

Manitoba Ombudsman

REPORT UNDER

THE PERSONAL HEALTH INFORMATION ACT

CASE 2014-0012 (web version)

MISERICORDIA HEALTH CENTRE AND MISERICORDIA HEALTH CENTRE FOUNDATION

PRIVACY COMPLAINT: DISCLOSURE

**PROVISIONS CONSIDERED: CLAUSE 22(2)(f) and SUBSECTIONS 23.2(1)(2) OF THE
PERSONAL HEALTH INFORMATION ACT AND
SUBSECTION 8.1(4) OF THE *PERSONAL HEALTH INFORMATION REGULATION***

REPORT ISSUED ON FEBRUARY 14, 2014

SUMMARY: The complainant provided the ombudsman with a record demonstrating that the Misericordia Health Centre (Misericordia, the hospital or the trustee) had disclosed some of his personal health information to the Misericordia Health Centre Foundation (the foundation). We found that the trustee had authority under *The Personal Health Information Act* to have disclosed the complainant's name and address to the foundation. However, the trustee did not fully comply with the requirement to give notice about the disclosure of personal health information to its charitable foundation for fundraising purposes. Additionally, the foundation did not comply with the requirement to notify individuals of the right to refuse further solicitation. As a result of this complaint, changes were made to fulfill these requirements.

BACKGROUND TO THE COMPLAINT

On December 2, 2013, the complainant received a letter from the Misericordia Health Centre Foundation in which he was invited to support the foundation. That letter included the sentence, in reference to the Misericordia Health Centre, "You may have come here for any number of reasons: eye surgery, an X-ray, a visit to the physiotherapist, a consultation with someone in the Sleep Disorder Centre."

On December 10, 2013, the complainant sent a letter to the chief executive officer of the Misericordia Health Centre alleging a "serious ethical breach of patient confidentiality," as he was of the opinion that such disclosure of his personal health information was unauthorized.

Misericordia responded to the complainant on December 23, 2013 advising that only his name and address had been disclosed to the foundation under subsection 23.2(1) of PHIA, a provision cited in its letter. The trustee's letter provided information about the "bright green signs" posted at the hospital in which the issue of "who else can see your information" is addressed. Additionally, the letter cited subsection 23.2(2), a provision that speaks to the notification requirements when disclosing personal health information for fundraising purposes. Finally, the trustee's letter advised the complainant that it had asked the foundation to remove the complainant's name and mailing address from its list(s).

THE COMPLAINT

On January 16, 2014 we received a complaint under *The Personal Health Information Act* (PHIA or the act) respecting the disclosure of the complainant's personal health information by Misericordia to the foundation.

The complainant advised that the trustee had disclosed to the foundation his name and address and had indicated that he had attended the hospital for a medically-related issue. He believed that authority did not exist under the act for such disclosure to have been made. Additionally, the complainant indicated that he had not seen any "bright green signs posted through the Facility" and that, even if he had seen them, it is unlikely he would have read them, expecting a medical facility to protect his privacy. He advised that whenever he goes to a hospital, he goes straight to his appointment and then straight home.

Finally, the complainant noted that this type of practice, a "negative option notification" or "reverse onus notification" runs counter to the process of "informed consent" and, in his words, "the whole medical system is based upon informed consent."

ANALYSIS OF ISSUES AND FINDINGS

PHIA sets out the circumstances under which trustees may disclose personal information.

1. Did the trustee disclose personal health information in contravention of PHIA?

a) Was personal health information disclosed?

PHIA pertains to all records of personal health information maintained by a trustee and defines personal health information as recorded information about an identifiable individual that relates to the individual's health, or health care history and the provision of health care to the individual.

In this case, the complainant took exception to the trustee's disclosure of his name and address and information that, in his opinion, was indicative of the fact that he had recently attended the hospital for a medically-related issue.

During the course of our investigation, we asked the trustee to clarify the specific information disclosed to the foundation, in respect of the following statements that appeared in the foundation's December 2, 2013 letter to the complainant:

You may have come here for any number of reasons: eye surgery, an X-ray, a visit to the physiotherapist, a consultation with someone in the Sleep Disorder Centre... Whatever your reason for your visit to Misericordia Health Centre, we hope your experience with our staff and in our facility was a positive one.

On January 27, 2014 the trustee wrote to our office, advising that it had only disclosed the name and the address of the complainant to the foundation. At no time did the trustee disclose the reason for the complainant's visit to Misericordia. The trustee indicated that, to avoid any confusion, the foundation would remove the first statement (in italics above) from any future solicitation letters.

We find that the name and address, combined with the inference that the complainant had visited Misericordia for a medically-related purpose, falls within the definition of personal health information.

Based on our review of the letters received by the complainant - one by the foundation dated December 2, 2013 letter and the other by Misericordia dated December 23, 2013 - we are satisfied that the complainant's personal health information was disclosed by the trustee to the foundation.

b) Was the disclosure of personal health information authorized under PHIA?

Subsection 22(2) of PHIA permits disclosure of personal health information, *without consent*, for certain purposes and, in some cases, if certain conditions are met. Clause 22(2)(f) is pertinent to this matter:

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

- (f) in accordance with subsection 22(2.2) (disclosure to another government), section 23 (disclosure to patient's family), section 23.1 (disclosure to religious organization), **section 23.2 (disclosure for fundraising)**, section 24 or 24.1 (disclosure for health research) or section 25 (disclosure to an information manager); [emphasis added]

Misericordia's December 23, 2013 letter to the complainant advised that it had disclosed only his name and address to its affiliated Misericordia Health Centre Foundation and that such disclosure was in accordance with section 23.2 of PHIA. Specifically, the letter cited subsections 23.2(1) and 23.2(2) of PHIA:

Disclosure for fundraising

23.2(1) If a trustee is

- (a) a hospital or personal care home; or
- (b) a health care facility or health services agency designated in the regulations for the purpose of this section;

it may disclose to a charitable fundraising foundation with which it is affiliated the name and mailing address of an individual who has been a patient of the hospital, who is or has

been a resident of the personal care home, or who is receiving or has received services from the facility or agency.

Conditions

23.2(2) The trustee may make a disclosure under subsection (1) only if

- (a) the trustee has notified the individual in writing that the trustee might disclose personal health information about the individual to a charitable fundraising foundation, or has posted a notice to that effect where it is likely to come to the individual's attention;
- (b) the notice is in a form that the individual can reasonably be expected to understand;
- (c) the individual has been given a reasonable opportunity to object to the disclosure and has not done so; and
- (d) the trustee and the foundation comply with any additional requirements specified in the regulations.

As the trustee is a hospital and had disclosed only the name and mailing address of the complainant, a patient of the hospital, to an affiliated charitable fundraising foundation, we find that authority existed under clause 23.2(1)(a) of PHIA to have made the disclosure without the complainant's consent.

In support of meeting the condition under clause 23.2(2)(a), the trustee advised that it had posted "bright green signs" that would likely come to the attention of those attending Misericordia and that, included on the signs, was the statement, "Unless you tell us not to, we can share your name and address with a charitable fundraising foundation associated with our facility."

We wrote to the trustee on January 17, 2014 asking that it advise our office as to the location of the "bright green signs". For example, were they located at the information desk(s), or at patient registration desks where they would be most likely to come to the attention of individuals? We also asked whether any other written notifications were being provided to patients in advance of appointments and/or while attending the hospital.

We ascertained that the "bright green signs" are actually paper posters (or notices) that would appear to grab the attention. They include text in mainly black-colored but some white-colored font. The background color of the posters is half white and half green. The main title of the poster is in white font on a green background and there are two main sections to the poster. The text to each of these section headers is in white font. One of the section headers has an orange-colored background, the other, a blue-colored background. The section with the blue background is titled, "Who Else Can See Your Information", and it is within this section of the poster that individuals are advised that the trustee can share their name and address with an affiliated charitable fundraising foundation, unless instructed otherwise.

Misericordia wrote to us on January 27, 2014, listing the locations of the posters, and advising that it had conducted a recent audit to determine whether the posters were still in their original locations. This audit revealed that a few of the posters were no longer present and had to be replaced. Additionally, the trustee advised that *Health Information Access and Privacy*

brochures, in which notice about disclosure for fundraising purposes appears on page 5, are available on the table in the registration waiting area.

Our office toured Misericordia to determine whether, in our opinion, the posters were positioned such that they would likely come to an individual's attention. We noted that, while the posters appeared in various areas of the hospital, they were not located in a couple of areas, such as at the information desk and within the main waiting room area of urgent care, where individuals would likely be attending. We asked that the trustee place posters in those areas as well. The trustee has since affixed an additional four posters in these areas.

In our opinion, the notice is now affixed in all areas/locations throughout the hospital where it is likely to come to an individual's attention. Additionally, the notice is in a form that an individual would reasonably be expected to understand (clauses 23.2(2)(a)(b) of PHIA).

The trustee's letter indicated that there are no other notifications provided to patients other than the information contained in the posters and the brochures available in the hospital. In other words, there are presently no additional procedures in place to alert individuals, either in advance of their appointments or at the time when they attend the hospital, to the fact that their names and addresses may be disclosed for fundraising purposes.

In this regard, we followed up with the Winnipeg Regional Health Authority's (WRHA's) chief privacy officer. The WRHA's chief privacy officer is responsible for providing direction and support to privacy officers within the Winnipeg Health Region, in which Misericordia is located. The chief privacy officer advised our office that pamphlets are presently being created, with the understanding that they will provide information about how personal health information may be shared. They will eventually be placed at information and registration desks throughout the region and may also be inserted with other communications mailed to individuals about upcoming appointments/surgeries.

In support of meeting the condition under clause 23.2(2)(c), the trustee advised that it does not disclose an individual's name and address until at least three months have elapsed since that individual's visit. It felt that this period of time was reasonable to allow for any objection to the disclosure. Assuming that the notice comes to the attention of an individual at the time of his/her visit, we agree that this is a sufficient period of time for an individual to object to the disclosure of his/her name and address.

Clause 23.2(2)(d) of the PHIA advises that the trustee and the foundation are required to comply with any additional requirements specified in the regulations. In this regard, we referred to *The Personal Health Information Regulation* (the regulation), specifically subsection 8.1(4). This provision reads as follows:

- 8.1(4)** A charitable fundraising foundation must
- (a) clearly inform an individual to whom it sends a solicitation under section 23.2 of the Act that the individual may refuse any further solicitation; and
 - (b) provide a telephone number that the individual may call to communicate a refusal.

We reviewed the two-page letter that the foundation had sent to the complainant on December 2, 2013 and were unable to find any information respecting an individual's right to refuse further solicitation. We advised the trustee as such in our letter dated January 17, 2014 and were subsequently informed that this omission was an "unfortunate oversight". The trustee has since advised the complainant and our office that the foundation will remove the complainant's name and address from its lists(s). Additionally, the trustee has since provided our office with a copy of the "sample" solicitation that will be used going forward. We find that the revised solicitation letter is compliant with clauses 8.1(4)(a)(b) of the regulation, in that it now advises individuals that they can choose not to receive further communications from the foundation.

SUMMARY OF FINDINGS

1. We found that the information in question was personal health information as defined under PHIA.
2. We found that the disclosure of the complainant's personal health information by Misericordia to the foundation was authorized under subsection 23.2(1) of PHIA.
3. We found that, at the commencement of our investigation, the trustee was not fully compliant with subsection 23.2(2) of PHIA. We are now satisfied that the trustee and the foundation are fully compliant with the requirements as listed under subsection 23.2(2) of PHIA and as noted under clauses 8.1(4)(a)(b) of the regulation.
4. To the extent that, at the commencement of our investigation, Misericordia was not fully compliant with some of the conditions as noted under subsection 23.2(2) of PHIA, we found that the trustee was not compliant with clause 22(2)(f) of PHIA. We are now satisfied that any future disclosure of names and address by the trustee to the foundation for the purpose of fundraising will be compliant with clause 22(2)(f) of PHIA.

CONCLUSION

Based on the findings of the ombudsman, the complaint is partly supported. We appreciate the assistance and cooperation by the trustee to ensure compliance with the act and regulation.

February 14, 2014
Manitoba Ombudsman