



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report PH-2021-001

October 19, 2021

Western Health

and

WorkplaceNL

Summary:

A Complainant filed two privacy complaints under the *Personal Health Information Act (PHIA)* with this Office against two custodians of personal health information. The privacy complaints alleged that the Complainant's personal health information had been improperly disclosed by Western Health, and improperly used by WorkplaceNL. The Commissioner found that there had been an improper disclosure of the Complainant's personal health information by the first custodian but not an improper use of that information by the second custodian. As the former custodian has, since the time of the disclosure, satisfactorily amended its policies and procedures to prevent future inappropriate disclosures, the Commissioner had no recommendations to make.

Statutes Cited:

[Personal Health Information Act](#), SNL 2008, c.P-7.01, sections 5(1), 29(1), 31(e), 31(h), 34(b), and 34(i).

[Workplace Health, Safety and Compensation Act](#), RSNL 1990, c.W-11.

I BACKGROUND

[1] This Office received two privacy complaints from a Complainant under the *Personal Health Information Act (PHIA)* against two different custodians. The first privacy complaint was against Western Health, alleging that the health authority had disclosed too much of the Complainant's medical file to WorkplaceNL. The second privacy complaint was against WorkplaceNL alleging that there was an improper use of the information contained in the Complainant's medical file which WorkplaceNL had received from Western Health.

[2] The Complainant had made a claim to WorkplaceNL in relation to a workplace injury. In connection with this claim, WorkplaceNL had made a request to Western Health for records of the Complainant's personal health information as follows:

Please send a copy of all chart notes, medical reports and diagnostics for the last five years in relation to the back. Thank you.

[3] Included on this request form was an Authorization to Release Information statement signed by the Complainant. It reads in part:

I consent to WorkplaceNL collecting and using all information it considers relevant for the purpose of determining my entitlement to benefits and managing my claim under the Workplace Health, Safety and Compensation Act (WHSC Act). This includes, but is not limited to, collecting and using information from physicians, hospitals, health care providers and employers pertaining to my examinations, treatment, medical history, injury/incident and employment.

[4] Western Health provided a number of records of personal health information to WorkplaceNL. The Complainant became aware of what personal health information had been disclosed and believed that the amount of information disclosed constituted an improper disclosure, and an improper use, of the Complainant's personal health information.

[5] 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 was conducted.

II POSITIONS OF THE CUSTODIANS

Western Health

- [6] Western Health was not able to locate any record or document detailing exactly what personal health information had been disclosed in response to WorkplaceNL's request. In the absence of those details, to the best of Western Health's knowledge, the personal health information that Western Health disclosed was the paper record of the Complainant's health information held by the Complainant's clinic. Western Health initially thought this was about nine pages of information. As Western Health was not able to confirm what was disclosed, this Office asked WorkplaceNL for the records it received from Western Health. WorkplaceNL provided 84 pages of records. The records consisted of some personal health information not related to the Complainant's back as well as several entries outside of the five-year period specified in WorkplaceNL's request.
- [7] Western Health already had a policy in place regarding disclosure of information. The relevant portion of that policy for this complaint involved what should be documented in relation to a request for information. The information that should be documented in a patient's file should include the details of the request, to whom the information was disclosed, any direction that was sought, the basis under the legislation for disclosure without consent as well as the specific information that was disclosed.
- [8] Western Health acknowledged that the records provided were not wholly responsive to the request from WorkplaceNL and that their release to WorkplaceNL was an inappropriate disclosure.
- [9] Early in our investigation, Western Health advised it was committed to reviewing its Disclosure of Information Policy and developing a step-by-step procedure to supplement this policy. This would be shared with all employees in the organization whose role involved disclosure of information. Since then, Western Health has advised this Office that the policy review has been completed and they have finalized guidelines supplementary to its existing policy to be implemented at all Western Health clinics for processing requests for disclosure of personal health information.

[10] The revised guidelines provide a clearer process for responding to requests for records of personal health information. For example, the guidelines direct staff to date stamp the request to create a record of when the request was received; to review the request to ensure there is consent from the patient (and if consent has not been received, to not proceed before contacting a manager); to search for records and verify the request is for the correct patient; to only print those records that have been requested. The guidelines specifically state to not provide information that has not been specifically requested. The guidelines also state to retain a copy of the request, the completed consent form and cover letter.

WorkplaceNL

[11] It is WorkplaceNL's position that it has the authority to collect and use personal health information under *PHIA*. Furthermore, WorkplaceNL stated that it is also governed by the *Workplace, Health, Safety and Compensation Act* ("WHSCA") which provides WorkplaceNL with extensive powers to collect, use, and disclose personal health information.

[12] WorkplaceNL submits that, under *PHIA*, it can collect information directly from a person with their consent, or do so indirectly if another Act or Act of Canada permits the disclosure. As well, WorkplaceNL can collect information to determine an individual's eligibility to participate in a health care program or to receive a benefit, product or health care service from a custodian. This also applies if WorkplaceNL is verifying the eligibility of an individual who is participating in the above.

[13] With regard to its powers under *WHSCA*, WorkplaceNL submits that its Board of Directors is empowered to establish policies and programs in relation to compensation benefits to injured workers and dependents. Further, directors or other persons, such as employees who have been tasked with conducting an inquiry, have the powers conferred on a commissioner under the *Public Inquiries Act*. These powers include the power to require a person to produce "all documents, records, electronic files, and other things that may relate in any way to the subject of the inquiry." Based on this, it is WorkplaceNL's position that it has the authority to make an inquiry or examine any record that it considers necessary for the purposes of *WHSCA* and WorkplaceNL has the authority to require the production of records or other documents which may be applicable to the inquiry.

[14] WorkplaceNL also stated the compensation scheme created by the *WHSCA* requires a worker to take steps to mitigate their injury, and such mitigation would include taking all reasonable steps to provide to WorkplaceNL full and accurate information on a matter relevant to a claim for compensation and to notify WorkplaceNL immediately of a change in circumstances that affects the worker's initial or continuing entitlement to compensation. This obligation to provide WorkplaceNL with such information strengthens WorkplaceNL's entitlement to the entirety of the personal health information it received from Western Health.

[15] At the beginning of its investigation into the Complainant's back injury, WorkplaceNL determined that there were a number of potential causes for the back pain or injury and it was for this reason that WorkplaceNL requested the chart notes. WorkplaceNL explained that, notwithstanding that a request was made for specific information, the investigator does not know at the outset what information will be relevant for their assessment and therefore it is difficult for this to be determined. While the Complainant has argued that only a portion of the information collected is relevant, WorkplaceNL argues that it cannot make that decision without reviewing what was received and it may come to a different conclusion.

[16] For example, Section 19 of the *WHSCA* grants WorkplaceNL the exclusive jurisdiction to determine whether an injury has arisen out of and in the course of employment, the existence and degree of impairment because of the injury, the degree of diminution of earning capacity because of the injury and whether a worker is entitled to compensation under the *WHSCA*. As such, WorkplaceNL has the ability and power to gather personal health information for its investigation of claim related injuries.

[17] WorkplaceNL stated that, in this case, further investigation was required to determine the cause of the Complainant's ongoing loss of earning capacity. The Complainant's prior back history was relevant to the claim and the Complainant's family doctor indicated that the Complainant was being taken off work due to another complicating factor. This means that other records would need to be reviewed in the adjudication of the work-related injury.

[18] WorkplaceNL explained that once information is collected from the various sources, if it is not already in electronic format, the paper records received are processed by WorkplaceNL.

The records are sorted, assigned to the claim file and imaged to the electronic file. Once this occurs the decision maker must review the information and take appropriate action. WorkplaceNL's imaged records are the official record and have been recognized by the courts as an official record.

[19] Finally, WorkplaceNL notes that there is a process in place for the permanent removal of records from a claim file if information has been imaged to the wrong claim file and this process can also be used for correction purposes. However, once information has been received, WorkplaceNL cannot remove information as it risks removing information potentially relevant to a claim. WorkplaceNL provides lifetime coverage for healthcare costs even if wage loss claims are closed and therefore records are required to assess eligibility for ongoing healthcare coverage.

III COMPLAINANT'S POSITION

[20] The Complainant stated that WorkplaceNL only requested information related to her back injury and any other relevant information on file. It is the Complainant's position that Western Health disclosed her entire medical file whereas the only record of personal health information that was relevant to her back injury and which should have been disclosed was a single letter contained in her file. It is the Complainant's position that the majority of the medical history that was sent to WorkplaceNL was irrelevant to her injury and to her WorkplaceNL claim.

[21] The Complainant stated that WorkplaceNL retained and used all the information that was disclosed to it by Western Health. It is the Complainant's position that the non-relevant information should have been destroyed by WorkplaceNL as soon as it realized that the file contained more personal health information than necessary.

[22] It is the Complainant's position that the fact that the information was retained by WorkplaceNL makes it evident in her opinion that it was improperly utilized in the evaluation of her claim. The Complainant believes that the medical history was used by WorkplaceNL prejudicially and to her detriment.

[23] The Complainant believes that there should be limitations on the collection and use of the information to prevent WorkplaceNL from having complete freedom to collect and use the information as it chooses.

IV DECISION

[24] “Personal health information” is defined in *PHIA* at section 5:

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;

[25] Both Western Health and WorkplaceNL are custodians of personal health information under *PHIA*, as that term is defined at section 4.

[26] Western Health’s authority for disclosing personal health information under *PHIA* is found under sections 36 (disclosure generally), 39 (disclosure for health related purposes), and 43 (disclosure required by law). Specifically, section 36 states:

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.

[27] In this case, the Complainant consented to WorkplaceNL collecting and using a broad range of personal health information. However, WorkplaceNL’s request to Western Health was relatively narrower and the request only specified “chart notes, medical reports and diagnostics for the last five years in relation to the back”.

[28] As admitted by Western Health, there was an over-disclosure of the Complainant's personal health information. Indeed, Western Health was unclear as to what had been disclosed in response to the request from WorkplaceNL. Under section 48 of *PHIA*, there is a requirement that when a custodian discloses personal health information that they keep a record of the person to whom the information was disclosed, the date and purpose of the disclosure and a description of the information disclosed. It does not appear that this was followed by Western Health. Based on this Office's review, many of the records consisted of personal health information that was outside the parameters of the request made by WorkplaceNL, which only specified records relating to the complainant's back.

[29] However, I am satisfied that Western Health has since taken steps to help ensure that there are now clear policies and guidelines in place informing employees how disclosure of personal health information should take place and to ensure compliance with section 48 of *PHIA*.

[30] WorkplaceNL's authority for collecting personal health information under *PHIA* is found at sections 29 through 31. Specifically, sections 29(1), 31(e), and 31(h):

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.

...

31. A custodian may collect personal health information from a source other than the individual who is the subject of the information where

...

(e) the custodian collects the information from a person who is permitted or required by an Act or an Act of Canada or by a treaty, agreement or arrangement made under an Act or an Act of Canada to disclose it to the custodian;

...

(h) *the information is collected for the purpose of*

- (i) *determining the individual's eligibility to participate in a health care program or to receive a benefit, product or health care service from a custodian and the information is collected in the course of processing an application made by or for the individual who is the subject of the information, or*
- (ii) *verifying the eligibility of an individual who is participating in a health care program or receiving a benefit, product or health care service from a custodian to participate in the program or to receive the benefit, product or service;*

[31] An individual can consent to the collection of personal health information directly, but WorkplaceNL can also collect personal health information if other criteria are met. WorkplaceNL therefore has authority under *PHIA* for the collection of the Complainant's personal health information.

[32] WorkplaceNL's authority for using the Complainant's personal health information is set out in *PHIA* under sections 34(b) and (i):

34. *A custodian may use personal health information in its custody or under its control for one or more of the following purposes:*

...

(b) *where an Act or an Act of Canada permits or requires a person to disclose the personal health information to the custodian, for the purpose for which the information was disclosed;*

...

(i) *for the purpose of obtaining payment or processing, monitoring, verifying or reimbursing claims for payment for the provision of health care or related goods and services;*

[33] WorkplaceNL is relying on *WHSCA* as the legislative authority for requiring a person to disclose personal health information. WorkplaceNL also argues that it can use the Complainant's personal health information for the purposes of obtaining payment or processing, monitoring, verifying or reimbursing claims for payment for the provision of health care. *WHSCA* has given WorkplaceNL broad powers of investigation and the ability to collect and use personal health information as required.

- [34] It is not within the jurisdiction of this Office to comment on the Complainant's WorkplaceNL claim. This Office can assess whether WorkplaceNL was permitted to use the Complainant's personal health information under *PHIA*.
- [35] WorkplaceNL's use of the Complainant's personal health information is permitted by *PHIA* under section 34. While the Complainant argues that WorkplaceNL used her personal health information to her detriment, how WorkplaceNL determined her claim is an issue that the Complainant must pursue through the statutory appeal process with WorkplaceNL.
- [36] Western Health should not have disclosed the personal information that it did to WorkplaceNL on the basis of the request sent to it by WorkplaceNL. However, it should be acknowledged that WorkplaceNL could have initially requested more of the Complainant's personal health information or even made multiple requests for the Complainant's personal health information if WorkplaceNL determined it was necessary for assessing the Complainant's claim. Understanding the Complainant's injury and its possible causes is the responsibility of WorkplaceNL when reviewing a claim.
- [37] Overall, there has been no improper collection or use of the Complainant's personal health information under *PHIA* by WorkplaceNL.

V RECOMMENDATIONS

- [38] I have no recommendations to make to Western Health in this case as it has already developed appropriate guidelines for employees to follow when disclosing personal health information.
- [39] While the Complainant believes that WorkplaceNL used her personal health information to her detriment, I can find no improper use under *PHIA*, therefore I have no recommendations to make to WorkplaceNL.

[40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of October 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador