the British Columbia *Personal Information Protection Act* as

information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information. [s. 1]

This law has been designed to be substantially similar to PIPEDA.

The comparable law in Alberta is the *Personal Information Protection Act*. We are informed by the Alberta government that it had decided that 'work product' was excluded implicitly by the statutory definition of personal information in section 1(k) and therefore it did not need to be explicitly defined.

In terms of Saskatchewan's FOIP Act, the definition of "personal information" is in section 24. It does not explicitly identify 'work product information'. My view however, and my approach to overseeing the *Freedom of Information and Protection of Privacy Act*, the *Local Authority Freedom of Information and Protection of Privacy Act* and HIPA will be to construe personal information in a way consistent with the approach taken by my colleagues in other jurisdictions, notably Ontario, British Columbia and Alberta and relevant decisions of superior courts in Canada.

I also rely on the decision of the office of the Ontario Information and Privacy Commissioner in Reconsideration Order R-980015.¹³ This is an extensive review of what is and is not personal information. The Ontario Commissioner clearly differentiates work product from personal information and confirms only the latter is protected under the Ontario FOIP Act.

I also rely on the Supreme Court of Canada decision in *Dagg v. Canada (Minister of Finance)*.¹⁴ [1997] 2 S.C.R. 403. In this case, sign-in logs for government employees working at the workplace on weekends were not considered "personal information" and consequently were accessible.

I would suggest there are some compelling reasons why "personal information" should not be given such an expansive meaning that it captures work product and in this example, physician prescription practice information. Chief among these would be the goals of accountability and transparency in the provision of public services. Just as the FOIP Act carves out certain employee information from the definition of "personal information" in section 24(2), it is important that HIPA not be construed in such a way as to obstruct accountability of providers of important publicly funded health services.

¹³ Available online at www.ipc.on.ca, pages 3-6 and 7-13

¹⁴ [1997] 2 S.C.R. 403, page 6

There may well be good public policy reasons to limit the sale/collection of prescribing information about Saskatchewan physicians. That is a question for Saskatchewan Health and the Legislative Assembly to consider. Those public policy considerations however should be founded on a principle(s) other than the 'protection of personal information'.

(c) Is it appropriate to include privacy protection for the professional practice information of physicians in a regulation under HIPA?

This office would prefer that health provider information be dealt with in a separate instrument more appropriate than HIPA and its focus on patient information. A more appropriate statute would be one dealing with either physicians or pharmacists and the manner in which they discharge their legal and professional responsibilities.

We note a related Order H2002-003 issued by the Information and Privacy Commissioner of Alberta ("OIPC") on March 19, 2003. This resulted from an own-motion investigation undertaken by the Alberta OIPC. The issue was "*Does the [Health Information Act ("HIA")] permit Alberta pharmacists and pharmacies to disclose health services provider information to IMS HEALTH, Canada?*" This Order usefully reviews the types of data at issue and the business practices of IMS. The Commissioner concluded that the disclosure of the physician's first and last name in the context of the 35 data elements collected by IMS is prohibited by HIA unless consent of the physician is obtained prior to disclosure. This decision is now the subject of a judicial review application pending before the Court of Queen's Bench of Alberta.

It is important to note that the decision of my Alberta counterpart is based on a statutory provision unique to the Alberta HIA-an element that does not appear in our HIPA. The Alberta HIA addresses not only personal health information but also captures "health services provider information". It sets out rules for the collection, use and disclosure of health services provider information. The Saskatchewan HIPA does not address "health services provider information" and focuses exclusively on personal health information.

Conclusion on Proposed Amendment #10

For the reasons noted above, in our opinion, health provider information is a discrete, collateral matter independent of 'personal health information'. As such, it ought to be regulated under legislation that generally governs the conduct of Saskatchewan physicians and pharmacists and not under the *Health Information Protection Act*. If the proposed regulation under HIPA proceeds, then we are

concerned that other kinds of matters not directly related to personal health information will be included either in HIPA or its regulation. This would tend to ‘muddy the waters’ and make the HIPA regime more challenging for purposes of implementation than is already the case.

Proposed Regulation #11

Disclosure of registration information for regional health authority and affiliate fundraising.

We have difficulty with Option One (the opt-out consent).

According to internationally recognized Fair Information Practices, or Fair Information Principles, personal information collected by a health region for one purpose, namely obtaining health care services, should not be used or disclosed for other purposes without consent.

Fundraising is clearly an important matter for regional health authorities coping with escalating costs to provide timely, appropriate health care services to all Saskatchewan residents. It is perfectly appropriate for health regions to ask patients whether their registration information can be disclosed to the foundation affiliated with the hospital. If there is no consent, then that person’s information should not be shared with the foundation or fundraising organization.

I am not aware of any reliable, documented evidence that most Saskatchewan residents would not give consent for this purpose if asked.

Reference is made in the draft regulation package to the treatment of fundraising in the Ontario *Personal Health Information Protection Act, 2004*.¹⁵ The draft regulations in Ontario propose the following constraints on disclosure for fundraising purposes:

- 1. Personal health information held by a health information custodian may only be collected, used or disclosed for the purpose of fundraising activities undertaken for a charitable or philanthropic purpose related to the custodian’s operations.*
- 2. Consent under clause 32(1)(b) of the Act may only be inferred where,*
 - i. the custodian has at the time of providing service to the individual, posted or made available to the individual a brief statement that unless he or she requests otherwise, his or her name and contact information may be disclosed and used for fundraising purposes on behalf of the custodian, together with information on how the individual can easily opt-out of receiving any future fundraising solicitations on behalf of the custodian, and*
 - ii. The individual has not opted out*

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3. *The individual may not be solicited for fundraising purposes relating to the operations of a custodian earlier than 60 days after discharge from a facility operated by the custodian or the provision of health care to the individual by the custodian.*

4. *All solicitations for fundraising must provide the individual with an easy way to opt out of receiving future solicitations.*

5. *When contacting or attempting to contact the individual for the purpose of fundraising, the custodian or a person conducting fundraising on its behalf must not reveal any information about the individual's health care or state of health."*

Alberta has taken a very different approach by prohibiting the use of personal health information for commercial purposes. Alberta's *Health Information Act* provides as follows:

107(2) No person shall knowingly ...(f) use individually identifying health information to market any service for a commercial purpose or to solicit money unless the individual who is the subject of the health information has specifically consented to its use for that purpose."

The penalty for this offence is a fine of not more than \$50,000.

This Alberta provision is consistent with a key recommendation in the *Canada Health Infoway Paths to Better Health- Final Report* as follows:

5.1 In harmonizing and strengthening the protection of personal health information across jurisdictions, governments should ensure that their privacy legislation for health embodies the following mechanisms and principles:...(g) provisions prohibiting all secondary commercial use of personal health information;¹⁶ [emphasis added]

Our office has received complaints from citizens who learned that their personal information had been disclosed by the hospital in which they recently received service to a foundation. In fact, the letter to the former patient was signed by the head of surgery in the hospital. This is troublesome for several reasons. Would an unsophisticated patient receiving such a letter be concerned that their future care might be compromised if he or she elects not to make a contribution to the foundation?

According to Saskatchewan Health, the arguments from Regional Health Authorities are that seeking opt-in consent would not be as effective and would add an administrative cost. Our response is that there should be demonstrable evidence that opt-in consent would not work.

¹⁶ Minister of Public Works and Government Services, 1999, p. 5-4

In our view Option Two is preferable. We think that the qualification that consent can only be obtained “at time of discharge from the service” is unduly restrictive. In our view, section 6 adequately addresses what constitutes valid consent.

Conclusion

The publication of the regulations in draft form provides an excellent opportunity for an informed and vigorous public discussion of the rules that should apply to the collection, use and disclosure of personal health information in Saskatchewan.

We hope that this commentary will be useful in the public review of the draft regulations under *The Health Information Protection Act*.

Respectfully submitted,

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Saskatchewan Information and Privacy Commissioner

September 10, 2004