
NBPPIA-2008-03

INQUIRY INTO INDIVIDUAL COMPLAINT – WORKSAFE NB

December 17, 2008

Individual Complaint – WorkSafe NB

1. Introduction

This report is further to a complaint received by the Office of the Ombudsman with respect to the disclosure of an individual's health information to a Pharmacist. This report will summarize our findings and conclusions based on our inquiry into the matter. The investigation was initiated to determine if WorkSafe NB officials respected the *Protection of Personal Information Act* and to address concerns raised by the complainant at this office.

2. Background

The original complaint received by this office from the complainant was that an agent of WorkSafe NB, the nurse in charge of the complainant's pain management care, called the complainant's pharmacist and informed him that if the complainant did not fill out a required form she would not be allowing him to continue receiving his pain medication. The individual affected complained to this office that the sharing of this information constitutes a breach of his personal information. To obtain additional information about this complaint we contacted the WorkSafe Services Division Office. The WorkSafe NB record shows that the complainant's pharmacist called the WorkSafe NB nurse regarding authorization of pain medication for the complainant, as the complainant's prescription appeared to no longer be covered by WorkSafe NB. The nurse's notes indicate that she told the pharmacist that WorkSafe NB had specially authorized the complainant to continue receiving the pain medication and had extended his coverage for the medication for two months, on July 28, 2008. Further to that, she informed the Pharmacist that WorkSafe NB should know by the end of September after further assessment if the Commission would be continuing to fund medication for this claim. In the meantime, however, the nurse told the Pharmacist that he could dispense the prescription to the complainant and WorkSafe NB would pay for the medication.

3. Analysis

The issue that must be resolved in this report is whether there is any merit to the complainant's grievance that his rights under the *Protection of Personal Information Act* were violated when the WorkSafe nurse shared his personal and medical information with his pharmacist. Another question that should be addressed in part, based on the nature of this complaint, is does a patient have a realistic expectation of privacy regarding communications between nursing staff and his pharmacist?

The medical profession and all the healing arts are founded upon a relationship of trust that starts with respect for patient privacy. The law also respects the high standard of care that health care providers must exercise when dealing with personal information, such as health information, since it may reveal intimate secrets about a person's history or condition and often sits very close to the biographical core of their being. Many of us share information with our physician or other health care provider that we would not

share with a parent, spouse or child. If a patient believes the information he or she has entrusted to their health care provider has been breached, it could be detrimental to the relationship and perhaps even to the health of the patient. In order to have a viable health care system, health care providers need to ensure a patient's right to privacy is protected.

The context for this analysis is that health information is arguably among the most sensitive of information and control over this information must remain with the patient and not the health care provider. As Mr. Justice Laforest pointed out in *McInerney v. MacDonald*, "When a patient approaches a physician for health care, he or she discloses sensitive information concerning personal aspects of his or her life."¹ Mr. Justice Laforest also noted in that decision, "Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient."² With respect to who retains control over this information, Mr. Justice Laforest stated that, "... such information remains in a fundamental sense one's own, for the individual to communicate or retain as he or she sees fit. ... professional secrets acquired from a patient by a physician in the course of his or her practice are the patient's secrets and, normally, are under the patient's control."³

Subsection 2(1) of New Brunswick's *Protection of Personal Information Act (POPIA)* makes every public body subject to the Statutory Code of Practice, which is contained in Schedule A of the *Act* and interpreted in accordance with Schedule B. WorkSafe NB is a public body to which *POPIA* applies based on section 3 of the *General Regulation* under the *Protection of Personal Information Act*. The Statutory Code of Practice is based on the ten privacy principles developed by the Canadian Standards Association; (1) accountability, (2) identifying purpose, (3) consent, (4) limiting collection, (5) limiting use, disclosure and retention, (6) accuracy, (7) safeguards, (8) openness, (9) individual access and (10) challenging compliance. The principle of particular concern in this situation is Principle 3: Consent and Principle 5: Limiting Use, Disclosure and Retention.

Principle 3 in Schedule A provides that, "The consent of the individual is required for the collection, use, or disclosure of personal information, except where inappropriate." Schedule B provides additional information with respect to applying the principles contained in Schedule A. Relevant to the complaint we received is paragraph 3.4(c) of Schedule B, which states, "Consent is not required when a public body collects, uses or discloses personal information to protect or assert its own lawful rights or those of another public body, including lawful rights against the individual." In addition, paragraph 3.4(d) of Schedule B is relevant to the complaint and states, "Consent is not required when a public body collects, uses or discloses personal information to verify the individual's eligibility for a government program or benefit for which the individual has applied." Principle 5 in Schedule A is also somewhat relevant and states, "Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required or expressly authorized by law."

¹ *McInerney v. MacDonald*, [1992] 2 S.C.R. 138

² *Ibid.*

³ *Ibid.*

Section 3 of Schedule A contemplates that an individual's consent will not be required where inappropriate; however, the word inappropriate does not provide sufficient guidance to resolve this complaint and is subject to interpretation. Schedule B of *POPIA* provides more direction on how to apply section 3 of Schedule A and as a guideline states that the disclosure of personal or medical information without the consent of the complainant is possible in certain circumstances. The complainant and WorkSafe NB officials presented the facts of this incident somewhat differently; however, the crux of this issue is uncontested, which is that there was an exchange of information between the WorkSafe NB nurse and the complainant's pharmacist about the authorization of pain medication for the complainant paid for by WorkSafe NB. Based on that fact, either paragraph 3.4(c) or 3.4(d) of Schedule B could be applied to authorize this exchange of information without the consent of the complainant. Such an exchange of information would be possible under *POPIA* as WorkSafe NB was at the time of the disclosure paying for the complainant's pain medication. Therefore, the nurse was on the one hand protecting WorkSafe NB's lawful rights against the complainant by discussing with the pharmacist whether the complainant was entitled and eligible to receive pain medication paid for by WorkSafe NB. On the other hand, she was equally disclosing information to the pharmacist that was necessary to verify the complainant's eligibility for WorkSafe NB compensation or subsidy, a government benefit that the complainant applied for.

The notion of "except where inappropriate" could also be interpreted and applied by looking to legislation in other provinces. As one example, Ontario's *Personal Health Information Protection Act*⁴ states as follows:

Disclosures related to providing health care

- 38. (1)** A health information custodian may disclose personal health information about an individual,
- (a) to a health information custodian described in paragraph 1, 2, 3 or 4 of the definition of "health information custodian" in subsection 3 (1), if the disclosure is reasonably necessary for the provision of health care and it is not reasonably possible to obtain the individual's consent in a timely manner, but not if the individual has expressly instructed the custodian not to make the disclosure;
 - (b) in order for the Minister, another health information custodian or a local health integration network to determine or provide funding or payment to the custodian for the provision of health care; or
 - (c) for the purpose of contacting a relative, friend or potential substitute decision-maker of the individual, if the individual is injured, incapacitated or ill and unable to give consent personally. 2004, c. 3, Sched. A, s. 38 (1); 2006, c. 4, s. 51 (2); 2007, c. 10, Sched. H, s. 13.

⁴ *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Sch. A

Based on s. 38 of Ontario's *Personal Health Information Protection Act*, their best practice is to share health information without the patient's express consent only under specific and defined limited circumstances. When attempting to define the parameters of the term "except where inappropriate", it is also important to keep in mind that legislators are currently contemplating enacting personal health information legislation for New Brunswick. Many features of the prospective legislation are considered in a discussion paper dated September 2008, entitled *Personal Health Information: Access and Privacy Information*. Based on the discussion paper, it is possible that in the near future the notions of privacy and consent will have to be rethought by New Brunswickers. The discussion paper anticipates that there could be express consent, implied knowledgeable consent, and in certain circumstances, health care providers could share information without a patient's express or implied consent.

In order to analyze this complaint, this office also considered Principle 5 of *POPIA* and WorkSafe NB's internal policies and procedures. It is our finding that privacy is an important principle for the health care professionals employed by WorkSafe NB, as the health care professionals that collect and use claimants' health information must sign the Commission's oath of confidentiality and review WorkSafe NB's Code of Ethics. In accordance with *Policy 21-023: Disclosure of Claim File Information*, health care professionals working with WorkSafe NB are personally responsible to only disclose personal health information collected by them in limited circumstances. Section 1.0 of *Policy 21-023* directly incorporates the principles contained in *POPIA* into the policy, reinforcing to health care staff the importance of maintaining the confidentiality of personal information. In addition, section 3.5 of *Policy 21-023* states that staff may not disclose information in claim files except for the purpose of administration and enforcement of the *Workers' Compensation Act*, the *Occupational Health and Safety Act* or the *Workplace Health, Safety and Compensation Commission Act*. Thus, we find that *Policy 21-023* limits the disclosure of personal health information in a manner that is consistent with *POPIA*. Further, with respect to Principle 5 of *POPIA*, it is our finding that the nurse disclosed the complainant's information to the pharmacist for the purpose it was collected, which is the subsidy of pain medication by WorkSafe NB.

In light of all of the above, the WorkSafe NB nurse and the pharmacist can be considered health care custodians that must be able to share patient information in order to provide better health care to the patient. Moreover, it will not always be appropriate or necessary for these health care custodians to require express consent to be able share and discuss certain limited aspects of the individual's health information. With respect to this specific incident, it was not appropriate or practical for the WorkSafe NB nurse and pharmacist to require express consent from the patient to be able to exchange limited information about the complainant's eligibility for government funding; therefore, his consent was implied and reasonable. A patient might still be able to withhold consent, but to do so the patient would have to provide express nondisclosure directives and he or she should know that it may affect the quality of his or her care or ultimately his or her eligibility for financial assistance.

4. Findings

After reviewing the *Protection of Personal Information Act*, governmental policies and speaking with WorkSafe NB officials, our office has concluded that in this case the disclosure of the complainant's information to the pharmacist does not constitute a breach of the *Protection of Personal Information Act*. It is also our finding that *POPIA* authorizes the disclosure complained of without consent as a result of paragraph 3.4(c) and 3.4(d). With respect to Principle 5 of *POPIA*, it is our finding that the nurse disclosed the complainant's information to the pharmacist for the purpose it was collected, which is the subsidy of pain medication by WorkSafe NB.

5. Conclusion

Based on our preliminary inquiry into this matter, this office does not find it necessary to make any further recommendations. Given our findings, we will take no further action in this matter and the file is now closed.