

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 21-HIA 41

Citation: 2021 NTIPC 68

File: 20-133-6  
October 4th, 2021

**BACKGROUND**

- [1] On February 19, 2020 an individual asked the Office of the Information and Privacy Commissioner to review an unauthorized disclosure of personal health information by a Yellowknife medical clinic operated by the Northwest Territories Health and Social Services Authority (NTHSSA).
- [2] The Complainant had called the medical clinic to request two referrals from a family doctor - one for a medical massage and another for custom orthotics. The Complainant was to pick up the referrals once they were ready. The Complainant received a call from the clinic later that same day and advised the clerk that he would pick up the referrals within the next few days. When the Complainant arrived at the clinic to pick up the referrals, the clinical assistant (CA) initially could not find them. The CA then searched the office and found the referrals among other prescriptions that had been faxed to the Walmart Pharmacy. When the Complainant inquired why these referrals had been faxed to Walmart, the CA at first denied any knowledge and later, when pressed, suggested it was an error made by a new staff member in training. No further steps were taken by the CA and the incident was not reported to either a manager or the Quality Risk Manager at NTHSSA.

## THE APPLICABLE LEGISLATION

*NTHSSA and Walmart Pharmacy are both “health information custodians.”*

- [3] The HIA regulates the collection, use and disclosure of personal health information by health information custodians. Section 1(1) of the Act defines “health information custodian” to include “a prescribed organization responsible under the *Hospital Insurance and Health and Social Services Administration Act* for the management, control and operation of one or more facilities from which health services are provided”. The *Hospital Insurance and Health and Social Services Administration Act* establishes the Northwest Territories Health and Social Services Authority, which manages and operates most health service facilities in the Northwest Territories, including the health clinics in Yellowknife. Section 1(1)(b) of the *Health Information Regulations* prescribes the NTHSSA as a health information custodian.
- [4] Pharmacists as defined in the *Pharmacy Act* are also health information custodians as defined in section 1(1) of the HIA.

*Health Information Act applies to the referral documents:*

- [5] Pursuant to Section 4, the HIA applies to all records containing personal health information that are in the custody or control of a health information custodian. There are exceptions, none of which apply to this case. The referral documents contained the Complainant’s personal health information, including the nature of the referrals, the name and contact information of the Complainant as well as, potentially, a health care number and other personal health information. The HIA applies to these records.

- [6] Section 8(1) of the HIA requires all health information custodians to establish appropriate standards, policies and procedures to ensure compliance with the legislation.
- [7] Section 1 defines "Disclose": "to release information or make information available in any manner, including verbally or visually, to a person or organization."
- [8] Part 4 of the HIA deals with the collection, use and disclosure of personal health information. Section 38 of the HIA states:
38. A health information custodian shall not disclose personal health information about an individual unless
- (a) the custodian has the express consent of the individual and the disclosure is necessary for a lawful purpose; or
  - (b) the disclosure is permitted or required by this or another Act, or by an Act or regulation of Canada.

## **DISCUSSION**

- [9] There was no patient consent for the disclosure and the disclosure was not otherwise permitted or required by legislation. NTHSSA concedes that the Complainant's personal health information was disclosed to the Walmart Pharmacy and that it was not disclosed for an authorized purpose.
- [10] NTHSSA acknowledges that the clinical assistant (CA1) who faxed the referrals to the pharmacy did so in error and that the clinical assistant (CA2) who discovered the unauthorized disclosure did not deal with it in accordance with policy or law.

[11] The circumstances also raise issues with respect to the handling of personal health information by the Walmart pharmacy. While this review focuses on NTHSSA's actions, this review presents a good opportunity to remind pharmacists in the private sector of their obligation to comply with the HIA and I will, therefore, make some suggestions to the pharmacy to encourage better compliance with the HIA.

## **NTHSSA**

[12] When asked about the incident, the CA1 did not recall sending the documents or the steps taken in doing so. It appears the referrals were intermingled with several medical prescriptions that were faxed to the Walmart Pharmacy on the day in question. According to the pharmacy and NTHSSA, faxing prescriptions from a clinic to a pharmacy is a routine daily task and it is not unusual for different prescriptions for various clients to be sent by fax at the same time. NTHSSA did not provide any details regarding the established or expected procedure for sending these faxes, nor did it provide a copy of any fax cover sheet. I will assume, as best practice would demand, that the fax was sent with a cover sheet providing appropriate instructions of what to do in the event documents were received by the wrong recipient.

[13] When speaking to the Complainant, the CA2 did not appear to recognize the faxing error as an unauthorized disclosure of personal health information under the HIA, nor did the CA2 know how to proceed under NTHSSA's Privacy Breach Policy. The CA2 was unable to answer the Complainant's questions and did not refer the matter to a manager or supervisor who might have been better able to assist the Complainant.

- [14] The facts suggest that insufficient training was one of the main factors contributing to the unauthorized disclosure and to the failure to deal with the breach of privacy appropriately after it was discovered. NTHSSA advised that the CA1 who sent the documents to the Walmart Pharmacy was new in the position and that the error occurred on the first shift during which the CA1 had to scan and fax documents without supervision. The CA1 had just completed four days of training in this task with an experienced CA. NTHSSA advised that the CA1 had also completed the requisite Privacy and Confidentiality training six months before this incident.
- [15] In March 2017, the Minister of Health and Social Service issued a Ministerial Directive requiring both the Department of Health and all health and social services authorities to comply with a series of policies so as to meet the requirements of the *Health Information Act*. One of these is the Privacy Breach Policy which requires, among other things, every health and social services authority to authorize “one or more employees to handle privacy breaches in accordance with this Policy”. It also requires that “all detected potential privacy breaches must be reported to the Authorized employee”. This is a basic requirement that all employees should be aware of. It is not necessary for every employee to be intimately familiar with the Privacy Breach Policy, but it is imperative that every employee knows that any breach or potential breach must be reported and to whom. If employees are not aware there is an “Authorized employee” to refer privacy issues to, having the position will not help to address privacy breaches in a timely manner.
- [16] In the circumstances, it may also have been appropriate for the CA2 to report the error to the manager or supervisor. Presumably that person could have communicated with the Complainant about what had happened and what would be done to mitigate the error. It seems that the CA2 dealing with the Complainant

simply did not know how to handle the situation and did not report the breach to the authorized employee, a supervisor or manager.

- [17] Timing is important. The best opportunity to mitigate harm from an unauthorized disclosure of personal health information occurs when the mistake occurs. Once the Complainant asked the OIPC to review the matter and this office notified NTHSSA, NTHSSA quickly took steps to mitigate the breach. An official contacted the Walmart Pharmacy and asked the pharmacy to put the two referrals in a sealed envelope and hold them for retrieval. The documents were then picked up by the clinic's Nurse in Charge. This was a commendably quick response; however, this retrieval happened about three weeks after the breach occurred, which means the documents had been in the possession of a non-authorized third party for a significant period of time. During that time NTHSSA had no control over the documents and the personal health information they contain. A timely report by the CA2 to the Authorized employee or a supervisor could have resulted in a faster recovery of the records and posed less risk of any further unauthorized disclosure. Of course, the potential of further distribution by the pharmacy was reasonably small. The pharmacy is also a health information custodian subject to the HIA and there is no evidence it distributed the documents any further; however, the fact remains that the disclosure of the personal health information to the Walmart pharmacy was an unauthorized disclosure.

## **RECOMMENDATIONS FOR NTHSSA**

- [18] Both of the clinic assistants involved had apparently received basic privacy training as required under the Mandatory Privacy Training Policy. As has been said in many previous reviews by this office, privacy training is fundamental to preventing privacy breaches and responding appropriately when they do occur.

Evidently, the training provided to these CA employees failed to put sufficient emphasis on fundamental concepts or aspects of privacy protection and related obligations. Particularly, the CA2 did not recognize the incident as a breach of privacy and did not know what steps to take. In the case of the CA1, it appears the on-the-job training did not place sufficient emphasis on the need to ensure accuracy when disclosing documents containing personal health information to a third-party agency. I therefore make the following recommendations:

1. If one does not exist, a step-by-step guide should be created for dealing with referrals prepared by clinics operated by NTHSSA. The guide should specify that referrals are to be handled separately and kept separate from prescriptions while being scanned and sent to the appropriate third-party.
2. The employees in NTHSSA health facilities tasked with scanning and faxing of prescriptions or other personal health records should be fully trained and clearly instructed with respect to proper procedure and with respect to their obligation to ensure each document is being sent to the correct recipient. Any uncertainty should be addressed before an item is sent.
3. For all fax transmissions, a fax cover sheet should be used. The cover sheet should itemize the documents being sent and contain a notice to the recipient instructing what to do if a transmission or document is received in error.
4. NTHSSA should consider a more secure mode for communicating with pharmacies that does not rely on the use of dated fax technology and would allow for quick, accurate and more secure communication with pharmacies for each client individually and on a real-time basis.

5. NTHSSA should ensure all employees are appropriately trained to recognize and respond to instances of possible unauthorized collection, use or disclosure of personal health information. All employees should be trained so that they are aware of who the “Authorized employee” is within the organization and how that employee can be contacted in the event of a possible privacy breach.

## **WALMART PHARMACY**

- [19] In conducting this review our office contacted the Walmart Pharmacy in Yellowknife with some questions about their management of the documents they received from the clinic. All private pharmacies in the Northwest Territories are required to comply with the *Health Information Act*, and the responses to our questions did raise some concerns about Walmart’s management of records received from health clinics and other health information custodians. As this was one of the first matters involving a pharmacy referred to our office, we thought that it might be useful to make some observations and provide some suggestions for private pharmacies in the Northwest Territories.
- [20] Our first observation is that it was difficult to engage the organization. Walmart did not respond to the first request for information from the Information and Privacy Commissioner. It was not until a second request was sent that we received a response. That response did not really address the questions asked. Rather, in response to a question about how they normally manage faxes from health care providers and why they did not contact NTHSSA to alert them to their error in this case, they responded as follows:

The electronic fax referred to in the Letter was in fact addressed to the Walmart pharmacy. This fax contained several prescriptions that belonged to different patients. Similar faxes are received by our pharmacy on a daily



basis and there was nothing that would have prompted us to conclude that it was received in error given the intended recipient was identified as the Walmart Pharmacy. Once we received the fax, a new patient file was created in KROLL and the prescription was scanned to that file. Access to patient records within KROLL is limited by job code to pharmacists and pharmacy assistants and is password protected. Once the patient file was created, the pharmacist called the patient using the phone number on the prescription to let [them] know that we had received a new prescription for [them]. There was no response to the call we made so the pharmacist did not leave a voicemail. After a few days, we got a call from [NTHSSA] asking that we put the patient's prescription in an envelope and a nurse would come to pick it up from our pharmacy as it was not supposed to be faxed to us. This was our first notice of that it was a fax sent to us in error and we followed the instructions received.

- [21] While this explains what happened from the pharmacy's point of view, it does not explain why the pharmacy did not recognize two of the documents in the package as being referrals for other medical services. These two referrals were for services clearly not provided by the pharmacy (custom orthotics and a medical massage). The pharmacy staff receiving and entering the prescriptions into their system should have recognized the error or, later, the pharmacist who attempted to contact the client should have realized that these were not prescriptions and were received in error. When this was pointed out to the organization, the pharmacy provided the following additional information:

While Walmart is cognizant of the fact that we do not provide such services, you must view our treatment of the fax against common industry practices. Over the years, the role of pharmacists, especially those in remote Canadian locations, expanded from dispensing prescriptions to include treatment for minor ailments and in-depth consultations of health and medication needs, care and monitoring plans. Aside from these health services provided by the

pharmacists as part of the patients' circle of care, it is a common practice in remote Canadian locations for pharmacies to not only provide expanded health services but also to ensure patients receive prescriptions they need in order to obtain the health care services needed. Doctors often fax prescriptions for their patients to pick up from a conveniently located pharmacy.

- [22] It is not clear how “common industry practices” or “expanded health services” in a “remote Canadian location” are germane. Walmart received information that was not meant for them and, had anyone at the pharmacy read the actual referral documents, this should have been reasonably obvious: Walmart pharmacy does not supply medical massage or custom orthotics. Rather than contacting the clinic to query why the two referrals were sent to Walmart, the pharmacy employees simply proceeded to treat them the same as a prescription by scanning the information into Walmart’s own electronic system (KROLL) and then attempting to contact the client.
- [23] Walmart mentions pharmacies being part of a patient’s “circle of care”. This term is not used in the *Health Information Act* and it is not a concept the *Act* embraces. Under the HIA, personal health information can only be collected, used or disclosed where there is consent or it is necessary for a lawful purpose. Neither of those conditions were satisfied here.
- [24] The pharmacy had no control over what NTHSSA sent to them. Furthermore, section 19 of the *Health Information Act* allows a health information custodian who receives or collects personal health information from another custodian to “assume that the individual has provided implied consent to that custodian’s ... collection of the information for the purposes of a use referred to in the applicable section”. However, that assumption was not supported by the content of the documents. The “purpose” for the disclosures from NTHSSA in this case was to

provide the client with a referral for a medical massage and custom orthotics, neither of which was provided by the pharmacy. This should have raised some questions by pharmacy staff processing the documents. Even if circumstances allow that a health information custodian “may” assume implied consent, that does not mean that facts contrary to the assumption can be ignored. Pharmacies are obliged to protect the privacy of individuals and that obligation requires taking the time and making the effort to consider the content of documents received.

- [25] Once the pharmacy received the documents it had an obligation to manage that personal health information in accordance with the *Health Information Act*. Where a health information custodian comes into possession of personal health information there is an obligation imposed by the *Health Information Act* to use the information only where there is consent or it is necessary for a lawful purpose. Before using client information (including entering it into their electronic record system) a pharmacy’s staff should review the information upon receipt and identify any anomalies that might suggest an error had been made. The *Health Information Act* does not require one health information custodian to identify errors made by another health information custodian. However, it is incumbent on a health information custodian to ensure it deals with personal health information appropriately. Simply relying on another health information custodian to have sent the right information is unlikely to fulfill that statutory duty, particularly in cases such as this where the error was reasonably plain from the content of the documents. When such an error becomes evident, best practice would be to contact the other custodian to confirm the possibility of an error.

- [26] Part of this discussion requires reference to section 85 of the *Act* which states:

85. (1) A health information custodian shall take reasonable measures to maintain administrative, technical and physical safeguards for the protection of personal health information, including for protection

...

(c) against unauthorized access to or unauthorized use, disclosure or alteration of personal health information;

[27] In addition, section 13(1)(j) of the *Health Information Regulations* states:

13. (1) The administrative, technical and physical safeguards required under section 85 of the Act must include

...

(j) procedures that provide for effective prevention of, response to and remediation of security and privacy breaches.

[28] We encourage Walmart Pharmacy (and all private pharmacies operating in the Northwest Territories) to play a proactive role in identifying and dealing with possible privacy breaches, in accordance with the *Act* and the regulations. At a minimum to address the circumstances of this case, before taking any steps to use a faxed document, a pharmacy should have a process to review the contents to ensure it is a matter properly in its possession and prevent any unauthorized use.

Andrew Fox  
**Information and Privacy Commissioner**