

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Report on File 19-256-6

Citation: 2022 NTIPC 11

August 22, 2022

**BACKGROUND**

- [1] On October 25<sup>th</sup>, 2019, the Office of the Information and Privacy Commissioner (OIPC) received notice from the Northwest Territories Health and Social Services Authority (NTHSSA) of an unauthorized disclosure of personal health information that occurred on June 17<sup>th</sup>, 2019. NTHSSA advised that a document containing a patient’s personal health information was mistakenly faxed to 60 “health care related” recipients, only one of which was the intended recipient, DynaLIFE Medical Laboratories. The document included the patient’s name, date of birth, health care number and the type of tissue specimens that had been submitted to DynaLIFE for testing.
- [2] According to NTHSSA, the error was caused by the employee’s lack of familiarity with a new fax machine which had been installed in the Stanton Territorial Hospital’s lab and had a “very sensitive touch screen user interface.” In selecting the desired contact from the pre-programmed numbers in the fax machine the employee inadvertently selected a group contact that had been created for the purpose of performing the fax machine audit. The employee did not notice the error before the fax transmission was initiated. NTHSSA did not specify how or when the error was detected. There is some indication that at least three of the unintended recipients contacted Stanton Territorial Hospital to report that they had received the fax in error, and it may have been these notifications that identified that an error had been made.
- [3] NTHSSA provided a list of the recipients who received the fax transmission. These included several private companies, a number of Nunavut health centers, several Alberta

health facilities, both private and provincially run, as well as other GNWT departments and organizations and several federal agencies. The recipients were initially described by NTHSSA as “health care related recipient”, but this does not describe all recipients identified.

- [4] NTHSSA confirmed that the unintended recipients were sent a follow-up fax the same day asking each to confidentially destroy the document received. NTHSSA says it did not receive any acknowledgments from any of the unintended recipients that the notice had been received or that the fax sent in error had been destroyed. No other follow-up occurred.
- [5] NTHSSA also notified the affected individual. The notice included a statement that the incident was being reported to the Office of the Information and Privacy Commissioner. Our office was not provided with a copy of this letter.
- [6] In response to this incident, NTHSSA indicated that it had taken steps to prevent or at least reduce the possibility of similar breaches.
- a. One of these steps was to move all recipient-group lists from the top of the contacts list to the bottom by adding the prefix “ZZZ” to the front of the group names.
  - b. Instructions were given to all managers within NTHSSA-Stanton that the same steps should be taken with respect to all fax equipment within the organization. This would help to ensure that a group of recipients would not be chosen in error.
  - c. The employee who sent the fax was instructed to review the current policy and procedures for the faxing of client information, and to review privacy best practices for handling client information.
- [7] NTHSSA indicated that there was no training provided when the new fax machine was

installed. It appears management assumed that employees who had previously used fax equipment would be able to use the new equipment without additional instructions.

Following this incident, NTHSSA indicated it was developing a fax training program, including a competency-based test.

- [8] The Commissioner determined that a review was appropriate in light of the large number of organizations who received the patient's personal health information. NTHSSA was notified that a review would be undertaken pursuant to section 137(1) of the *Health Information Act*.

## DISCUSSION

- [9] The *Health Information Act* and the *Health Information Regulations* regulate how a health information custodian<sup>1</sup> (HIC) can collect, use and disclose personal health information. The Act places a positive onus on HICs to take reasonable steps to protect personal health information from unauthorized use or disclosure. NTHSSA agrees this fax error amounted to an unauthorized disclosure of the patient's personal health information.
- [10] The general purpose of the review process is to identify if there was an unauthorized collection, use or disclosure of personal health information and to make recommendations for action by the HIC to mitigate any harm resulting from the breach and to prevent similar errors in the future. NTHSSA took reasonable and appropriate steps to mitigate the error and to prevent a further breach of a similar nature. However, in my view NTHSSA should have done more.
- [11] NTHSSA provided a list of 60 fax recipients that formed the fax group that was sent the subject documents in error. A majority are involved in the delivery of health care services in some respect. Several recipients are health care facilities operated by NTHSSA. But,

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<sup>1</sup> A defined term in section 1 of the *Health Information Act*.

more than half of the recipients are not located in the Northwest Territories and are therefore not subject to the *Health Information Act*. At least two are organizations within the Northwest Territories but not subject to the HIA.

- [12] The number of unauthorized disclosures gives rise to immediate concern, as does the inherently sensitive nature of personal health information. Such a wide distribution of a document where many recipients are not subject to the HIA creates a potential for unauthorized use (i.e., reading) and potentially further disclosure (i.e., the recipient sharing the information with others). This incident raises the question: what should the HIC do in such circumstances to mitigate any harm and prevent any further unauthorized disclosure?

#### *Applicable Legislation*

- [13] Section 85(1) of the *Health Information Act* 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

(a) of the confidentiality of personal health information and the privacy of individuals the information is about;

(b) of the confidentiality of personal health information that is to be stored or used outside the Northwest Territories, or that is to be disclosed by the custodian to a person or organization outside the Territories;

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

...

- [14] Section 13 of the *Health Information Regulations* provides:

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.

(2) For the purposes of section 85 of the Act, measures to maintain safeguards must be proportionate to any threat to the security, confidentiality or integrity of personal health information

[15] The combined effect of these provisions is that NTHSSA must respond fully and completely to a privacy breach and to take reasonable steps to mitigate any harm caused by the privacy breach and to prevent a similar breach in the future.

[16] In my view, given the number of unauthorized disclosures and the varied nature of the recipients, a proportionate response required NTHSSA to confirm with each of the unintended recipients that the faxed information was destroyed without being used or disclosed further and to document these steps. This conclusion is consistent with the Privacy Breach Policy issued pursuant to a Ministerial Directive issued in March 2017, which directive is binding on NTHSSA. Under Schedule 4 of this policy, NTHSSA is required to take the following steps in “immediate mitigation” of a breach:

Measures taken must stop or limit the spread of a potential or confirmed privacy breach and start to respond to a breach. Immediate mitigation measures that may be taken include, but are not limited to:

- Recovering records;
- ...
- Destroying unauthorized copies of information, documenting the destruction;...

[17] What mitigation measures did NTHSSA take to recover the records or destroy the records? The fax transmission used a fax cover sheet that contained a standard message:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, of the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If

you receive this communication in error, please delete it immediately and notify us by telephone. [emphasis added]

- [18] On the same day as the fax error occurred, NTHSSA was contacted by 3 of the 60 recipients. There is no evidence of further contact. Later that same day, NTHSSA sent another fax to all 60 recipients, notifying them the earlier fax had been sent in error and directing that the documents be confidentially destroyed. NTHSSA reports that none of the 60 recipients confirmed that the documents had been confidentially destroyed. It is not clear if confirmation of document destruction was expressly requested.
- [19] NTHSSA should have sought and obtained confirmation from each of the unintended recipients that they had taken appropriate steps to secure and confidentially destroy the documents that were faxed in error. Additionally, NTHSSA should have documented each recipient's response. It is not reasonable to simply assume that instructions sent to the unintended recipients were followed. This is so particularly where the disclosures were to organizations outside NTHSSA or beyond the jurisdiction of the HIA, and where most recipients did not comply with the request for telephone contact on the initial fax cover sheet.
- [20] Sometimes silence can be taken to indicate consent; however, silence in these circumstances only serves to beg the question: were the documents destroyed confidentially or not? A reasonable response would have entailed NTHSSA obtaining an answer.

#### *Fax Machines / Fax Policy*

- [21] It has been observed many times that the use of fax technology for the exchange of records containing personal health information is not best practice for maintaining security and confidentiality. There are far more secure methods for document

transmission available. However, the healthcare industry continues to rely on faxing. This is not entirely a matter within the control of NTHSSA as many other jurisdictions continue to employ fax technology. Indeed, the Alberta government recently implemented a “new” system for use in that province which continues to rely on fax technology for most of its communications. This obliges NTHSSA to communicate with Alberta healthcare institutions via fax. Nevertheless, this office will continue to encourage the use of more secure means of communication whenever possible.

[22] NTHSSA - Stanton Hospital’s “Facsimile Transmission of Patient Information Policy” provides guidance for the use of fax technology. This policy (effective January 2011 with a next review date of January 2014) pre-dates the coming into force of the *Health Information Act*. A review of this policy is in order to ensure compliance with the *Health Information Act* and to reflect current best practice. The relevant section reads as follows:

**Procedure for sending a fax using pre-programmed (speed dial) numbers:**

1. Only information which is immediately necessary for the continuity of patient care should be transmitted by fax.
2. Use confirmed pre-programmed dialing features for frequently dialed numbers to eliminate the possibility of incorrect dialing,
3. Use visual check on the fax machine to ensure the correct number was dialed before pressing "Send" or "Fax",
4. A cover sheet must be used (sample in Appendix II).

[23] It appears the employee did not comply with part 3 of this policy. There is no suggestion that the screen on the new fax machine was difficult to read, only that it was easy to add a recipient group by mistake.

[24] It appears that others within NTHSSA who received the errant fax transmission also failed to comply with this policy. Under the heading “Receiving a Fax” the following direction is given:

2. If received in error, notify the sender of an erroneous transmission and return or destroy the information as instructed by the sender.
- [25] The list of unintended recipients includes at least 30 other divisions within NTHSSA. Only one of those notified the sender of the error. Clearly there is a need to review this part of the policy system wide.
- [26] The policy does not require the sender to print a confirmation sheet for the transmission or to ensure, via a review of that transmission sheet, that the document was sent to the correct fax number. The policy would be usefully improved by adding the requirement that a sender must positively confirm that a fax was sent to the correct recipient.

## RECOMMENDATIONS

1. The Privacy Breach policy should be amended by adding a direction that when a health information custodian has disclosed personal health information contrary to the *Health Information Act*, the health information custodian must follow up with all unauthorized recipient(s) by
  - a) confirming the recipient has dealt with the documents in accordance with instructions provided (i.e., the information has not been further disclosed and the documents have been either returned or destroyed), and
  - b) documenting all communications with the recipient(s).
2. NTHSSA should review the Facsimile Transmission of Patient Information Policy and amend it as appropriate to reflect current best practices. This should include a direction that fax transmission is to be used only where more secure technology cannot be used and should require that a fax confirmation sheet be printed immediately after sending a transmission containing personal health information and be reviewed to ensure the transmission was sent to the correct recipient.
3. NTHSSA should ensure that its employees are trained on how to use the fax machines they are required to use, including how to send faxes securely and what steps to take if

a fax is sent or received in error. NTHSSA should ensure that its employees are aware of the Facsimile Transmission of Patient Information Policy and are kept informed of any amendments to that policy.

Andrew Fox  
**Information and Privacy Commissioner**