

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2020-02

February 28, 2020

SOMAYEH PHARMACY LTD.

Case File Number 006413

Office URL: www.oipc.ab.ca

Summary: The Complainant provided evidence (Netcare logs) showing access of her health information via Netcare at Shoppers Drug Mart #363 on May 6, 2015. On that date, the licensee of the pharmacy and custodian of the information in the Electronic Health Record (EHR) for Shoppers Drug Mart #363 was Somayeh Pharmacy Ltd.. One of the individuals accessing the health information was an employee and affiliate of the custodian. In the companion order, H2020-01, the Adjudicator found that the access by this individual had been done without authority.

The Adjudicator found that at the time the information was accessed, Somayeh Pharmacy Ltd. was in compliance with its duty to protect health information as required by section 60(1) of the *Health Information Act* (HIA), as well as with its duty to establish policies and procedures to facilitate the implementation of the HIA as required by section 63(1).

Statutes Cited: **AB:** *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(f)(x), 60(1), 62(2), 63(1), 80; *Pharmacy and Drug Act*, R.S.A. 2000, c. P- 13, ss. 14(1)(b.1)), 14(1)(e), 14(1.1).

Cases cited: **AB:** Order H2020-01, Investigation Report 2013-IR-02.

I. BACKGROUND

[para 1] The Office of the Information and Privacy Commissioner received a complaint under the HIA of improper access of health information on Netcare. The Complainant submitted Netcare logs showing access of her health information occurred from Shoppers Drug Mart #363 on May 6, 2015. On May 6, 2015, the licensee of the pharmacy and custodian of health information at Shoppers Drug Mart #363 was Somayeh Pharmacy Ltd.. One of the individuals accessing the health information was an employee and affiliate of the pharmacy. In the companion order, H2020-01, I found that the access by this individual had been done without authority.

[para 2] At the time the complaint in this case was received by this office, Somayeh Pharmacy Ltd. had ceased to operate at the Shoppers Drug Mart location. In 2017, Somayeh Pharmacy Ltd. began to operate as a licensed pharmacy at a different location – the Medicine Shoppe #387.

II. ISSUES IN THE INQUIRY

[para 3] The issues set out in the Notice of Inquiry were as follows:

1. Was Somayeh Pharmacy Ltd. the custodian/authorized custodian of the health information?
2. If yes, did Somayeh Pharmacy Ltd. meet its duty to protect health information as required by section 60(1) of the HIA?
3. If yes, did Somayeh Pharmacy Ltd. meet its duty to establish policies and procedures to facilitate the implementation of the HIA as required by section 63(1)?
4. If yes, did Somayeh Pharmacy Ltd. use the Complainant's health information in contravention of Part 3 of the HIA?

Under section 62(2) of the HIA, a collection of health information by an affiliate is deemed to be a use by the custodian of the information.

[para 4] In the course of conducting this proceeding, I asked some questions of Ms. Sattari, the pharmacist that was operating the licensed pharmacy at the Shoppers Drug Mart location at the time the events complained of occurred. Included in her answers (as set out below) was a statement that after the pharmacy Ms. Sattari/Somayeh Pharmacy Ltd. had been operating in Shoppers Drug Mart #363 ceased operations, the documents that set out the pharmacy's policies with regard to personal health information and confidentiality remained at the Shoppers Drug Mart location.

[para 5] This statement caused me to consider a further question – whether the licensed pharmacy that had formerly been operated by Somayeh Pharmacy Ltd. at that location continued to exist in a new location (the premises of the Medicine Shoppe #387), or whether the pharmacy at the new location was a different licensed pharmacy. This question is important because it is not possible to issue an order, should one be called for at the conclusion of an inquiry, against a licensed pharmacy that no longer exists. I will therefore consider this question as a preliminary issue.

III. DISCUSSION OF ISSUES

Issue 1

[para 6] It was conceded by the respondent that at the time of the EHR accesses that were done without authority, the licensee of the pharmacy at Shoppers Drug Mart #363 was Somayeh Pharmacy Ltd., that it was operated by pharmacist Somayeh Sattari, and that Somayeh Pharmacy Ltd.¹ was at that time the authorized custodian of the health information.

Preliminary Issue

[para 7] With regard to the issue raised at para 5 above of whether this licensed pharmacy ceased to exist when Somayeh Pharmacy Ltd. ceased to operate there, I note that the definition of “custodian” under section 1(1)(f)(x) of the HIA includes “a licensed pharmacy as defined in the *Pharmacy and Drug Act*”. That act defines “licensed pharmacy” as “a pharmacy with respect to which a licence is issued”, and it defines “pharmacy” as “the premises or part of premises in or from which a pharmacy service is provided”.

[para 8] The *Pharmacy and Drug Act* also deals with the licencing of pharmacies, and provides that licences terminate when the designated proprietor on the licence changes (section 14(1)(e)), and also when a pharmacy changes locations (section 14(1)(b.1)) – other than when the required notification and approval are given under section 14(1.1).

¹ The information provided to me in this inquiry does not address whether Ms. Sattari was also, or could also have been, an authorized custodian as a member of the Alberta College of Pharmacists, who could meet or had met the eligibility terms of the regulation so as to gain access to the EHR in her own right. Investigation Report 2013-IR-02 addressed the question of whether a licensed pharmacy, or the pharmacist who is licensed to operate it, is the custodian of health information held by the pharmacy. That Report considered the licensed pharmacy to be the custodian of health information held by the pharmacy, rather than the pharmacist who operates that pharmacy. I acknowledge that when access to the EHR is granted, the information manager agreement that is entered into with Alberta Health must necessarily be signed by an individual. However, where a licensed pharmacy that is an incorporated company is involved, it would seem reasonable that the pharmacist would be signing the agreement on behalf of the licensed pharmacy, rather than in the pharmacist’s own right. In any event, it was the licensed pharmacy, and not Ms. Sattari, that was named as the respondent in the present inquiry, so there is no question of making an order relative to her as an authorized custodian.

[para 9] As noted, the location of the pharmacy of which Somayeh Pharmacy Ltd. was the licensee, changed. When asked, Ms. Sattari explained that when Somayeh Pharmacy Ltd. began to operate at the Medicine Shoppe location (in 2017), a new licence was granted, as well as a new authorization from Alberta Health for the new licensed pharmacy to access the EHR. I take it from this that section 14(1.1) was not relied on, and that the earlier licence had terminated (in 2015). A possible conclusion to be drawn from this is that the earlier licensed pharmacy had ceased to exist.²

[para 10] It would follow from this that it would not have been appropriate to name Somayeh Pharmacy Ltd. – the former licensee of a licensed pharmacy that no longer exists – as the respondent in this inquiry, because there would be no licensed pharmacy relative to which an order could be issued.

Issues 2 and 3

[para 11] Regardless of the answer to the question posed in the preliminary issue, it is possible, based on the material before me, to answer the questions raised in Issues 2 and 3 in relation to the pharmacy that was previously operating at the Shoppers Drug Mart location. I will do so in case the correct answer to the question posed above is that the pharmacy continued to exist when its location changed, and also because determining the policies of the formerly-operating licensed pharmacy was an essential step in making findings in the associated inquiry in Case File #002269 (Order H2020-01).

[para 12] Ms. Somayeh Sattari, the pharmacist who obtained the licence, provided the following information in her initial submission:

At [the relevant] time I (Somayeh Sattari/Somayeh Pharmacy Ltd.) was the licensee and the authorized custodian of health information at Shoppers Drug Mart #363. Although [the employee] improperly accessed [the Complainant's] health information, I believe I did my best to meet my professional duty as the authorized custodian to protect health information as required by section 60(1) of the HIA. All my staff (including staff that did not have access to Netcare) were educated on HIA and the severe consequences of improper access to information on Alberta Netcare. I had policies and procedures in place to facilitate the implementation of HIA. I am not sure why this information was accessed by [the employee] and how or if it was used in contravention of Part 3 of HIA. As mentioned above I was not aware of this access until I received the letter dated March 6, 2018 nearly 3 years after the incident.

² This conclusion is problematic, however, because it would be unclear who would have custody of any physical health records that had been located in the pharmacy, unless any such records were removed to the new location. This may or may not be what typically happens in situations such as the present (that is, where the pharmacy is operating in connection with a business such as Shoppers Drug Mart). It seems unlikely that it happened in the present case because the pharmacy in the new location did not begin operation until some years later. For this and other reasons, greater legislative clarity with respect to issues relating to who is the custodian of health information in the case of pharmacies, particularly those operating in connection with another business, and what happens when pharmacies change location and licences are granted or terminate, would be beneficial.

[para 13] Ms. Sattari also advised that she had terminated the employee in question, although for other reasons.

[para 14] I asked for further details about the administrative and technical mechanisms that had been had put in place for ensuring the pharmacy's affiliates complied with the Act (such as terms in the employment contracts, the content, mechanism and frequency of staff training (indicating whether the particular affiliate received this training), whether affiliates (including the particular affiliate) were required to sign a confidentiality agreement setting out appropriate restrictions on accessing EHR information, and any technical mechanisms such as audit logs.

[para 15] In response to these questions, the pharmacist provided the following additional information:

Shoppers Drug Mart had standard employee hire and agreement packages that all new employees including [the employee in question] had to complete, agree to and sign. This employee package contained a confidential/non-disclosure section. In addition to this pharmacy staff including [the employee in question] signed a confidentiality agreement with regards to EHR and Alberta Netcare. Pharmacy staff including [the employee in question] were trained on the pharmacy privacy policies and HIA and staff with access to netcare completed an online module. Unfortunately these documents remained in the possession of Shoppers Drug Mart.

I still do feel I did my best to meet my professional duty as the authorized custodian especially with regards to this particular affiliate, because he was informed, trained and aware that he was responsible for all access to Alberta Netcare Portal under his login credentials.

Furthermore as I indicated in my previous email (please see below thread) I terminated his employment as a result of ... [a different matter]

[para 16] With respect to audits, Ms. Sattari gave the following information:

With regards to audit logs: Based on what I recall the HealthWatch system that was in place at Shoppers Drug Mart pharmacies had a user bar-code scanning mechanism in place where it would log who dispensed the medications along with time and date.³

[para 17] In view of this information and the attachments the pharmacist provided, and on the assumption that I have jurisdiction to do so, I find that when Somayeh Pharmacy Ltd. was operating at the Shoppers Drug Mart #363 location, it met its obligations under

³ Ms. Sattari also provided details about the mechanisms Somayeh Pharmacy Ltd. currently has in place to protect health information at the new location.

60(1) and 63(1) of the Act to protect health information in the EHR against unauthorized access by affiliates, in accordance with the requirements of the HIA.

Issue 4

[para 18] In view of the foregoing findings, I do not believe it is appropriate in this case to address the final issue of whether when the affiliate who accessed the information did so without authority, there was a contravention of the Act by the custodian by reference to section 62(2) of the HIA.

IV. ORDER

[para 19] I make this Order under section 80 of the Act.

[para 20] I find that at the time the Complainant's health information was accessed via the EHR, Somayeh Pharmacy Ltd. was in compliance with its duty to protect health information against unauthorized access by affiliates as required by section 60(1) of the HIA, as well as with its duty to establish related policies and procedures to facilitate the implementation of the HIA as required by section 63(1).

Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication