

Information and Privacy Commissioner of Alberta

Report of an Investigation concerning custodians and information managers

July 24, 2013

Dr. Dianne Smith

Dr. Ashif Jaffer

Investigation Report H2013-IR-01

(OIPC Files H4992 and H4993)

Introduction

- [1] On August 13, 2012, Dr. Dianne Smith reported to the Information and Privacy Commissioner that she had lost custody and control of her patients' medical information from the Didsbury Medical Clinic. She further stated that the information may be in the custody of the clinic's electronic medical record (EMR) vendor, Telin Medical Systems Ltd. (Telin) or of a second physician associated with the Didsbury Medical Clinic, Dr. Ashif Jaffer.
- [2] Dr. Smith had decided to leave the Didsbury Medical Clinic and open her own clinic. She contacted Telin to request the medical files of her patients be migrated into her new EMR located at her new clinic. Telin notified her that because they did not have an agreement with her they were unable to grant her request. As a result of her leaving the clinic and Telin refusing to provide her with a copy of her patient's records, she lost custody and control of these records.
- [3] The Commissioner decided to open an investigation under section 84(1)(a) of the *Health Information Act* (HIA, or "the Act") and authorised me to investigate and attempt to settle this matter. This provision allows the Commissioner to conduct investigations on her own motion to ensure compliance with any provision of the HIA.
- [4] This report outlines the findings and recommendations arising from this investigation.

Background

- [5] Dr. Dianne Smith joined the Didsbury Medical Clinic in July of 2009. At that time the clinic had one other physician, Dr. Ashif Jaffer employed at the clinic. The clinic was owned and operated by 1014138 Alberta Corporation, a company operated by Mr. Shiraz Jaffer. For the purpose of clarity Mr. Jaffer and Dr. Jaffer are two separate individuals who have the same last name.

- [6] According to Dr. Smith, for the two years prior to her leaving the clinic, she was the only full-time practicing physician at the Didsbury Medical Clinic. During this period Dr. Jaffer was practicing primarily in another town in Alberta approximately three hundred kilometres from Didsbury.
- [7] On June 1, 2012 Dr. Smith provided Mr. Jaffer with 30 days notice of her intention to resign. This was in accordance with her employment contract. Her intention was to leave the Didsbury Medical Clinic and open her own clinic located in the same town. Dr. Smith opened her own clinic on July 4, 2012.
- [8] The Didsbury Medical Clinic maintained an EMR for the management of patient records. The software for the EMR was provided by Telin and health information was stored on a server located within the clinic. Telin provided data and system backup services for the clinic and information technology services such as troubleshooting as required.
- [9] Dr. Smith chose a different EMR vendor for her own clinic. She requested Telin provide her newly chosen EMR vendor with a copy of the Didsbury Medical Clinic's medical records for the purposes of continuing treatment and care. She requested that Telin assist her new vendor to migrate the records from the Telin EMR to her new EMR. It was Dr. Smith's position that she was the custodian of all patient records located at the Didsbury Medical Clinic because she was the only regularly practicing physician there.
- [10] Telin refused to provide those records to her stating Telin's contract was with the clinic and not her. As a result of having no formal relationship with Dr. Smith, they were therefore unable to disclose the records to her without the consent of the clinic owner. The clinic owner had initially refused to provide consent.
- [11] On August 13, 2012, Dr. Smith self-reported a breach to the Commissioner's office citing she had lost custody of more than 1500 patient records.

Application of the HIA

- [12] The *Health Information Act* (HIA) applies to "health information" in the custody or under the control of a "custodian". "Health information" is generated through the provision of a "health service."
- [13] The definition of "health service" in section 1(1)(m) of the HIA includes (among other things) protecting, promoting or maintaining physical health, preventing illness and diagnosing and treating illness. The patient health records in the EMR are records generated as the result of these services and are therefore health information.
- [14] Dr. Smith and Dr. Jaffer fall under the definition of "custodian" as set out in section 1(1)(f)(ix) of the HIA and section 2(2)(e) of the *Health Information Regulation* because they are members of the College of Physicians and Surgeons of Alberta
- [15] Mr. Jaffer, the owner and operator of the Didsbury Medical Clinic, is not a custodian.

EMR Vendors and the HIA

[16] EMR vendors provide ongoing support or assistance to the custodian who purchased their product. Section 66(1) of the HIA describes an information manager as a person or body that;

(a) Processes, stores, retrieves or disposes of health information,

(b) ...

(c) Provides information management or information technology services.

[17] Both Dr. Smith and Dr. Jaffer used the Telin EMR at the Didsbury Medical Clinic. Although the EMR was locally installed on a server maintained at the clinic, Telin provided back up services to the clinic and maintained these backups of patient files. The backups were therefore disclosed to Telin on a nightly basis throughout the tenure of their use of the EMR. Telin was therefore storing information (backup tapes) on behalf of the clinic. Storing information on behalf of a custodian falls within the description of information manager services in section 66(1)(a) of the HIA. Telin also provided the clinic with troubleshooting assistance with the EMR software on an as required basis. Troubleshooting, or assisting with software issues is a type of information technology service and therefore falls within the description of an information manager service as described in section 66(1)(c) of the HIA. Telin was therefore providing two kinds of information management services to the Didsbury Medical Clinic. Therefore Telin acted as information manager for the physicians practicing at Didsbury Medical Clinic, as defined by section 66(1) of the HIA.

[18] Amendments to the HIA were made in 2010 that changed the wording of section 66. However both prior to and after these amendments, custodians could only disclose to information managers if an agreement was in place.

[19] The agreement in this investigation was signed prior to 2010. I therefore refer to the pre-2010 version of the Act in this report. Some of the wording has changed but the effect is still the same. Custodians cannot disclose to an information manager without an information manager agreement in place.

[20] Section 66(3) of the HIA allows custodians to disclose to information managers once an information management agreement is in place. It states;

A custodian that has entered into an agreement with an information manager may disclose health information to the information manager without the consent of the individuals who are the subjects of the information for the purposes authorised by the agreement.

[21] Section 31 of the HIA states that “no custodian shall disclose health information except in accordance with this Act.” As noted above, a custodian has the authority to disclose health information to an information manager when an information manager agreement is in place between the two parties (information manager and the custodian). However if there is no agreement in place, a custodian may be found to have contravened section 31 of the HIA.

Issue

[22] The issue under consideration in this investigation is:

Did the custodian(s) disclose health information to Telin Medical Systems Ltd. in contravention of section 31 of the HIA?

Analysis and Findings

Did the custodian(s) disclose health information to Telin Medical Systems Ltd. in contravention of section 31 of the HIA?

[23] I reviewed the information manager agreement between Didsbury Medical Clinic and Telin. My review found that the agreement was signed by Mr. Shariz Jaffer, who is the owner of the Didsbury Medical Clinic, and also by a representative of Telin.

[24] The HIA only identifies custodians as being able to enter into an information manager agreement. Section 66(2) of the HIA states;

A custodian may enter into an agreement with an information manager in accordance with the regulations for the provision of any or all of the services described in subsection (1).

[25] As previously noted in this report, Mr. Jaffer in his role as owner and operator of the clinic is not a custodian as defined in the HIA. Given that Mr. Jaffer is not a custodian under the HIA and that the HIA only allows a custodian to sign the agreement, this agreement should have been signed by Dr. Jaffer and Dr. Smith. I find the agreement provided to me is not a valid information manager agreement as defined in the HIA.

[26] If Dr. Smith and Dr. Jaffer had entered into a valid information manager agreement, they would have had the authority to disclose information to Telin. This disclosure could have been authorised under section 66(3) of the HIA. As previously stated in this report, this allows a custodian to disclose health information to their information manager once an information manager agreement is in place. The authorities to disclose health information are laid out in Part 5 of the Act. There is no other authority in Part 5 that would allow Dr. Smith and Dr. Jaffer to disclose health information in the circumstances described here.

[27] Given that neither Dr. Smith nor Dr. Jaffer had an information manager agreement with Telin, I find that both Dr. Jaffer and Dr. Smith contravened section 31 of the HIA when they disclosed health information to Telin.

Recommendations

- [28] I recommend Dr. Jaffer re-visit the agreement with Telin to ensure that it is signed by the custodian of the records (in this case himself).
- [29] I recommend that Dr. Smith review her agreement with her new EMR vendor to ensure that the agreement is signed by the custodian of the records (in this case herself).
- [30] Generally, I recommend all custodians review their agreements with their EMR providers to ensure that they are signed by the custodian(s) responsible for the custody and control of the health information.

Conclusions

- [31] Dr. Smith was eventually able to regain custody and control of her records. However the process took several weeks. This time delay could have been avoided if she had entered into an information manager agreement with Telin.
- [32] This investigation highlights two important issues with respect to the relationships between custodians and information managers. The first is that information manager agreements must be signed by custodians. Agreements signed by individuals who are not custodians are not valid information manager agreements under the *Health Information Act*. Custodians do not have the authority to disclose health information to providers of information manager services without an agreement pursuant to section 66 of the *Health Information Act*. When custodians do not directly sign agreements with their EMR vendors, they may find themselves in the unfortunate position of not being able to exercise control over health information they need to provide health services. Custodians remain accountable for the health information they collect, use and disclose and must ensure they are playing an active role in determining how that information is managed.

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