



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report AH-2023-001

December 21, 2023

Newfoundland and Labrador Health Services

Summary:

The Complainant requested from Newfoundland and Labrador Health Services (NLHS) a report made under the *Adult Protection Act* in relation to their spouse. NLHS denied access to the record relying on section 29 of the *Adult Protection Act*. The Complainant made a complaint to our Office stating that, as the substitute decision-maker for their spouse, they believed they were entitled to the entire record. The Commissioner found that NLHS's denial of the complete record is not compliant with the requirements of the *Personal Health Information Act* and recommended that NLHS complete a line-by-line review of the report and release information where appropriate.

Statutes Cited:

[*Personal Health Information Act*](#), 2015, SNL 2008, P-7.01, sections 5(3), 7, and 58.

[*Adult Protection Act*](#) SNL 2011 c. A-4.01, sections 12, 16, and 29.

Authorities Relied On:

NL OIPC Report [AH-2018-001](#).

I BACKGROUND

- [1] The Complainant submitted an access request to what was previously known as Eastern Health. In April 2023, all health care boards in Newfoundland and Labrador were consolidated into the Newfoundland and Labrador Health Services (NLHS) and that health authority is the successor of Eastern Health. For the sake of consistency, references to the custodian in the remainder of this Report will be to NLHS even if, at the time, the organization that received the request and made the decision about access was known as Eastern Health. The Complainant's request was for a copy of a report produced under the *Adult Protection Act* (APA) regarding their spouse. The Complainant is the substitute decision-maker for their spouse and also has a power of attorney for their spouse.
- [2] Of note, the APA at the time of the request has since been updated with a new version of the *Adult Protection Act, 2021*. As the previous versions of the APA was in force at the time of the Complainant's request, and NLHS's decision made pursuant to the previous legislation, this Report will follow the previous version of the APA and all references are to provisions and sections in the 2011 statute.
- [3] The Complainant advised that there was an investigation completed under the APA and that the file was closed; however, the Complainant wanted a copy of the complaint and report. The Complainant advised that the access request was made to the Release of Information Office (ROI) at NLHS and was processed as a request for personal health information.
- [4] NLHS denied access to the report relying on section 29 of the APA and advising that there was a misunderstanding resulting from the request being submitted to ROI and engaging *Personal Health Information Act* (PHIA).
- [5] The Complainant was not satisfied with NLHS's response and filed a complaint with this Office. The file could not be resolved and the complaint proceeded to formal investigation in accordance with section 67 of the PHIA.

II CUSTODIAN'S POSITION

[6] NLHS's position is that the entire report should be withheld.

[7] NLHS believes that the Complainant is asking for a copy of the APA Report to find out information about a complaint made against them and not for information related to their spouse or their spouse's care. NLHS's view of the request is that the Complainant is seeking personal information not personal health information.

[8] Based on this interpretation, NLHS states that the requested information does not meet the definition of personal health information and therefore *PHIA* does not apply as outlined under section 8 as follows:

8. (1) This Act applies only to personal health information collected, used or disclosed by a custodian or in the custody or control of a custodian.

[9] Personal health information is defined under section 5 of *PHIA* as follows:

5. (1) In this Act, "personal health information" means identifying information in oral or recorded form about an individual that relates to

- (a) the physical or mental health of the individual, including information respecting the individual's health care status and history and the health history of the individual's family;*
- (b) the provision of health care to the individual, including information respecting the person providing the health care;*
- (c) the donation by an individual of a body part or bodily substance, including information derived from the testing or examination of a body part or bodily substance;*
- (d) registration information;*
- (e) payments or eligibility for a health care program or service in respect of the individual, including eligibility for coverage under an insurance or payment arrangement with respect to health care;*
- (f) an individual's entitlement to benefits under or participation in a health care program or service;*
- (g) information about the individual that is collected in the course of, and is incidental to, the provision of a health care program or service or payment for a health care program or service;*
- (h) a drug as defined in the Pharmacy Act, 2012 , a health care aid, device, product, equipment or other item provided to an individual*

under a prescription or other authorization issued by a health care professional; or

(i) the identity of a person referred to in section 7.

[10] The *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* applies to all personal information, other than personal health information, that is in the custody or control of a public body. The personal information contained in the requested report would normally be governed by *ATIPPA, 2015*. However, Schedule A of *ATIPPA, 2015* exempts section 29 of the *APA* which is the section that deals with disclosure of confidential information. NLHS's position is that the Complainant cannot access the *APA* Report under *ATIPPA, 2015* based on this exemption.

[11] NLHS maintains that the disclosure of information which would identify the individual who made the report that initiated the investigation under the *APA* is restricted by section 29 of the *APA*. Except for enumerated exceptions, section 29 of the *APA* mandates confidentiality of matters known to persons employed in the administration of the *APA*, with section 29(3)(b) specifically mandating the denial of access to information "...where the disclosure would identify a person who made a report under section 12 (*APA* referral source)".

[12] NLHS submits that the maintenance of confidentiality within the *APA* process for the protection of source information is paramount for the successful protection of those in need.

III THE COMPLAINANT'S POSITION

[13] The Complainant's position is that as their spouse's substitute decision-maker and with the power of attorney that they should have full access to their spouse's personal health information and personal information contained in the *APA* report.

V DECISION

[14] The main issue in this Report is whether the Complainant can access any of the information contained in the *APA* Report.

[15] *PHIA* applies to records containing personal health information, whereas *ATIPPA, 2015* applies to records containing personal information not subject to *PHIA*. Both pieces of legislation refer to a record and the issue in this case is that the *APA* Report is a mixed-content record in that it has some personal health information and some personal information.

Complainant's Spouse's Personal Health Information

[16] *PHIA* applies to the Complainant's spouse's personal health information contained in the *APA* report. Section 7 of *PHIA* provides for a representative to exercise the right or power of an individual to access their personal health information. Section 7(a) provides for a written authorization whereas 7(b) provides for the exercise of such rights or powers by a substitute decision-maker:

7. *A right or power of an individual under this Act or the regulations may be exercised*

(a) *by a person with written authorization from the individual to act on the individual's behalf;*

(b) *where the individual lacks the competency to exercise the right or power or is unable to communicate, and where the collection, use or disclosure of his or her personal health information is necessary for or ancillary to a "health care decision", as defined in the Advance Health Care Directives Act, by a substitute decision maker appointed by the individual in accordance with that Act or, where a substitute decision maker has not been appointed, a substitute decision maker determined in accordance with section 10 of that Act;*

...

[17] The Complainant's spouse designated the Complainant as their attorney in the Enduring Power of Attorney. This document includes the following authorization:

I hereby authorize my attending physician, physicians or other medical treatment provider to release any or all patient information regarding my person, including but not limited to any patient records, test results, reports, and medical opinion to my attorney.

[18] The essence of a power of attorney is that it allows someone to act on your behalf. Furthermore, there is specific language in this power of attorney allowing the Complainant to access their spouse's patient information. We believe this clearly constitutes "written authorization from the individual to act on the individual's behalf" as stated in section 7(a) of *PHIA*.

[19] Based on this, the Complainant should be able to access all of their spouse's personal health information contained in the APA Report.

Complainant's Spouse's Personal Information

[20] One argument is that section 5(3) of *PHIA* applies, as identifying information about someone that is contained in a record that contains their personal health information is also their personal health information. Section 5(3) of *PHIA* states:

(3) In addition to the matters referred to in paragraphs (1)(a) to (i), personal health information includes identifying information about an individual that is contained in a record that contains personal health information within the meaning of that subsection.

[21] Based on this wording, the arguments above would equally apply here and the Complainant should be entitled to access their spouse's personal information contained in the APA Report with some exceptions. Opinions of others about the Complainant's spouse would be considered the Complainant's spouse's personal information. However, the identities of the opinion-givers along with information contained in the opinion that could identify the opinion-giver should not be released.

[22] Section 58 of *PHIA* lists exceptions to disclosure as follows:

58. (1) *A custodian shall refuse to permit an individual to examine or receive a copy of a record of his or her personal health information where*

(a) another Act, an Act of Canada or a court order prohibits disclosure to the individual of the record or the information contained in the record in the circumstances;

...

(2) A custodian may refuse to permit an individual to examine or receive a copy of a record of his or her personal health information where

(d) granting access could reasonably be expected to

(i) result in a risk of serious harm to the mental or physical health or safety of the individual who is the subject of the information or another individual,

(ii) lead to the identification of a person who was required by law to provide information in the record to the custodian, or

(iii) lead to the identification of a person who provided information in the record to the custodian in confidence under

circumstances in which confidentiality was reasonably expected.

[23] Since section 16 of the *APA* requires a person's cooperation with any investigation conducted under that legislation, section 58(2)(d)(ii) of *PHIA* would apply to allow the custodian to withhold information that could lead to the identification of a person who was required by law to provide information in the record. Section 16 of the *APA* is as follows:

16. (1) Where a director requires that an investigation be completed under section 14, a person shall cooperate with that investigation.

[24] Information that should be withheld in the *APA* Report should be the names and other identifying information of those individuals consulted in the course of the investigation under their report. Individual names are clearly information that could reasonably be expected to identify an individual. Other identifying information could be personal pronouns that would identify a person's sex and references to the individual's relationship to the Complainant's spouse, if any. As well, factual material may need to be examined to ensure that it does not identify or lead to identification of individuals involved in the report. It is possible that in some cases information which would ordinarily be treated as the personal information of the person the report is about (that is, the Complainant's spouse) may have to be withheld if that personal information would identify other persons. It is reasonable to assume that any investigation into the welfare and well-being of an individual will include the family members of that individual and members of the community close to them. The wording of section 16 of the *APA* states cooperation with an investigation is mandatory for "a person" without limiting the cooperation that is required to a specific group of people. This term is fairly broad and therefore could encompass any individual involved in any way with the investigation, such as the initial reporter, witnesses and others.

[25] If we consider that *APA* Reports are not as health-centric as other records, such as a patient's medical chart, and is more of a mixed-content record, then we would need to consider other alternatives if section 5(3) of *PHIA* doesn't apply to the full *APA* Report.

[26] If it is personal information under *ATIPPA, 2015* then section 29 of the *APA* overrides access rights under *ATIPPA, 2015* in the interest of maintaining the confidentiality of those

involved in the adult protection process. Section 29(a) of the *APA* provides an exception to this restriction "with the consent of the person to whom the information relates". While the Complainant's spouse cannot consent directly, I think there is a strong argument that the power of attorney allows the Complainant to consent on their behalf. However, this does not resolve the issue of whether the Complainant can receive information that relates to other persons who were involved in the *APA* Report.

[27] All things considered, I believe that the Complainant should be able to access the information in the *APA* report with the exception of information that could lead to the identification of a person who was required by law to provide information in the record to the custodian, as discussed above.

Complainant's Information

[28] If the *APA* Report contains any of the Complainant's personal health information or personal information, then they should be able to access it subject to limited exceptions. Section 58(2)(d)(ii) of *PHIA* would still apply to withhold information which could lead to the identification of a person who was required by law to provide information in the *APA* Report. While the Complainant can consent under section 29(1)(a) of the *APA* for release of personal information, section 29(3)(b) would still apply to withhold information that could identify a person who made a report under section 12 of the *APA*.

[29] Overall, the Complainant, as the substitute decision-maker for their spouse, should be able to access their spouse's personal health information and personal information contained in the *APA* Report with limited exceptions. The right or power of a substitute decision-maker to exercise an individual's right to access their personal health is still subject to the restrictions articulated at section 58 of *PHIA* and section 29 of the *APA*, however the blanket refusal of all information in the *APA* Report by NLHS is not in keeping with the legislative requirements under *PHIA*.

V RECOMMENDATIONS

- [30] Under the authority of section 72(2) of the *PHIA* I recommend that NLHS review the *APA* Report on a line-by-line basis and release information not subject to section 58 of *PHIA* or section 29 of the *APA*.
- [31] As set out in section 74 of the *PHIA*, the head of NLHS must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report (in this case the Applicant) within 15 days of receiving this Report.
- [32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of December, 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador