

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-3531

Appeal MA15-595

Regional Municipality of Durham

November 28, 2017

**Summary:** The appellant sought access to documents prepared by the region in response to information brought to its attention that one of its Emergency Services Workers were not in full compliance of the region's policies and procedures while attending to his son. The region claims that the documents are excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* under section 52(3)3. The appellant appealed the region's decision to this office and the adjudicator conducted a review to determine whether the records contain the appellant's son's personal health information and whether *MFIPPA* or the *Personal Health Information Protection Act*, or both, apply.

The adjudicator orders the region to disclose the portions of the records which contain the personal health information of the appellant's son. However, the adjudicator finds that the remaining information contained in the records is excluded from the scope of *MFIPPA* under section 52(3)3 and upholds the region's decision to withhold these portions of the records.

The region's decision is partially upheld.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 52(3)3.

*Personal Health Information Protection Act, 2004*, SO 2004, ss. 4(1) "definition of personal health information", 4(4), 8(4), 52(3)

## OVERVIEW:

[1] The appellant filed a request to the Regional Municipality of Durham (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for records relating to an ambulance call and his son's death.

[2] The region located responsive records and granted the appellant full access to several ambulance call reports and investigation reports.<sup>1</sup> However, the region withheld access to a letter and tracking sheet prepared by the region's Professional Standards department. The region claims that the withheld records are excluded from the scope of *MFIPPA* by reason of section 52(3).

[3] The appellant appealed the region's decision to this office and a mediator was assigned to the appeal.

[4] The parties were not able to resolve the matter and it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry. During the inquiry, the parties provided their written representations to this office. The appellant's representations detailed his desire to access as much information as possible to understand the circumstances surrounding his son's death.

[5] After considering the representations of the parties, I invited the region to provide supplemental submissions as to whether the records contain personal health information (PHI) as defined in the *Personal Health Information Protection Act (PHIPA)*. If the records are dedicated primarily to the personal health information of the appellant's son, the appellant has a presumptive right of access to the whole record under section 52(1) of *PHIPA* despite whatever exemptions or exclusions may apply under *MFIPPA*.

[6] In this order, I find that the records contain identifying personal health information of the appellant's son but are not dedicated primarily to the son's personal health information. As a result, the region is ordered to disclose the portions of the records containing the PHI of the appellant's son to him. Applying section 8(4) of *PHIPA*, the appellant may have a right of access under *MFIPPA* to the other information in the records. However, in this case, I find that the remaining information contained in the records is excluded from the scope of *MFIPPA* given the application of section 52(3)3 which excludes certain types of employment records.

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<sup>1</sup> The region provided the appellant with full access to the following documents:

- Ambulance Call Report (6 pages);
- Ambulance Call Report (8 pages);
- Durham Region Emergency Medical Services Incident Report (4 pages);
- Durham Region Emergency Medical Services Incident Report (4 pages);
- Defibrillator Full Disclosure Report (354 pages); and
- Ministry of Health and Long-Term Care Investigation Report (36 pages).

## **RECORDS:**

[7] The records at issue in this appeal consist of:

- a letter, dated March 5, 2015 (1 page); and
- an Emergency Medical Services Quality and Development Remedial Tracking Sheet, dated February 24, 2015 (2 pages).

[8] These records were identified as Document 7 on the Index of Records provided to the appellant.

## **ISSUES:**

- A. Do the records contain personal health information as defined in section 4(1) of *PHIPA*?
- B. Does the appellant have a right of access to the personal health information contained in the records under section 52(1) of *Personal Health Information and Protection of Privacy Act*?
- C. Does the appellant have a right of access to the remaining portions of the records under the *Municipal Freedom of Information and Protection of Privacy Act* or are the records excluded from the scope of the *Act* under section 52(3)3?

## **DISCUSSION:**

[9] There is no dispute that the region is an entity that is an institution subject to *MFIPPA* under section 2(1) and is also a body subject to *PHIPA* under section 3(1).

[10] The region takes the position that the records do not contain personal health information and thus *PHIPA* has no application in the circumstances of this appeal.

[11] Section 52 of *PHIPA* grants an individual a right of access to a record of their own personal health information, or to an individual authorized to make a request on the individual's behalf, that is in the custody or under the control of a health information custodian, subject to limited exceptions and exclusions.

[12] *MFIPPA* grants an individual a right of access to records of general information under Part II and to their own personal information under Part III which is in the custody or under the control of an institution, subject to certain exceptions and exclusions. Under section 8(4) of *PHIPA*, a person may still have a right of access under *MFIPPA* to information in a record of personal health information if that health information can be reasonably severed from the record. Here, the region submits that the records are excluded from the scope of *MFIPPA* under section 52(3)3.

[13] There is no dispute between the parties that the appellant is acting for his deceased son and that his request to the region for information relating to his son may be treated as a request for access under section 52 of *PHIPA*.<sup>2</sup>

[14] In situations where the *MFIPPA* and *PHIPA* could both apply, the approach of this office is to first consider the extent of any right of access under *PHIPA*, and then consider the extent of any right of access under the municipal act to any remaining portions of the record to which the appellant does not otherwise have access to under *PHIPA*.<sup>3</sup>

[15] Accordingly, the first question I must address is whether the records contain the personal health information of the appellant's son.

**A. Do the records contain personal health information as defined in section 4(1) of PHIPA?**

[16] "Personal health information" is defined in *PHIPA*, in part, as:

4(1) In [*PHIPA*],

"personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

(2) In this section,

"identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is

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<sup>2</sup>Section 23(1)(4) of *PHIPA* sets out the authority of a deceased person's estate trustee (or the person who assumed responsibility for the administration of the estate, if there is no estate trustee) to exercise powers with respect to a deceased person's personal health information. These powers include the authority to make a request for access to the personal health information of the deceased person.

<sup>3</sup> *PHIPA* Decisions 17, 27 and 30.

contained in a record that contains personal health information described in that subsection.

[17] Section 4(4) provides for an exception to section 4(1) and provides that personal health information does not include identifying information contained in the record that is in the custody or under the control of a health information custodian if,

(a) the identifying information contained in the record relates primarily to one or more employees or other agents of the custodian; and

(b) the record is maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employees or other agents.

[18] In its representations, the region advises that the records were created under the following circumstances:

[T]he Superintendent of Professional Standards, prepared the letter and tracking sheet in response to information brought to its attention as an employer where an employee's actions were not in full compliance with the Region's policies and procedures.

[19] The region takes the position that the records do not contain any identifying personal health information and states:

Neither the letter, nor the Tracking Sheet, contain identifying information about an individual. There is nothing in the document that identified the requester's son and as such, while there may be medical information, there is no personal health information in the record. The run number is purposely used by the Region to de-personalize a call. The whole point of a run number is to ensure personal privacy and to make sure that the document is devoid of any personal health information...

The Region submits that a run number is not, in any way, personal health information as it does not identify an individual. Adding in a date and a medical procedure does not make this any more identifiable.

[20] In determining whether the records contain the appellant's son's PHI, I am guided by the "record-by-record" approach that this office has adopted where the whole record, as opposed to individual paragraphs, sentences or words are analyzed to determine if the record contains the personal information or PHI of an individual.<sup>4</sup>

[21] I have reviewed the records and am satisfied that they contain the appellant's son's personal health information. The two records at issue consist of a one-page letter

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<sup>4</sup> The "record-by-record" approach for dealing with requests for records of personal information is set out in Order M-352. This approach has recently been adopted by this office to also review records which may contain PHI in *PHIPA* Decision 17, 27 and 30.

and 3-page tracking sheet. Both documents were prepared by the region's Professional Standards department and were provided to the employee in question. Contained in the records are references to the run number, date of the incident, the patient's physical condition when the ambulance arrived and the medical procedure performed by the employee. In addition, the records identify the EMS worker who performed medical services on the appellant's son. In my view, the combination of this information identifies the specific ambulance call which responded to the emergency involving the appellant's son. As a result, it contains identifying personal health information as defined in sections 4(1)(a) and (b) of *PHIPA*.

[22] I acknowledge the region's position that the records contain an assigned "run number" which anonymizes the personal health information in the record. The result of this anonymization means that other individuals viewing the records for other purposes (ie: possible disciplinary proceedings against the employee) cannot identify the appellant's son. However, the fact that the information is non-identifiable to others does not mean it is not the personal health information of the appellant's son for the purpose of a request for access under *PHIPA*. These records were identified as responsive to the request for information about the appellant's son and they clearly relate to the incident involving the appellant's son and the health care provided to him. I find they are "records of personal health information" within the meaning of *PHIPA*.

***Does the exception in section 4(4) apply?***

[23] The region takes the position that even if the records contain identifying personal health information, the exception in section 4(4) applies. In support of its position, it states:

In this instance, these records are for the sole purpose of internal employment purposes. Should a date, run number and provision of a medical service be together deemed "personal health information", the Region would still submit that the only reason for the existence of the records has to do with the employee and our internal employment purposes. The record is maintained for such internal employment purposes only and is not in any way maintained due to any personal health information that may or may not be contained in the record.

[24] Section 4(4) excludes from the definition of "personal health information" identifying information in a record in the custody or control of a custodian, where the information relates *primarily* to employees or agents of the custodian, and the record is *primarily* maintained for the purpose other than health care to employee or agents.

[25] The approach taken by this office in the past is that section 4(4) is engaged when the identifying personal health information at issue relates to a custodian's employee or agent.<sup>5</sup> Here, the region submits that the exception in section 4(4) applies though the identifying personal health information at issue does not relate to one of its

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<sup>5</sup> PHIPA Decision 44.

employees but rather to the appellant's son.

[26] In my view, in order for the exception at section 4(4) to apply, the personal information at issue must relate to one or more of the custodian's employees or agents. The purpose of the exception is to distinguish between the personal health information held by employers when providing health care to employees, and PHI held by employers for employment-related and not health care related purposes.

[27] I find support for this interpretation of section 4(4) in the the following excerpt from the *Guide to the Ontario Personal Health Information Protection Act*<sup>6</sup>:

Personal health information does not include identifying information contained in a record of the health information custodian if that identifying information relates primarily to employees or other agents of the custodian, and the record is maintained primarily for a purpose other than the provision of health care to the employees or other agents. For instance, records that a health information custodian holds about the disability accommodations needs of an employee would fall outside the definition of personal health information. Although relating to the health of the employee, such records are specifically excluded from the definition of personal health information for the purposes of *PHIPA*. Likewise, generally, records concerning a custodian's employee's Workplace Safety and Insurance Board claim or concerning an occupational illness from which a custodian's employee suffers are not considered records of personal health information *when held by the custodian in its role as employer*. The rationale for this approach seems clear. It is appropriate to regulate health information custodians, as employers, in the same manner as other employers with respect to the privacy of their employees' personal health information. As [*PHIPA*] does not focus on the regulation of the collection, use, and disclosure of employee health information by employers generally, health information custodians are not regulated differently in this regard by the [*PHIPA*]. [Emphasis Mine]

[28] Having regard to the above, I find that the exception in section 4(4) does not apply in the circumstances of this appeal as the identifying personal health information at issue does not relate to the region's employee. Accordingly, I will go on to review whether the records are dedicated primarily to the personal health information of the appellant's son.

**B. Does the appellant have a right of access to the personal health information contained in the records under section 52(1) of *Personal Health Information and Protection of Privacy Act*?**

[29] To determine the extent of the appellant's right of access to the records under *PHIPA*, I must determine whether the records are "dedicated primarily" to his son's

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<sup>6</sup> Halyna Perun et al. (Toronto: Irwin Law Inc., 2005) at p.87.

personal health information. This is because the right of access in *PHIPA* applies either to a whole record under section 52(1) or only to certain portions of a record of personal health information under section 52(3).

[30] Section 52(3) states:

Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can be reasonably be severed from the record for the purpose of providing access.

[31] Under section 52(3) of *PHIPA*, if a record is not dedicated primarily to personal health information about the individual requesting the information, they only have a right to access any personal health information that can reasonably be severed.<sup>7</sup> If the record is dedicated primarily to the personal health information of the requester, the right of access applies to the entire record, even if it incidentally contains information about other matters or other parties.

[32] In addition, sections 8(1) and 8(4) of *PHIPA* preserves the appellant's right of access under section 4 of *MFIPPA* to a record of personal health information if the information constituting the personal health information of an identifiable individual is removed from the record.<sup>8</sup> Accordingly, I must first determine the extent of the appellant's right of access under *PHIPA*, and then consider the extent of any right of access under *MFIPPA* to any remaining portions of the records to which the complainant does not otherwise have access under *PHIPA*.<sup>9</sup>

***Are the records "dedicated primarily to personal health information" about the appellant's son?***

[33] This office's approach to the interpretation of section 52(3) was established in *PHIPA* Decision 17.<sup>10</sup> To determine whether a record is "dedicated primarily" to the personal health information of an individual within the meaning of section 52(3), this office takes into consideration various factors, including, but not limited to:

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<sup>7</sup> *PHIPA* Decision 17 at paragraphs 85-115.

<sup>8</sup> Sections 8(1) and (4) state:

8 (1) Subject to subsection (2), the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise.

(4) This Act does not limit a person's right of access under section 10 of the Freedom of Information and Protection of Privacy Act or section 4 of the Municipal Freedom of Information and Protection of Privacy Act to a record of personal health information if all the types of information referred to in subsection 4 (1) are reasonably severed from the record.

<sup>9</sup> *PHIPA* Decisions 30 and 33.

<sup>10</sup> See also *PHIPA* Decisions 24, 30, 33, 53 and 57.



- the quantity of personal health information of the requester in the record;
- whether there is personal health information of individuals other than the requester in the record;
- the purpose of the personal health information in the record;
- the reason for creation of the record;
- whether the personal health information of the requester is central to the purpose for which the record exists; and
- whether the record would exist “but for” the personal health information of the requester in it.<sup>11</sup>

[34] During the inquiry stage, I sought and received representations from the region on this specific issue. The region submits that the records are not dedicated primarily to the personal health information of the appellant’s son. In support of its position, the region submits:

- The quantity of personal health information at issue is minimal, namely a date, run number and medical procedure;
- The remaining information contained in the records address matters relating to the employee; and
- The records were created for “internal employment purposes” and “not to provide any health care in any form”.

[35] I have reviewed the records and find that they are not dedicated primarily to the personal health information of the appellant’s son. The records were created by the region’s Professional Standard’s department and sent to an employee to address an internal employment issue. I am satisfied that the information relating to the appellant’s son contained in the records is incidental and has been included only to reference the specific call to the employee. In my view, the records were not created for any other purpose but to address an employment issue.

***Can the personal health information be reasonably severed?***

[36] Under section 52(3), where a record is not dedicated primarily to the personal health information of the individual seeking access, the right of access applies only to the individual’s personal health information that can be reasonably severed from the record. Previous decisions from this office and the courts have found that information which would comprise of disconnected or meaningless snippets is not reasonably

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<sup>11</sup> PHIPA Decision 17, paragraph 95.

severable and such snippets need not be released.<sup>12</sup>

[37] The region takes the position that disclosing the personal health information contained in the records to the appellant would be meaningless and would not provide him any information that has not already been disclosed to him. The region advises that the appellant was present on the date of the call, has a copy of the ambulance call report and is aware of the medical procedure performed by the EMS employee.

[38] Having regard to the region's submissions and my review of the records, I find that the personal health information at issue contained in the cover letter can be reasonably severed from the remaining information contained in the record. However, I find that severing the personal health information at issue contained in the tracking sheet from the information relating to the employee would result in disconnected meaningless snippets being disclosed to the appellant.

[39] Accordingly, I find that the appellant has a right of access to his son's personal health information contained in the cover letter and order the region to disclose this information to the appellant. In making my decision, I took into account that the cover letter contains information which describes the patient's physical condition when the ambulance arrived and the medical procedure performed by the employee. The tracking sheet does not contain this level of detail.

[40] I will now go on to consider the region's argument that the remaining information contained in the records is excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act*.

**C. Does the appellant have a right of access to the remaining portions of the records under the Municipal Freedom of Information and Protection of Privacy Act or are the records excluded from the scope of the Act under section 52(3)3?**

[41] Although section 8(1) of *PHIPA* provides that *MFIPPA* does not apply to personal health information in the custody or control of a health information custodian, section 8(4) preserves rights of access under *MFIPPA* if all personal health information in a record of personal health information can be reasonably severed. In this case, however, even if section 8(4) applies to preserve the appellant's right of access under *MFIPPA*, the remaining information in the records at issue is excluded by application of section 52(3)3 of *MFIPPA*, which states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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<sup>12</sup> PHIPA Decision 17, paragraph 133. See also PHIPA Decisions 27 and 33.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[42] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[43] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>13</sup>

[44] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>14</sup>

[45] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>15</sup>

[46] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

***Parts 1 and 2: collected, prepared, maintained or used in meetings, consultations, discussions or communications***

[47] As noted above, the region submits that it collected, prepared, maintained or used the records for "internal purposes" to communicate with its employee.

[48] I have reviewed the records and am satisfied that they were collected, prepared, or maintained by the region thus meeting part 1 of the section 52(3)3 test. I am also satisfied that the records were collected, prepared, maintained or used by the region in meetings, consultations, discussions or communications it had with its employee. Therefore, I find that parts 1 and 2 of the section 52(3)3 test is also met.

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<sup>13</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>14</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

<sup>15</sup> *Ministry of Correctional Services*, cited above.

***Part 3: labour relations or employment-related matters in which the institution has an interest***

[49] The region's representations state:

The Region is not indicating that these documents are being used to seek dismissal at this time, simply that these documents are from part of the Region's disciplinary program in place for EMS employees.

These documents are of a direct interest to the Region as they clearly refer to matters involving our workforce and our ability to ensure compliance with our internal policies and standards. These documents are not in any way related to any litigation that may or may not be pending from the requester. They are solely related to the Region's management of its workforce and in particular, a specific, named employee.

[50] Having regard to the representations of the parties and the circumstances giving rise to the creation of the records, I am satisfied that the meetings, consultations, discussions or communications relate to an employment-related matter in which the region has an interest.

[51] The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>16</sup> The region's evidence is that the records were created in response to information brought to its attention that the response by one of its EMS employees to the medical emergency was not in full compliance of its policies and procedures. This office has found that similar types of records addressing training and discipline issues pertaining to a specific employee relate to employment-related matters.<sup>17</sup>

[52] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.<sup>18</sup> Having regard to the subject-matter of the records, I am satisfied that the region's efforts to ensure full compliance with its policies and procedures and document the incident in the employee's personnel file demonstrates that its interest in the matter extends to more than mere curiosity or concern.

[53] Accordingly, I find that part 3 of the section 52(3)3 test has been met. As none of the exceptions to section 52(3) listed in section 52(4) apply, I find that section 52(3)3 applies to exclude the remaining information contained in the records from the scope of *MFIPPA*.

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<sup>16</sup> Order PO-2157.

<sup>17</sup> For example, in Order MO-2017 police officer's annual requalification reviews were found to relate to an employment-related matter, along with police officer's training certificates in Order PO-2263 and allegations of employee misconduct in Orders MO-1635 and PO-2748.

<sup>18</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

**ORDER:**

1. I order the region to disclose the personal health information contained in the cover letter to the appellant. For the sake of clarity, a severed copy of this record in the form it is to be disclosed to the appellant has been provided with the region's copy of this decision.
2. I find that the remaining information contained in the records fall outside of the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)3 and uphold the region's decision to withhold this information from the appellant.
3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record to be disclosed by the region to be provided to me.

Original signed by \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ November 28, 2017