



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

PH-2022-001

February 11, 2022

Eastern Health

Summary:

The Complainant filed a privacy complaint under the *Personal Health Information Act* (“PHIA”), alleging that Eastern Health had breached their privacy during registration at a blood collection clinic when the Clerk loudly asked a question related to the Complainant’s HIV status. Eastern Health conducted its own investigation and determined that a breach had not occurred due to a lack of objective evidence that the clerk had been overheard. The Commissioner found that a breach had occurred and that it was a material breach and recommended that a breach report be filed with this Office. The Commissioner also recommended that signage be posted to help remind staff to be discrete when discussing personal health information.

Statutes Cited:

[Personal Health Information Act](#), SNL 2008, c. P-7.01, section 15 and 66.

[Personal Health Information Regulations](#), NLR 38/11, section 5.

I BACKGROUND

- [1] In 2020, the Complainant attended Eastern Health's blood collection clinic at Major's Path. While checking-in at the registration desk, the clerk assisting the Complainant loudly asked a co-worker for assistance with a registration code. The code contained "HIV", as the Complainant is HIV positive. This loud exclamation was repeated four times and the Complainant believed that it could have been overheard by others – both other staff and other patients – in and around the registration desk.
- [2] The Complainant was very upset by this interaction and filed a complaint with Eastern Health through its Client Relations Office. Following its receipt of this complaint, Eastern Health advised the Complainant that it had spoken to staff about the incident and confirmed that the clerk meant no disrespect. Eastern Health also indicated that the clerk was reminded of the importance of patient privacy and reminded that they should keep their voice down. Eastern Health also confirmed that the clerk no longer works in that particular department.
- [3] The Complainant was not satisfied with this response and made a complaint to this Office under the *Personal Health Information Act* ("PHIA").
- [4] 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 PUBLIC BODY'S POSITION

- [5] Eastern Health has submitted that it does not believe that a breach occurred in this case. Eastern Health's position is based on the lack of objective evidence that the exclamations were, in fact, overheard by anyone other than the clerk's coworker. Eastern Health submitted that when the clerk asked their coworker for assistance, any disclosure of personal health information was appropriate as the coworker was then included in the Complainant's circle of care.

[6] It was also noted that the clinic has plastic barriers, social distancing, and there is typically a radio or televisions playing, all of which serve to limit the ability of others to overhear conversations at the registration desk.

[7] Eastern Health also noted that the results of its own investigation showed no malicious intent by the clerk. The volume of the clerk's voice and the importance of patient privacy was also discussed with the clerk in an effort to avoid such issues in the future.

III COMPLAINANTS POSITION

[8] The Complainant believes that their privacy was breached and that Eastern Health failed to properly safeguard their personal health information. They note that the setup of the clinic made it very likely that the clerk's words were overheard. The concern was not that the clerk sought the assistance of a coworker, but rather that the Complainant's personal health information could be overheard by members of the public. They believe that given the sensitivity of the personal health information and the location, the expectation of privacy is high.

[9] The Complainant is not satisfied with the results of Eastern Health's internal investigation as they believe that Eastern Health should have acknowledged that a breach occurred and reported it to the Office.

IV ISSUES

[10] The issues to be addressed is whether the Complainant's personal health information was improperly disclosed contrary to section 15 of PHIA and, if so, was the breach a material breach that should have been reported to this Office, pursuant to section 15(4)

V DECISION

[11] The relevant portions of section 15 of *PHIA* state:

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;*
- (b) records containing personal health information in its custody or control are protected against unauthorized copying or modification; and*
- (c) records containing personal health information in its custody or control are retained, transferred and disposed of in a secure manner.*

...

(3) Except as otherwise provided in subsections (6) and (7), a custodian that has custody or control of personal health information shall notify the individual who is the subject of the information at the first reasonable opportunity where the information is

- (a) stolen;*
- (b) lost;*
- (c) disposed of, except as permitted by this Act or the regulations; or*
- (d) disclosed to or accessed by an unauthorized person.*

(4) Where a custodian reasonably believes that there has been a material breach as defined in the regulations involving the unauthorized collection, use, or disclosure of personal health information, that custodian shall inform the commissioner of the breach.

[12] Therefore, the first assessment to be made is whether a breach occurred under section 15(1) of *PHIA*. The Complainant has alleged that Eastern Health failed to ensure reasonable safeguards were in place to protect their personal health information from unauthorized “access, use or disclosure”. The act of failing to put in place reasonable security safeguards, as required by section 15 of *PHIA*, would constitute a breach of the Act.

[13] Eastern Health’s assertion is that because there is no objective evidence that the clerk was overheard, there is no breach. This is a flawed argument. In order to be deemed a violation of section 15, it is not necessary to prove that the information has definitively been

disclosed. Rather, it must only be established that the custodian has failed to take reasonable steps to secure information against inappropriate disclosure.

[14] It is not incumbent on all persons entering a medical facility to report every instance of an overheard conversation, and to require such would not be feasible. However, the notion that it must be proven that a third party has seen or heard the personal health information in order for a breach to have occurred is incorrect. For example if a paper copy of a person's health record was found in a public place there would be no requirement to prove that someone had actually viewed the record in order to determine that a breach had occurred. The simple act of leaving the record in an unsecured place is enough to prove a breach. In this case the simple fact that the clerk loudly said "HIV" within the hearing of other staff and patients is enough to determine that a breach occurred.

[15] The clinic in question is frequented by a constant stream of patients seeking bloodwork for various reasons. Due to precautions necessitated by the COVID-19 pandemic, all available floor space is utilized to promote social distancing; meaning people are not congregating in one area, but are instead spread out across the whole waiting area, including near the registration desks. Despite the submission of Eastern Health that social distancing would decrease the chance of being overheard, it may well have the opposite effect by causing people to be waiting nearer to the desks than they would otherwise. The same is true for the plastic barriers, while they may block some sound, their presence may also require people to speak louder than they regularly would, potentially increasing the likelihood of being overheard.

[16] As such, it cannot be said that Eastern Health took all reasonable precautions to protect the Complainant's personal health information in this situation, in particular any staff checking in patients at a blood collection clinic should be sufficiently trained in the codes required to do their job, and should be cognizant of the volume and content of their speech, particularly when discussing such things as HIV status in a blood collection clinic. This need to be discreet is heightened by the precautions put in place to protect the public from COVID-19 as there are likely to be more people spread throughout the clinic.

[17] A *material breach* is defined in section 5 of the *Personal Health Information Regulations* as follows:

5. *The factors that are relevant to determining what constitutes a material breach for the purpose of subsection 15(4) of the Act include the following:*
- (a) the sensitivity of the personal health information involved;*
 - (b) the number of people whose personal health information was involved;*
 - (c) whether the custodian reasonably believes that the personal health information involved has been or will be misused; and*
 - (d) whether the cause of the breach or the pattern of breaches indicates a systemic problem.*

[18] Pursuant to section 15(4) of PHIA, the consequence of finding that a breach is a material breach is that the custodian is obliged to notify this Office of the breach.

[19] As noted in section 5(a) of the *PHIA* regulations, the sensitivity of the personal health information is an important factor in determining if a breach is material. In this case, the personal health information was extremely sensitive, particularly given the history of discrimination and stigmatization experienced by people who are HIV-positive. The sensitivity of the information if further increased given the location, a blood collection clinic, and the nature of HIV as a blood-borne virus. Due to the extremely high sensitivity of the personal health information and the real possibility that the clerk's exclamations were overheard by third parties, this situation would constitute a material breach and as such should have been the subject to a breach report submitted to this Office.

[20] For clarity, this determination is not saying that every instance of potentially-overheard personal health information would result in a material breach. The notion that people can overhear personal health information being collected and disclosed in the process of providing health services is an issue that has emerged from time to time over the years. This issue has been exacerbated by the precautions taken as a result of the COVID-19 pandemic, particularly given that staff and members of the public are wearing masks and often communicating through plexiglass or similar barriers more often than had previously been the case, leading them to have to talk more loudly and thus be overheard. Any assessment must look at the reasonableness of the policies and procedures in place.

[21] The province's health authorities have to provide health services to the population as best as they reasonably can, while also protecting privacy in a way that is commensurate with the sensitivity of the information. While Eastern Health has policies and procedures in place to protect against inappropriate disclosure of personal health information, there may be circumstances where the expectation of privacy is diminished. The same is true for people receiving health care services in a hospital ward, waiting in a waiting room at a physician's clinic, being dispensed drugs at a pharmacy, or even simply being present in a clinic of another health care provider. The standard to secure personal health information, as described in section 15, is a contextual one where efforts must be made that are reasonable in the circumstances. Loud, oral communication of sensitive personal health information where greater discretion could have been applied does not meet that standard.

VI RECOMMENDATIONS

[22] Pursuant to section 72(2) of *PHIA*, this Office recommends the Custodian do the following:

- a. File a breach report with this Office regarding the incident, pursuant to section 15(4) of *PHIA*, and
- b. Ensure proper signage is in place to remind both staff and the public to be mindful of the potential of being overheard.

[23] As set out in section 74(1) of the *PHIA*, the Custodian must give written notice of his or her decision with respect to these recommendations to the Commissioner within 15 days of receiving this Report.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of February 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador