

Saskatchewan Information and Privacy Commissioner



Advisory for Saskatchewan Physicians and Patients Regarding Out-Sourcing Storage of Patient Records

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Advisory for Saskatchewan Physicians and Patients
Regarding Safe Storage of Personal Health Information

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This document serves as an advisory to Saskatchewan physicians and patients of concerns identified by the Saskatchewan Information and Privacy Commissioner (OIPC) with the DOCUdavit Solutions Inc. (DSI) initiative to offer certain services to Saskatchewan physicians and personal representatives of deceased Saskatchewan physicians. Those concerns relate exclusively to compliance with *The Health Information Protection Act*¹ (HIPA) and privacy 'best practices'.

It does not appear that the OIPC has jurisdiction over a corporation that is not a government institution or a local authority or a health information trustee. This would be the case regardless of where that corporation has been incorporated and where its head office may be. Nonetheless, any trustee in Saskatchewan that utilizes the services of DSI is obligated to comply with HIPA. This letter is intended to assist Saskatchewan trustees in determining whether to contract with DSI or similar contractors and if they do, what considerations would be important to address.

We can, of course, offer only general non-binding advice at this stage. At some future date, the OIPC may be required to deal with a formal complaint from a patient about the arrangements with DSI and all parties need to be satisfied that our decision will be based solely on the evidence, submissions from all involved parties and the applicable law.

We would strongly encourage DSI to undertake a Privacy Impact Assessment (PIA). There is a HIPA related PIA form available at our website, www.oipc.sk.ca under the *Resources* tab.

Our comments in this letter are based solely on the following documents that we understand have been produced by DSI:

- 1) *About DOCUdavit Solutions Inc.*
- 2) *DOCUdavit Solutions Inc. Privacy Policy* (Privacy Policy)
- 3) *DOCUdavit Solutions Services Contract* (Service Contract)

One general observation is that the documents reflect a lack of familiarity with our Saskatchewan law and practices. As can be seen from our commentary that follows, it appears that DSI does not comply with HIPA and does not satisfy all regulatory requirements and what's more, any trustee that enters into the arrangement described in the subject documents would likely be off-side HIPA.

An additional observation is that the three documents considered together reflect a lack of familiarity with modern privacy legislation and the difference between privacy and confidentiality. Also, there is a casual and inaccurate use of terms such as use, disclosure and access throughout the documents that does not reflect modern privacy law. The documents seem to reflect an outdated preoccupation with 'confidentiality' and too little familiarity with 'privacy'.

¹ c. H-0.021, S.S. 1999

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ISSUES TO CONSIDER

1) Which law applies?

HIPA applies if we are discussing (1) “personal health information” as defined in section 2(m) of HIPA, that is (2) in the “custody”² or under the “control”³ of an organization and (3) that organization qualifies as a “trustee” as defined by section 2(t) of HIPA. Section 2(m) provides as follows:

2(m) “personal health information” means, with respect to an individual, whether living or deceased:

- (i) information with respect to the physical or mental health of the individual;
- (ii) information with respect to any health service provided to the individual;
- (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
- (iv) information that is collected:
 - (A) in the course of providing health services to the individual; or
 - (B) incidentally to the provision of health services to the individual; or
- (v) registration information;

Section 2(t) provides as follows:

(t) “trustee” means any of the following that have custody or control of personal health information:

- (i) a government institution;
- (ii) a regional health authority or a health care organization;
- (iii) a person who operates a special-care home as defined in *The Housing and Special-care Homes Act*;
- (iv) a licensee as defined in *The Personal Care Homes Act*;
- (v) a person who operates a facility as defined in *The Mental Health Services Act*;

² **Custody** is the physical possession of a record by a trustee, 2008-2009 Annual Report OIPC, p. 68

³ **Control** is a term used to indicate that the records in question are not in the physical possession of the trustee, yet still within the influence of that body via another mechanism (e.g. contracted service), 2008-2009 Annual Report OIPC, p. 68

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- (vi) a licensee as defined in *The Health Facilities Licensing Act*;
- (vii) an operator as defined in *The Ambulance Act*;
- (viii) a licensee as defined in *The Medical Laboratory Licensing Act, 1994*;
- (ix) a proprietor as defined in *The Pharmacy Act, 1996*;
- (x) a community clinic:
 - (A) as defined in section 263 of *The Co-operatives Act, 1996*;
 - (B) within the meaning of section 9 of *The Mutual Medical and Hospital Benefit Associations Act*; or
 - (C) incorporated or continued pursuant to *The Non-profit Corporations Act, 1995*;
- (xi) the Saskatchewan Cancer Foundation;
- (xii) a person, other than an employee of a trustee, who is:
 - (A) a health professional licensed or registered pursuant to an Act for which the minister is responsible; or
 - (C) a member of a class of persons designated as health professionals in the regulations;
- (xiii) a health professional body that regulates members of a health profession pursuant to an Act;
- (xiv) a person, other than an employee of a trustee, who or body that provides a health service pursuant to an agreement with another trustee;
- (xv) any other prescribed person, body or class of persons or bodies;

The records in question are patient records containing personal health information. The records appear to be either in the custody or under the control of trustees in Saskatchewan. HIPA therefore appears to be the applicable law.

DSI is not a trustee under HIPA since it is not one of the organizations identified in section 2(t). Nonetheless, trustees in Saskatchewan that may transfer personal health information to a business that is an information management services provider (IMSP) are responsible for any failure of the business to satisfy all of the requirements imposed by HIPA on trustees.

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Responsibilities of any contractor for a public body in Saskatchewan are discussed in the OIPC brochure – *A Contractor's Guide to Access and Privacy in Saskatchewan*. This brochure is accessible at www.oipc.sk.ca under the *Resources* tab. The same considerations apply to trustees contemplating an arrangement with a contractor who will deal with personal health information.

PIPEDA also applies to physicians in private practice and their patient records. By reason of section 13(2) of PIPEDA and the PARTS document created by Industry Canada, Health Canada and the Privacy Commissioner of Canada however, PIPEDA will have little practical impact on patient files physically within the territory of the Province of Saskatchewan.

Section 13(2) of PIPEDA provides as follows:

13.

(2) The Commissioner is not required to prepare a report if the Commissioner is satisfied that

(a) the complainant ought first to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province; [emphasis added]

In this regard, we note that the term 'custodian' is used throughout the three documents. This is a term used in Alberta and Ontario stand-alone health information laws but not in Saskatchewan where the responsible entity for purposes of HIPA is a trustee. Is the Saskatchewan reader of the documents to assume that 'custodian' is interchangeable with trustee? Given the transparency requirements in HIPA including section 9, it would be appropriate that all of DSI's literature should use the appropriate terminology so that everyone is clear on the applicable law.

In this regard, the documentation from DSI is confusing since at some points it appears that 'custodian' refers to what we consider to be physician 'trustees' and yet in other places, it appears that DSI is describing itself as a 'custodian'. For example, in the Privacy Policy, there is the statement that "**DOCUDavit Solutions Inc. (DSI) will: Safeguard the health information for whom they are Custodians.**" [emphasis added] DSI cannot become a 'trustee' for purposes of HIPA simply by declaring itself a trustee. The label is exclusive to the entities described in section 2(t) of HIPA. The Privacy Policy purports to treat and describe DSI as a trustee under HIPA e.g. "If an individual disagrees with DSI decision, the individual can appeal to the Information and Privacy Commissioner." That is misleading. We do not oversee companies that do not qualify as a 'trustee' under HIPA. If an aggrieved patient complained to our office about something DSI has or has not done we would only have jurisdiction to the extent that there is a 'trustee' that would still be said to have 'control' over the personal health information in question. In that case, our focus is on the trustee and holding the trustee accountable for what has been done by their agent or IMSP. In other words we will want to hear from the trustee not from their contractor in the vast majority of cases.

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DSI in its document entitled *About DOCUdavit Solutions Inc.* makes questionable representations.

For example, in the third paragraph, “At DOCUdavit Solutions, we maintain a strict dedication to Quality Control and Cross-Canada Compliance with all Federal and Provincial Legislation and policies within our clients specific industry (health, Law, financial, government and corporate). Our adherence to this policy ensures that each project, regardless of size, and satisfies all regulatory requirement while meeting our customer’s satisfaction.”

In this advisory we will assess that assertion.

Appendix A purports to list the “applicable Privacy Act” but is inaccurate. For Saskatchewan, *The Freedom of Information and Protection of Privacy Act* (FOIP) applies only to those bodies defined in the FOIP Regulation as a “government institution”. Physicians do not qualify as government institutions. HIPA does apply to physicians in this province to the extent they have custody or control of personal health information. Provincially, there is also *The Privacy Act* that permits an action to be brought in the Court of Queen’s Bench for an unjustified invasion of privacy.

Parenthetically, we note that there is no such statute as the *Personal Health Information Access and Protection of Privacy Act* listed for Alberta.

2) Fees

We have no idea on what basis DSI can assert that its fees are authorized by HIPA.

The only fees permitted by HIPA relevant to the exercise of access by a patient are those that are “reasonable” and must not exceed the “prescribed amount to recover costs incurred in providing access to a record containing personal health information.” Section 38 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.

As of this date, no fees have been prescribed by HIPA for Saskatchewan physicians. We have considered the question of fees in several cases and determined that a \$20 fee, equivalent to fees now permitted regional health authorities under *The Local Authorities Freedom of Information and Protection of Privacy Act*, and a \$0.25 per page photocopy cost would be reasonable. Again, we refer to the *Annotated Section Index for HIPA* available at our website, www.oipc.sk.ca.

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Our office has not yet determined whether in similar circumstances a fee of \$75 for an individual and \$150 for a family of four would be reasonable but when we do receive a formal complaint in that circumstance we would no doubt be guided by our past formal decisions.

3) IMSP OR TRUSTEE OR ARCHIVE

The documents collectively at times indicate that DSI would be a kind of IMSP and yet at other times indicate that DSI would have the rights and privileges of a trustee. At some points in the documents, DSI is presented as a kind of archive. Section 2 (j) of HIPA provides as follows:

(j) "information management service provider" means a person who or body that processes, stores, archives or destroys records of a trustee containing personal health information or that provides information management or information technology services to a trustee with respect to records of the trustee containing personal health information, and includes a trustee that carries out any of those activities on behalf of another trustee, but does not include a trustee that carries out any of those activities on its own behalf;

Section 18 provides as follows:

18(1) A trustee may provide personal health information to an information management service provider:

- (a) for the purpose of having the information management service provider process, store, archive or destroy the personal health information for the trustee;
- (b) to enable the information management service provider to provide the trustee with information management or information technology services;
- (c) for the purpose of having the information management service provider take custody and control of the personal health information pursuant to section 22 when the trustee ceases to be a trustee; or
- (d) for the purpose of combining records containing personal health information.

(2) Not yet proclaimed.

(3) An information management service provider shall not use, disclose, obtain access to, process, store, archive, modify or destroy personal health information received from a trustee except for the purposes set out in subsection (1).

(4) Not yet proclaimed.

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(5) If a trustee is also an information management service provider and has received personal health information from another trustee in accordance with subsection (1), the trustee receiving the information is deemed to be an information management service provider for the purposes of that personal health information and does not have any of the rights and duties of a trustee with respect to that information.

In Saskatchewan there is no problem with an IMSP contracting to provide certain storage, retrieval and digitization of patient file information but there are clear limitations on what the IMSP can do with the patient information. Those limitations aren't identified in the DSI document package. As for purporting to have trustee like powers, the short answer is that DSI cannot unilaterally assume the role of a trustee. An organization can only be a trustee if it is included in section 2(t) of HIPA.

In addition, it appears that part of DSI's business model is to offer storage services for the estate of a deceased physician. In this regard, section 22 is quite clear that a trustee continues to be fixed with responsibility for personal health information in the trustee's custody or control until death and then the personal representative steps into the role of the deceased. Although there is provision for patient files to be transferred to an approved archive and that would extinguish the trustee's legal responsibility under HIPA, DDI has not been designated as an approved archive.

Section 4 of the HIPA Regulations provides as follows:

Designated archives

4(1) For the purposes of section 22 of the Act, the following are designated archives:

- (a) affiliates;
- (b) the Department of Health;
- (c) health professional bodies that regulate members of a health profession pursuant to an Act;
- (d) regional health authorities;
- (e) Saskatchewan Archives Board;
- (f) Saskatchewan Health Information Network;
- (g) University of Regina Archives;
- (h) University of Saskatchewan Archives.

(2) Nothing in this section requires a designated archive to accept personal health information from a trustee.

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Section 22 of HIPA provides as follows:

22(1) Where a trustee ceases to be a trustee with respect to any records containing personal health information, the duties imposed by this Act on a trustee with respect to personal health information in the custody or control of the trustee continue to apply to the former trustee until the former trustee transfers custody and control of the personal health information to another trustee or to an information management service provider that is a designated archive.

(2) Where a former trustee fails to carry out the duties continued pursuant to subsection (1), the minister may appoint a person or body to act in place of the former trustee until custody and control of the personal health information is transferred to another trustee or to an information management service provider that is a designated archive.

(3) Where a trustee dies, the duties imposed by this Act on a trustee with respect to personal health information in the custody or control of the trustee become the duties of the personal representative of the trustee and continue to apply to the personal representative until the personal representative transfers custody and control of the personal health information to another trustee or to an information management service provider that is a designated archive.

4) Record storage outside of Saskatchewan

There is no prohibition in HIPA against a trustee in Saskatchewan hiring an out of province IMSP. Nonetheless, the trustee continues to be bound by the general duties (ss. 9, 10, 16, 23) in HIPA and since there are differential risks associated with the movement of records outside of Saskatchewan a trustee must ensure there are appropriate reasonable measures to protect the personal health information outside of the province. That would require certain due diligence to ensure that the storage facility is adequate for the purpose, to ensure that what the IMSP can do with the personal health information is limited and clearly defined.

There should be an opportunity for the trustee to audit and inspect the IMSP's facilities and practices. There should be the right of the trustee to terminate the agreement and recover possession of the records at its discretion and a clear prohibition against the IMSP retaining personal health information after termination of the contract. There should be no disclosure by the IMSP to any third party without the express written authorization of the trustee. The contract language must reflect that the IMSP has no ownership interest in the patient files and holds them in strict confidence on behalf of the Saskatchewan trustee.

The structure of HIPA is that there normally is always a Saskatchewan based trustee who can be said and seen to be responsible for personal health information of Saskatchewan residents. The one circumstance where this would not be the case would be when a physician dies and a personal representative resident outside of Saskatchewan becomes a trustee but who most likely will not be a healthcare professional. The difficulty is that when a physician in

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Saskatchewan retires and arranges to transfer records to an Ontario based storage company and then dies, the records are outside of Saskatchewan, and also outside the reach of our oversight office and that of the Saskatchewan College of Physicians and Surgeons. At that point, the patients in Saskatchewan are effectively deprived of any measure of control over their own personal health information. The qualification would be that presumably the Ontario *Personal Health Information Protection Act* (PHIPA) would apply but there are some significant differences between HIPA and PHIPA, the oversight of PHIPA is provided by the Ontario Information and Privacy Commissioner and it will be much less convenient for the Saskatchewan patient to exercise those rights available to them under PHIPA.

There is also the possibility that PIPEDA may apply given the movement of personal health information between provinces in the course of commercial activity. In that case, there are also significant differences between HIPA and PIPEDA, the oversight of PIPEDA is provided by the federal Privacy Commissioner and again it will be much less convenient for the Saskatchewan patient to exercise those rights that may be available to them under PIPEDA.

The ideal solution may be to have a Saskatchewan based storage facility overseen by a licensed health professional which would be subject to HIPA and oversight by our office and would be convenient to Saskatchewan residents. To the extent that ideal does not exist, presumably there will be interest in considering out of province record storage facilities.

DOCUdavit Solutions Inc. Privacy Policy

The Privacy Policy includes a number of problematic features.

The opening paragraph is inconsistent with HIPA and more particularly section 22 of HIPA. We refer to the text in the initial paragraph "...contracted with DOCUdavit Solutions Inc (DSI) to be the Custodian of their patient medical records". DSI cannot simply become a trustee by contract. DSI can only become a trustee of the patient records if it is already a trustee under HIPA or if it is a 'designated archive'. To our knowledge, neither has been achieved in this case.

As an IMSP, DSI should not have control of any personal health information yet the opening paragraph states "... personal information in our custody and control".

The scope of the phrase "... manner in which we will collect, use, disclose and otherwise manage the personal information we have in our custody" is inconsistent with the role of an IMSP.

DSI purports, in the opening paragraph, that "DSI will comply with ... PIPEDA ". We have indicated elsewhere in this letter that PIPEDA has little practical impact for Saskatchewan physicians who instead should be focusing on their obligations under HIPA.

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Since we understand that the primary role of DSI is to store the records and digitize them and facilitate access by patients, we don't understand why the Privacy Policy includes the phrase: "only disclose what is needed to do the job". The physician needs to comply with section 21 of HIPA.

We are puzzled by the phrase "Provide anonymous information whenever possible". The implication is that when not possible, DSI will provide identifiable information. Who would that information be provided to and under what circumstances? We have the same concerns with the phrase, "only provide information to those with a need to know ...".

Under the heading, *Patient Access to Their Own Health Information*, DSI indicates that the patient must sign an authorization. We have not seen that authorization and do not know if that authorization conforms with Part V of HIPA. It is stated, "if an individual disagrees with DSI decision, the individual can appeal to the Information and Privacy Commissioner." Individuals certainly can appeal to our office but only from decisions and actions of trustees. DSI has no standing or status under HIPA. Furthermore, the appeal would be from the decisions and/or actions of the physician trustee not from some decision made by DSI which it has no authority to make. The reference to custodians' duty to assist is confusing since it is unclear whether this means the trustee physician or DSI falsely holding itself out as a 'trustee'.

Contrary to the assertion that "DSI will charge a fee for access..." it is not an IMSP that decides what fees will be charged since that is uniquely the decision of the physician trustee. Again, DSI is not a trustee and does not have the rights, powers and obligations of a trustee other than those of an IMSP acting under the control of a physician trustee.

The section entitled *Corrections to Patients Health Information* is also confusing since it contemplates that DSI intends to make decisions in conjunction with the patient but without the supervision or intervention of a physician trustee. Section 40 of HIPA provides as follows:

Right of amendment

40(1) An individual who is given access to a record that contains personal health information with respect to himself or herself is entitled:

- (a) to request amendment of the personal health information contained in the record if the person believes that there is an error or omission in it; or
- (b) if an amendment is requested but not made, to require that a notation to that effect be made in the record.

(2) A request for amendment must be in writing.

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(3) Within 30 days after a request for amendment is received, the trustee shall advise the individual in writing that:

- (a) the amendment has been made; or
- (b) a notation pursuant to clause (1)(b) has been made.

(4) Subject to subsection (6), where a trustee makes an amendment or adds a notation pursuant to clause (1)(b), the trustee must, where practicable, give notice of the amendment or notation to any other trustee or person to whom the personal health information has been disclosed by the trustee within the period of one year immediately before the amendment was requested.

(5) A trustee that receives a notice pursuant to subsection (4) must make the amendment or add the notation to any record in the custody or control of the trustee that contains personal health information respecting the individual who requested the amendment.

(6) A trustee is not required to notify other trustees where:

- (a) an amendment or a notation cannot reasonably be expected to have an impact on the ongoing provision of health services to the individual; or
- (b) the personal health information was disclosed to the other trustees for any of the purposes or in any of the circumstances set out in subsection 27(2).

(7) An amendment required to be made pursuant to this section must not destroy or obliterate existing information in the record being amended, other than registration information.

The section entitled *Disclosure of Patients Health Information* is also confusing since it contemplates DSI making decisions that need to be made by the physician trustee. Also, it appears that the broad protection for trustees and their employees and IMSPs afforded by section 61 of HIPA would not extend to DSI acting as some kind of de facto trustee.

The bulleted item dealing with disclosure without consent at the discretion of DSI is certainly problematic. To complicate matters, the examples such as “persons acting in the best interests of an incompetent individual” don’t align with HIPA provisions for disclosure without consent. Since disclosures without consent of the patient for secondary purposes are an exception to the consent requirement, they should therefore be narrowly interpreted. Surely these decisions should be made by the responsible trustee not by an IMSP that purports to exercise ‘trustee-like’ powers.

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Trustees can certainly exercise discretion but the discretion for an IMSP is much narrower and cannot oust the responsibility of the physician trustee.

The section entitled *Security of Patients Health Information* is curious since it purports to require DSI to protect against unauthorized access, use, copying, modification or disclosure” and that it will maintain ‘strict confidentiality’ yet the DSI documents themselves permit a range of activities that appear to be unauthorized and inconsistent with ‘strict confidentiality’.

Under the title, *Breach of privacy policy*, it appears that DSI intends to actually deal with and make key decisions about a privacy breach when an IMSP’s responsibility is normally to immediately notify the physician trustee who is then responsible for making decisions with respect to notification and addressing other features of our office’s *Privacy Breach Guidelines*. It appears that DSI intends to make the decision whether a breach has occurred of “its privacy policy within 30 days”. The key is that the trustee must deal with a breach of HIPA not a breach of a flawed privacy policy. The notification to the physician should be immediate. Again there is reference to DSI as a ‘custodian’.

Service Contract

There is no difficulty with an IMSP inviting a Saskatchewan physician to enter into a contract for the storage or archiving of health records or for the conversion of paper records to digital form.

Section 18 has been considered by our office in our Investigation Report 2005-002 (Saskatchewan Cancer Agency). There is an Annotated Section Index for HIPA available at our website, www.oipc.sk.ca under the *Legislation* tab to enable the reader to find that discussion.

Key to any arrangement with an IMSP is that the trustee does not surrender control of the records and in fact continues as the trustee with responsibility for those records notwithstanding that the physical possession or custody of those records is transferred to the IMSP. In interpreting section 18 and particularly section 18(1), (3) and (4) of HIPA, we have held that the IMSP is not at liberty to use the personal health information for its own purposes and is not at liberty to exercise discretion over use and disclosure of that PHI.

The difficulty with the Service Contract is that it purports to shift responsibility from the trustee to an IMSP that is not a trustee.

As discussed earlier, section 18 applies to and binds any Saskatchewan trustee that contracts with an IMSP. That provision is quite clear that an IMSP may engage in four different activities enumerated in subsections (a) to (d). Section 18(3) makes it abundantly clear that an IMSP cannot use, disclose, obtain access to, process, store, archive, modify or destroy personal health information received from a trustee **except for the purposes set out in subsection (1)**. Many of the activities described in the DCI material go well beyond that which is permitted by section 18(1).

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Clause 12 of the Service Contract is problematic insofar as it contemplates a “blanket signed authorization” permitting DSI to transfer personal medical records (we assume that is what is meant by PMR) to the patient upon request. This does not appear to accommodate the provisions in HIPA that permit a trustee to refuse to disclose information in six different circumstances including when the information relates to a third party. We don’t understand how a trustee in Saskatchewan can contract out of the responsibility in section 38 to consider reasons to deny access or to at least sever the record in accordance with section 38(2).

Clause 13 and the commitment to transfer records (presumably this includes responding to an access request under section 35 of HIPA) refers to a “timely manner” but we don’t understand how that relates to the defined time for response of 30 calendar days in HIPA (Sections 36 and 37).

With respect to Terms and Conditions, we offer the following comments⁴:

2) Appointment of DSI as Custodian. The language is confusing insofar as it makes DSI the “sole custodian of the customer materials ...” It incorporates by reference the other terms of the agreement but this is also problematic given the items already noted in this letter.

3(b) Duties of DSI. The facilitation of access must be within the time limits defined by HIPA not “as soon as is reasonably practical in the circumstance”.

4) How can a trustee with statutory responsibility for patient files surrender the right to terminate the agreement with DSI? The threshold requirement of “mutuality and the non-performance by DSI” to terminate the IMSP contract is a problem. Typically what we expect to see in an IMSP is that it can be cancelled by the trustee unilaterally.

5) These type of decisions in response to court orders, subpoenas, etc. need to be made by the trustee not by the IMSP. There is a weak provision for “reasonable efforts to provide Customer with written notice of the receipt of such Order to allow the Customer an opportunity to protect its interests...” This seems inadequate recognition of the primary and continuing responsibility of the trustee under HIPA.

7) The anticipated representation by the “customer” relates also to the right to transfer all of the materials to DSI but we have something of a tautology since we question whether any physician can enter into this arrangement with DSI without violating HIPA and exposing himself or herself to remedies and actions under HIPA.

8) The broad indemnification contemplated by this clause requires the provision of all material documentation both in paper and digital form and presumably that includes the actual patient files that have been entrusted to DSI. How will the confidentiality of patients be protected under the exercise of this indemnity related power?

⁴ Using the numbering that appears in the DOCUdavit document.

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11) It appears that there are typographical errors in this clause's final sentence. It contemplates disclosure to others but under HIPA it would be a 'use' and not a 'disclosure' for staff of DSI who have no need-to-know to view any of the records and yet improper use does not appear to be captured. There is reference to aggregate information and de-identified information but there are different definitions and thresholds in the jurisdictions that have a stand-alone health information law so we do not know what is meant by aggregate data or de-identified data. In any event, that begs the question of why and under what circumstances would DSI be revealing patient data to anyone other than the physician who is the customer. This may involve a physician breaching section 21 of HIPA since DSI is not a trustee and yet purports to be able to disclose the personal health information to third parties.

12) We don't understand the inclusion of "disclosure" in the list of approved activities by DSI. Providing a patient with access is not a disclosure, it is the exercise of a right of access. Returning records to the customer is not a disclosure since the physician has never alienated the records. Having the contract subject to the law of Ontario is problematic. Would it not make more sense for the law of Saskatchewan, namely HIPA, to prevail in the event of a dispute that involves the personal health information of individuals? We note the statement: "DSI will not collect, use or disclose any confidential or personal information contained in Customer material/PMR and/or gleaned in the course of providing services herein." That is inconsistent with other provisions however in the same set of terms of conditions.

The foregoing observations and commentary relate to DMI as an IMSP. There appears however to be an intention in these documents to have DMI move from being an IMSP to becoming some kind of custodian that sounds very much like a 'trustee' under HIPA. That offends HIPA which is very clear that a trustee continues to be responsible for the patient information under their control until such time as they have transferred the records to another trustee or to an approved archive. To our knowledge, DMI is not an approved archive. As stated earlier, an IMSP cannot exercise trustee like powers.

Conclusion

Saskatchewan physicians and other trustees are entitled to make arrangements with an IMSP to store their patient records and to digitize those records. They must however ensure that they retain control over records even if they are physically transferred to a storage facility operated by an IMSP. Such physicians must also ensure that their agreement with the IMSP fully aligns with the permitted activities in section 18 of HIPA and does not exceed the limited powers that can be contracted out. Those physicians must also be mindful of practical difficulties that can arise when the documents are transferred to an IMSP based in another jurisdiction. They should consider carefully the risks to their patients and mitigation strategies to minimize those risks that arise from the transfer of records outside of Saskatchewan.

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Health record storage companies soliciting business in Saskatchewan from physicians and other trustees would be well advised to become familiar with HIPA and particularly section 18 and then ensure that their contract with Saskatchewan trustees is fully aligned with HIPA. That would include using the terminology and statutory concepts in HIPA as interpreted by our office and the courts.