

2001-170

CONSIDERING EVERY AMBIT OF SECTION 22(2)(a), DISCLOSURE TO ANOTHER HEALTH PROFESSIONAL

PHIA -- Privacy (disclosure) – Specialist-physician

s. 20(1)(2), 21(1)(b), 22(2)(a)

***Introduction:** Under The Personal Health Information Act (PHIA), “disclosure” refers to revealing personal health information to persons or organizations outside of the individual trustee or trustee organization that collects or maintains the personal health information. A trustee can disclose personal health information only if the disclosure is to the individual the personal health information is about or to the individual’s representative; if the individual has consented to disclosure; or if the disclosure is otherwise authorized under PHIA.*

The case summarized below highlights the unique nature of section 22(2)(a), one of approximately 20 instances under the headnote “Disclosure without individual’s consent”, where PHIA authorizes a trustee to disclose personal health information without the individual’s consent. Section 22(2)(a) is unlike any other provision of section 22(2). While it allows a trustee to disclose an individual’s personal health information, without consent, to a person who is providing or has provided health care to the individual to the extent necessary to provide health care to the individual, this is subject to the very important proviso “unless the individual has instructed the trustee not to make the disclosure”. There is no similar “override” in any of the other authorizations for disclosure without consent under PHIA.

In the case summarized below, the individual provided written instructions to his specialist-physician, proscribing release of his personal health information without his written consent, including “conversations with other health care professionals, and ALL other forms of communication...” [his emphasis]. When the physician/patient relationship happened to deteriorate and the specialist-physician felt it necessary to refer the individual back to the referring physician (an action about which the specialist-physician consulted with the relevant professional regulatory body). He provided a summary of treatment to the referring physician.

As outlined in the case below, the specialist-physician had reasons, based on health care practice and what seemed to be in the interests of the patient, for sharing the personal health information with the referring physician. Nevertheless, based on the individual’s explicit wishes and section 22(2)(a) of PHIA, the disclosure was not in compliance with the legislation.

We know that, routinely, trustees will disclose limited personal health information to other health care providers for the purpose of facilitating health care without the consent of the individual the personal health information is about. Trustees must be aware, however, that where an individual has provided instruction to not disclose, section 22(2)(a) cannot authorize such disclosure. Nevertheless, in that event, it is still possible that another authorization to disclose without consent under section 22(2) may apply to the same information, where the individual does not have similar control.

An individual complained to our office under PHIA about an alleged breach of privacy by his former specialist-physician, a trustee under the Act. The individual indicated he believed that the specialist-physician had breached his privacy by disclosing his personal health information without his consent.

The individual advised our office that he had written to the specialist-physician, indicating his wishes regarding the specialist-physician's communication with others about his personal health information while in the specialist-physician's care and if that care was terminated. The individual informed us that he had instructed the specialist-physician not to release his personal health information without his prior written consent.

Our office reviewed the individual's letter to the specialist-physician which stated that, under no circumstances, should there be release of any information about the individual by the specialist-physician to anyone, including any other health care professionals, unless the individual provided prior written consent for each release.

The individual advised our office that, a month later, the specialist-physician disclosed his personal health information in a letter to his family physician, who had referred the individual to the specialist-physician for treatment.

We reviewed the specialist-physician's letter in which the individual's personal health information was disclosed to the family physician. The letter noted, at the outset, that the specialist-physician felt it was necessary to return the individual to the family physician's care because there had been some complications regarding his treatment.

We note that the letter was approximately one-and-a-half pages in length and contained personal health information of the individual relating to the specialist-physician's assessment, observations during treatment and medications that were tried.

Further to the individual's complaint to our office, enquiries were made with the specialist-physician. He advised our office that he had received a referral from the family physician and that he had provided treatment to the individual for some time before the therapeutic relationship deteriorated. The specialist-physician advised us that, after consulting with the relevant professional regulatory body about discontinuing treatment, it was felt that termination of the doctor/patient relationship was necessary and the individual would be referred back to his family physician.

The specialist-physician advised our office that it is usual practice to provide a referring physician with a summary of the treatment provided so that appropriate treatment and follow-up of the patient can be made with subsequent caregivers. We were informed by the specialist-physician that to do otherwise could jeopardize the health of the patient. In this circumstance, for example, he had prescribed medications for the individual and he believed that it was important to convey to the family physician that the medications had not been successful.

We discussed with the specialist-physician the written instructions provided to him by the individual regarding the release of his personal health information. The specialist-physician advised our office that when he received the instructions, he understood them to mean that the individual did not want him to communicate with the insurance company and respond to any other enquiries relating to the individual's health care without the

individual's consent. The specialist-physician stated that it did not occur to him that the restriction on the release of information extended to communicating with the individual's family physician relating to his health care.

The specialist-physician informed our office that there was no intention to breach the individual's privacy and he regretted this misunderstanding. He advised us that his intention in sending a letter to the family physician was to ensure continuity of health care for the individual.

In considering this disclosure in relation to the provisions of PHIA, we noted that every disclosure must be authorized under the Act and be limited to the minimum amount of information necessary, as follows:

General duty of trustees re use and disclosure

20(1) *A trustee shall not use or disclose personal health information except as authorized under this Division.*

Limit on amount of information used or disclosed

20(2) *Every use and disclosure by a trustee of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.*

PHIA permits trustees to disclose personal health information with the consent of the individual the information is about, as provided in section 22(1)(b) of PHIA, which states:

Individual's consent to disclosure

22(1) *Except as permitted by subsection (2), a trustee may disclose personal health information only if*

(b) the individual the information is about has consented to the disclosure.

PHIA also permits trustees to disclose personal health information without the consent of the individual in certain specified circumstances. One such circumstance is where the disclosure is to a person who is providing or has provided health care to the individual, to the extent necessary to provide health care, unless the individual instructs the trustee not to make the disclosure. Section 22(2)(a) of PHIA states:

Disclosure without individual's consent

22(2) *A trustee may disclose personal health information without the consent of the individual the information is about if the disclosure is*

(a) to a person who is providing or has provided health care to the individual, to the extent necessary to provide health care to the individual, unless the individual has instructed the trustee not to make the disclosure;

In this case, the disclosure was made to the family physician, another health care provider. The specialist-physician believed that the disclosure was necessary to facilitate the individual's return to the care of the family physician and to ensure that appropriate treatment and follow-up could be made with subsequent health care providers. He advised us that it is his usual practice to provide a written report in this circumstance and not doing so could jeopardize the patient's health care.

Nevertheless, in this particular case the individual had provided the specialist-physician with instructions not to release the individual's personal health information without his consent. This being the case, section 22(2)(a) did not apply to this disclosure.

The legislation is very particular about the disclosure of personal health information. As noted in this report, obtaining consent from the individual is one means to authorize a disclosure of personal health information under PHIA. Alternatively, the Act sets out specific circumstances where disclosures may be authorized without consent. Based on our review of this matter in relation to the Act and our discussions with the specialist-physician, it was determined that this disclosure of personal health information was not authorized under section 22(2) of PHIA.

Accordingly, we were of the opinion that the disclosure by the specialist-physician was not in compliance with PHIA. We would note, however, that there was no indication from our review that the disclosure was made in bad faith.