

Manitoba mbudsman

REPORT UNDER

THE PERSONAL HEALTH INFORMATION ACT

CASES 2014-0050, 2014-0052, 2014-0254

MANITOBA PUBLIC INSURANCE

PRIVACY COMPLAINTS: COLLECTION, USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION

PROVISIONS CONSIDERED: 13(1), 13(2), 20(2), 22(2)(o)

REPORT ISSUED ON DECEMBER 2, 2014

SUMMARY: Manitoba Ombudsman received two complaints under *The Personal Health Information Act* (PHIA or the act) relating to an allegation of unauthorized collection and use of personal health information by Manitoba Public Insurance (MPI). The collection had occurred several years ago in relation to an accident injury claim. The complainant had been assured, after bringing the matter to MPI's notice, that personal health information collected without authorization had been removed from her MPI claim file, the year following the accident. However, in 2013 the complainant became aware that this information had been disclosed to another public body and copies were still retained by that other public body. Our office investigated and found that there had been an unauthorized collection of personal health information and thus it followed that any subsequent use and disclosure of the personal health information collected by MPI was also unauthorized. Complaints of unauthorized collection, use and disclosure of personal health information were supported.

BACKGROUND

Several years ago the complainant was involved in a motor vehicle accident which resulted in a claim to Manitoba Public Insurance (MPI) for Personal Injury Protection Plan (PIPP) benefits.

The complainant provided MPI with signed 'Authorization(s) for Release of Health Care Information' authorizing MPI to collect personal health information regarding the motor vehicle accident injuries sustained by the complainant from the complainant's physician(s).

Early in the year following the accident, the complainant obtained a copy of her PIPP claim file and became aware that the file contained personal health information unrelated to the motor vehicle accident. This led her to conclude that MPI had collected personal health information beyond that which had been authorized. At that time, by means of a letter, the complainant brought this matter to the attention of her MPI claim file manager. (The claim manager's supervisor was also notified by letter.) Subsequently, the complainant brought the matter to the notice of MPI's vice-president corporate legal and general counsel by another letter approximately one month later.

Personal health information collected without authorization was severed from the complainant's claim file approximately one month after the submission of the letter to the vice-president corporate legal and general counsel and MPI acknowledged the collection of personal health information beyond that authorized by the complainant in a letter to the complainant at that time. One year later, the complainant requested and received written confirmation that the personal health information collected without authorization had been severed from any copies of the complainant's claim file that had been provided to other parties (such as MPI's Internal Review Office or IRO which in turn provides claimant information relating to appeals of its decisions to the Automobile Injury Compensation Appeal Commission or AICAC).

Pursuant to an appeal before AICAC (or the commission) in 2013, the complainant obtained a copy of the AICAC index which contained material relating to her previous appeals before the commission. These previous appeals had been withdrawn or settled by mediation so no decision had been issued in these matters. On review, the complainant became aware that the personal health information collected without authorization several years earlier was contained in the copy of the AICAC index she obtained from the Claimant Advisor Office (CAO). Part of Manitoba Tourism, Culture, Heritage, Sport and Consumer Protection, the CAO is an advocacy office completely independent from MPIC and AICAC that has been created to assist appellants in appealing MPIC Internal Review Office decisions to AICAC.

COMPLAINT

Subsection 39(2) of *The Personal Health Information Act* (PHIA or the act) provides an individual with the right to make a complaint to ombudsman if they feel their personal health information has been collected, use or disclosed contrary to the act. On January 29, 2014 our office was advised of two complaints under PHIA alleging the unauthorized collection and use of the complainant's personal health information by MPI.

During the investigation of these complaints, our office determined that the complainant's personal health information, which was alleged to have been collected and used without authorization from the complainant, was disclosed to AICAC by MPI. Subsequently, a complaint of unauthorized disclosure of personal health information was also made against MPI by the complainant on May 27, 2014.

INVESTIGATION

On becoming aware in mid-2013 that personal health information collected by MPI without authorization several years prior had found its way into her AICAC appeal index/indices, the complainant contacted MPI and asked for an explanation. MPI conducted an investigation and made a report to the complainant in late 2013. Further to our investigation, MPI provided our office with a copy of this report as well as detailed representations and copies of relevant documents. Our office also reviewed and considered information provided by the complainant. With regard to the collection, use and disclosure of the complainant's personal health information by MPI, our office has distilled the information received from all sources into the following summary of events:

- Copies of five signed 'Authorization(s) for Release of Health Care Information' which the complainant had provided to MPI over an approximately four-month period following the claim initiation were provided for our review. We noted that three limited the release of information to "personal health information regarding the injuries I sustained in the accident, from the date of the accident and including up to two years of medical history prior to the date of the accident as that history relates to the injuries I sustained." Two limited the release of information "personal health information regarding the injuries I sustained in the accident, from the date of the accident as that history relates to the medical appointment(s) I had with you."
- Two days following the date of the most recent authorization the complainant's MPI claim manager sent a letter to the complainant's primary care physician asking for "chart notes 2 years prior to the motor vehicle accident of [date removed] to present. We also ask that you confirm the medications that you have prescribed, the reasons why they were prescribed, and if directly related to the above noted motor vehicle accident. A signed 'Authorization for Release of Healthcare Information' allowing for the release of the requested information is enclosed."
- Early in the year following the accident, the complainant requested a copy of her MPI claim file which she received within a matter of days. The complainant related that following a review of the contents, she immediately contacted her MPI case manager (and the case

manager's supervisor) by registered letters dated [three days after receipt of the claim copy]. In these letters she expressed her belief that MPI had "violated both PHIA and FIPPA in the collection of [her] personal health information."

- That same month, the complainant launched an appeal with AICAC of an injury claim decision issued by the Internal Review Office (IRO) of MPI. Pursuant to standard procedure when an appeal of an MPI decision is made to AICAC, the original and one photocopy of the claimant's MPI IRO file were provided to AICAC [mere days after the date of the complainant's registered letters]. Included with this material were copies of the complainant's personal health information (chart notes) which had been collected from the complainant's physician as per the letter sent to the physician by MPI late the prior year. [It has been determined that the file forwarded to AICAC at this time included personal health information that was collected in excess of the authorization provided by the complainant.]
- Approximately two weeks later, the complainant met with an MPI claims officer and again advised that she believed there had been a privacy breach of PHIA/FIPPA with regard to the 'over gathering' of information and that she would be taking up these concerns with MPI's general counsel. Days after this meeting, the complainant contacted MPI's general counsel with her concerns by letter.
- Approximately two weeks later again, AICAC completed preparation of an index file using the photocopy of the complainant's file which had been provided to AICAC by MPI along with the original file. This index contained a 'Tab 6' which included personal health information (chart notes) collected from the complainant's physician in excess of the authorization provided by the complainant.
- A single day after the index was prepared, an employee of MPI's legal department made a request to AICAC for a return of the complainant's original file so that MPI could respond to a 'FIPPA request'.
- Several days thereafter, a meeting took place between the complainant and MPI's general counsel during which the complainant's concerns regarding the over collection of her personal health information were discussed.
- The complainant met with a new MPI claim manager two days after meeting with MPI's general counsel and the complainant was instructed to 'black out' the information in the chart notes (contained in her claim file) which the complainant did not believe to be relevant to her motor vehicle accident injuries. The complainant did so. The original version of the chart notes received from the complainant's physician in the complainant's MPI file(s) was replaced with the severed version.

- Several days later, the file which had been returned to MPI by AICAC, was returned to AICAC after the personal health information collected without authorization had been severed by an MPI employee. Unbeknownst to the MPI employee, AICAC had already completed its index (before the file was returned to MPI). This index contained the personal health information collected about the complainant without authorization. As AICAC did not know the nature of the 'FIPPA matter' which prompted MPI to request the return of its file and was not aware of the severing that took place, it did not make changes to its index.
- The complainant made a number of requests to her claim manager(s) for confirmation that the personal health information collected without authorization had also been severed from any copies of information from the complainant's claim file that had been provided by MPI Claims Administration to other parties. Just over one year after the events described above, the complainant received written confirmation as she had been requesting as follows:

On [date removed], I confirmed with [your previous case manager] that any copies of original chart notes previously released to any other party (i.e. the Internal Review Office), were obtained and were replaced with the amended version.

The assurance made to the complainant specifically mentioned MPI's Internal Review Office. The assurance made to the complainant did not specifically mention AICAC but the complainant assumed AICAC had been contacted.

- In 2013, the complainant commenced another appeal with AICAC. As part of its own procedures, AICAC provided copies of the index related to the complainant's appeal to the CAO. This record was provided to the complainant by the CAO in 2013. On review of this material the complainant noticed that the unauthorized personal health information which had been severed from her MPI claim file the year after the accident was present in the copy of the AICAC index the complainant had received from the CAO.

ANALYSIS OF ISSUES AND FINDINGS

One of the stated purposes of PHIA is to establish rules governing the collection, use, disclosure, retention and destruction of personal health information in a manner that recognizes the right of individuals to privacy of their personal health information.

Under PHIA, personal health information means recorded information about an identifiable individual that relates, among other things, to health care history. Our office notes that the complainant's chart notes, which were provided to MPI by the complainant's physician, were personal health information as defined by PHIA. As such MPI was required to collect, use and disclose this information only in accordance with the requirements set out in Part 3 of PHIA.

Was there an unauthorized collection of the complainant's personal health information by MPI?

Our office notes that subsection 69(2) of *The Manitoba Public Insurance Corporation Act* (MPIC Act) requires claimants for PIPP benefits to provide information as follows:

Claimant must provide information

69.2 *A claimant must provide any information, and any authorization necessary to obtain information, reasonably required by the corporation for the purpose of handling the claim.*

In accordance with this requirement, the complainant completed 'Authorization(s) for Release of Health Care Information' which authorized her physicians to provide MPI with personal health information related to the accident injuries sustained by the complainant. Authorizations provided by the complainant (including the one forwarded to her physician late in the year in which the accident occurred) were limited to personal health information collected by her physicians from the date of the accident and up to two years prior to the date of the accident as that history related to the injuries sustained by the complainant.

Section 13 of PHIA sets out restrictions on the collection of personal health information as follows:

Restrictions on collection

13(1) *A trustee shall not collect personal health information about an individual unless*
(a) the information is collected for a lawful purpose connected with a function or activity of the trustee; and
(b) the collection of the information is necessary for that purpose.

Limit on amount of information collected

13(2) *A trustee shall collect only as much personal health information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.*

Our offices notes that clause 13(1)(b) of PHIA states that the collection of personal health information must be necessary to the lawful purpose for which it is collected under 13(1)(a) (in this case, the administration of PIPP benefits) and subsection 13(2) limits collection to only that information which is reasonably necessary to accomplish the purpose. However, our office noted that the letter from the complainant's claim manager to the complainant's physician on [date removed] requested that the complainant's physician provide chart notes for two years prior to the complainant's motor vehicle accident without limitation or qualification. The letter also requested the complainant's physician to "confirm the medications that you have prescribed, the

reasons why they were prescribed, and if directly related to the above noted motor vehicle accident.” The claim manager’s request did not accurately reflect the limitation on the collection of personal health information – “as that history related to the injuries sustained” – which appeared on the complainant’s authorization. This limitation was not mentioned in the claim manager’s letter.

Our office concluded that to be in compliance with section 13 of PHIA, the collection of personal health information by MPI should have been limited to information which was connected to the lawful purpose (handling her injury claim) and that which was necessary for the purpose (health history related to the injuries sustained by the complainant). This would limit the collection of the complainant’s personal health information to that information which related to the accident injuries she had sustained in accordance with the authorization form. Our office notes that MPI’s general counsel acknowledged the discrepancy between the complainant’s authorization for the collection of personal health information and the collection undertaken by the complainant’s claim manager. In a letter to the complainant [described earlier in this report] MPI’s general counsel stated:

...I believe that your concern is well founded. The correspondence sent to your care gives does not adequately reflect restrictions on the release of pre-accident medical information set out in the authorizations.

Based on our review of the legislation and the representations and documents provided, our office has found that the collection of the complainant’s personal health information was in excess of the authorization(s) requested by MPI and provided by the complainant and in excess of that which was necessary to accomplish the purpose for which the information was collected and, therefore, not authorized under Section 13 of PHIA.

Was there an unauthorized use and disclosure of the complainant’s personal health information by MPI?

Section 20 of PHIA sets out the general duties of personal health information trustees with regard to the use and disclosure of personal health information. Subsection 2 is of relevance in this matter:

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.*

Our office determined the complainant’s accident injury claim file contained personal health information which was collected without authorization and in excess of that required to

accomplish the purpose for which it was collected. In finding that there was an unauthorized collection of the complainant's personal health information it logically follows that any subsequent use or disclosure of that extraneous information must be found to be unauthorized.

With regard to the disclosure of the complainant's personal health information to AICAC, MPI has made explanatory representations. Information provided to our office indicates that MPI forwarded the complainant's claim file to AICAC as requested by AICAC on [date removed]. This was subsequent to the complainant's advice to MPI that she believed PHIA had been contravened when her personal health information was collected. MPI did not provide evidence to challenge this version of events. However, MPI has submitted that the complainant did not clearly articulate her specific concerns with regard to the collection of her personal health information (chart notes) in her registered letters to MPI claims administration (and did not do so until she contacted MPI's general counsel by letter approximately one month later – sometime after the disclosure to AICAC had been made). MPI has also submitted that it would have been unlikely that MPI's IRO would have been aware of the complainant's registered letters to her claims officer when it provided a copy of the claim file to AICAC only a few days later.

Our office acknowledges that MPI may not have been able to prevent the disclosure of the over-collected personal health information to AICAC as, at the time the information had been sent, it had not been recognized by the IRO that it was extraneous. However, MPI has also submitted that even if it were aware that the complainant's claim file contained personal health information collected without authorization, it would still have been required to forward the file to AICAC under section 181 of the MPIC Act. MPI has represented:

Furthermore, even if the IRO had been aware of the existence and contents of the [date removed] letters prior to forwarding the claim file to AICAC, it would still have been bound to comply with Section 181 of the MPIC Act.

Section 181 of the MPIC Act reads:

Corporation to provide information

181 *The corporation shall without delay forward to the commission any record or other information that the commission requests in respect of an appeal filed under this Part.*

Our office notes that clause 22(2)(o) of PHIA authorizes the disclosure of personal health information without an individual's consent where required to comply with another enactment:

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*

(o) authorized or required by an enactment of Manitoba or Canada.

Our office recognizes that documents properly acquired and used to make a decision regarding an accident injury claim by MPI's IRO would appropriately be provided and, in fact, must be provided to AICAC under the MPIC Act. However, we also note that MPI provided our office with information concerning its unsuccessful efforts to retrieve the complainant's over-collected personal health information from AICAC. MPI's actions in requesting the return of the claim file from AICAC and sending it back with a severed version of the health information at issue are not consistent with its position. Certainly there may be situations where AICAC may require information that was over-collected to be provided (for example, if a decision where this information was determinative is under review) and MPI would defer to AICAC in making this determination. This did not seem to be the case here. We note the severed version of the case notes was integrated into later appeal indexes without issue.

Our office has concluded that the use and disclosure of the complainant's personal health information was in excess of that which was necessary to accomplish the purpose for which the information was used and disclosed and, therefore, not in compliance with subsection 20(2) of PHIA.

OTHER MATTERS

MPI has acknowledged that there was a discrepancy between the parameters of the complainant's signed 'Authorization(s) for Release of Health Care Information' and the statements made in the MPI claim manager's letter of [date removed] to the complainant's physician. In making this acknowledgement, MPI's general counsel made the following commitment to the complainant:

I have directed that staff in our Bodily Injury Claim Centres be reminded that the medical authorization release is the governing document when it comes to obtaining medical information. All correspondence must reflect the terms and conditions contained in the release document.

During the course of this investigation, our office asked MPI if the changes committed to in MPI general counsel's letter had been made to PIPP procedures. MPI provided our office with a copy of the provisions concerning 'FIPPA/PHIA Compliant Authorization Forms' in the 'PIPP Procedures Manual' which were updated concurrent with general counsel's letter. The relevant passage reads:

When requesting that the claimant sign the Authorization for Release of Health Care Information please ensure the letter confirms that the Authorization is only for medical information for 2 years prior to the accident as it relates to the injuries they sustained. The same information is to be included if the Authorization is sent to a health care provider

requesting that the claimant sign it. If requested in person, please document the file noting that this has been explained to the claimant.

MPI explained:

The provisions were amended to specifically address the issue of concurrence between the terms of the signed authorization and the wording of the cover letter requesting records from a caregiver.

As part of its 2013 investigation, MPI reviewed the complainant's accident claim files¹ for copies of the over collected personal health information. MPI determined that no copies of the un-severed chart notes were present in either file. MPI also contacted an occupational therapy service which had conducted an assessment with regard to the complainant's MPI claim and which had received copies of the un-severed personal health information. The occupational therapy service confirmed that the copy of the chart notes it currently had in its files was the severed version.

Our office also asked MPI if any other copies of the complainant's personal health information collected without authorization had been retained. It appeared from information provided to our office that copies of the complainant's un-severed personal health information may have been present in copies of the complainant's claim file that were returned to MPI's legal department by AICAC on two other occasions. MPI responded that this coincided with the conclusion of a previous appeal process launched by the complainant the year after the accident. As a result, the related MPI Internal Review Office file would have been closed and the file copies provided to MPI by AICAC on these two occasions would have been shredded. MPI has assured our office that no copy of the un-severed chart notes currently exists within MPI.

CONCLUSION

Based upon the ombudsman's findings, the complaints of unauthorized collection, use and disclosure of personal health information against MPI are supported.

December 2, 2014
Manitoba Ombudsman

¹ In addition to the [date removed] accident, the complainant was also involved in another motor vehicle accident in [date removed], in which she also sustained injuries.

[Note to Reader- both the Background and Investigation sections of the original version of this report contained detailed information necessary to describe for the parties the chain of events and the basis for the ombudsman's findings. To protect the identity of the complainant, we have in some instances replaced detailed descriptions with summary information. For similar reasons, specific dates of relevant events have been obscured in most instances throughout the report.]