

INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

Report of an investigation concerning the disclosure of health information in response to a subpoena issued by a foreign court

February 3, 2009

Dr. David F. Meller

Investigation Report H2009-IR-002

(Investigation H2264)

Introduction

- [1] In September 2008, the complainant wrote to the Information and Privacy Commissioner, stating that his physician, Dr. Meller (or “the custodian”) had disclosed his health information in response to a subpoena from a court in Montana, USA. The complainant wanted to know whether the subpoena was valid and whether the custodian should have responded. The complainant also contends that Dr. Meller disclosed his information to a Montana-based lawyer in response to this subpoena without his consent.
- [2] The Commissioner authorized me to conduct an investigation under section 85(e) of the *Health Information Act* (HIA, or “the Act”). Section 85(e) allows the Commissioner to conduct investigations to attempt to resolve complaints that health information has been collected, used, or disclosed by a custodian in contravention of the HIA.

Background

- [3] Dr. Meller is the complainant’s physician and is based in Lethbridge, Alberta. The complainant was involved in a motor vehicle accident in Montana and took legal action as a result, hiring a Montana-based lawyer to act on his behalf. The other party to the litigation also engaged a Montana lawyer, who subpoenaed Dr. Meller to give a sworn deposition.
- [4] The subpoena in question was issued by the Montana Eighth Judicial District Court, Cascade County, Montana. The opposing party’s lawyer visited Dr. Meller’s office in Lethbridge on August 15, 2008 to take his sworn deposition.
- [5] Dr. Meller confirms that he responded to the subpoena by giving a sworn deposition and provided a copy of the complainant’s medical chart to the

opposing party's lawyer. The complainant's Montana-based lawyer also attended this meeting via telephone conference call.

Application of HIA

- [6] The *Health Information Act* applies to health information in the custody or control of custodians. Dr. Meller is a health services provider who is paid under the Alberta Health Care Insurance Plan to provide health services and consequently falls under the definition of "custodian" set out in section 1(1)(f)(ix) of the HIA.
- [7] The complainant sent me a transcript of the sworn deposition given by Dr. Meller in response to the subpoena. Dr. Meller was deposed by the opposing party's lawyer and his oral evidence transcribed by a Calgary-based court reporter. Dr. Meller's evidence includes the complainant's diagnostic, treatment and care information and consequently falls under the definition of "health information" set out in section 1(1)(k) of the HIA. The transcript also records the fact that Dr. Meller gave a copy of the complainant's medical chart to the opposing party's lawyer.

Issue

- [8] Did the custodian have the authority under section 35 of the *Health Information Act* to disclose identifying diagnostic treatment and care information without the consent of the individual who is the subject of the information?

Analysis

- [9] I asked the custodian to provide his reasoning or a legal opinion that would support the disclosure of the complainant's health information. The custodian responded by providing the following three arguments, which I will consider in turn:
- a. The Subpoena appeared to be an official court document. Dr. Meller said he understood he could have been compelled under the *Alberta Rules of Court* to produce a copy of the complainant's medical chart.
 - b. The complainant had previously authorized him to release his medical information in relation to the proceedings in Montana.
 - c. The complainant's legal counsel attended the deposition and did not object to the disclosure.

Do the Alberta Rules of Court apply to this disclosure?

- [10] Before considering the *Alberta Rules of Court*, it is important to review the applicable sections of the *Health Information Act*.
- [11] Section 35(1) of the HIA gives custodians the discretion to disclose individually identifying diagnostic, treatment and care information without patient consent

under certain limited circumstances. In particular, section 35(1)(i) says a custodian may make such a disclosure,

- (i) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction in Alberta to compel the production of information or with a rule of court binding in Alberta that relates to the production of information,

[12] Furthermore, section 3 of the HIA says,

3 This Act

- (a) does not limit the information otherwise available by law to a party to legal proceedings,
- (b) does not affect the power of any court or tribunal in Canada to compel a witness to testify or to compel the production of documents, and
- (c) does not prohibit the transfer, storage or destruction of a record in accordance with an enactment of Alberta or Canada.

Section 3 of the HIA speaks to the scope of the Act. It ensures that the HIA does not interfere with Canadian legal and court proceedings or other Canadian or Alberta laws in general.

[13] Sections 3 and 35(1)(i) of the HIA provide clear authority for a custodian to respond to subpoenas issued by courts with jurisdiction in Alberta and Canada. However, the subpoena that Dr. Meller responded to was issued by a court with jurisdiction in Montana.

[14] Dr. Meller said he understood that he could have been compelled to disclose health information under the *Alberta Rules of Court*. His understanding is correct, in theory. There is a process that would have allowed Dr. Meller to respond to this subpoena. Section 56 of the *Alberta Evidence Act*, read in conjunction with Rules 394 and 395 of the *Alberta Rules of Court*, sets out a process that allows subpoenas issued from foreign courts to be recognized by the Court of Queen's Bench of Alberta.

[15] In this case, however, Dr. Meller responded directly to the Montana subpoena. None of the parties to the complainant's lawsuit had applied to the Court of Queen's Bench of Alberta to have it recognize the Montana subpoena. Therefore, the *Alberta Rules of Court* did not, in fact, apply to this disclosure. This means that Dr. Meller had no authority under section 35(1)(i) of the HIA to respond to the subpoena.

[16] I also considered Dr. Meller's authority to disclose information under section 35(1)(h) of the HIA. This section of the *Act* was previously interpreted in the Information and Privacy Commissioner's Order H2004-005. In that Order the Commissioner said the custodian had authority to disclose the complainant's health information without consent for the purpose of a court proceeding to which the custodian was not a party. This section of the HIA does not mention whether the court proceeding needs to be in Canada or Alberta. However, section 3 of the HIA only allows custodians to disclose information in response to orders

from courts or tribunals with jurisdiction in Canada. When read with section 3 in mind, section 35(1)(h) cannot authorize this disclosure either. This notion is further supported by section 107(5.1) of the HIA, which explicitly prohibits custodians from disclosing health information in response to court orders or subpoenas from courts without jurisdiction in Alberta.

- [17] I find that the custodian did not have the authority under section 35 of the *Health Information Act* to disclose individually identifying health information without consent of the individual who was the subject of the information.

Did the complainant authorize the disclosure?

- [18] Dr. Meller sent me a form signed by the complainant to indicate that the complainant had authorized the disclosure of his health information to support the legal action in Montana. This form was signed by the complainant and it authorized disclosure of health information to the complainant's own lawyer. The form does not authorize disclosure to any other parties. Therefore, I find that the form did not authorize Dr. Meller to disclose the complainant's health information in response to the subpoena.

- [19] The complainant asserts Dr. Meller disclosed his health information to the opposing party's lawyer without consent. After reviewing the records presented to me by both parties, I did not see any evidence to indicate that the complainant consented to have his health information disclosed to any party but his own lawyer.

Presence of the complainant's legal counsel

- [20] The complainant's legal counsel was present via telephone conference call when Dr. Meller gave his deposition. From my reading of the transcript of this call, there is no evidence to suggest that the complainant's counsel raised any concerns about Dr. Meller's disclosure of his client's health information. At the same time, it is clear he was aware that Dr. Meller was disclosing his client's health information through the sworn deposition and by handing over a copy of the complainant's medical chart.

- [21] Section 104(1)(i) of the HIA addresses the exercise of rights by representatives as follows,

104(1) Any right or power conferred on an individual by this Act may be exercised

...

- (i) by any person with written authorization from the individual to act on the individual's behalf.

- [22] The complainant's lawyer had written authority to act on his behalf. The complainant's lawyer allowed, or at least did not object to, the disclosure of the complainant's health information. In light of section 104(1)(i), allowing this disclosure can be interpreted as the complainant's own action, or inaction. However, failure to object to a disclosure is not the same thing as consenting to a disclosure. The HIA only recognizes explicit consent, given in writing or electronically, as set out in section 34 of the *Act*. Therefore, I cannot find that the complainant consented to the disclosure through his lawyer.

[23] Dr. Meller had little reason to believe the complainant would object to the disclosure of his health information to support his legal action in Montana. The complainant's lawyer could have objected to the disclosure for the reasons outlined at paragraphs 10-17, but did not. In my opinion, the presence of the complainant's legal counsel is a significant mitigating factor in this case. The complainant's legal representative was present and aware of the disclosure as it took place. It is understandable that Dr. Meller was under the impression the complainant had no objections to the disclosure. However, my finding at paragraph 17 that Dr. Meller did not have authority to disclose under section 35 of the HIA still stands.

Recommendations

[24] While I believe Dr. Meller acted in good faith in disclosing the complainant's health information, he did not seem to be aware of the general prohibition in the HIA against disclosing health information in response to foreign subpoenas. I recommend that the custodian review the *Health Information Act* with his legal counsel to ensure his disclosure policies and procedures reflect this prohibition.¹

Conclusion

[25] The *Health Information Act* was amended in 2006 to give explicit direction to custodians that they must not disclose health information in response to foreign court orders without proper jurisdiction. When considering responding to a foreign subpoena or other court order, custodians must take reasonable steps to ensure it has been recognized by a court with jurisdiction in Alberta or Canada, or get consent from the patient to disclose their health information.

Brian Hamilton
Portfolio Officer, Health Information Act
Office of the Information and Privacy Commissioner of Alberta

¹ As an alternative, a custodian may get consent from the patient to disclose health information in response to a foreign subpoena, as long as the patient's consent meets the criteria of section 34 of the HIA.