



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report AH-2018-001

May 17, 2018

Eastern Health Regional Health Authority

Summary:

An Applicant requested from Eastern Health notes and other information in relation to his parent. The records were generated by a named Eastern Health employee. Eastern Health released the requested notes with the names and identifying information of third party individuals severed. The Applicant objected on the grounds that as the substitute decision maker he believed he was entitled to the entire record. The Commissioner found that Eastern Health is obliged to protect the privacy of third party individuals under the *Personal Health Information Act* and the *Adult Protection Act*.

Statutes Cited:

[Personal Health Information Act](#); [Adult Protection Act](#); [Advance Health Care Directives Act](#)

I BACKGROUND

- [1] The Applicant is the substitute decision maker for his parent and in that role requested from Eastern Health, pursuant to the *Personal Health Information Act* (“PHIA”), the parent’s personal health information as follows:

All documentation regarding [named social worker]’s involvement in [parent]’s Community Support Program File.

- [2] Eastern Health responded to the Applicant’s request, providing 57 pages of records. These records were subject to numerous redactions to remove the names and other identifying information of third party individuals interviewed and consulted in the process of conducting an investigation under the *Adult Protection Act* (the “APA”). Several passages were also severed as Eastern Health deemed them to be non-responsive to the Applicant’s request.

- [3] The Applicant filed a complaint with this Office. During our investigation, Eastern Health provided to the Complainant all records that it had previously redacted as non-responsive. The Complainant’s objection to the remaining redactions could not be resolved and the complaint proceeded to formal investigation in accordance with section 67 of the *PHIA*.

II CUSTODIAN’S POSITION

- [4] Eastern Health submits that it is required to maintain in confidence the identities of any individuals involved in an investigation pursuant to the *APA* and that the *PHIA* supports withholding such information.

III THE COMPLAINANT’S POSITION

- [5] The Complainant asserts that as his parent’s substitute decision maker he should have full access to their personal health information in order to make informed decisions for their healthcare.

IV DECISION

[6] Eastern Health has noted that the records relate to an investigation carried out pursuant to the APA. The PHIA, in section 58, lists exceptions to disclosure, the relevant provisions being:

58.(1) A custodian shall refuse to permit an individual to examine or receive a copy of a record of his or her personal health information where

(a) another Act, an Act of Canada or a court order prohibits disclosure to the individual of the record or the information contained in the record in the circumstances;

...

(d) granting access could reasonably be expected to

(i) result in a risk of serious harm to the mental or physical health or safety of the individual who is the subject of the information or another individual,

(ii) lead to the identification of a person who was required by law to provide information in the record to the custodian, or

(iii) lead to the identification of a person who provided information in the record to the custodian in confidence under circumstances in which confidentiality was reasonably expected.

[7] The APA requires a person's cooperation with any investigation conducted under that Act:

16. (1) Where a director requires that an investigation be completed under section 14, a person shall cooperate with that investigation.

[8] The individuals consulted in the course of Eastern Health's investigation were compelled by law (in accordance with s. 16(1) of the APA) to provide the statements and information that are contained in the records sought by the Complainant. A custodian is required by section 58(1)(d)(ii) to withhold information that could reasonably be expected to lead to the identification of persons compelled to provide information.

[9] The information severed is the names and other identifying information of those individuals consulted in the course of Eastern Health's investigation under the *APA*. Individual names are clearly information that could reasonably be expected to identify an individual. The "identifying" information in this case are personal pronouns that would identify a person's sex and references to the individual's relationship to the Complainant's parent. It is reasonable to assume that any investigation into the welfare and well-being of an individual will include the family members of that individual and members of the community close to them. This may be a small group and family members in particular may be easily identified with such terms as "his mother", "her father", "son", "daughter", "sister", "brother" or similar. Accordingly, any terms disclosing the sex of an individual or their relation to the subject of the investigation could reasonably be expected to lead to the identification of that person. It is clear that Eastern Health was correct in refusing to release any information that could identify those individuals consulted in its investigation of the welfare of the Complainant's parent under the *APA*. The wording of section 16 of the *APA* states cooperation with an investigation is mandatory for "a person" without limiting the cooperation that is required to a specific group of people. We therefore conclude that it encompasses a broad scope of that term: any individual involved in any way with the investigation – witness, complainant, etc.

[10] As the *APA* compels a person to provide information and the *PHIA* requires a custodian to withhold information that would identify someone so compelled, we agree with Eastern Health's decision to withhold the severed information.

Representative

[11] As noted, the Complainant is the appointed substitute decision maker for his parent and it is necessary to distinguish between his right of access as a third party and his right of access as the personal representative of the parent.

[12] The *PHIA* provides for a representative to exercise the right or power of an individual to access their personal health information. Section 7(b) provides for the exercise of such rights or powers by a substitute decision maker:

7. *A right or power of an individual under this Act or the regulations may be exercised*

...

(b) *where the individual lacks the competency to exercise the right or power or is unable to communicate, and where the collection, use or disclosure of his or her personal health information is necessary for or ancillary to a "health care decision", as defined in the Advance Health Care Directives Act, by a substitute decision maker appointed by the individual in accordance with that Act or, where a substitute decision maker has not been appointed, a substitute decision maker determined in accordance with section 10 of that Act;*

[13] The *Advance Health Care Directives Act* further defines a "health care decision" at section 2(b) as:

... a consent, refusal to consent, or withdrawal of consent of any care, treatment, service, medication, or procedure to maintain, diagnose, treat, or provide for an individual's physical or mental health or personal care and includes

- (i) *life-prolonging treatment,*
- (ii) *psychiatric treatment for a person other than a person admitted to a psychiatric unit as an involuntary patient under section 24 or detained in a psychiatric unit under subsection 81(4) or released into the community under a community treatment order under subsection 40(2) of the Mental Health Care and Treatment Act ,*
- (iii) *the administration of nutrition and hydration, and*
- (iv) *admission to treatment facilities and removal from those institutions, other than the admission, transfer, removal or discharge of a person admitted as an involuntary patient under section 24 or detained in a psychiatric unit under subsection 81(3) or released into the community under an assisted community treatment order under subsection 40(2) of the Mental Health Care and Treatment Act;*

[14] Following a review of the submissions of the parties and of the records in question, we are satisfied that Eastern Health has provided the Complainant, as the substitute decision maker for his parent, all of the information to which he is entitled in order to make health care decisions for his parent. Further, we are satisfied that the right or power of a substitute

decision maker to exercise an individual's right to access their personal health is still subject to the restrictions articulated at section 58 of the *PHIA*.

V RECOMMENDATIONS

[15] Under the authority of section 72(2) of the *PHIA* I recommend that Eastern Health continue to withhold all redacted information referencing the names or other identifying information of third parties.

[16] As set out in section 74 of the *PHIA*, the head of Eastern Health must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report (in this case the Applicant) within 15 days of receiving this Report.

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of May, 2018.



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