



May 3, 2010

To: MEMBERS OF THE LEGISLATIVE ASSEMBLY

Re: *The Health Information Protection Amendment Regulations, 2010*

On April 12, 2010 the Minister of Health (the Minister) made reference in the Legislative Assembly (the Assembly) to the Office of the Information and Privacy Commissioner (OIPC) in the course of discussing the new Health Information Protection Amendment Regulations, 2010 (Order in Council 187/2010) (the Regulation). In addition, I have now received a request from a Member of the Legislative Assembly (MLA) for written documentation of any verbal or written consultation I have conducted with the Minister, or his representatives, regarding the disclosure of patient's health information to a third party.

I have determined that the most appropriate way to respond to certain statements made by the Minister on April 12, 2010 and the query for information from another MLA, would be through this letter to all MLAs.

I am also available to meet with any Standing or Special Committee of the Assembly to discuss the Regulation.

My mandate includes providing advice and commentary to the Assembly and to the Saskatchewan public. My mandate is particularized by sections 52 and 53 of *The Health Information Protection Act* (HIPA) as follows:

Privacy powers of commissioner

52 The commissioner may:

- (a) offer comment on the implications for personal health information of proposed legislative schemes or programs of trustees;
- (b) after hearing a trustee, recommend that the trustee:
 - (i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and
 - (ii) destroy collections of personal health information collected in contravention of this Act;
- (c) in appropriate circumstances, comment on the collection of personal health information in a manner other than directly from the individual to whom it relates;

(d) from time to time, carry out investigations with respect to personal health information in the custody or control of trustees to ensure compliance with this Act;

(e) comment on the implications for protection of personal health information of any aspect of the collection, storage, use or transfer of personal health information.

General powers of commissioner

53 The commissioner may:

(a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(b) conduct public education programs and provide information concerning this Act and the commissioner's role and activities;

(c) receive representations concerning the operation of this Act.¹

Copies of OIPC Correspondence to Saskatchewan Health

MLAs are certainly free to ask the Minister to release the correspondence from my office with respect to earlier iterations of this Regulation and I consent to the release of same provided this includes all letters over the last six years and not just a portion of those letters on that subject. It would not be appropriate for me to unilaterally release that correspondence without the permission of the Ministry.

My office regularly provides detailed advice and consultation services to the bodies we oversee under any of the three laws that define our jurisdiction including HIPA. We have assured these bodies that the advice we provide in the spirit of promoting excellent access to information and privacy protection standards is confidential. We routinely advise such public bodies that, in the event that the public body proceeds to publicly announce a program or legislation that negatively impacts the access and privacy rights of Saskatchewan residents, we will publicly outline any concerns our office has identified. We have consistently followed this practice since November 2003.

Past Advice from OIPC on Disclosure to Third Parties

In response to the question from an MLA about past advice to the Minister or that Ministry regarding disclosure of patient's personal health information, I can advise that this has taken many different forms.

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¹ *The Health Information Protection Act*, S.S. 1999, c. H-0.021, sections 52 and 53.

For the last six years I have consistently advised trustees that there are four key problem areas that trustees need to particularly focus on. These four problem areas are:

- 1) **Disclosure of personal health information to third parties**
- 2) Access by patients to their own personal health information
- 3) Consent
- 4) Security of personal health information

The Regulation in question only engages disclosure of personal health information to third parties as noted above.

With respect to disclosure, I would refer MLAs to my commentary in the following instruments and materials available at our website, [.oipc.sk.ca](http://oipc.sk.ca):

- Investigation Report 2005-001 (Automobile Injury Appeal Commission)
- Investigation Report F-2007-001 (Saskatchewan Workers' Compensation Board)
- Investigation Report H-2005-002 (Prevention Program for Cervical Cancer)
- OIPC Annual Report 2007-2008, page 17 to 24
- OIPC Annual Report 2006-2007, page 11 to 13 and 38
- OIPC Annual Report 2008-2009, page 29
- Letter dated March 6, 2007 to the Honourable Myron Kowalsky re: Bill 20, *The Gunshot and Stab Wound Mandatory Reporting Act*
- Letter dated April 11, 2007 to the Honourable Myron Kowalsky re: *The Health Information Protection Regulation Amendments*
- FOIP FOLIO archived issues:
 - November 2003: General commentary on HIPA compliance (page 3)
 - December 2003: General HIPA commentary (page 1)
 - May 2004: A cautionary note for pharmacists and trustees, disclosure of PHI under HIA (page 1)
 - July 2004: Discretionary disclosure by reason of section 27(2) of HIPA (page 3); Requirements under section 16 (page 4)
 - August 2004: Commentary on Draft HIPA Regulations (page 6)
 - September 2004: Commentary on Draft HIPA Regulations (page 4)
 - March-April 2005: Discusses mandatory notification of breaches in other jurisdictions (page 2); Pan-Canadian Health Information Privacy and Confidentiality framework (page 5)
 - October 2005: Disclosure of PHI without consent (page 2)
 - December 2005: Protection of PHI section 3(2)(b) (page 2)
 - January 2006: Contractor's Guide and discussion of section 27(4)(b) (page 2)
 - February 2006: Opt-out of PPCC screening (page 5)

- March 2006: Commentary on the YDDSA (page 2)
- July 2006: Commentary on HSNumber (page 3)
- September 2006: Third Anniversary of HIPA, some interesting quotes from 1998 Throne Speech (page 1)
- February 2007: Disclosure of PHI to keep someone safe (page 3)
- March 2007: Laptop encryption of PHI (page 3)
- April 2007: Commentary on Gunshot and Stab wound reporting legislation (page 3)
- May 2007: CHI White Paper on governance (page 4)
- August 2007: Disclosure of PHI to Police (page 5); Alberta OIPC and limited sharing of PHI (page 6)
- September 2007: Consent for youth (page 3)
- November 2007: EHR Survey (page 3)
- December 2007: Registration information is PHI (Page 2)
- February 2008: Sharing of PHI for fundraising improper Lycka case (page 2)
- May 2008: Commentary on Alberta case and BC Bill 24 (page 3); disclosure of PHI in emergency situations (page 4)
- November 2008: Tool for exercising discretion to disclose PHI
- January 2009 (page 2); section 16 obligations (page 3)
- March/April 2009: Alberta's Bill 52 (page 3); Alberta critical of disclosure of PHI to U.S. Court (page 7)
- June/July 2009: Health Care Directives Act (page 3); Alberta QB overrules Lycka decision (page 5)
- August 2009: Provision of PHI to insurers (page 3)
- September/October 2009: Patient First Review (page 3)
- November/December 2009: Report on management of access requests (page 2); FINTRAC (page 4)
- January 2010: Amending PHI (page 3); Encrypting PHI (page 4); Ontario Human Rights Tribunal Court decision (page 7)
- February/March 2010, outsourcing PHI storage (page 2); FINTRAC (page 6)

Past Consultation on HIPA fundraising Regulation

I note that the Minister stated in the Assembly on April 12, 2010:

But it's important also to know, Mr. Speaker, that the **Privacy Commissioner was consulted formally four different times on this very Regulation**, Mr. Speaker.² [emphasis added]

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² Saskatchewan *Hansard*, April 12, 2010, p. 4704.

A review of my records indicates that there were only three consultations with my office that could be described as formal and those consultations spanned the period 2004 to 2007:

- 1) In August 2004, Saskatchewan Health³ published, in draft form, a set of HIPA Regulations and invited public comment. This included an item described as *Proposed Regulation #11, Disclosure of registration information for Regional Health Authority and affiliate fundraising*. This fundraising Regulation differs significantly from the Order in Council 187/2010. I responded, by means of my *Report on The Health Information Protection Act Draft Regulations*, dated September 10, 2004. My Report is available at our website under the 'Resources' tab.
- 2) On August 11 2006, Saskatchewan Health provided a draft Regulation for consultation. The draft Regulation differs significantly from Order in Council 187/2010. I responded, by means of a letter, to the Executive Director of Policy and Planning, Saskatchewan Health dated September 18, 2006. In that letter, I advised that if the Department proceeded with the draft Regulation or published the draft Regulation for public scrutiny and comment, we would also publish our commentary on our website. In that case, our comments may be reorganized and appear in a somewhat different format but nonetheless would be consistent with this letter. By a letter dated November 22, 2006, the Executive Director of Policy and Planning, Saskatchewan Health responded to several suggestions I had made for amendment. I was advised that one data element that we had objected to would be deleted from the Regulation.
- 3) On June 1 2007, Saskatchewan Health provided a draft Regulation for consultation which reflected further revisions to earlier iterations. I responded, by means of a letter, dated June 12, 2007. In that letter I noted some positive changes. I made the observation that our office had still not seen evidence that the requirement of express consent is not feasible and appropriate. I advised that as noted earlier, at such time as the Department proceeded with the draft Regulation or published the draft Regulations for public scrutiny and comment, we would also publish our commentary on our website. I advised that the Department could expect that our comments may be reorganized and appear in a somewhat different formal but nonetheless would be consistent with this letter.

I understand that Saskatchewan Health has suggested that there was also a consultation on fundraising in May 2006, but to the best of my knowledge my office was not involved in that consultation and I can find no record of such a May 2006 consultation.

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³ The Ministry of Health or Department of Health (hereinafter called "Saskatchewan Health")

Consultation since 2007

The new Regulation is similar to the 2007 iteration. There is a significant change, however, in the new Regulation in the substitution of “personal health information” for “any information about a client’s health care or state of health” in subsection (7). The statutory definition of personal health information is much broader.

I had not seen the new Regulation until a copy was emailed to my office at my request on April 13, 2010 at 2:47 p.m. by Saskatchewan Health.

I have not received any draft documentation with respect to the type of contract that Saskatchewan Health will be introducing pursuant to subsection 7.1(1)(i) or (8) of the Regulation. In my view, Saskatchewan Health should have completed those pieces and made them available for public comment prior to proclamation of the subject Regulation.

In summary, for my office, there was only the public consultation in 2004, the exchange of correspondence in 2006 and a further exchange of correspondence in June 2007. I am not aware of any other formal consultation on the matter of a fundraising Regulation under HIPA. I also wish to stress that, in each of the three consultations, the text upon which I was commenting was different; none of the three consultations involved text identical to Order in Council 187/2010 although the 2007 consultation text was very similar but for one significant difference.

I have also enclosed a document entitled *Report on The Health Information Protection Amendment Regulations, 2010 (Order in Council 187/2010), May 3, 2010* that outlines my views and concerns regarding the new HIPA fundraising Regulation for your information.

Respectfully submitted,

R. Gary Dickson, Q.C.
Saskatchewan Information and Privacy Commissioner
Enclosure