

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 229

Complaint HA23-00046

Dr. Lisa Trepanier

October 26, 2023

Summary: This decision addresses a complaint of an access decision made under the *Act* for all of the complainant's personal health information held by the custodian. The custodian denied access to all of the records, claiming the application of the exemption in section 52(1)(e)(i) (risk of harm, including to treatment or recovery). In this decision, the adjudicator finds that most of the records are dedicated primarily to the complainant's personal health information while others are not, and that in either case, the exemption in section 52(1)(e)(i) does not apply. The custodian is ordered to release the records, either in whole or in part, to the complainant.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, sections 52(3) and 52(1)(e)(i); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 20 and 49(d).

Decisions Considered: PHIPA Decisions 34, 87, 100, 123, 208, 212 and 216.

BACKGROUND:

[1] This decision resolves the issues raised as a result of a complaint about an access decision made under the *Personal Health Information Protection Act, 2004* (the *Act*) by Dr. Lisa Trepanier (the custodian) in response to an access request. The access request was for all of the requester's personal health information held by the custodian, who is a registered psychologist – a member of the College of Psychologists of Ontario. The requester had attended therapy sessions with a registered psychotherapist – a member of the College of Registered Psychotherapists of Ontario (the therapist), who

was working under the custodian's supervision.

[2] In response, the custodian located records responsive to the access request and issued a decision letter to the requester, denying access to them in their entirety. The custodian claimed the application of the exemption in section 52(1)(e)(i) of the *Act* to the records, advising the requester that the release of the records would raise "a concern for serious harm" to the requester.

[3] The requester, now the complainant, made a complaint regarding the custodian's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the complaint, the complainant advised the mediator that she did not believe that the release of the records could reasonably be expected to harm her or another individual. The custodian reiterated her position that the exemption in section 52(1)(e)(i) applied to the records. The custodian also noted that the complainant already has in her possession several records at issue, such as correspondence between herself and the custodian or the psychotherapist and invoices for services rendered.

[5] The complaint then moved to the adjudication stage of the complaints process, where I decided to conduct a review. I provided the custodian, initially, with the opportunity to provide representations. The custodian advised the IPC that she wished to rely on submissions she wrote to the mediator during the mediation of the complaint. These submissions were shared with the complainant when I sought representations from the complainant. I received representations from the complainant, which addressed one of the issues in this complaint, but also dealt with issues that are not within the IPC's jurisdiction. In this decision, I address only the representations that relate to this complaint and the relevant issues under the *Act* arising from it.

[6] For the reasons that follow, I find that most of the records are dedicated primarily to the complainant's personal health information and she therefore has a right of access to these records in their entirety, subject to any applicable exemptions. I also find that other records are not dedicated primarily to the complainant's personal health information and she, therefore, has a right of access to only her personal health information that can be reasonably severed from these records, subject to any applicable exemptions. I further find that the exemption in section 52(1)(e)(i) does not apply to any of the records or information at issue. As a result, I order the custodian to release the records to the complainant either in whole or in part, as set out in the order provisions.

RECORDS:

[7] There are 145 pages of records, consisting of intake records, clinical notes,

summary notes, a supervision record, emails, text messages, invoices and receipts.¹

ISSUES:

- A. Are the records “dedicated primarily” to the complainant’s personal health information within the meaning of section 52(3) of the *Act*?
- B. Does the exemption in section 52(1)(e)(i) of the *Act* apply to the records?

DISCUSSION:

Issue A: Are the records “dedicated primarily” to the complainant’s personal health information within the meaning of section 52(3) of the *Act*?

[8] There is no dispute between the custodian and the complainant that the records contain the personal health information of the complainant as defined in section 4(1) of the *Act*, that the custodian is a health information custodian as defined in section 3(1) of the *Act* and that the therapist under the supervision of the custodian was as “agent” of the custodian, as defined in section 2 of the *Act*.²

[9] The extent of an individual’s right of access under the *Act* depends on whether the record of his or her personal health information is “dedicated primarily” to that information.

[10] This is because, subject to any applicable exemptions, the right of access in the *Act* applies either to the whole record, or only to certain portions of it. Specifically, while section 52(1) of the *Act* grants a right of access to the entire record, section 52(3) limits access where the record is not “dedicated primarily” to the individual’s personal health information. Section 52(3) of *PHIPA* states:

Despite subsection (1) [setting out exemptions from the right of access in *PHIPA*], 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 reasonably be severed from the record for the purpose of providing access.

¹ During the review, the complainant agreed to remove a duplicate record (relating to a complaint made to a regulatory College) from the scope of this complaint.

² An “agent” is defined in section 2 of the *Act* as follows:

in relation to a health information custodian, means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent’s own purposes, whether or not the agent has the authority to bind the custodian, whether or not the agent is employed by the custodian and whether or not the agent is being remunerated.

[11] PHIPA Decision 17 set out this office's approach to the interpretation of section 52(3) (see paragraphs 85-115), and this approach has been followed in subsequent PHIPA Decisions.³ In order to determine whether a record is "dedicated primarily" to the personal health information of the individual within the meaning of section 52(3), this office takes into consideration various factors, including:

- 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.

This list is not exhaustive.

Representations

[12] Neither the custodian's nor the complainant's representations directly address whether the records are dedicated primarily to the complainant's personal health information within the meaning of section 52(3) of the *Act*.

Analysis and findings

[13] Based on my consideration of the records themselves, I find that the majority of the records are "dedicated primarily" to the complainant's personal health information and that her access rights are, therefore, not limited by section 52(3) of the *Act* with respect to these records.

[14] The records that I find are "dedicated primarily" to the complainant's personal health information consist of the following:

- discussions that took place between the complainant and the therapist during the therapy sessions,
- text and email communications between the complainant, the custodian and the therapist about the complainant's healthcare, and

³ See, for example, PHIPA Decisions 208 and 216.

- invoices that were sent to the complainant by the custodian for the therapy sessions.

[15] In particular, I find that these records contain only the complainant's personal health information and that the purpose of and reason for the creation of the records was to discuss and plan the complainant's healthcare. I further find that the complainant's personal health information is central to the purpose for which the records exist, and that the records would not exist but for the personal health information of the complainant in them.

[16] Therefore, I find that these records are "dedicated primarily" to the complainant's personal health information and that as a result, her access rights are to these records as a whole, subject to the applicability of any exemptions found in section 52(1) to them.

[17] Conversely, I find that some of the records are not "dedicated primarily" to the complainant's personal health information. These records are entitled "Individual Supervision Records," and consist of 16 pages of the custodian's evaluation of and consultations with the therapist in relation to the therapy sessions conducted by the therapist with the complainant. While these records contain the complainant's personal health information, I find that they are not "dedicated primarily" to her personal health information. On my consideration of these records, I find that they do not contain a large quantity of the complainant's personal health information, and that the purpose of the personal health information in the records and the reason for the creation of these records is to evaluate the therapist's work performance. As a result, I find that with respect to the Individual Supervision Records, the complainant's right of access is limited by section 52(3) to only her personal health information that can reasonably be severed from the records under section 52(2), subject to the applicability of any exemptions found in section 52(1).

[18] The custodian is claiming the application of the exemption in section 52(1)(e)(i) to all of the personal health information, which I consider below.

Issue B: Does the exemption in section 52(1)(e)(i) of the *Act* apply to the records?

[19] Parts of a record may be exempt from the right of access under the *Act*. Exemptions may apply whether the right of access is under section 52(1) or 52(3) of the *Act* — namely, whether or not the record is "dedicated primarily" to the personal health information of the requester.

[20] In other words, if the record is dedicated primarily to the personal health information of the requester, such that he or she has a right of access under the *Act* to the whole record, section 52(1) provides that part(s) of the record may be exempt from the right of access.

[21] If the record is not dedicated primarily to the personal health information of the requester, such that the requester has a right of access under the *Act* only to the reasonably severable personal health information in the record, section 52(1) also provides that some or all of that information may be exempt from the right of access.

[22] Section 52(1) of the *Act* lists exemptions from the right of access. The custodian is claiming the application of section 52(1)(e)(i), which states:

Subject to this Part [Part V of *PHIPA*, setting out the rights of access and correction], 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,

(e) granting the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,

Representations

[23] The custodian submits that the purpose of the exemption in section 52(1)(e)(i) is to protect the treatment, recovery, and physical security of a patient and others. According to the custodian, the records, which include emails, text messages and clinical notes, contain discussions of a sensitive nature between the complainant, the custodian and the therapist. The custodian's concern is that if the records are released to the complainant, they may be discovered and read by a certain member of the complainant's family. Because of the nature of the relationship between the complainant and this family member, the custodian is concerned that the complainant's safety and well-being may be at risk. The custodian further submits that reading some of the sensitive content in the records may be "harmful and triggering" to the complainant without an ongoing "therapeutic alliance," such as contact with another therapist.

[24] The complainant submits that releasing her records of personal health information to her will not cause her any harm, and that if the custodian had been concerned about her safety during the course of her therapy she should have contacted authorities such as the police at that time, but did not. The complainant further submits that the custodian's argument that the family member will find her records is speculative and unwarranted. In addition, the complainant states that she and the relevant family member are currently being treated and assisted by separate therapists, and are in "good hands." The complainant also provided a written statement made by the family member, in which this individual states that they are aware of the content of the discussions between the complainant, the custodian and the therapist.

Analysis and findings

[25] The purpose of section 52(1)(e)(i) is to protect the treatment, recovery and physical security of a patient and others. This exemption must be approached in a sensitive manner given the difficulty of predicting future events.

[26] Section 52(1)(e)(i) is similar to the exemptions in sections 49(d) and 20 of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, which apply, respectively, where disclosure could reasonably be expected to prejudice the mental or physical health of the individual, or seriously threaten the safety or health of an individual.

[27] Previous IPC decisions have found that the standard of proof required under section 52(1)(e)(i) of the *Act* is the same as the standard under sections 49(d) and 20 of the *FIPPA*, as well as other exemptions that contain the words “could reasonably be expected to.”⁴ The health information custodian must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that granting access will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁵

[28] Having regard to the totality of the evidence presented and the circumstances of this matter, I find that there is insufficient evidence before me to establish that granting the complainant access to her records of personal health information could reasonably be expected to result in a risk of serious harm to her treatment or recovery, or a risk of serious bodily harm to her or any other individual.

[29] I find that the custodian’s evidence falls short of demonstrating a risk of harm that is well beyond the merely possible or speculative. As previously stated, the custodian’s concern is two-fold – if the records are released to the complainant, they may be discovered and read by a certain member of the complainant’s family, possibly putting her safety and well-being at risk, and that reading some of the sensitive content in the records may be “harmful and triggering” to the complainant without an ongoing “therapeutic alliance,” such as contact with another therapist.

[30] I am satisfied, based on the complainant’s response to the custodian’s concerns, that the threshold for the risk of harm contemplated in section 52(1)(e)(i) has not been met because the custodian’s argument is speculative at best. As a result, I find that there is insufficient evidence before me demonstrating that the exemption in section 52(1)(e)(i) applies to the complainant’s personal health information, and I order the custodian to release the complainant’s personal health information to her.

⁴ See PHIPA Decision 34.

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (Can LII) at paras. 52-54.

ORDER:

1. For the foregoing reasons, pursuant to section 61(1) of the *Act*, I order the custodian to release the records in their entirety to the complainant by **December 1, 2023** but not before **November 28, 2023**, with the exception of the Individual Supervision Records.
2. I order the custodian to release the Individual Supervision Records in part to the complainant by **December 1, 2023** but not before **November 28, 2023**. I have enclosed a copy of these records with the decision sent to the custodian. The custodian is to release the portions of these records that *are* highlighted.
3. I reserve the right to require the custodian to provide to the IPC a copy of the records it releases to the complainant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ October 26, 2023