



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island**

HI-20-001

Re: Physician

**Maria MacDonald,
Adjudicator**

November 17, 2020

Summary: An individual alleges that their doctor disclosed two types of personal health information to their mother without their consent. The adjudicator found that the doctor had not disclosed one of the types of personal health information. The doctor acknowledges disclosing the other type of personal health information, but advises that they did so out of concern for the health and safety of the individual. The Adjudicator accepted this explanation, and found that, in the circumstances, subsection 24(1) of the *Health Information Act* authorized the doctor to disclose this information to reduce or prevent the risk of serious harm to the Complainant's health or safety.

Statute Considered: *Health Information Act*, RSPEI 1988, c H-1.41, ss 1(t), 23(2), 24(1).

Report Cited: Investigation Report IR-16-002, *Re: Health PEI*, 2016 CanLII 48835 (PE IPC)

Other sources: *Paperback Oxford English Dictionary*, 6th Ed. 2006, *Sub verbo*, "risk"

I. BACKGROUND

- [1] An individual made a complaint that their doctor disclosed their personal health information to their mother, without the individual's consent. Throughout this order, I shall refer to this individual as "the Complainant", and to the doctor as "the Custodian".
- [2] The Complainant was seeing the Custodian and a counsellor for treatment for addictions. The Complainant requested that the Custodian not talk to the Complainant's parents because the Complainant believed that the Custodian was disclosing information from their counselling to the Complainant's mother. About six months later, the Complainant still believed that the Custodian was disclosing their personal health information, and ended the doctor-patient relationship.
- [3] The Custodian denies disclosing any counselling information. The Custodian acknowledges that they phoned the Complainant's mother to advise her that the Complainant had ended the doctor-patient relationship, and that the Complainant would be in a potentially dangerous situation with opioid withdrawal if the Complainant's prescription ran out. The Custodian advises that they disclosed this information out of concern for the health and safety of the Complainant.

II. THE COMPLAINT

- [4] The complaint relates to two types of information. With respect to the information from counselling, the Complainant states:

June of 2019 started seeing an addiction councilor. I mentioned I was nervous to speak to my doctor because [the doctor] mentions things to my parents about things I've talked to [the doctor] about without my permission. The reason I suspected this is because my mom would say things such as "we know everything you've been saying. You don't like that [information from counselling]". That is what I told my councilor and my doctor. . .

[5] With respect to information the Custodian disclosed when the Complainant ended the doctor-patient relationship, the Complainant states:

“Someone from [the Custodian’s] office called my mom to tell her that I was making a mistake switching from [the Custodian].

[6] The Complainant says they did not consent to the Custodian disclosing any information about ending the doctor-patient relationship to the Complainant’s mother.

III. ISSUES

[7] The first issue in this review is whether the Custodian disclosed information from counselling. The Custodian denies disclosing it, and does not rely on any authority to disclose it under the *Health Information Act*, RSPEI 1988, c H-1.41.

[8] The Custodian acknowledges disclosing personal health information to the Complainant’s mother when the Complainant ended the doctor-patient relationship, but says they did so for the health and safety of the Complainant. The second issue is whether the *Health Information Act* authorized the Custodian to disclose this information.

IV. ONUS OF PROOF

[9] The *Health Information Act* does not set out an onus of proof for allegations of unauthorized disclosure of personal health information, and the Office of the Information and Privacy Commissioner of PEI has not yet interpreted the onus of proof for these types of complaints under the *Health Information Act*.

[10] It is helpful to consider the approach of similar allegations under the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, for example, as set out in Investigation

Report IR-16-002, *Re: Health PEI*, 2016 CanLII 48835 (PE IPC), at paragraphs 8 and 9. The same principles apply to allegations of unauthorized disclosure of personal health information under the *Health Information Act*.

[11] When someone alleges that a custodian disclosed their personal health information, they have the burden to show that the information is their personal health information, and that disclosure occurred. If disclosure is proven, then the burden switches to the custodian, who must show that the disclosure was authorized by law.

V. DISCUSSION

[12] The three components to consider on an allegation of unauthorized disclosure are:

- (i) whether the information at issue is their personal health information;
- (ii) if the information is their personal health information, whether it was disclosed; and
- (iii) if the custodian disclosed personal health information, whether the law authorizes the disclosure.

[13] There is no dispute that the information at issue is “personal health information” as defined at subsection 1(t) of the *Health Information Act*. I accept that information that a patient discusses with their treating counsellor or doctor, which relates to an individual’s physical or mental health, is their personal health information under clause 1(t)(i) of the *Health Information Act*. I also accept that information relating to ending a doctor-patient relationship, including any associated risks to health or safety, relates to the provision of health care to the individual, and is personal health information under clause 1(t)(iii) of the *Health Information Act*. Based on the content of the information, I find that the two types of information that are the subject of the complaint are the Complainant’s personal health information.

[14] I will address the remaining two elements of an allegation of unauthorized disclosure:

- a. Whether the Custodian disclosed personal health information, and
- b. Whether the *Health Information Act* authorizes the Custodian to disclose personal health information.

[15] I will address the information from counselling first, then the information related to the Complainant ending the doctor-patient relationship.

Information from Counselling

[16] The Custodian advises that their ordinary practice is to enter into written agreements with all of their patients. Among other things, patients consent to the Custodian collecting or disclosing any information they deem useful in medical management. The Custodian advises that they discuss this with their patients with addictions, but they rarely disclose any personal health information. The Custodian states:

I tell all my patients with addictions, that I will only break confidentiality if I am worried for their safety or the safety of others in a very serious way as per the Canadian Medical Association (CMA) code of ethics. It is very unusual for me to break confidentiality in such a way.

[17] The Custodian advises that, with the Complainant's knowledge and consent, they talked to the Complainant's parents over the last few years to hear their concerns. The Custodian advises that they did not disclose the Complainant's personal health information, and only gave the Complainant's parents general feedback. About six months before the Complainant ended the doctor-patient relationship, the Complainant asked the Custodian not to talk to their parents about the Complainant. The Custodian states that they did not talk to the Complainant's parents after that, until the Complainant ended the doctor-patient relationship.

[18] The Custodian denies that they disclosed personal health information from counselling. The Custodian states that, although the Complainant may have talked about the described information with other health care professionals, family or friends, the Custodian was not aware of the information that the Complainant had set out in their complaint.

[19] The Complainant did not hear the Custodian disclose any information. They base their complaint on comments made by their mother. With the Complainant's permission, I spoke to the Complainant's mother to inquire about what, if any, information the Custodian or the Custodian's staff, disclosed to them. The Complainant's mother advised that neither the Custodian, nor any staff member, ever disclosed any personal health information to her, with the exception of when the Complainant ended the doctor-patient relationship. She further advises that she would not expect to receive any personal health information from the Custodian. In the past, she had asked for personal health information, such as results from drug testing, but the Custodian firmly, but professionally, declined to provide this information to her.

[20] If the Complainant's mother knows anything that the Complainant discussed in counselling, the question is whether she learned it from the Custodian. In consideration of the nature of the information, and the relationship between the Complainant and their mother, this would not have been the only possible way that she could have known this information. The Complainant's mother advised that she knows her children very well, perhaps better than the Complainant realizes. It is possible that the Complainant's mother has insight about her adult child based on their shared lives, which the Complainant may also have discussed in counselling.

[21] The Complainant did not provide sufficient evidence to substantiate their complaint that the Custodian disclosed the Complainant's personal health information from counselling sessions to the Complainant's mother. Based on the information available to me, I find that the Custodian did not disclose the personal health information from counselling sessions to the Complainant's mother.

[22] In consideration of the finding, that the Custodian did not disclose personal health information related to counselling to the Complainant's mother, it is not necessary to consider whether disclosure is authorized under the *Health Information Act*.

Disclosure that the Complainant ended the doctor-patient relationship

[23] The Complainant characterizes the personal health information, in part, as their request for a new doctor. Part of the Complainant's complaint is that their mother learned that the Custodian was no longer their doctor, before the Complainant knew.

The next day June 17th, of course guess who gets a call before me. My mom, someone from [the Custodian's] office called my mom to tell her that I was making a mistake switching from [them]. Before mentioning it to me. I had to find out by calling after my mom already knew. When I called the secretary said "don't worry you are not our patient anymore. You will not be seeing [the Custodian] again".

[24] The Custodian characterizes it a little differently. The Custodian describes it as the Complainant ending the doctor-patient relationship. The Custodian says the Complainant explicitly communicated to their employee, and later the same day to the Custodian directly, that the Complainant did not want the Custodian to continue to be their doctor. The Complainant confirms this in other submissions, stating that: "We ended the call with me saying." If you don't switch me from your patient list I will do it myself". I accept that the Complainant ended the doctor-patient relationship.

[25] The Custodian phoned the Complainant's mother after the Complainant ended the doctor-patient relationship. The complaint is that the Custodian advised their mother that the Complainant was making a mistake switching from the Custodian. The Custodian acknowledges disclosing that the Complainant ended the doctor-patient relationship and that the Custodian was concerned about opioid withdrawal if the Complainant's prescription ran out. The Custodian does not comment on disclosing an opinion that ending the doctor-patient relationship is a mistake. The Complainant was not present in this conversation, and I accept that the information the Custodian disclosed to the Complainant's mother was that the Complainant had ended the doctor-patient relationship and that the Complainant was in a potentially dangerous situation with opioid withdrawal if their prescription ran out.

[26] Among other things, the *Health Information Act* sets out when custodians may disclose personal health information. A custodian may disclose personal health information if the individual consents to disclosure. However, in some circumstances, the *Health Information Act* also authorizes a custodian to disclose personal health information without the individual's consent. In some circumstances, not applicable here, Custodians are required to disclose personal health information without consent.

[27] The Complainant did not consent to disclosure of personal health information. The issue is whether the *Health Information Act* authorizes the Custodian to disclose that the Complainant had ended the doctor-patient relationship, and that the Complainant was in a potentially dangerous situation if their prescription ran out.

[28] The Custodian says they disclosed the information out of concern for the Complainant's health and safety. The Custodian did not specifically mention this provision, but clause 24(1)(a) of the *Health Information Act* authorizes a Custodian to disclose personal health information without that individual's consent, to prevent or reduce risk of serious harm. Clause 24(1)(a) of the *Health Information Act* states:

24. (1) A custodian may disclose personal health information without the consent of the individual to whom it relates if the custodian reasonably believes that disclosure is required
(a) to prevent or reduce a risk of serious harm to the health or safety of the individual to whom it relates or another individual; or
...

[29] When assessing a disclosure of personal health information under clause 24(1)(a) of the *Health Information Act*, a Custodian must consider the following:

- a. The custodian must believe that there is a risk of harm. The definition of "risk" in the *Paperback Oxford English Dictionary*, (2006, 6th ed.) includes "a situation that could be dangerous or have a bad outcome". A custodian does not need to prove that the feared outcome will definitely occur, nor does the feared outcome need to be immediate or imminent, but it must be more than a mere possibility;

- b. The custodian must believe that the feared harm is harm to an individual's health or safety. In this context, the expression 'health or safety' suggests bodily or psychological harm;
- c. The custodian must believe that the harm is serious. Clause 24(1)(a) of the *Health Information Act* uses the expression "serious harm", which is not defined. I interpret 'serious harm' to be more grave than 'significant harm';
- d. The custodian must believe that disclosure would prevent or reduce the risk of serious harm. This is an assessment about whether the person, to whom the custodian discloses personal health information, has the ability to prevent or reduce the risk of the serious harm;
- e. The custodian's beliefs must be reasonable; and
- f. As with all disclosures of personal health information, the amount of information disclosed must be limited to the minimal amount necessary to accomplish the purpose for which it was disclosed [subsection 23(2) of the *Health Information Act*.]

[30] Subsection 24(1)(a) of the *Health Information Act* uses the words "may disclose". A custodian is authorized, but not required, to disclose personal health information. A custodian must exercise discretion regarding whether to disclose personal health information, and they must exercise their discretion reasonably. A decision is not reasonable if, for example, a custodian's decision to disclose is made in bad faith or for an improper purpose, or if they considered irrelevant considerations, or failed to consider relevant considerations.

[31] We advised the Complainant of the Custodian's position; that they disclosed the information out of concern for the Complainant's health and safety. We also advised the Complainant of clause 24(1)(a) of the *Health Information Act*.

[32] The Complainant does not agree that there was any risk to their health or safety. They advised that:

I never missed a prescription, never missed a dose, never missed a test. Never planned or mention stopping, and yet they contacted my parents under the guise of “[the Complainant] could suffer withdrawal if [they miss] a dose.” Which is true. But wasn’t even a possibility, had I been kicked out [of their parent’s home], I would not have discontinued treatment. The doctor went around me and contacted my parents. Despite no risk to my health.

[33] The Custodian’s concern related to the potentially dangerous situation with opioid withdrawal if the Complainant’s prescription ran out. Not all doctors can prescribe some of the medications used to treat addictions. There is a difference between taking a prescription drug in accordance with a prescription, and access to a prescription from a doctor. The Custodian advises:

The main issue in this letter, is that [the Complainant] is denying that [they] would have discontinued treatment or risked withdrawal (and it's consequences). I would disagree. By firing [their] prescriber, [the Complainant] is walking out on treatment. There are no immediate options in the community to get methadone, unless [they were] admitted to the provincial addiction centre at Mt. Herbert. There are various barriers to this, including the fact that [the Complainant] told me [they]’d never go there, as well as the fact that there are 20-40 people on the wait list at most times, and so getting in right away rarely (or never) happens.

The only reason [the Complainant] did not go into withdrawal, was that I asked a favor of a colleague to take on [their] case. Otherwise, [the Complainant] would have certainly been in withdrawal, without a prescriber or prescription.

...

The things we worry about are: relapse, withdrawal, overdose, suicide, crime, etc. These were realistic concerns.

[34] The Custodian does not need to prove that Complainant’s prescription will definitely run out, but that it is more than a mere possibility. Based on the Custodian’s description of the challenges to get a prescription, and their professional experience in this area, I am satisfied that there was a risk that the Complainant would not have access to a prescription.

[35] I am satisfied that the concerns listed by the Custodian are all risks of serious harm to the Complainant’s health and safety if their prescription ran out. I find that the Custodian’s

beliefs about the risk of serious harm to the health and safety of the Complainant are reasonable.

[36] The Custodian must have a reasonable belief that disclosure to the Complainant's mother could prevent or reduce the risk of serious harm. Based on information from the Complainant and the Complainant's mother, I am persuaded that the Complainant's mother is in close contact with the Complainant, and a key player in the safety net of the Complainant. In these circumstances, it is reasonable to believe that the Complainant's mother would assist in preventing or reducing the risk of serious harm to the health or safety of the Complainant. They could assist the Complainant find another prescribing doctor, or watch for signs of any of the feared outcomes, relapse, withdrawal, overdose, suicide, etc, and if detected, would intervene to attempt to assist the Complainant.

[37] I further find that the Custodian released only the minimum amount of personal health information necessary to accomplish the purpose of preventing or reducing the risk of serious harm to the health or safety of the Complainant.

[38] In consideration of the above, I find that the Custodian was authorized by section 24(1)(a) of the *Health Information Act* to disclose the limited personal health information to the Complainant's mother with the objective to prevent or reduce the risk of serious harm to the Complainant's health and safety.

[39] There is no suggestion that the Custodian was acting in bad faith or for an improper purpose, or that they considered any irrelevant considerations, or failed to consider relevant circumstances. I am satisfied that the Custodian properly exercised their discretion in these circumstances.

[40] I find that the Custodian's disclosure to the Complainant's mother, that the Complainant ended the doctor-patient relationship, and that there was a dangerous situation of opioid

withdrawal if the Complainant's prescription ran out, complied with the *Health Information Act*.

VI. CONCLUSION

- [41] In conclusion, I find that information from counselling, and the information relating to the Complainant ending the doctor-patient relationship, and the danger of opioid withdrawal if the Complainant's prescription ran out, is the personal health information of the Complainant.
- [42] I find that the Complainant did not provide sufficient evidence to substantiate the complaint that the Custodian disclosed the Complainant's personal health information from counselling sessions to the Complainant's mother.
- [43] The Custodian acknowledges disclosing personal health information to the Complainant's mother relating to the Complainant ending the doctor-patient relationship. I find that clause 24(1)(a) of the *Health Information Act* authorized the Custodian's to disclosure this personal health information to prevent or reduce the risk of serious harm to the health or safety of the Complainant, and was in compliance with the *Health Information Act*. The Custodian presented themselves with a strong understanding of their obligations to protect personal health information, and acted appropriately in the circumstances.
- [44] In consideration of these findings, I make no order or recommendations in this matter.

Maria MacDonald
Adjudicator, Office of the Information and
Privacy Commissioner