

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 120

Complaint HA15-73

The Sault Area Hospital

May 21, 2020

**Summary:** The complainant sought access under the *Freedom of Information and Protection of Privacy Act (FIPPA)* to all hospital video surveillance footage taken of him during the two days he was a patient at the hospital. The hospital located a video and issued a fee estimate under *FIPPA* of \$2,316.50 to the complainant for an edited copy of it. The complainant appealed the fee estimate and decision under *FIPPA*.

In this decision, the adjudicator finds that both the *Personal Health Information Protection Act (PHIPA)* and *FIPPA* govern the complainant's request. She finds that the video contains the complainant's personal health information as defined in section 4(1)(b) of *PHIPA*, but is not dedicated primarily to it, and, as a result, the complainant has a right of access under *PHIPA* only to his reasonably severable personal health information in the video. This includes images of police officers and hospital staff that qualify as the complainant's personal health information under section 4(1)(b) of *PHIPA* because of the circumstances of the video's creation and its contents. It does not include images of other patients. Those images constitute the personal health information of those other patients under *PHIPA*, and the hospital is ordered to obscure them. The adjudicator also finds that the exemption in section 52(1)(c) of *PHIPA* claimed by the hospital does not apply to the complainant's reasonably severable personal health information.

The adjudicator further finds that the complainant is entitled to access the remaining portions of the video under section 47(1) of *FIPPA*. She upholds the hospital's \$100 fee (for reviewing the footage and placing it on a CD), its denial of the complainant's request for a waiver of the fee, and its search for records. Finally, the adjudicator confirms that the hospital may also charge a fee, representing reasonable cost recovery, for a third-party service provider to perform the necessary editing of the video, provided that the hospital first gives the complainant a fee estimate as required by section 54(10) of *PHIPA*.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, sections 2 (definition of “health care”), 4(1)(b), 52(1)(c), 52(3), and 54(10), (11) and (12); *Freedom of Information and Protection of Privacy Act*, sections 2 (definition of “personal information”) and 47(1).

**Decisions and Orders Considered:** PHIPA Decisions 17 and 117, and Orders PO-3510, PO-2225, HO-009 and HO-014.

**Cases Considered:** *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991 (CanLII).

## **BACKGROUND:**

[1] This decision addresses a patient’s right of access to hospital video surveillance footage of the patient. In September 2015, the complainant filed a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to all video surveillance footage of him taken at the Sault Area Hospital on two specific days in July 2015. The hospital issued a decision stating that the sole record responsive to the complainant’s request, a video of him in its psychiatry unit on one of the two July days, showed other individuals and could not be disclosed to him based on the discretionary personal privacy exemption in section 49(b) of *FIPPA*. In its decision letter, the hospital quoted a fee of \$2,316.50 for an external service provider to obscure the images of non- hospital staff individuals in the video so that it could grant the complainant access to the video.

[2] The hospital subsequently issued a second decision letter stating that it had no records responsive to the request for video surveillance footage of the second July day. It explained that unless extracted for a designated purpose, video surveillance footage is accessible for only 30 days.

[3] The complainant appealed the hospital’s decision under *FIPPA* to the Office of the Information and Privacy Commissioner (IPC). Although the hospital and the complainant treated this matter as an access request and appeal under *FIPPA*, the IPC processed it as a complaint under the *Personal Health Information Protection Act (PHIPA)*.<sup>1</sup>

[4] The IPC attempted to mediate the complaint. During mediation, the hospital noted that the complainant’s September 2015 request for the July 2015 video surveillance footage was outside its 30-day retention period. It explained that the only reason the video exists is because the Crown Attorney’s Office requested certain footage in July 2015—before the hospital’s 30-day retention period expired—and in response, and further to a court order, the hospital extracted specific video surveillance

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<sup>1</sup> The reason for this treatment is explained at page 4 of this decision in the section titled “Preliminary Issue, Access Under *PHIPA*.”

footage to create the video, and then retained it. The hospital stated that the remaining footage from the complainant's two days at the hospital, including all footage from his second day there, no longer exists because it was destroyed after 30 days in accordance with the hospital's usual practice. The complainant asserted that he submitted his request within the 30-day retention period and accordingly, the relevant video surveillance footage should have been retained by the hospital. He also took the position that the fee of \$2,316.50 is excessive and that he is entitled to access the complete video.

[5] Mediation did not resolve the issues and the matter was moved to the adjudication stage of the complaint process. I decided to conduct a review of the matter under *PHIPA* and I invited the parties to provide representations on a number of issues, including those set out below. Both parties provided representations that I shared in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*. I also notified the police officers who appear in the video of my review. I invited them to provide representations, but none of them did.

[6] In this decision, I find that the video contains the complainant's personal health information and he has a right of access to his reasonably severable personal health information in it under *PHIPA*. I order the hospital to grant the complainant access to most of the video, excluding the images of two patients that must be obscured. I also uphold the hospital's search for records, its \$100 fee for reviewing the video and providing it to the complainant on a CD, and its fee waiver denial. Finally, I confirm that the hospital may charge the complainant an invoiced amount from a third party to obscure 12 seconds of the video, as long as the invoiced amount is reasonable and first provided to the complainant in a fee estimate, and subject to the complainant's usual right to complain to the IPC about the amount of the fee.

## **RECORD:**

[7] The record at issue in this complaint is a video composed of four separate recordings from three different hospital cameras. It was compiled by the hospital at the request of the Crown Attorney's office for use in a law enforcement proceeding. The hospital selected and organized the recordings for the video, in response to the Crown Attorney's request for specific video surveillance footage. Considering the circumstances of its compilation and existence, and its treatment and use by the hospital and the Crown Attorney as a single video, I have decided it is consistent and appropriate to treat the video as a single record here. The video contains no audio and is 43 minutes and 24 seconds long. In this decision, I refer to each of the four recordings as a "file" where appropriate. The four files are:

File 1: ICU Lounge Camera 24, time stamped 9:14:00 (8 minutes).

File 2: ICU Corridor Camera 59, time stamped 9:14:00 (1 minute 18 seconds).

File 3: ICU Corridor Camera 59, time stamped 9:15:18 (17 minutes 42 seconds).

File 4: Private Room Camera 27, time stamped 9:22:00 (16 minutes 24 seconds).

[8] The complainant appears in all four files. The video shows the complainant moving within the hospital, and hospital staff and police officers interacting with him. The complainant does not appear in the last ten minutes of File 3.

## **ISSUES:**

- A. Does the video contain the complainant's "personal health information" as that term is defined in section 4 of *PHIPA*?
- B. Is the video "dedicated primarily to personal health information about" the complainant within the meaning of section 52(3) of *PHIPA*?
- C. Does the exemption at section 52(1)(c) of *PHIPA* apply to the complainant's reasonably severable personal health information in the video?
- D. Does the complainant have a right of access under *FIPPA* to the images of hospital staff who assist other patients in File 1, and to the last ten minutes of File 3?
- E. Did the hospital conduct a reasonable search for records?
- F. What is an appropriate fee for access? Should the fee be waived?

## **DISCUSSION:**

### **Preliminary Issue**

#### ***Access under PHIPA***

[9] There is no dispute that the hospital is both a health information custodian within the meaning of section 3(1) of, and subject to, *PHIPA*, and an institution within the meaning of the definition in section 2(1) of, and subject to, *FIPPA*. Because the hospital is subject to both *PHIPA* and *FIPPA*, and each statute has its own rules governing access to information, it is necessary to determine which one governs the complainant's access request.

[10] The complainant and the hospital believe that *FIPPA* governs the access request. The complainant submitted his access request under *FIPPA* and the hospital, following his lead, processed it under *FIPPA*. In its representations on this issue, the hospital relies on Order PO-3510 to support its decision to process the request under *FIPPA* on the basis that the video contains the complainant's personal information, but not his

personal health information. I disagree with this submission and with the parties' position.

[11] Like this matter, Order PO-3510 deals with an access request for video surveillance footage from hospital cameras. However, it did not apply *PHIPA* and determined access under *FIPPA* instead. I note that Order PO-3510 was issued in July 2015. Since then, the IPC's approach to determining which statute governs when dealing with a health information custodian that is also an institution, and to identifying personal health information in access requests made under *FIPPA*, has evolved.

[12] The IPC's current approach, set out in PHIPA Decision 17 issued on November 10, 2015, is to begin with the access request and consider all of the circumstances. In articulating this approach, PHIPA Decision 17 stressed that health information custodians should focus on the context out of which the access request arose and the nature of the information sought by the requester.<sup>2</sup> In accordance with its current approach, the IPC considered the circumstances of the complainant's access request upon receiving his appeal and processed the matter as a request for personal health information governed by *PHIPA*, as well as a request for information that is not personal health information, governed by *FIPPA*.

[13] I follow the IPC's current approach in this decision. The context of the complainant's request is that he was a patient of the hospital and he wishes to obtain information about himself that was recorded by the hospital's video surveillance system. I understand the complainant's request to be a request for access under *PHIPA* because it is a request for information relating to him and arising out of his experience as a patient of the hospital, and because, as I explain below, I find that the video contains his "personal health information" as that term is defined in *PHIPA*. I will therefore determine the extent of the complainant's right of access to the video under the access provisions in Part V of *PHIPA*, initially. I will then consider the extent of any right of access he has under *FIPPA* to the remaining portions of the records for which I have made no determination under *PHIPA*.<sup>3</sup>

**A. Does the video contain the complainant's "personal health information" as that term is defined in section 4 of *PHIPA*?**

***The definition of "personal health information"***

[14] The relevant parts of the definition of "personal health information" in section 4 of *PHIPA* are:

(1) In [*PHIPA*],

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<sup>2</sup> PHIPA Decision 17, paragraph 52.

<sup>3</sup> The IPC has taken this approach in PHIPA Decisions 17, 27, 30 and 33, among others.

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

(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.

### *Representations of the parties*

[15] In their representations, the parties do not consider the definition of personal health information in *PHIPA* or apply it to the contents of the video. They simply deny that the video contains the complainant’s personal health information. The complainant states that because the record is a video, *FIPPA* applies. The hospital states that it based its position on the access request, the analysis and findings in Order PO-3510, and the fact that the complainant was not wearing a patient gown or wristband in the video.

### ***The video contains the complainant’s “personal health information”***

[16] I disagree with the parties’ position. Applying the definition of personal health information to the video, I find that most of the contents of the video fit within section 4(1)(b) of *PHIPA*.

### *Section 4(1): Identifying information about an individual in recorded form*

[17] The video contains identifying information about the complainant in recorded form. The identifying information is the image of the complainant that is visible throughout 33 minutes of the video as he moves within the hospital. The identifying information about the complainant also includes the images of others interacting with him in the video as he moves within the hospital. These images of others interacting with the complainant identify him due to the nature and sequence of the events shown, and the circumstances of the complainant’s being recorded during his stay at the hospital as a patient.

*Section 4(1)(b): The identifying information relates to the providing of health care to the complainant*

[18] I am satisfied that the identifying information about the complainant in the video relates to the providing of health care to him. "Health care" is a broadly defined term in section 2 of *PHIPA* that includes any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that:

- a. is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,
- b. is carried out or provided to prevent disease or injury or to promote health[.]

[19] Although the hospital acknowledges that the complainant's information in the video primarily relates to a "medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation", it argues that the video is not related to its provision of health care to the complainant because its staff depicted in it are primarily restraining him until law enforcement arrives rather than providing care. I reject the hospital's argument.

[20] The complainant's identifying information in the video was recorded during his attendance at the hospital for health care, which the complainant confirms in his representations where he states that he was taken to the hospital voluntarily under the *Mental Health Act*. The hospital's submission that the complainant was not wearing a patient gown or wristband does not negate the fact that the complainant was at the hospital, as a patient, seeking health care. I find the fact that the complainant's image in the video was recorded while he was a patient at the hospital sufficient to establish some connection between the complainant's identifying information in the video and the providing of health care to him within the meaning of section 4(1)(b) of *PHIPA*.

*The complainant's identifying information in the form of images of health care professional hospital staff, hospital security staff and police officers interacting with him qualifies as his personal health information under section 4(1)(b) of PHIPA*

[21] I include the images of health care professional hospital staff, hospital security staff and police officers who interact with the complainant in the video as identifying information about him that relates to the providing of health care to him. I do so because I am satisfied that these images in the video have some connection to the providing of health care to the complainant as required to fit within section 4(1)(b) of *PHIPA*. These images include health care professionals who are in physical contact with the complainant and those who appear to be observing or monitoring him because they are involved in providing health care to him. They also include hospital security staff and police officers who interact with the complainant during the hospital's provision of health care to him. All of the incidents captured in the video are incidents of providing health care as that term is broadly defined in *PHIPA*.

***Images of other patients are not the complainant's personal health information***

[22] There are parts of the video in Files 1 and 3 that show other patients moving within the hospital. Some of these parts simultaneously show the complainant. These patients do not interact with the complainant. I find that the images of these other patients are not the complainant's personal health information as they do not constitute identifying information about him. Rather, in the circumstances of this complaint, the images of other patients are the personal health information of only these other patients.

***Images of hospital staff, police officers and firefighters who do not interact with the complainant are not the complainant's personal health information***

[23] There are parts of the video in Files 1 and 3 that show certain health care professional hospital staff who are helping other patients leave an area of the hospital. Some of these parts simultaneously show the complainant. These hospital staff members do not interact with the complainant. I find that the images of these health care professional hospital staff are not the complainant's personal health information.

[24] There is also a part of the video, the last ten minutes of File 3, in which the complainant does not appear, but police officers, firefighters and hospital staff—both health care professional and security—do. These individuals all appear in the corridor outside the hospital room in which the complainant is being restrained. These individuals do not interact with the complainant in these last ten minutes of File 3. I find that these images of hospital staff, police officers and firefighters in the last ten minutes of File 3 do not qualify as the complainant's personal health information.

**B. Is the video "dedicated primarily to personal health information about" the complainant within the meaning of section 52(3) of PHIPA?**

[25] Section 52(3) limits an individual's access to a record if the record is not dedicated primarily to personal health information about the individual requesting access. It dictates that where a record is not so dedicated, an individual has a right of access only to the portion of his personal health information that can reasonably be severed from the record for the purpose of providing access.

[26] PHIPA Decision 17 sets out the qualitative approach that the IPC takes in determining whether a record is dedicated primarily to the individual's personal health information. The qualitative approach considers whether the record is mainly related, in a qualitative way, to the individual's personal health information and not to other information. The considerations for such an analysis include:

- the quantity of personal health information of the individual in the record
- the purpose the information serves in the record



- the reason for the record's creation
- the uses of the record
- whether the personal health information of the individual is central to the purpose for which the record exists
- whether the record would exist "but for" the personal health information of the individual in it.<sup>4</sup>

### ***The hospital's representations***

[27] The hospital submits that the video is not dedicated primarily to personal health information about the complainant because it was not related to or required for the complainant's care. It states that hospital staff depicted in the video were primarily restraining the complainant until police officers arrived rather than providing him care. The hospital explains that the purpose of the surveillance cameras in the common areas (Cameras 24 and 59) is to detect, deter, or prevent any activity or behaviour that may place the safety of the unit, patients and staff at risk, whereas the purpose of Camera 27, which is in a patient room, is to provide monitoring of the individual patient. The hospital explains that it created and retained the video because of a request made by the Crown Attorney's Office in July 2015 and a corresponding court order. The hospital acknowledges that if the video is not dedicated primarily to personal health information about the complainant, his personal health information can reasonably be severed from the video for the purpose of providing him access to it under *PHIPA*.

[28] The complainant does not address this issue in his representations.

### *The video is not "dedicated primarily" to the complainant's personal health information*

[29] I agree with the hospital that the video is not dedicated primarily to the complainant's personal health information. I agree despite my finding that, quantitatively, most of the video contains the complainant's personal health information.

[30] With the exception, arguably, of File 4 (which was recorded in a hospital room), the footage from which the video was extracted was not created for the purpose of recording the complainant's personal health information, and serves no health care purpose. The video surveillance footage was recorded for security purposes. The complainant's personal health information was not central to the security purpose for which the video surveillance footage was recorded. In addition, the video that was compiled from this footage was created for a legal proceeding in unique circumstances.

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<sup>4</sup> PHIPA Decision 17, paragraph 95.

The video would not exist but for the Crown Attorney's request to collect and preserve specific portions of the video security footage, focussed on certain incidents involving the complainant and police officers.

[31] Considering the overall security-related provenance of the underlying video surveillance footage, and the purpose of the extraction of specific security footage—to create a video for use in a law enforcement proceeding—I am not satisfied that the video is dedicated primarily to the complainant's personal health information. Accordingly, I find that section 52(3) of *PHIPA* applies and operates to limit the complainant's access under *PHIPA* to only the portion of his personal health information in the video that can reasonably be severed from the video for the purpose of providing access.

*The complainant has a right of access only to his personal health information in the video that can reasonably be severed*

[32] Having found that the video contains, but is not dedicated primarily to, the complainant's personal health information, section 52(3) of *PHIPA* requires me to identify the complainant's reasonably severable personal health information in the video so that only it can be provided to him in satisfaction of his access rights under *PHIPA*, subject to the application of any exemptions. I have made findings at pages 6 and 7 above about what is included in the complainant's personal health information.

[33] I find that all of the complainant's personal health information can reasonably be severed from the video for the purpose of providing him access. This includes the images of the complainant, and the police officers, hospital security and health care professional staff who interact with the complainant in the video, in accordance with my findings above that these images form part of the complainant's personal health information within the meaning of section 4(1)(b) of *PHIPA*. It also includes the remaining parts of the video that show the complainant where he appears with other patients, excluding the images of those patients in accordance with my finding above that they do not qualify as the complainant's personal health information.

[34] I agree with the hospital that the best way to isolate the complainant's reasonably severable personal health information from the remainder of the record is to obscure the images of other patients. Accordingly, I will order the hospital to obscure the images of the other patients before granting the complainant access to the video. Having watched the video, I identify 12 seconds of it as requiring the obscuring of patients in the following parts of the video (according to the video's time stamps).

From File 1 (Camera 24), five seconds of obscuring is required as follows:

- 1:51-1:54 and 1:56-1:58. One female patient using a walker.

From File 3 (Camera 59), seven seconds of obscuring is required as follows:

- 1:35-1:42. Two female patients, one in a blue hospital gown and one using a walker (who appears in File 1 too). The patients' faces are partially obscured at times in this part of the video.

[35] As a result of the application of section 52(3) of *PHIPA*, the complainant is not entitled to access under *PHIPA* the parts of the video that do not qualify as his personal health information. However, because the hospital is an institution under *FIPPA* as well a custodian under *PHIPA*, he may have a residual right of access under *FIPPA* to the information that is not personal health information, which is the footage in Files 1 and 3 described at page 8 above.<sup>5</sup> At Issue D below, I consider the extent of the complainant's right of access under *FIPPA* to these parts of Files 1 and 3.

**C. Does the exemption at section 52(1)(c) of *PHIPA* apply to the complainant's reasonably severable personal health information in the video?**

[36] The right of access to one's reasonably severable personal health information under section 52(3) is subject to the application of any exemptions. The exemptions are found in section 52(1) of *PHIPA*. During my review of this complaint, I invited submissions from the parties on the possible application of any exemptions, including section 52(1)(c) which states:

Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

the information in the record was collected or created primarily in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded[.]

***The video was created primarily for use in a proceeding***

[37] The complainant does not address this issue in his representations. The hospital submits that the video was created primarily for use in a law enforcement proceeding. It states that it created the video in July 2015 for the Crown Attorney's Office that asked it for video surveillance footage showing certain occurrences involving the complainant. The hospital provides me with a copy of the email correspondence from the Assistant Crown Attorney asking for the particular video surveillance footage it sought and specifying that it needed the footage for a criminal proceeding involving the complainant. The video's creation primarily for use in a proceeding satisfies the first

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<sup>5</sup> There is no residual right of access under *FIPPA* to the images of the other patients, as those images are the personal health information of those patients: see *PHIPA*, section 8(1).

part of the section 52(1)(c) exemption.

***The proceeding has been concluded***

[38] In its representations, the hospital states that it does not know the status of the proceeding. Accordingly, during my review, I contacted the Assistant Crown Attorney to determine the status of the proceeding. The Assistant Crown Attorney confirmed that the proceeding for which the video was created had been completely disposed of and that all appeal periods had expired.

***Section 52(1)(c) of PHIPA does not apply to the complainant's reasonably severable personal health information***

[39] Because the proceeding and all possible appeals or processes resulting from it have been concluded, the second part of the section 52(1)(c) exemption is not satisfied in this complaint. As a result, I find that section 52(1)(c) does not apply to the complainant's reasonably severable personal health information in the video. There is no suggestion from the parties that any other exemption under section 52(1) applies and I find that none does. I will thus order the hospital to grant the complainant access to his reasonably severable personal health information.

**D. Does the complainant have a right of access under *FIPPA* to the images of hospital staff who assist other patients in File 1, and to the last ten minutes of File 3?**

[40] As I indicated above, the hospital is both a health information custodian subject to *PHIPA*, and an institution subject to *FIPPA*. The complainant therefore has a right of access to information from the hospital under both these laws. As a general principle, it is not always necessary for a hospital that receives a request for personal health information under *PHIPA* to also issue an access decision under *FIPPA*. In this case, the complainant has clearly indicated that he wishes to have access to the whole video. Because of my finding under section 52(3), the complainant's rights under *PHIPA* are restricted to his own reasonably severable personal health information in the video. I will now consider the extent of his right of access to the remaining portions of the video under *FIPPA*.

[41] I found above that the record contains the complainant's personal health information. Such information is also his "personal information" under *FIPPA*.<sup>6</sup> Section 47(1) of *FIPPA* grants individuals a general right of access to their own personal information held by an institution, subject to certain exemptions. Section 49(b), relied on by the hospital, is an exemption from an individual's right of access to his own

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<sup>6</sup> Section 2(1) of *FIPPA*.

personal information under this section of *FIPPA*, and it applies when a record contains the personal information of both the individual seeking access and another individual, and where disclosure would be an unjustified invasion of the other individual's personal privacy. I must therefore determine whether the images of hospital staff, police officers and firefighters in these remaining portions of the video are their personal information.

***File 1 does not contain the personal information of hospital staff assisting other patients***

[42] The hospital does not suggest that the images of the hospital staff assisting other patients in this portion of the video constitute the personal information of those hospital staff members. It is clear from my review of File 1 that these hospital staff appear in a professional capacity in the video, as they perform their employment duties of attending to patients, and they do not appear in a personal capacity or reveal anything of a personal nature about themselves.<sup>7</sup> I find that File 1 does not contain the personal information of the hospital staff assisting other patients.

***File 3 does not contain the personal information of hospital staff, police officers and firefighters who do not interact with the complainant***

[43] The hospital submits that this portion of the video contains the personal information of the police officers shown in the video. It states that the officers' images are of a personal nature due to an investigation and proceeding that resulted from the incidents shown in the video. The hospital also submits that the personal information is highly sensitive and that disclosure of it might unfairly damage the reputation of the police officers. It offers no other information to support its submissions. As I noted above, I notified the police officers about this complaint and invited them to provide representations but they did not.

[44] I do not agree that the video contains the personal information of the police officers. In the video, the police officers are carrying out their professional duties in the hospital after being called for assistance. The police officers' information in the video appears in a professional capacity, not a personal one. The hospital has not satisfied me that the police officers' images in the video reveal something of a personal nature about them. Accordingly, I find that the police officers' images in the video are professional in nature and do not qualify as their personal information under *FIPPA*.

[45] There is no suggestion that the last ten minutes of File 3 contain the personal information of the security and health care professional hospital staff, or the firefighters who appear in it. From my review of these last ten minutes, it is clear that the hospital

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<sup>7</sup> See section 2(3) of *FIPPA*. In addition, the IPC has consistently held that information associated with an individual in a professional capacity does not qualify as "personal information" unless it reveals something of a personal nature about the individual. See Order PO-2225.

staff and the firefighters appear in a professional capacity and not a personal one. All of them are engaged in carrying out their professional duties in this part of File 3. I find that the images of hospital staff and firefighters in the last ten minutes of File 3 are professional in nature and do not qualify as the personal information of these individuals under *FIPPA*.

***Section 49(b) of FIPPA does not apply***

[46] Because I have found that the portions of Files 1 and 3 that I am considering under *FIPPA* do not contain the personal information of anyone other than the complainant, the discretionary exemption in section 49(b) of *FIPPA* does not apply. In accordance with the complainant's right of access under section 47(1) of *FIPPA*, and absent the application of any exemption under *FIPPA* that affects the complainant's access rights, I will order the hospital to disclose these remaining portions of the video to the complainant.

**E. Did the hospital conduct a reasonable search for records?**

[47] Because the complainant claims that additional footage should exist, I must decide whether the hospital conducted a reasonable search for records. A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records which are reasonably related to the request. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the hospital's decision. If I am not satisfied, I may order further searches.

[48] Section 53 of *PHIPA* requires individuals to exercise their right of access to a record of personal health information by making a written request. In this complaint, the video footage in question was taken in July 2015, and the written request for access is dated September 9, 2015. While the complainant asserts that he submitted his request within the hospital's 30-day retention period, the documentation he provided in support of his assertion confirms that he did not.

[49] The hospital states that it received the complainant's September 9 request on September 16, 2015, more than three weeks after the expiration of the 30-day retention period in August 2015. The hospital provides copies of the complainant's request and follow-up correspondence, along with its written responses to him. It also provides a statement from its Privacy and Freedom of Information Coordinator affirming that:

- upon receiving the complainant's request, he contacted the Manager of Security who was responsible for surveillance footage.
- the Manager of Security searched for the requested footage and located the video, which had been retained for a legal matter.

- the Manager of Security told him that there was no other video footage of the dates noted by the complainant in his request.

***The hospital conducted a reasonable search for records***

[50] I find that the hospital conducted a reasonable search for records responsive to the complainant's request. The hospital had an experienced employee, responsible for the surveillance footage requested by the complainant, conduct the search. The hospital explained its 30-day retention practice for surveillance footage and this explanation adequately answers why no footage of the second day sought by the complainant was located. The video was extracted before the 30-day retention period expired and retained for a law enforcement matter; this is why it was available when the complainant submitted his request for access in September, well after the hospital's 30-day retention period expired. Having found the hospital's search reasonable, I uphold it.

**F. What is an appropriate fee for access? Should the fee be waived?**

[51] Because I have primarily applied *PHIPA* in this decision and have decided access to most of the requested information under it, I find it appropriate to refer to the fee and fee waiver provisions in *PHIPA*, rather than those in *FIPPA*, in order to determine the appropriate fee for access.<sup>8</sup>

[52] The fee and fee waiver provisions in *PHIPA* are discretionary. Together, sections 54(10) and (11) of *PHIPA* give the hospital the discretion to charge the complainant a fee for access to his own personal health information that cannot exceed the "prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed." Section 54(12) of *PHIPA* also gives the hospital discretion to waive payment of all or any part of the fee if, in the hospital's opinion, it is "fair and equitable to do so."

[53] The hospital provided its initial fee estimate of \$2,316.50 under section 57(1)(c) of *FIPPA*. The hospital states it based its fee estimate on a quote from a local production company because it does not have the equipment necessary to edit the video itself. The hospital confirms that it did not give a copy of the video to the company that provided the quote.<sup>9</sup> Rather, it told the company that it required 22 minutes of facial blurring for a 44-minute video and the company generated its quote based on that information alone. The complainant calls this fee estimate outrageous

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<sup>8</sup> A similar approach to the determination of the fee was taken in *PHIPA* Decision 17.

<sup>9</sup> The complainant expressed concern in his representations about the disclosure of the video to a third-party editing company. However, the hospital had already confirmed in its representations, which I provided to the complainant, that it did not give a copy of the video to the company in order to obtain the quote.

and asserts that it should be waived.

[54] Because the hospital did not consider the application of *PHIPA* when it processed the complainant's access request, I invited it to provide a fee estimate for the video under *PHIPA*. The hospital then provided a fee estimate of \$100: \$90 for 45 minutes of review of the video to determine whether there is any information that must be removed before the complainant can be given access to it and \$10 for the cost of the compact disk. The hospital notes that the \$100 fee is only an estimate and subject to change. The hospital also states that it should be able to recover a fee for editing the video, over and above its \$100 fee.

[55] Although the complainant received the hospital's *PHIPA* fee estimate prior to providing representations in this complaint, he does not directly address it in his representations. He only addresses the *FIPPA* fee estimate, briefly. He argues that he is being grossly overcharged to obtain information on what happened to him while he was under the hospital's care.

***The hospital's \$100 fee for reviewing the video and providing it on a CD represents reasonable cost recovery***

[56] Previous IPC orders<sup>10</sup> and *PHIPA* Decision 17<sup>11</sup> have concluded "reasonable cost recovery" does not mean "actual cost recovery" or full recovery of the costs incurred by a health information custodian in fulfilling a *PHIPA* access request. They have also held that the use of the word "reasonable" to describe cost recovery suggests that costs should not be excessive and that, as a whole, section 54(11) must be interpreted in a way that does not create a financial barrier to the important purpose of *PHIPA* to grant a right of access to one's own personal health information. These past orders and *PHIPA* Decision 17 concluded that the fee scheme set out in a proposed regulation to *PHIPA*, published by the Minister of Health and Long-Term Care in 2006,<sup>12</sup> but never adopted, provided the best framework for determining the amount of "reasonable cost recovery" under *PHIPA*. I agree with this line of reasoning and apply it here.

[57] The relevant parts of the 2006 framework are:

Fees for access to records

25.1 (1) For the purposes of subsection 54(11) of [*PHIPA*], the amount of the fee that may be charged to an individual shall not exceed \$30 for any or all of the following:

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<sup>10</sup> Orders HO-009 and HO-014.

<sup>11</sup> See paragraph 255.

<sup>12</sup> Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol 139-10 (11 March 2006), at page 377. Available online here: <https://files.ontario.ca/books/139-10.pdf>.



...

4. Review of the contents of the record for not more than 15 minutes by the health information custodian or an agent of the custodian to determine if the record contains personal health information to which access may be refused.

5. Preparation of a response letter to the individual.

6. Preparation of the record for photocopying, printing or electronic transmission.

7. Photocopying the record to a maximum of the first 20 pages or printing the record, if it is stored in electronic form, to a maximum of the first 20 pages, excluding the printing of photographs from photographs stored in electronic form.

8. Packaging of the photocopied or printed copy of the record for shipping or faxing.

9. If the record is stored in electronic form, electronically transmitting a copy of the electronic record instead of printing a copy of the record and shipping or faxing the printed copy.

10. The cost of faxing a copy of the record to a fax number in Ontario or mailing a copy of the record by ordinary mail to an address in Canada.

(2) In addition to the fee charged under subsection (1), fees for the services set out in Column 1 of Table 1 shall not, for the purposes of subsection 54(11) of [PHIPA], exceed the amounts set out opposite the service in Column 2 of the Table.

...

**TABLE 1**

| <b>ITEM</b> | <b>COLUMN 1</b>  | <b>COLUMN 2</b>                                      |
|-------------|--|--|
| <b>3.</b>   | For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form   | \$10   |
| <b>12.</b>  | For the review by a health information custodian or an agent of the custodian of the contents of a record to determine if the record contains personal health information to which access or disclosure may be refused | \$45 for every 15 minutes after the first 15 minutes |

[58] The hospital's \$90 charge for 45 minutes to review the video does not exceed

the permitted charges under the 2006 framework. The hospital could have charged \$120 for 45 minutes of time to review the video (namely, \$30 for the first 15 minutes under section 25.1 and \$90 for the remaining 30 minutes under item 12 of Column 1 in Table 1 of the 2006 framework). I accept 45 minutes to be a reasonable amount of time to review the video and the hospital's charge of \$90 for its review to be consistent with reasonable cost recovery under the 2006 framework. The hospital's \$10 fee for the cost of the compact disk fits within Item 3 of Column 1 in Table 1 of the 2006 framework. Considering the hospital's \$100 fee is lower than the \$130 that it could have charged in accordance with the 2006 framework for reviewing the video and providing it to the complainant on a CD, I uphold it.

***The hospital may recover reasonable, third party costs for editing the video***

[59] As noted above, the hospital also seeks to recover its costs of a third party's editing of the video for the purpose of providing access. *PHIPA* and the 2006 framework do not provide a prescribed amount for editing the video by obscuring patients or for preparing it for the purpose of granting the complainant access. I accept, however, that a reasonable cost of a third party's severing of the video, where the hospital is not able to edit the video itself, is allowable as reasonable cost recovery under *PHIPA*.<sup>13</sup>

[60] I do not have submissions from the hospital on what it would cost to obscure 12 seconds of the video—its submissions and initial fee estimate were based on its assumption that 22 minutes of footage needed to be edited. However, I agree with the hospital that it should be able to recover its costs for having to outsource the obscuring of the video. An invoiced amount from a third party to edit the video could be an allowable cost under *PHIPA* provided the invoiced amount is reasonable. Accordingly, if the hospital is unable to obscure the video, it may obtain a revised quote for the obscuring from a third party. Based on my finding that only 12 seconds of obscuring is required, I anticipate any quote the hospital may obtain will be significantly lower than \$2,316.50.

[61] In conclusion, I uphold the hospital's \$100 fee for review and the CD under section 54(11) of *PHIPA*. The hospital may also charge the complainant an invoiced amount for the obscuring of 12 seconds of the video if the hospital must outsource this severing of the record, provided that the invoiced amount represents reasonable cost recovery, and provided the hospital first gives the complainant an estimate of the fee, as required under section 54(10) of *PHIPA*.<sup>14</sup> It is open to the complainant to complain to this office about the fee for severing the video.

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<sup>13</sup> *PHIPA* Decision 117.

<sup>14</sup> *PHIPA* Decision 117.

***The hospital's decision to deny a fee waiver is upheld***

[62] In its representations, the hospital denies the complainant's request for a fee waiver but provides few submissions on the reasons for its denial. It refers to the fee provisions of *FIPPA* in its explanation of why it denied a fee waiver. It argues that the cost should not be excluded from the fee on the basis that it would not have been incurred if the hospital were able to edit the video itself. It states that it seeks payment for the costs incurred from a third-party editor and has added no other costs. Finally, it states that it is unaware of the complainant's current financial circumstances.

[63] As I noted above, the complainant does not directly address the *PHIPA* fee of \$100 in his representations. He addresses only the \$2,316.50 fee and asserts that it should be waived, but he provides no other arguments in support of his assertion.

*The hospital's decision to deny a fee waiver is reasonable*

[64] Under section 54(12) of *PHIPA*, the hospital may waive payment of all or any part of the fee if, in its opinion, it is fair and equitable to do so. The hospital's representations show that after it turned its mind to the appropriate fee under *PHIPA*, it decided to deny the complainant's fee waiver request. However, the hospital's representations on why it exercised its discretion to deny the fee waiver request are brief and are based on *FIPPA*, which, unlike *PHIPA*, contains a mandatory fee waiver provision.<sup>15</sup> Nonetheless, I am satisfied that the hospital's considerations under *FIPPA* are equally applicable to a determination of whether a fee waiver is "fair and equitable" under *PHIPA*.<sup>16</sup> Considering the discretionary nature of the fee waiver provision in section 54(12) of *PHIPA*, and the hospital's stated considerations in denying a fee waiver, I am satisfied that the hospital exercised its discretion to deny a fee waiver under *PHIPA*. The complainant provides no arguments on why it would be "fair and equitable" for the hospital to waive the fee. He also provides no information on his financial circumstances.

[65] In these circumstances, and absent any information before me on why a fee waiver would be fair and equitable, I am satisfied that the hospital's exercise of discretion in denying a fee waiver was reasonable. Accordingly, I uphold the hospital's decision to deny a fee waiver. However, as noted above, the complainant may make a further request for a fee waiver upon receipt of the hospital's fee estimate for third

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<sup>15</sup> Section 57(4) of *FIPPA* states, in part:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) The extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) Whether the payment will cause financial hardship for the person requesting the record[.]

<sup>16</sup> *PHIPA* Decision 17.

party editing of the video. Despite my findings on the fee and fee waiver in this complaint, I note that the hospital retains the discretion to waive the fee, completely or partly, at any time, and I urge it to consider whether there are good reasons to do so in the circumstances of this case.

**ORDER:**

1. I do not uphold the hospital's decision to deny the complainant full access to the video.
2. I order the hospital to obscure the images of patients in File 1 (at 1:51-1:54 and 1:56-1:58) and File 3 (at 1:35-1:42) of the video and to then grant the complainant access to the remainder of the video.
3. If the hospital decides to charge a fee for the cost of obscuring, it is to give the complainant an estimate of the fee in accordance with section 54(10) of *PHIPA*.
4. For the purposes of order provisions 2 and 3, the date of this decision should be treated as the date of the access request.
5. The timelines referred to in order provision 4 may be extended if the hospital is unable to comply in light of the current COVID-19 situation. I remain seized of the complaint to address any such request.
6. I uphold the hospital's \$100 fee for review and CD costs, its search for records, and its denial of a fee waiver.

Original signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ May 21, 2020