



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report PH-2017-001

January 23, 2017

Morneau Shepell Ltd.

Summary: The Office of the Information and Privacy Commissioner (OIPC) received a Privacy Complaint under the *Personal Health Information Act* from an individual who complained that personal health information collected during a medical assessment for the purpose of a fitness certificate was improperly used and disclosed. The Complainant also alleged that there had been a failure to adequately protect his personal health information. The Commissioner determined that the occupational health services provider that collected the personal health information was a custodian under the provisions of the *Personal Health Information Act*. The Commissioner found that there had not been an improper use or disclosure of the Complainant's personal health information. Furthermore, there had not been a failure by the custodian to adequately protect the personal health information of the Complainant.

Statutes Cited: *Personal Health Information Act*, S.N.L. 2008, c.P-7.01, sections 2(h), 2(j), 2(k), 2(o), 4, 5(1), 15(1), 24, 29(1), 33(1), 35, 36(1) and 66(6).

I BACKGROUND

- [1] On May 6, 2014 this Office received a Privacy Complaint against Morneau Shepell Ltd. (“Morneau Shepell”) in which the Complainant alleged that his personal health information had been improperly used, disclosed and inadequately protected. Morneau Shepell provided occupational health related services to the Complainant’s employer and was involved in a medical assessment of the Complainant to determine if the Complainant was fit to carry out the functions of a particular position with the Complainant’s employer. The doctor who carried out the medical assessment in Labrador did so as a contractor with Morneau Shepell and sent the results of the assessment to Morneau Shepell’s office in St. John’s.
- [2] The Complainant in describing the events leading to his Complaint referred to two individuals who will be referred to in this Report as the “Nurse” and the “Physician”, both of whom held positions in the St. John’s office of Morneau Shepell.
- [3] The Complainant provided a lengthy description of his Complaint, which included the following details:

On May 17/2012 I had a medical performed for work duties I have (firefighter/paramedic), I read and signed the consent form which specified the [Labrador] Doctor’s name conducting the medical. No other persons or entities were mentioned in this. The doctor completed my medical, and mentioned one thing that needed further follow-up. . . . He advised me it was ok to go back to work and to make sure that I did follow up. I have a copy of the medical clearance.

The next morning I did as was requested and followed up until the problem was resolved.

On June 8/2012 I was contacted by [a Nurse] from St. John’s stating that after reviewing my file, I still should not “RETURN” to work. After I have been working since the medical in which I was cleared. I asked who she was and why she was looking at my personal health information. I was told that they are all medical professionals and can review anything conducted by their office. I then told her I did not give her permission to review anything. . . . She then stated [the Physician] “likes to” review all important medicals of firefighters etc., I told her that I don’t care what she likes to look at, I was cleared by the doctor that completed my medical and she did not have permission to look at anything!

- [4] The Complainant continued by indicating that he was contacted by an occupational nurse working for his employer who advised him that the Physician had indicated that he could not return to work until she had completed further testing or he had obtained a letter from the local clinic stating that he was fit for work. The Complainant provided details of his response to this occupational health nurse:

I told her that their Doctor had no right to look at my file, she had never seen me before She was not aware of the events leading up to the medical that morning, as was explained in detail to the doctor that examined me. She would not be getting any information period. I was then told that unless the information was forwarded to them I would not be allowed to return to work. I then asked about the medical clearance from the doctor that had conducted the medical, I was advised that [the Physician] overruled it and I was off work!

- [5] The Complainant stated:

My paperwork . . . was passed around their office like yesterday's left over birthday cake and that is unacceptable. I have to follow the Personal Health Information Act as a paramedic but [the Physician] and her office doesn't. Enough is enough and something has to be done. The consent form may be changed but it still does not change what happened.

I requested copies of all my paperwork from them. Included in it are several pages of notes by doctors and nurses that "reviewed" my medical and their "opinions". Only one doctor's name was on the consent form that I signed. There was nothing there about anybody who wanted to look may do so.

Since this happened [my employer] has been un-accepting of any wrong doings of Shepell [sic], and have been trying to get me to return for another medical Now [my employer] is telling me that I "have to" and the consent form now states that anyone in their office can look at your file.

. . . The reason behind the complaint is that I was cleared by the original doctor, he signed off on my medical as being fit for work. He did advise me to follow up with my own doctor . . ., which I did. The main reason is that we were told [the Physician] likes to look at important medicals. Likes to look at is not in the circle of care but a follow up with my own doctor is.

- [6] The Complainant also complained about the fact that a fax containing his personal health information which he arranged to have sent to the St. John's office of Morneau Shepell on a Friday afternoon "was there the whole weekend for anybody to see."

[7] Section 66(5) of *PHIA* requires this Office to provide a copy of any complaint to “the custodian whose decision or action is the subject matter of the complaint”. This Office was initially uncertain as to whether Morneau Shepell was a “custodian” as that term is defined in section 4 of the *Personal Health Information Act (PHIA)*. Therefore, a copy of the Complaint was sent to the Nurse and the Physician referred to in the Complaint on the basis that each was a custodian “whose decision or action is the subject matter of the complaint.”

[8] Both the Nurse and the Physician responded to the Complaint by indicating, among other things, that they were not the custodians of the Complainant’s personal health information in these circumstances.

[9] Following investigation of the circumstances of this matter, this Office decided that the issue of who was the custodian of the Complainant’s personal health information had to be determined. Specifically, the issue to be decided is whether:

- Morneau Shepell was the custodian;
- the Nurse and/or the Physician were the custodians in these circumstances; or,
- all three might be custodians of the personal health information of the Complainant.

[10] To further complicate matters, during the course of the review of this matter the occupational health services business carried on by Morneau Shepell was sold to Horizon Occupational Health Solutions Inc. (“Horizon”).

[11] Section 67(1) of *PHIA* provides that this Office may take the steps considered appropriate to resolve a complaint to the satisfaction of the complainant and the custodian. This Office was unable to bring about such a resolution and, therefore, pursuant to section 67(2) a review must be conducted. Section 68(4) of *PHIA* provides that the complainant and the affected custodian must be given an opportunity to make representations during a review.

[12] In accordance with section 68(4), the Complainant, Morneau Shepell, Horizon, the Nurse and the Physician were all given the opportunity to provide written representations on the following issues:

- (1) Whether Morneau Shepell was a custodian of personal health information under the provisions of the *Personal Health Information Act* at the time of the circumstances described in the Complaint;
- (2) Whether the Nurse was a custodian of personal health information under the provisions of the *Personal Health Information Act* at the time of the circumstances described in the Complaint;
- (3) Whether the Physician was a custodian of personal health information under the provisions of the *Personal Health Information Act* at the time of the circumstances described in the Complaint;
- (4) Whether any collection, use or disclosure of the personal health information of the Complainant was carried out within the “circle of care”, as that term is used and defined in section 24 of the *Personal Health Information Act*;
- (5) Whether there has been an improper collection, use or disclosure of the Complainant’s personal health information in contravention of the *Personal Health Information Act*; and/or
- (6) Whether there has been an inadequate protection of the Complainant’s personal health information in contravention of the *Personal Health Information Act*.

II COMPLAINANT’S SUBMISSION

[13] The Complainant did not provide a written submission but his position is detailed in his Privacy Complaint form, including the portions previously referenced.

III SUBMISSION OF MORNEAU SHEPELL

[14] The position of Morneau Shepell is set out in correspondence from its legal counsel as follows:

Morneau Shepell Ltd. is no longer in the business of providing occupational health related services in Newfoundland and Labrador. As such, it takes no

position on the issue of whether a commercial provider of these services would be considered a "health care provider" under section 4(1)(f) of the Personal Health Information Act such that the provider could be considered a "health care custodian" under the Act.

Regardless of whether Morneau Shepell Ltd. was itself a custodian, Morneau Shepell Ltd. submits that it is reasonable for health care providers, health care practitioners and their authorized agents operating in the occupational health setting to assume that they have consent to collect, use or disclose Personal Health Information for the purpose of preventing work-related injuries. The implied consent would extend to quality assurance reviews with the ultimate goal of protecting or maintaining the health and safety of an individual who receives occupational health related services. It would also apply to health care providers, health care practitioners and their authorized agents working out of different offices provided that they work as a team in the ordinary course to achieve this purpose.

[The Physician's] role as Regional Medical Director included supervision of the doctors providing occupational health services to the employees of Morneau Shepell Ltd.'s institutional clients, in part, by way of quality assurance reviews. With respect to the complaint at issue, [the Physician] used [the Complainant's] Personal Health Information in the course of reviewing the work of [the Labrador Doctor], who had engaged in a fitness assessment of [the Complainant]. Her review concluded that additional information was needed before [the Complainant] could be assessed as fit to work. [The nurse] was assigned by [the Physician] the task of communicating this outcome to [the Complainant]. As such, and without opining on the designations themselves, it is Morneau Shepell Ltd.'s view that the manner in which [the Physician] and [the Nurse] used [the Complainant's] Personal Health Information was for the purpose of health care and in keeping with the Act.

IV SUBMISSION OF HORIZON OCCUPATIONAL HEALTH SOLUTIONS INC.

[15] The position of Horizon is set out in correspondence dated February 6, 2015. In its submission Horizon provided background information to the Complaint as follows:

. . . As you may be aware, on August 29, 2014 Horizon Occupational Health Solutions Inc. ("Horizon"), ... acquired the occupational health clinics business from Morneau Shepell Ltd. ("Morneau Shepell"). The incident giving rise to this complaint occurred in or around May and June of 2012, more than two years prior to Horizon's involvement in the business. As such, Horizon has not been named in the complaint and is reluctant to make any specific submissions regarding the circumstances giving rise to this complaint or with

respect to the practices and protocols surrounding the collection, use, disclosure and protection of personal health information at the time of this incident.

. . . Furthermore, the health care professionals named in the complaint remain key personnel with Horizon. Accordingly, Horizon is keenly interested in achieving further clarity with respect to the “custodian” issue as well as the “circle of care” concept as described in the provisions of the Personal Health Information Act.

[16] Horizon commented on the issue of who is the custodian in these circumstances as follows:

Horizon takes no position as to who, if anyone, was a custodian of personal health information under the provisions of the Personal Health Information Act at the time of the circumstances described in the complaint. Based on recent correspondence between Horizon and the Office of the Information and Privacy Commissioner of Newfoundland and Labrador (“OIPC”), it appears that there is uncertainty as to whether private organizations providing occupational health services would fall under the definition of “health care provider” as per section 2(1)(k) of the Act.

At issue, is whether the definition of “health care” is broad enough to encompass the services offered by occupational health organizations and its staff, and whether such services are performed for “health related purposes” as described in subsections 2(1)(h)(i)-(viii) of the Act. . . .

[17] The concept of “circle of care” was also discussed by Horizon in its submission, as follows:

Notwithstanding the uncertainty surrounding the custodian issue, Horizon respectfully submits that it is standard and necessary protocol within the occupational health services industry for health care professionals and their authorized agents to rely on an individual’s implied consent when collecting, using, disclosing, or handling personal health information for the purpose of providing health care (if such services are deemed to be “health care” as per above).

Many of Horizon’s clients within the province operate in safety sensitive environments and/or remote locations. It is imperative (and in some instances legislatively mandated) that certain fitness for work assessments be completed to help manage health and safety related risks, not only to the individual but also to those who share the same workplace. It is for these purposes, that Horizon collects and uses the health information of individuals who participate in a fitness for work assessment. It is also for these purposes

that Horizon's health care professionals may share an individual's health information with other health care professionals and their authorized agents within the Horizon network.

Given that Horizon's clients are located across the province and in areas which would be considered "remote", our team of health care professionals cannot be situated in a single office, which may be typical in other health care settings. Horizon's Regional Medical Director is based in its St John's offices. She is one of the most experienced and well respected Occupational Health Physicians not only within our organization, but across the province as well. In her role as Regional Medical Director, she is responsible for supervising the work performed by other physicians and/or health care professionals with Horizon and providing her expertise and input as required. This practice helps to ensure: (a) the overall quality of the services provided by Horizon; and (b) the health and safety of the individual and the workplace. Horizon submits that although its team of health care professionals may operate in different locations throughout the province, they continue to operate as a team and for the purpose of determining an individual's fitness for work. Accordingly, an individual's implied consent would likely apply to these types of situations.

It is also worth noting that at the outset of an assessment, the purpose for the collection and use of health information is explained to the individual in a manner in which it would be reasonable to believe that the individual is aware. Horizon believes that it is reasonable to presume that the implied consent of the individual is valid in such circumstances where the individual can be said to have implicitly provided knowledgeable and informed consent.

V SUBMISSION OF THE NURSE

[18] The position of the Nurse is set out in three documents: correspondence dated May 28, 2014 written as the Nurse's initial response to the Complaint, correspondence dated November 12, 2014 written as an addendum to the Nurse's initial response and in a third submission dated January 30, 2015 after this matter proceeded to formal investigation.

[19] In her correspondence dated May 28, 2014, the Nurse discussed her position with Morneau Shepell, as follows:

I am a registered nurse with a licence to practice in the province of Newfoundland and Labrador. I have been a nurse for 21 years, 14 of which have been in the area of occupational health and safety. I am currently employed as an occupational health and safety nurse at Morneau Shepell's

St. John's office, where I have worked for 8 years. In my role with Morneau Shepell, I report to a medical director, [the Physician].

[20] The Nurse described her involvement with the Complainant's file:

My involvement in [the Complainant's] file has been limited. I understand that [the Complainant] was one of several employees from his company who were scheduled to take a firefighting course and whose employer wished to have the eligible employees assessed to ensure they were appropriately healthy for the physical demands of the course. [The Complainant's] fitness assessment was carried out on May 17, 2012 by a physician in Labrador City. ... I understand that [the Labrador doctor] sent the results of his assessment to [the Physician], as is the usual practice.

I understand that [the Physician] reviewed [the Labrador doctor's] assessment of [the Complainant] on June 8, 2012. On that same date, she requested that I contact [the Complainant] to advise him of her finding that he was not fit to return to work. I relayed this message to [the Complainant] on June 8, 2012, as requested by [the Physician].

Subsequently, [the Physician] advised me that she had calculated a particular risk factor for [the Complainant] and that she was recommending follow-up assessments. She asked that I relay this message to [the Complainant]. On June 12, 2012, I telephoned [the Complainant] and relayed [the Physician's] message and recommendation.

[21] The Nurse emphasized that she had no clinical role in relation to the Complainant:

The purpose of my communications with [the Complainant] was solely to relay information from [the Physician]. These communications could have been equally made by administrative personnel. I did not assess [the Complainant], nor did I make any findings, diagnoses or recommendations. In short, I played no clinical role in [the Complainant's] file.

[22] The Nurse discussed the disclosure of the Complainant's personal health information:

While I received [the Complainant's] personal health information from [the Physician], I communicated it only to [the Complainant] himself during our two communications described above. The meaning of "disclosure" under the Personal Health Information Act must be limited to disclosures to third parties outside of the circle of care. In any event, I note that paragraph 39(1)(d) provides that the disclosure of PHI without consent is permitted for the "purpose of delivering, evaluating or monitoring a program of the custodian that relates to the provision of health care ...".

[23] In her initial response to the Complaint, the Nurse took the position that she was not a custodian within the meaning of the *Personal Health Information Act*:

For the reasons that follow, I respectfully disagree that I am a "custodian" pursuant to the Personal Health Information Act with respect to [the Complainant's] personal health information:

1. While I agree that I am a "health care professional" generally, my role vis-a-vis [the Complainant] was not clinical in nature and I could not be considered to be his health care professional. As indicated above, my role in [the Complainant's] file was administrative in nature in that I simply passed along communications from [the Physician]. I conducted no assessments of [the Complainant], nor did I make any diagnoses, recommendations or findings. My communications with [the Complainant] could have been made, and often are made, by administrative staff.

2. Section 4(1) of the *Personal Health Information Act* ("PHIA") deems only those who have "custody" or "control" of personal health information to be "custodians". I did not have custody or control of [the Complainant's] personal health information. As I indicated above, [the Complainant's] fitness assessment was performed and recorded by [the Labrador doctor] and the interpretation was performed and recorded by [the Physician]. I played no clinical role in his file and was not responsible for taking action on the file or for ensuring the security of the physical file.

3. Section 4(2) of PHIA sets out an explicit exclusion from the list of deemed custodians for health care professionals who are also employees. If I could be considered a custodian pursuant to s. 4(1), s. 4(2) operates to nullify such a result. In this respect, I am an employee of Morneau Shepell and work under the clinical management of . . . a physician who played a clinical role in [the Complainant's] file. As such, my role is analogous to those of nurses working in a public hospital, who are not custodians within the meaning of PHIA. This exception is echoed in the definition of "health care professional" in paragraph 2(1)(j) of PHIA.

[24] The Nurse also set out her position on the "circle of care":

Moreover, it is important to consider that PHIA provides that consent to use or disclose personal health information is implied as between the health care professionals and their staff who are members of the circle of care. In particular, paragraph 21(1)(b) [sic] provides that I had the implied consent of [the Complainant] to continue to use and disclose his personal health information after I had received it from [the Physician] and had no reason to believe that [the Complainant] had withdrawn such consent. I note that I was not involved in obtaining [the Complainant's] consent to participate in his fitness medical.

I also note that it is common practice in occupational medicine that medicals are completed at other agencies but returned to the occupational firm for review. . . .

In this vein, subsections 34 (a) and (d) of PHIA provide that a custodian may use personal health information "for the purpose for which the information was collected or created and for all the functions reasonably necessary for carrying out that purpose" and "for the purpose of activities to improve or maintain the quality of care".

[25] In her response the Nurse also commented on other matters in the Complaint:

In addition, I would like to address several of the allegations [the Complainant] made in his narrative attached to the privacy complaint form:

1. In . . . [the Complainant's] narrative, he refers to our telephone call on June 8, 2012. I did not express myself in the manner alleged . . . Rather, I advised him that the usual practice at Morneau Shepell included reviews of fitness medicals by the medical director in the St. John's office, especially for emergency response team members and firefighters. I also advised [the Complainant] that the medical director and those working with her were in the circle of care.

2. In . . . [the Complainant's] narrative, he refers to a discussion with an individual at Morneau Shepell about the transmission of a facsimile communication. I do not believe that I was a party to this discussion. Nonetheless, I note that there is no fax machine in the traditional sense at Morneau Shepell; rather, facsimile communications are received in a central email inbox where they remain until that folder is accessed. [The Complainant's] facsimile communication was secure over the weekend and would not have been accessed until the administrative staff returned to the office after the weekend.

3. . . . [the Complainant's] narrative . . . refers to notes on his file by doctors and nurses who reviewed his file and provided their opinions. I wish to reiterate that I was in receipt of [the Complainant's] personal health information solely because [the Physician] communicated it to me for the purpose of relaying messages to [the Complainant]. My notes on his chart confirm that I relayed [the Physician's] communications and recorded [the Complainant's] responses to same.

[26] The conclusion of the Nurse's initial response summarized her position:

In summary, I would like to underline that my limited role in [the Complainant's] file was administrative in nature and was by virtue of being an employee reporting to the medical director of my employer. For these reasons and the others noted above, I was not a "custodian". Moreover, I did not

disclose [the Complainant's] personal health information within the meaning of PHIA and my uses of his personal health information were at the direction of my medical director, appropriate for being in his circle of care and related to legitimate purposes for using personal health information sanctioned by PHIA.

- [27] Subsequent to her initial response, the Nurse provided an addendum dated November 12, 2014 in which she indicated that she wished to provide additional clarification regarding her roles and responsibilities. She stated:

I would like to clarify that in my role as occupational health nurse with Morneau Shepell, I report clinical matters only to [the Physician] and in turn, receive medical guidance and direction. However, for all administrative matters, I am accountable to report to [the] Vice President of Health Management, who is located at the Morneau Shepell offices in Toronto, Ontario.

I would also note that I primarily work as an account manager for Morneau Shepell's Occupational Health Division. Given that my involvement with [the Complainant] was strictly in connection with an occupational medical clearance, it is my understanding that I would not be considered a "custodian" within the meaning of subsection 4(1) of the Personal Health Information Act ("PHIA"), as I did not provide "health care" to him (see paragraph (h) of subsection 2(1) of PHIA).

As well, as I mentioned in my correspondence of May 28, 2014, I did not have custody and control of [the Complainant's] personal health information. Indeed, my role in [the Complainant's] file was purely administrative in nature in that I simply communicated a message from [the Physician] to [the Complainant].

- [28] The Nurse provided her final written submission after being advised that this matter would be proceeding to the formal report stage. In that submission, the Nurse provided background information on occupational medical clearances:

. . . it may be helpful if I provided additional information about occupational medical clearances to further demonstrate that I should not be considered a "custodian" within the meaning of subsection 4(1)(e) of the Personal Health Information Act . . .

In particular, occupational medical clearances (also known as "fitness to work" assessments) are medical assessments that are conducted when an employer wishes to be certain that an employee can safely do a specific job or

task. The purpose is to determine if the employee is medically fit to perform the duties required of the specific job or task.

Given their limited objective, occupational clearances should not be considered as providing “health care” as defined in section 2(h) of PHIA as they are not done for a “health-related purpose”.

VI SUBMISSION OF THE PHYSICIAN

[29] The position of the Physician is set out in her correspondence in which she commented on the suggestion that she was a custodian as follows:

I would like to express my concern that I am being considered custodian of the Complainant's records. I am a Contractor with Morneau Shepell and have access to their charts, materials, and records as part of that contract. The charts, materials, and records belong to them. If access to these records is requested by a third party, a properly executed consent form needs to be completed and presented to Morneau Shepell.

At the time of my review of the Complainant's record I was National Medical Director with Morneau Shepell. That responsibility included the role of Regional Medical Director for Newfoundland and Labrador. One of those responsibilities is to provide quality assurance reviews. As such I have access to the records of Morneau Shepell in fulfillment of the terms of my contract. The work I do for Morneau Shepell is also dependent on the contractual terms they have with their individual clients.

It was in the context of quality assurance review that I was given the Complainant's medical for review. In particular, if a new physician is working in one of our clinics, I or one of the designate physicians in our offices will review the medicals of that physician to ensure the quality of the medical is of a certain standard and to ensure the appropriate fitness decisions have been made. This is done to protect the well-being of the worker, as well as to provide feedback to the new physician relative to their assessments.

In the Complainant's case there was an abnormal medical finding. He had appropriately been advised to follow up with his family doctor. As he was about to do a course in the week of June 11, I was asked to review his chart by Morneau Shepell's Occupational Health Nurse responsible for the . . . contract, to ensure he was safe to take part in that course. I asked for the results of his family doctor follow up as I had concerns for his safety given the medical finding at the time of his medical.

The only information released to the Complainant's employer . . . was fitness information. No medical information was released.

Even though the medical was completed in the Morneau Shepell office in Labrador City, that office is considered part of the Newfoundland and Labrador region and in the circle of care of my responsibility and contractual requirements.

VII DISCUSSION

(1) Whether Morneau Shepell was a custodian of personal health information under the provisions of the *Personal Health Information Act* at the time of the circumstances described in the Complaint.

[30] The meaning of “personal health information” is set out in section 5 of *PHIA*, which provides in part as follows:

5. (1) *In this Act, "personal health information" means identifying information in oral or recorded form about an individual that relates to*
- (a) the physical or mental health of the individual, including information respecting the individual's health care status and history and the health history of the individual's family;*
 - (b) the provision of health care to the individual, including information respecting the person providing the health care;*
 - (c) the donation by an individual of a body part or bodily substance, including information derived from the testing or examination of a body part or bodily substance;*
 - (d) registration information;*
 - (e) payments or eligibility for a health care program or service in respect of the individual, including eligibility for coverage under an insurance or payment arrangement with respect to health care;*
 - (f) an individual's entitlement to benefits under or participation in a health care program or service;*
 - (g) information about the individual that is collected in the course of, and is incidental to, the provision of a health care program or service or payment for a health care program or service;*

(h) a drug as defined in the Pharmacy Act, 2012 , a health care aid, device, product, equipment or other item provided to an individual under a prescription or other authorization issued by a health care professional; or

(i) the identity of a person referred to in section 7.

[31] The term “custodian” is defined in section 4 of *PHIA*, which provides in part as follows:

4. (1) In this Act, "custodian" means a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with the performance of the person's powers or duties or the work described in that paragraph:

...

(e) a health care professional, when providing health care to an individual or performing a function necessarily related to the provision of health care to an individual;

(f) a health care provider;

[32] “Person” is described in section 2(o) of *PHIA* to include “a board, commission, tribunal, partnership, association, organization or other entity.”

[33] The meaning of “health care” is provided for in section 2(h), which reads in part as follows:

(h) "health care" means an observation, examination, assessment, care, service or procedure in relation to an individual that is carried out, provided or undertaken for one of the following health-related purposes:

(i) the diagnosis, treatment or maintenance of an individual's physical or mental condition,

(ii) the prevention of disease or injury,

(iii) the promotion of health,

(iv) rehabilitation,

[34] The term “health care professional” is set out in section 2(j) of *PHIA*, which provides in part as follows:

(j) "health care professional" means a person, including a corporation, that is licensed or registered to provide health care by a body authorized to regulate a health care professional under one of the following enumerated Acts but does not include an employee of a health care professional when acting in the course of his or her employment:

[35] Two of the enumerated Acts referred to in section 2(j) are the *Medical Act, 2005* and the *Registered Nurses Act*.

[36] "Health care provider" is defined in section 2(k) of *PHIA* as follows:

(k) "health care provider" means a person, other than a health care professional, who is paid by MCP, another insurer or person, whether directly or indirectly or in whole or in part, to provide health care services to an individual;

[37] Having reviewed the provisions of *PHIA*, the circumstances of this matter and all the submissions, I make the following findings. The Labrador Doctor who conducted the medical assessment of the Complainant did so on behalf of Morneau Shepell. The "Consent for Release of Information" form signed by the Complainant authorizing the "medical assessment" by the Labrador Doctor is clearly a Morneau Shepell consent form. The form is headed Morneau Shepell and contains at the bottom the addresses of Morneau Shepell's offices in St. John's and in Labrador.

[38] I find that the Labrador Doctor was providing "health care" on behalf of Morneau Shepell within the meaning of section 2(h) of *PHIA*. The "medical assessment" amounts to an "observation, examination, assessment . . . service or procedure" in relation to the Complainant carried out for the purposes of a diagnosis, treatment or maintenance of the Complainant's physical condition in accordance with section(2)(h)(i) or the prevention of injury to the Complainant in accordance of section 2(h)(ii).

[39] Therefore, Morneau Shepell at the time of the Complaint was a "health care provider" within the meaning of section 2(k), which provides as follows:

(k) "health care provider" means a person, other than a health care professional, who is paid by MCP, another insurer or person, whether directly

or indirectly or in whole or in part, to provide health care services to an individual;

[40] I also find that Morneau Shepell collected “personal health information” within the meaning of section 5(1)(b). The information collected by the Labrador Doctor on behalf of Morneau Shepell is identifying information about the Complainant that relates to the “provision of health care” to the Complainant.

[41] As a result, Morneau Shepell had custody or control of personal health information as a result of or in connection with the performance of its duties as a health care provider. Therefore, I find that Morneau Shepell was a “custodian” within the meaning of section 4(1)(f) of *PHIA* at the time described by the Complainant.

(2) Whether the Nurse was a custodian of personal health information under the provisions of the *Personal Health Information Act* at the time of the circumstances described in the Complaint.

[42] The Nurse was at the time of the events forming the basis of the Complaint a registered nurse under the *Registered Nurses Act* and is listed as such on the registry of members found on the web site of the Association of Registered Nurses of Newfoundland and Labrador. In fact, the Nurse described herself in a written submission as a registered nurse with a licence to practice in the province of Newfoundland and Labrador. Therefore, this individual is a “health care professional” within the meaning of section 2(j)(xv) of *PHIA*.

[43] It is not disputed that the Nurse was an employee of Morneau Shepell, which I have found to be a custodian under the provisions of *PHIA*. Section 4(2) provides in part as follows:

(2) Except as otherwise provided in this Act or the regulations, a person described in one of the following classes shall not be considered to be a custodian in respect of personal health information he or she may collect, use, disclose or dispose of while performing the powers or duties described:

(a) an employee of a custodian when acting in the course of his or her employment;

[44] I find that any actions carried out by the Nurse were conducted in the course of her employment with Morneau Shepell. Therefore, the Nurse was not a custodian of the personal health information of the Complainant.

(3) Whether the Physician was a custodian of personal health information under the provisions of the *Personal Health Information Act* at the time of the circumstances described in the Complaint.

[45] The Physician was at the time of the events forming the basis of the Complaint a medical practitioner under the *Medical Act, 2005* and is listed on the medical register, which is available in an electronic version on the website of the College of Physicians and Surgeons of Newfoundland and Labrador. This individual took no issue with this Office referring to her as a medical practitioner. Therefore, this individual is a “health care professional” within of section 2(j)(ix) of *PHIA*.

[46] Although the Physician was a health care professional, I find that she was not a custodian of the personal health information of the Complainant. Any duties carried out by the Physician were as a contractor with the custodian Morneau Shepell.

[47] Issues (4) and (5) will be discussed together.

(4) Whether any collection, use or disclosure of the personal health information of the Complainant was carried out within the “circle of care”, as that term is used and defined in section 24 of the *Personal Health Information Act* and

(5) Whether there has been an improper collection, use or disclosure of the Complainant’s personal health information in contravention of the *Personal Health Information Act*.

[48] Collection of personal health information is provided for in section 29(1) as follows:

29.(1) A custodian shall not collect personal health information about an individual unless

(a) the individual who is the subject of the information has consented to its collection and the collection is necessary for a lawful purpose; or

(b) the collection is permitted or required by this Act.

[49] The use of personal health information by a custodian is dealt with in section 33 of *PHIA* as follows:

33. (1) A custodian shall not use personal health information about an individual unless

(a) it has the individual's consent under this Act and the use is necessary for a lawful purpose; or

(b) the use is permitted or required by this Act.

(2) A custodian shall not use personal health information if other information will serve the purpose of the use.

(3) The use of personal health information in its custody or under its control by a custodian shall be limited to the minimum amount of information necessary to achieve the purpose for which it is used.

(4) This section does not apply to personal health information that the custodian is required by law to use.

[50] The scope of the use of personal health information by a custodian is set out in section 35 of *PHIA* as follows:

35. A custodian shall limit the use of personal health information in its custody or under its control to those of its employees and agents who need to know the information to carry out the purpose for which the information was collected or a purpose authorized under this Act.

[51] The disclosure of personal information by a custodian is provided for in section 36 of *PHIA* as follows:

36. (1) A custodian shall not disclose personal health information that is in its custody or control unless

(a) it has the individual's consent under this Act and the disclosure is necessary for a lawful purpose; or

(b) the disclosure is permitted or required by this Act.

(2) A custodian shall not disclose personal health information if other information will serve the purpose of the disclosure.

[52] Consent to the collection, use or disclosure of personal health information is dealt with in section 24 of *PHIA*, as follows:

24. (1) A consent of the individual to the collection, use or disclosure of his or her personal health information may be express or implied.

(2) Where a custodian referred to in paragraph 4(1)(e), (f) or (g)

(a) collects personal health information from and with the consent of the individual who is the subject of the information; or

(b) receives personal health information about an individual from a custodian

for the purpose of providing health care or assisting in the provision of health care to the individual as part of a circle of care, that custodian is entitled to assume that he or she has the individual's continuing implied consent to use or disclose the information to another custodian or person for the purpose of providing health care to that individual unless the custodian collecting or receiving the information is or becomes aware that the individual has withdrawn his or her consent.

(3) For the purpose of subsection (2), the expression "circle of care" means the persons participating in and activities related to the provision of health care to the individual who is the subject of the personal health information and includes necessarily incidental activities such as laboratory work and professional consultation.

[53] I find that the collection of the personal health information of the Complainant was consented to by the Complainant by his signing the form entitled "Consent for Release of Information." The form grants consent to the "medical assessment" by the Labrador Doctor and clearly indicates that the assessment is for the purpose of Morneau Shepell determining if there is to be a "fitness certificate forwarded" to the Complainant's employer. Therefore, there was a proper collection of personal health information by the custodian Morneau Shepell.

[54] I am satisfied that the use of the Complainant's personal health information by the custodian Morneau Shepell was authorized by the "Consent for Release of Information" form signed by the Complainant. The Complainant's personal health information was used by Morneau Shepell to determine whether the Complainant would receive a fitness certificate.

The Physician as a contractor with Morneau Shepell was entitled to use the personal health information in order to make that determination. Likewise, the Nurse as an employee of Morneau Shepell was entitled to use the personal health information of the Complainant.

[55] In addition, it is my determination that section 24(2) of *PHIA* dealing with the “circle of care” is applicable in the circumstances of this matter. The Complainant’s personal health information was collected by Morneau Shepell, (a health care provider within the meaning of section section 4(1)(f)) with the express consent of the Complainant. In accordance with section 24(2), Morneau Shepell was entitled to assume it had the Complainant’s continuing implied consent to use or disclose that personal health information to another person for the purpose of providing health care to the Complainant.

[56] Therefore, I conclude that there was no improper use of the Complainant’s personal health information. I make a similar finding regarding any disclosure of the personal health information of the Complainant. The Complainant’s personal health information was properly collected by the custodian Morneau Shepell. The meaning of disclosure is provided in section 2(1)(g) as follow:

(g) "disclose", in relation to personal health information in the custody or control of a custodian or other person, means to make the information available or to release it but does not include a use of the information and "disclosure" has a corresponding meaning;

[57] There was no disclosure of the Complainant’s personal health information because the information was not made available to or released to anyone other than employees or contractors of the custodian Morneau Shepell. These employees and contractors of Morneau Shepell properly used the personal health information of the Complainant.

[58] Even if there was a disclosure of the personal health information to the Physician and the Nurse, then such a disclosure was authorized by section 24(2) because the Physician and the Nurse were within the circle of care. Consequently, there was no improper disclosure of the Complainant’s personal health information.

(7) Whether there has been an inadequate protection of the Complainant's personal health information in contravention of the *Personal Health Information Act*.

[59] As indicated, the Complainant arranged to have a fax containing his personal health information sent to the St. John's office of Morneau Shepell on a Friday afternoon and has alleged that the fax was left on the fax machine all weekend "for anybody to see". This amounts to an allegation that the Complainant's personal health information was not adequately protected as required by section 15 of *PHIA* which provides in part as follows:

15. (1) A custodian shall take steps that are reasonable in the circumstances to ensure that

(a) personal health information in its custody or control is protected against theft, loss and unauthorized access, use or disclosure;

[60] This allegation of the Complainant was addressed by the Physician in her submission:

Faxes at the St John's office are received on the computer of the administrative staff. They are printed by the staff as appropriate. The fax referred to by the Complainant was not printed until Monday - it was not lying on the fax machine all weekend. In any event the fax machine sits in a separate record room with both access doors locked within our clinic. The cleaners are not allowed access to this room unless a staff member is present during the cleaning process. The outside clinic door is double locked and the clinic has a security system.

[61] The Nurse also discussed the Complainant's concern regarding his fax by stating:

. . . I note that there is no fax machine in the traditional sense at Morneau Shepell; rather, facsimile communications are received in a central email inbox where they remain until that folder is accessed. [The Complainant's] facsimile communication was secure over the weekend and would not have been accessed until the administrative staff returned to the office after the weekend.

[62] Therefore, I find that there was adequate protection of the Complainant's personal health information by the custodian Morneau Shepell and, thus, there was no contravention of section 15(1) of *PHIA*.

VIII CONCLUSION

[63] I have reached the following conclusions:

- A. Morneau Shepell was at the relevant time a custodian of the Complainant's personal health information.
- B. The Nurse was not at the relevant time a custodian of the Complainant's personal health information.
- C. The Physician was not at the relevant time a custodian of the Complainant's personal health information.
- D. Any use or disclosure of the Complainant's personal health information by the custodian Morneau Shepell was carried out within the circle of care.
- E. There has not been any improper collection, use or disclosure of the Complainant's personal health information by the custodian Morneau Shepell.
- F. There has not been any failure by the custodian Morneau Shepell to adequately protect the personal health information by the Complainant.

IX RECOMMENDATIONS

[64] In light of my conclusions and the fact that Morneau Shepell is no longer providing occupational health related services within the Province of Newfoundland and Labrador I make no recommendation in this matter.

[65] It would be remiss of me if I did not acknowledge that this Report is unacceptably overdue and apologize to the Complainant, other involved parties and the public in general in regards to this failure to resolve this matter in a timely fashion. By way of explanation and not an excuse, the volume of time extensions, disregards and access to information complaints received by this Office and the mandatory deadlines in the *Access to Information and Protection of Privacy Act, 2015* lead to those files attaining priority. The lack of mandatory time deadlines in *PHIA* cannot allow these complaints to be given lesser status, especially given the sensitivity of personal health information. For future files, new policy requires that reports in regards to *PHIA* complaint files be completed no later than thirty (30)

days after the expiry of the one hundred and twenty days provided for in section 72(1) of *PHIA* for the conclusion of the review process. That is the outside date, barring extraordinary circumstances, with the goal being to conclude these files prior to that time where possible.

[66] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of January, 2017.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

