

# NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 07-26  
September 10, 2007  
Review File: 05-253-5

## A. BACKGROUND

On December 5<sup>th</sup>, 2005 this office received a "Request for Review" from the Complainant who felt that her personal health information had been improperly accessed and improperly disclosed without her consent. The complaint was very sketchy in terms of specifics and the Complainant was therefore asked to provide more details about her concerns. On January 19, 2006, the Complainant provided a three page letter outlining her concerns and the information in the January 19<sup>th</sup> letter was passed on to the health centre involved and a request was made for their response to the allegations. The health centre provided me with their initial response by letter dated July 3<sup>rd</sup>, 2006. I requested further details from the public body by letter of July 25<sup>th</sup>. A number of reminders were sent, requesting a response to my inquiries. Although I was assured that a letter would be coming on or about September 11<sup>th</sup>, 2006 that response was not received. Several more reminders were sent requesting the response, which was eventually received only on August 14<sup>th</sup>, 2007.

## DISCUSSION AND RECOMMENDATIONS

The *Access to Information and Protection of Privacy Act* sets out rules for the collection, use and disclosure of personal information about individuals which comes into the hands of public bodies. Some of the more relevant provisions of the Act are as follows:

42. The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.
43. A public body may use personal information only

- (a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose;
- (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or
- (c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.

47. A public body may disclose personal information only

- (a) in accordance with Part 1; or
- (b) in accordance with this Division.

48. A public body may disclose personal information

- (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;
- (b) where the individual the information relates to has identified the information and consented, in the prescribed manner, to its disclosure;
- (c) for the purpose of enforcing a legal right that the Government of Nunavut or a public body has against any person;
- (d) for the purpose of
  - (i) collecting a fine or debt owed by an individual to the Government of Nunavut or a public body, or
  - (ii) making a payment owed to an individual by the Government of Nunavut or a public body;
- (e) to a public body or a law enforcement agency for law enforcement purposes;
- (f) where disclosure is by the Minister of Justice or an agent or lawyer of the Minister of Justice to persons responsible for a place of lawful detention;
- (g) for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body;

- (h) to the Maintenance Enforcement Administrator for the purpose of enforcing a maintenance order under the Maintenance Orders Enforcement Act;
- (i) to the Information and Privacy Commissioner, where the information is necessary for the performance of the duties of that officer;
- (j) to the Auditor General of Canada or to any other prescribed person for audit purposes;
- (k) to an officer or employee of the public body or to a member of the Executive Council, where the information is necessary for the performance of the duties of the officer or employee or the member of the Executive Council;
- (l) for use in the provision of legal services to the Government of Nunavut or a public body;
- (m) to Nunavut Archives for archival purposes;
- (n) for the purpose of complying with a subpoena or warrant issued or an order made by a court, person or body that has the authority to compel the production of information or with a rule of court that relates to the production of information;
- (o) for the purpose of supervising an individual under the control or supervision of a correctional authority;
- (p) for the purpose of complying with a law of Nunavut or Canada or with a treaty, written agreement or arrangement made under a law of Nunavut or Canada;
- (q) when necessary to protect the mental or physical health or safety of any individual;
- (r) so that the next of kin of an injured, ill or deceased individual may be contacted;
- (s) for any purpose when, in the opinion of the head,
  - (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
  - (ii) disclosure would clearly benefit the individual to whom the information relates;

- (t) where the information is otherwise available to the public;
- (u) for any purpose in accordance with any Act that authorizes or requires the disclosure; or
- (v) to a member of the Legislative Assembly who has been requested by the individual to whom the information relates to assist in resolving a problem.

If none of these circumstances exist, the Act prohibits the disclosure of individual personal information. If the alleged uses and disclosures alleged by the Complainant in fact occurred, there is no suggestion made by the public body that the use or disclosure fell within any of the permitted allowances noted above. In other words, if the disclosure or use of the information occurred, it was improper.

Unfortunately, the *Access to Information and Protection of Privacy* (ATIPP) Act does not provide for a complaint process when someone feels that their privacy has been breached. This issue has been addressed in each of my Annual Reports since I assumed the role of the Information and Privacy Commissioner of Nunavut. Be that as it may, I have accepted this complaint, and others, and will provide my comments in the hope that the comments made may assist this public body and others to understand the Act more fully and take active steps to ensure the privacy of personal information in their possession and control.

## **THE COMPLAINT**

Without providing too much by way of background, this complaint arose in a relatively small community and is actually made up of three complaints. The first complaint is that a health worker (to be referred to as "A.B." for ease of reference) in the Complainant's community who had a family relationship with her former common law spouse, allegedly disclosed information to the spouse which had a detrimental effect on court proceedings involving her children. The second complaint was that the Complainant had seen "sticky notes" on her medical file in A.B.'s hand writing which suggested that the Complainant had certain health issues which could have had a negative impact on her medical treatment, particularly as she denied the truth of the alleged statements.

She said that she had asked a nurse about the notes during an appointment and the nurse had removed the notes and thrown them away. Thirdly, the Complainant felt that the health center, and in particular A.B. had contacted her former common law spouse about a medical emergency involving her son rather than contacting her and she felt this was both a breach of protocol and of her son's personal privacy, particularly as the former spouse was not the boy's natural father.

## **THE RESPONSE FROM THE PUBLIC BODY**

With respect to the first complaint, the public body advises as follows:

- a) In August, 2003, there was a note documented on the Complainant's medical file that indicated that the Complainant did not want A.B. to have any access to her medical records;
- b) After that notation was made, there is no evidence on the Complainant's health record that A.B. had any further dealings with her file. There were no subsequent chart entries by A.B. on the Complainant's file.
- c) all personal information which was provided to me in the course of this review is information taken from the Complainant's personal health records;
- d) there is a specific written policy regarding confidentiality of patient charts and files;
- e) in this particular case, there was an agreement that if A.B. was on duty when the Complainant came to the health centre, A.B. would not interact with the Complainant.
- f) patient charts are filed in a specifically designed portion of the office in the health centre in accordance with Government of Nunavut policies. The doorway to the office is permanently locked and access is restricted to those with a defined

need. There are patient/ client service counters that are open during the day, but in the evening and on weekends, these are secured by mesh barricades that are locked in place.

- g) medical charts are routinely accessed by staff for the medical personnel;
- h) after hours, the nurse on call is responsible for retrieving charts for any patients that are seen during the on-call shift and these charts are reviewed by the nursing supervisor the next morning to ensure that all interventions are properly documented and as a safeguard to ensure appropriate treatment/followup.
- i) all phone calls are logged in the "on-call" book.
- j) nurses on call are provided with a set of master keys to the building which will allow them access to any part of the building. These are unique keys which cannot be duplicated in the community;
- k) staff are reminded about confidentiality at almost every monthly staff meeting and from time to time at the morning staff meetings and staff is periodically shown a DVD on the need for confidentiality;
- l) all staff sign the standard Government of Nunavut confidentiality statement when commencing employment;

The public body could not verify definitively that A.B. did not have access to the Complainant's chart. The public body did quiz the employee, however, and were satisfied that her professional integrity was such that there was no inappropriate use or disclosure of the Complainant's records by A.B.

As it concerned the second issue, the public body indicated that a supervisor had done a thorough and comprehensive review of the Complainant's medical chart and that there was absolutely no evidence of any tampering with the file, there was a full

sequential continuity of the chart from page to page, there were no deletions, corrections or addendums on the file and all entries were made in the handwriting of the various professionals who had interacted with the Complainant. There were no "sticky notes" found on the file. There were, however, two "Post-It" notes in the chart, both of which were unmarked and which were placed there by a medical doctor as bookmarks to relevant sections of the file when the Complainant had been referred for medical treatment outside of the community.

Finally, with respect to the issue regarding the Complainant's son, the public body indicates that the Complainant's former common law spouse had legal custody of the boy at the time of the medical emergency and that is why he was contacted and not the Complainant.

## **DISCUSSION**

When privacy is breached, it is often difficult to determine the source of the leak, particularly with paper records. In this respect, electronic health records provide a much more secure manner of storing individual medical information. In the context of medical information in a small community, the task of keeping information confidential is, I would suggest, far more difficult than it is in a larger community where people are more anonymous. In a small community, it is virtually impossible to obtain medical assistance without someone you know seeing you enter the clinic, in the clinic or leaving it. From there, information spreads quickly and easily. That doesn't mean that it came from the staff of the health clinic. In fact, it probably didn't. But the perception may well be there, particularly if there is some animosity between the patient and a staff member.

Having read the complaint and the response received, I agree with the Complainant that there is reason for some suspicion about how certain information was obtained and what it was used for following the Complainant's referral out to another community for medical treatment. The details that appear to be on the Complainant's medical file about her private life and legal proceedings with respect to both herself and her family seems somewhat out of place for a medical file and I wonder why such detail is

included in a medical file. The response from the public body tells me that the health centre knew a lot more about what was going on in the Complainant's life than was strictly medical, including the outcome of custody proceedings between the Complainant and her former common law spouse and other legal happenings in the Complainant's life. Although I can understand having some background information about what is going on in a patient's life to help with diagnosis and treatment, the amount of detail provided was substantial and, frankly, somewhat disturbing.

It should also be pointed out that there are other explanations which might explain why information might have been disclosed without the Complainant's consent. For example, there appear to have been some concerns about the safety of the Complainant's children and there is a legal duty placed on any person who has information that a child may be in danger to report that information to a Child Protection Worker or a peace officer, notwithstanding the ATIPP Act. This obligation takes precedence over any privacy obligations set out in the ATIPP Act. In this case, it may have been that someone else became aware of some of the issues and passed them on to authorities. It might have been one of the children who said something to a teacher who then passed it on to authorities. Or it may have been the Complainant herself who said something to a close friend or relative who became concerned and passed the information on to others. The bottom line in this case is that, as pointed out by the public body, there is no way to say definitively that information about the Complainant came from one source or another.

I am satisfied that the health center in this case has policies and procedures in place and that they emphasize the importance of confidentiality on an ongoing basis. I recognize that, with paper records as opposed to electronic health records, it is more difficult to monitor who has access to medical files. Anyone who accesses an electronic health record leaves a digital record of the access and an audit trail can be traced. Not so with paper records. I also recognize that the human element is sometimes something that cannot be fully controlled in an institutional setting. In this case, it may or may not be that A.B. breached both the policies of the health center and her ethical responsibilities. There is simply no way to tell and because of that no steps can be

taken with respect to the individual involved. In my opinion, however, if the allegations could be proven, such use of a patient's records would be grounds for immediate dismissal.

In a case such as this, I can do no better than to quote a portion of an Order made by the Ontario Information and Privacy Commissioner in a situation in which similar allegations were made as appear in this case. In Order HO-002, she said:

This was a truly regrettable situation in which a patient who was admitted to a hospital, made a specific request to prohibit her estranged husband and his girlfriend, a nurse at the hospital, from having any information regarding her hospitalization, only to learn that the exact opposite had occurred.

While the hospital had policies in place to safeguard health information, they were not followed completely, nor were they sufficient to prevent a breach of this nature from occurring. In addition, the fact that the nurse chose to disregard not only the hospital's policies but her ethical obligations as a registered nurse, and continued to surreptitiously access a patient's electronic health record, disregarding three warnings alerting her to the seriousness of her unauthorized access, is especially troubling. Precautions against such blatant disregard for a patient's privacy by an employee of a hospital must be built into the policies and practices of a health institution.

This speaks broadly to the culture of privacy that must be created in healthcare institutions across the province. Unless policies are interwoven into the fabric of a hospital's day-to-day operations, they will not work. Hospitals must ensure that they not only educate their staff about the Act and information policies and practices implemented by the hospital, but they must also ensure that privacy becomes embedded into their institutional culture .....

I strongly encourage all health information custodians....to take the need to protect patient privacy to heart. Upholding compliance with the Act is not simply a matter of following the provisions of an enacted law, but ensuring that the use and disclosure of sensitive personal information such as health information is strongly monitored, and access controlled to those who truly need it in the performance of their duties. Predicating access on a "need to know" basis could perhaps be no more important than in a healthcare setting, where so much is at stake. The negative consequences flowing from unauthorized access and use of a patient's health information are extensive and far-ranging. Patients have enough to deal with - any additional stress arising from an unauthorized party peering into their health records is completely unacceptable.

## **RECOMMENDATIONS**

As noted, I can reach no conclusions in this case as to whether or not a member of the staff employed by the health centre used information she obtained in the course of her employment in a way which was not authorized. Whether or not the employee was guilty of inappropriately accessing, using or disclosing the Complainant's personal information, lessons can be learned from this situation. For that reason, I recommend:

- a) that this health centre and every health care institution in Nunavut, review and revise, as necessary, their procedures and protocols relating to patient health records, and those relating to human resources, to ensure that they comply with the requirements of the ATIPP Act, taking into account the paramount importance of protecting patients' personal health information;
- b) as part of this review, to implement a protocol to ensure that reasonable and immediate steps are taken, upon being notified of an actual or potential breach of an individual's privacy, to ensure that no further unauthorized use or disclosure is permitted;

- c) that the Government of Nunavut explore the possibility of implementing an electronic health record for all health institutions in Nunavut and that strong privacy controls be built into such systems to ensure that an audit trail is created every time such a record is accessed by any person;
- d) to ensure that all employees and/or agents of all health centers and nursing stations are appropriately informed of their duties under the ATIPP Act and their obligations to comply with all information management practices and protocols
- e) that all health centers review the nature of information on patient health records and that they limit that information to what is necessary to provide medical services.

As a postscript, I note that this review process took far longer than it should have because of the failure on the part of the public body in this case to respond to my requests. This is in spite of the fact that I wrote a number of letters to the public body requesting the information. In the end, it was only a threat to use the provisions of section 59 of the Act which sparked a response. The lack of a timely response to my requests is unacceptable and shows a lack of respect to the Complainant and to the process. I trust that this public body will take steps to ensure a more timely response in the future.

Elaine Keenan Bengts  
Information and Privacy Commissioner