



Office of the Information and
Privacy Commissioner of Alberta

Investigation Report H2017-IR-01

Investigation concerning custodians and information managers

October 2, 2017

Dr. Justin Charles Sebastian

Investigations 001281, 001354 and 002096

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Introduction

- [1] On August 17, 2015, Dr. Justin Sebastian reported to the Office of the Information and Privacy Commissioner (OIPC) that a consultation letter he prepared concerning one of his patients was inadvertently made accessible over the internet as a result of actions taken by an outside company he hired to provide transcription services. In response to this self-reported breach, the OIPC opened Case File #001354.
- [2] The company that provided the transcription services, SimiLife (“SimiLife”), had previously reported the same incident to the OIPC on July 28, 2015 (OIPC Case File #001281).
- [3] On October 27, 2015, the patient affected by this incident (the Complainant) complained to the OIPC about the lack of information provided to her by the transcription company regarding the cause of the incident, and the length of time her health information was exposed on the internet. The OIPC opened Case File #002096 in response to this complaint.
- [4] The Commissioner authorized me to investigate the complaint under the *Health Information Act* (HIA, or “the Act”) and attempt to settle this matter. This report outlines my findings and recommendations.

Background

- [5] Dr. Sebastian practices as a respirology specialist in Edmonton. As a specialist, the patients he sees are referred to him by other physicians. The Complainant in this case was referred to Dr. Sebastian by her family physician (the “Family Physician”).
- [6] Dr. Sebastian uses SimiLife, a company based in Edmonton, to provide transcription services for his practice. SimiLife subcontracts transcription work to an entity based in India.
- [7] The timeline of events leading to this incident is the following:
 - On April 23, 2015, the Complainant was seen by Dr. Sebastian, who dictated his consultation notes and made the recording available to SimiLife for transcription.
 - On April 27, 2015, the transcription of the recording was completed and uploaded on SimiLife’s server.
 - On April 29, 2015, Dr. Sebastian retrieved the transcribed consultation letter from SimiLife’s server and faxed it to the referring Family Physician.
 - On an unspecified date, the India-based entity SimiLife had subcontracted to perform the transcription services uploaded the consultation letter on another server under its control.
 - At a later time, an automated process from a search engine company was able to access the content of the consultation letter on the server controlled by the India-based subcontractor, and proceeded to index this content so that it would appear in search results.

- On July 14, 2015, employees of the Family Physician contacted Dr. Sebastian’s office to make him aware that the consultation letter Dr. Sebastian prepared for the Family Physician concerning the Complainant was widely available on the Internet.
- Upon receiving this information, Dr. Sebastian immediately alerted SimiLife of the issue.
- Later that day, SimiLife confirmed it had taken its server offline and was investigating the incident.
- On July 16, 2015, SimiLife confirmed to Dr. Sebastian that it had identified the root cause of the incident and addressed the issue by removing, or arranging to remove, the information from its various locations online.
- On July 23, 2015 Dr. Sebastian notified the patient (Complainant) by phone and in writing, and provided her with a copy of the letter that had been accessible through the Internet.

Application of the HIA

- [8] The HIA applies to “health information” in the custody or under the control of a “custodian”.
- [9] Section 1(1)(k) of the Act defines health information as “diagnostic, treatment and care information” or “registration information”. The audio recording of the Complainant’s consultation and the resulting consultation letter contain diagnostic, treatment and care information and registration information.
- [10] Dr. Sebastian meets the definition of “custodian” as set out in section 1(1)(f)(ix) of the HIA and section 2(2)(i) of the *Health Information Regulation* because he is a regulated member of the College of Physicians and Surgeons of Alberta.
- [11] I find that the HIA applies to Dr. Sebastian, as a custodian with custody or control of health information.

Transcription Companies and the HIA

- [12] Transcription companies provide ongoing services to the custodians who hire them. Section 66(1) of the HIA includes a description of the following services that, if performed by a person or body, makes that person or body an information manager for purposes of the HIA:

66(1) In this section, “information manager” means a person or body that

- (a) processes, stores, retrieves or disposes of health information,
- (b) in accordance with the regulations, strips, encodes or otherwise transforms individually identifying health information to create non-identifying health information, or
- (c) provides information management or information technology services.

[13] Dr. Sebastian used SimiLife to provide transcription services. In the course of performing transcription services, SimiLife was processing and storing health information on behalf of Dr. Sebastian.

[14] Processing and storing health information on behalf of a custodian falls within the description of information manager services in section 66(1)(a) of the HIA. Therefore, SimiLife acted as an information manager for Dr. Sebastian according to section 66(1)(a) of the HIA.

[15] Section 66(2) of the HIA makes it mandatory for custodians to enter into a written agreement with any information manager providing services to them. This section states that:

66(2) A custodian must enter into a written agreement with an information manager in accordance with the regulations for the provision of any or all of the services described in subsection (1).

[16] Section 66(3) of the HIA allows custodians to disclose health information to information managers once an information management agreement is in place. This section states that:

66(3) 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.

[17] 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 custodian). However, if there is no agreement in place, a custodian may be found to have contravened section 31 of the HIA.

Issues

[18] The issues under consideration in this investigation are:

- Did Dr. Sebastian enter into an information manager agreement with SimiLife in compliance with section 66 of the HIA?
- Did Dr. Sebastian have authority to disclose health information to SimiLife?

Analysis and Findings

Issue 1: Did Dr. Sebastian enter into an information manager agreement in compliance with section 66 of the HIA?

[19] As outlined above, the HIA requires custodians to enter into information manager agreements with their information managers. Once such an agreement is in effect, the custodian has the legal authority under the HIA to disclose to the information manager the health information relevant to the performance of the service sought by the custodian. The information manager is then required to comply with the HIA and the terms of the information manager agreement, although the responsibility for the information manager’s compliance with the HIA remains with the disclosing custodian.

- [20] In the course of my investigation, I asked Dr. Sebastian whether he had signed an information manager agreement with SimiLife for the transcription services provided to him. He indicated that this was not the case.
- [21] In situations where an information manager agreement has been signed between a custodian and the information manager, an investigation by our office would examine both parties' compliance with the HIA, as well as the information manager's compliance with the terms of the information manager agreement. In this particular case though, since there was no information manager agreement in effect, I do not have the ability to examine the information manager's compliance with the HIA or the terms of an information manager agreement.
- [22] I find that Dr. Sebastian failed to comply with section 66 of the HIA.

Issue 2: Did Dr. Sebastian have authority to disclose health information to SimiLife?

- [23] If Dr. Sebastian had entered into an HIA-compliant information manager agreement, he would have had the authority to disclose information to SimiLife, since this disclosure would have been authorized under section 66(3) of the HIA. 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 have allowed Dr. Sebastian to disclose health information in the circumstances described in this report.
- [24] Given that Dr. Sebastian did not have an information manager agreement with SimiLife, I find that he contravened section 31 of the HIA when he disclosed health information to SimiLife without authority.

Recommendations

- [25] I recommend that Dr. Sebastian sign an agreement with his transcription service provider, as well as with any other person or body providing services to him that is an information manager as defined in the HIA.
- [26] Dr. Sebastian indicated that this gap has been addressed, and that an information manager agreement is now in place with SimiLife.

Conclusion

- [27] This investigation highlights three important issues with respect to the roles and responsibilities of custodians and information managers under the HIA.
- [28] First, when custodians do not sign agreements with their information managers, they may find themselves unable to exercise control over health information they are responsible for. Custodians remain accountable for health information they collect and use, and for the actions of any information manager they may subsequently disclose health information to. In this instance, a properly executed information manager agreement would have allowed Dr. Sebastian to specify whether the information manager, upon receiving the health

information for the purpose of performing a service to Dr. Sebastian, was allowed to further disclose the health information.

- [29] Second, since there was no information manager agreement in place, Dr. Sebastian was unable to properly consider all applicable legal requirements. In a situation where health information is stored or used outside Alberta, such as in the present case, section 8(4) of the Health Information Regulation requires that custodians consider additional safeguards to ensure the confidentiality of health information.
- [30] Third, when custodians notify individuals whose health information was accessed, used or disclosed in contravention of the HIA, it is important they communicate with those patients openly, accurately and completely. In the present case, Dr. Sebastian decided to voluntarily notify the Complainant both in writing and by calling her. He provided her with information about the cause of the incident, the extent of the health information at issue, and the actions he took to address the issue. The steps taken by Dr. Sebastian reflect the recommendations found in OIPC publications with regards to responding to and reporting privacy breaches. However, the Complainant took issue with the lack of information received from SimiLife. It would have been helpful to all parties involved if Dr. Sebastian and SimiLife had coordinated their efforts in notifying the Complainant and addressing her subsequent questions.

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