Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4460

Appeal PA22-00021

Hamilton Health Sciences

November 27, 2023

Summary: Under *FIPPA*, the appellant made a request to Hamilton Health Sciences (the hospital) for statistical and other information relating to the work of the Child Advocacy and Assessment Program (CAAP) at a particular hospital location. The appellant asserts that her child was misdiagnosed by the CAAP team as a victim of child abuse, and she seeks information relating to the number and outcomes of similar incidents over the past 10 years. The hospital denies the appellant's characterization of the work of CAAP, including the assertion that CAAP team members diagnose child abuse or make child abuse allegations. Ultimately the hospital denied the appellant's request on the basis it does not compile the type of information she seeks.

In this order, the adjudicator explains her reasons for declining to conduct an inquiry of this matter under *FIPPA*. She accepts the evidence that the requested information does not exist in the form sought by the appellant, and finds there is no obligation under *FIPPA* for the hospital to conduct a search or to create a responsive record in the circumstances. She dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, as amended, sections 24 and 52(1); *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, as amended, section 4.

Orders and Investigation Reports Considered: Order PO-4248.

OVERVIEW:

[1] The appellant is the mother of a child who she alleges was misdiagnosed by members of the Child Advocacy and Assessment Program (CAAP) at a location operated by Hamilton Health Sciences (the hospital). As I explain further below, the work of the CAAP team includes making patient assessments at the request of child protection agencies.

[2] Some time later, the appellant made a request to the hospital under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) for certain information about the work of its CAAP team at this particular hospital location. The request took the form of the following six questions:

1. Please inform me how many cases of alleged child abuse the Child Advocacy and Assessment team (CAAP) at [one of the hospital's locations] diagnoses every year? (please provide me with statistics for the past 10 years).

2. How many of these alleged child abuse cases are later proven (by [that hospital location], by a team in another hospital or independent medical experts) to be in fact medical?

3. What are the consequences for the CAAP team [at the specified hospital location] when an alleged child abuse case is in fact proven medical (e.g. at a trial), as in the case of [here the appellant names two children, including her own child, both of whom she describes as having been "misdiagnosed" by different named doctors].

4. What is the number of child abuse allegations by CAAP at [the specified hospital location] leading to criminal charges? Please provide me with statistics for the past 10 years.

5. What is the number of child abuse allegations by CAAP at [the specified hospital location] leading to Family and Children's Services involvement? Please provide me with statistics for the past 10 years.

6. In case the CAAP team at [the specified hospital location] does not hold such statistics (asked about in 1-5.) Please explain why not.

[3] The hospital denied the appellant's request, initially on the basis the request is frivolous and vexatious, and/or the request was made in bad faith or for a purpose other than to obtain access, referring to sections of *FIPPA* that permit an institution to refuse a request in some circumstances. In the alternative, the hospital denied the request on the basis no responsive records exist. The hospital provided an explanation for its alternative position (which is set out in more detail below).

[4] The appellant was dissatisfied with the hospital's decision and appealed it to the

Office of the Information and Privacy Commissioner of Ontario (IPC).

[5] During the mediation stage of the appeal process, the hospital withdrew its claim that the request is frivolous or vexatious. The hospital issued a revised decision elaborating on its assertion that there exist no records in its custody or control that are responsive to the appellant's request. The hospital stated:

> The CAAP team does not diagnose child abuse and therefore, no such records exist. CAAP clinicians do not make child abuse allegations or determinations. Rather, CAAP clinicians provide reports to child protection agencies as mandated by the *Child, Youth and Family Services Act*; and data on such reporting is not collected. Furthermore, CAAP clinicians do not receive information regarding whether cases in which they are involved do or do not result in criminal charges. Lastly, information related to any patient care that leads to Family and Children's Services involvement is not data [the hospital] collects and would require [the hospital] to access individual health records and conduct a review of each patient's medical chart, which constitutes unauthorized access to personal information and is outside the scope of *FIPPA*. Access is denied under section 8 (1) of the *Personal Health Information and Protection of Privacy Act*.

[6] The matter could not be resolved through mediation, and the file proceeded to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under *FIPPA*.

[7] At the adjudication stage, I sought additional information from the parties to inform my decision on whether this matter should proceed to an inquiry under *FIPPA*. Among other things, I asked the hospital to clarify the role and responsibilities of the CAAP team, and to address whether its access decision would have been different had the appellant employed different terminology (such as "reports," rather than "diagnoses," of child abuse) in her access request.

[8] After considering the hospital's submissions, I shared with the appellant my preliminary assessment that this matter should not proceed to an inquiry under *FIPPA*. The appellant provided submissions, which I have considered in arriving at my decision in this matter. The parties' submissions were shared with one another in accordance with the IPC's *Code of Procedure* and *Practice Direction 7.*

[9] In the discussion that follows, I explain why I conclude this matter does not warrant an inquiry under *FIPPA*. I dismiss the appeal.

DISCUSSION:

Should the appeal proceed to an inquiry under *FIPPA*?

[10] At the adjudication stage, the IPC has the discretion to decide whether to conduct an inquiry into an institution's decision under *FIPPA*. This discretion is established by section 52(1) of *FIPPA*, which states that the IPC "may conduct an inquiry to review the head's decision. …" This discretionary language is mirrored in section 7.02 of the IPC's *Code*, which states:

> At the Adjudication stage, an Adjudicator may conduct an inquiry to dispose of some or all of the issues in the appeal.

[11] In this case, for the reasons that follow, I decline to conduct an inquiry.

[12] The hospital states that there exist no records within its custody or control that are responsive to the appellant's access request. Specifically, the hospital states in its revised decision that no records exist documenting "diagnoses" of child abuse by CAAP team members, because their responsibilities do not include making such diagnoses or allegations.

[13] I asked the hospital to clarify the roles and responsibilities of CAAP team members, including of hospital clinicians who are part of the team. The hospital explains that the current model of CAAP consists of pediatricians, social workers, and administrative support staff. The hospital states that CAAP team members may, under the *Child, Youth and Family Services Act, 2017* (*CYFSA*), provide child protection agencies with patient assessments upon request, or make reports of a child in need of protection.

[14] I noted that the hospital states in its revised decision that the CAAP team "does not diagnose chid abuse and therefore, no such records exist … Rather, CAAP clinicians provide reports to child protection agencies as mandated by [*CYFSA*]." I asked the hospital whether its access decision would have been different if the appellant had employed different terminology (for example, the word "reports" rather than "diagnoses") in her access request in relation to the data she seeks (regarding "alleged child abuse," "alleged child abuse cases," and "child abuse allegations"). The purpose of my question was to determine whether a broader interpretation of the appellant's access request would have yielded responsive records.

[15] The hospital responds that a request employing different terminology would not have yielded a different result. The hospital explains that the records the appellant seeks do not exist, because CAAP team members do not make "reports" or "allegations" or "diagnoses" of child abuse, as asserted by the appellant.

[16] I asked the hospital whether it retains its own copies of the patient assessments or reports the CAAP team does make. The hospital states that any patient assessment

provided upon request to a child protection agency under the *CYFSA* is retained by the hospital in the applicable patient's health record. The hospital asserts, however, that it does not collect the broader statistical data the appellant seeks about these patient assessments, or about any reports made by CAAP team members about children in need of protection (which, as noted, the hospital maintains do not entail any allegations or diagnoses of child abuse). The hospital also states that it does not collect data on any outcomes (such as the laying of criminal charges, or the involvement of family and children's services agencies) following a CAAP team member's provision of an assessment to a requesting agency.

[17] I shared with the parties my view that the circumstances of this case are similar to those considered by the IPC in Order PO-4248. That order concerned a request to an institution for statistical and other information about certain protocols and practices relating to a treatment provided at the institution.

[18] In that order, the adjudicator accepted and adopted previous IPC findings that *FIPPA* does not, as a rule, require an institution to create a record in response to an access request if one does not already exist.[1] Based on the evidence before her, the adjudicator in Order PO-4248 accepted the institution's explanations for why the requested information did not exist in the form sought by the requester, and she found no obligation for the institution in that case to create the requested record.

[19] The adjudicator also addressed an assertion by the institution about the relevance of the *Personal Health Information Protection Act, 2004* (*PHIPA*). She found it unnecessary to consider *PHIPA* in the circumstances, given her finding there was no obligation under *FIPPA* for the institution to create a responsive record in that case. By stating in its revised decision that *PHIPA* prevents the hospital from compiling the requested information, I understand the hospital in this appeal to be making an assertion about the relevance of *PHIPA* that is similar to the assertion considered by the adjudicator in Order PO-4248. I will consider this claim further below.

[20] First, I will address the hospital's reliance on section 8(1) of *PHIPA*, which provides that, subject to certain exceptions that are not relevant here, *FIPPA* does not apply to personal health information in the custody or under the control of a health

[1] The adjudicator cited IPC Orders P-50, MO-1381, MO-1442, MO-2129, MO-2130, PO-2237, PO-2256, MO-2829 and PO-3928.
In Order P-50, the IPC noted that while *FIPPA* generally gives requesters a right to the "raw material" that would answer all or part of a request, institutions are not required to organize that information in a particular format before disclosure. But see also Order P-99, in which the IPC found that the creation of a record from existing information is, in some circumstances, consistent with the spirit of *FIPPA*. The IPC has applied these principles in considering whether, given the particular circumstances, an institution is required to produce a responsive record: see Orders PO-2237, MO-4166-I, PO-4283, and MO-4355, among others.

information custodian.[2]

[21] I do not understand the appellant in this case to be seeking access to personal health information within the meaning of *PHIPA*.[3] Any individual patient assessments (contained within individual patient files) are not reasonably within the scope of the appellant's request to know the number and outcomes of any "cases of alleged child abuse" the CAAP team "diagnoses" on a yearly basis. Even if individual patient assessments were within the scope of the request, I do not understand the appellant to be claiming that she has a right of access to records of other individuals' personal health information under *PHIPA*.[4]

[22] Instead the appellant is seeking answers to her questions about the number and outcomes of "cases of alleged child abuse" "diagnosed" by CAAP team members on a yearly basis. The statistical and related information the appellant seeks is not information referable to any particular individual; instead, the requested information is in the nature of general (and not individually identifying) information about specific outcomes of the work of the hospital's CAAP team.[5] This is a matter to be decided under *FIPPA*.[6]

[23] Under *FIPPA*, if a requester claims that records exist beyond those identified by an institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of *FIPPA*.[7] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, she must

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[2] The exceptions are set out at section 8(2) of *PHIPA*, which states: "Sections 11, 12, 15, 16, 17, 33 and 34, subsection 35 (2) and sections 36 and 44 of [FIPPA] and sections 5, 9, 10, 25, 26 and 34 of [MFIPPA] apply in respect of records of personal health information in the custody or under the control of a health information custodian that is an institution within the meaning of either of those Acts, as the case may be, or that is acting as part of such an institution."

[3] "Personal health information" is defined in section 4 of *PHIPA* to include identifying information relating to an individual's physical or mental health, and to the providing of health care to the individual (paragraphs (a) and (b) of the definition at section 4(1) of *PHIPA*). The person who operates the hospital is subject to *PHIPA* as a health information custodian in respect of personal health information in the hospital's custody or control (paragraph 4.i of section 3(1) of *PHIPA*).

[4] Under *PHIPA*, only the individual to whom the personal health information relates (or that individual's lawfully authorized substitute decision-maker under *PHIPA*) has a right of access to records of the individual's personal health information: sections 5, 25, 52, and 53.

[5] In the language of *PHIPA*, the information at issue is not "personal health information" because it is not "identifying information" about an individual relating to one or more of the topics enumerated in section 4(1) of *PHIPA*. The term "identifying information" is defined at section 4(2) of *PHIPA* to mean "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."
For similar reasons, the information the appellant seeks is not "personal information" within the meaning of *FIPPA* (i.e., it is not information about an "identifiable individual" within the meaning of *FIPPA*).

[6] *FIPPA* establishes rights of privacy and access in respect of personal information as well as general information in the custody or under the control of institutions (such as the hospital).

[7] Orders P-85, P-221, and PO-1954-I.

still provide a reasonable basis for concluding that such records exist.[8]

[24] In this case, the hospital asserts that the information the appellant seeks does not exist, in any form, based on its position that CAAP team members do not diagnose or report child abuse, as the appellant alleges. Based on the information before me, I shared with the appellant my preliminary view that the information she seeks is not maintained or compiled by the hospital, and could not reasonably be expected to be located through a search of the hospital's records.

[25] The appellant disagrees with my preliminary assessment. In her submissions to me, the appellant asserts that the hospital is trying to avoid acknowledging the number of children affected by the incidents she describes, based on an undue focus on the terminology she employed in her access request. She suggests that replacing "diagnoses" and "allegations" in her request with other phrasing would yield responsive records. For instance, she suggests alternate phrasing such as "concludes that their injuries are highly suspicious for," and "non-accidental injuries and how many of these children are later medically diagnosed as having been sick, rather [than] having [suffered] from non-accidental injuries."

[26] Applying this logic, the appellant proposes reformulating her access request to replace references to "misdiagnoses" of "child abuse" with a request for the number of children for whom "the team has identified / expressed their opinion on / reported / confirmed / concluded, with medical issues that mimic child abuse, such as […]" There follows a list of 22 categories of "medical issues that mimic abuse."

[27] The appellant's proposed reformulation does not alter the substance of her request. The hospital has in my view already adequately answered my question of whether a broader reading of the appellant's request would yield responsive records; I have explained above why I am satisfied it would not. The hospital states, and I accept, that the particular statistical and related information the appellant seeks about the outcomes of the work of the CAAP team is not maintained or compiled by the hospital. I do not accept the appellant's allegation that the hospital is withholding responsive information simply because she has not employed its preferred phrasing.

[28] The appellant's proposed reformulation of her request includes also additional questions, such as the following:

- Please provide the total number of assessments done by [CAAP] at [the specified hospital location] in a year (including years 2013 through 2023).

- If the hospital allegedly has no statistics regarding the work of the whole CAAP team, how is their productivity, effectiveness, adherence to protocols and guidelines, feedback and follow-ups and monitoring being assessed?

[8] Order MO-2246.

- Please provide us with any statistical information that has been generated by the CAAP team at [specified hospital location] for each year of the past 10 years, beginning in 2013 through to 2023, along with the name of any programs/courses/studies/research that has accessed or relied upon such statistical information.

- Please provide any information on all research based on any information obtained by patients referred to or assessed by the CAAP team beginning in 2013 through to 2023.

[29] Such questions are not reasonably within the scope of the request at issue in this appeal. If the appellant now wishes to seek answers to questions like these, she may make a fresh request to the hospital. In that event, the parties may wish to have regard to the findings in this order and in IPC caselaw addressing the obligations of requesters and institutions under *FIPPA* around reasonable search and the identification of information and records "reasonably related" to an access request.[9]

[30] Finally, the appellant includes with her submission extracts from her child's hospital records, portions of which she has highlighted. Among the highlighted portions in these records are the following statements:

- "Clinical history – nonaccidental injury;"

- "Medical history […] – child abuse;" and

- "Diagnoses – child abuse, sequela."

[31] The appellant submits that these extracts disprove the hospital's claim that CAAP clinicians "do not diagnose child abuse, nor make child abuse allegations or determinations." It is the appellant's allegation that all these statements reflect a named CAAP pediatrician's misdiagnosis of her child, before the child was later accurately diagnosed as suffering from medical issues unrelated to child abuse.

[32] The above-noted statements contained in the extracts provided to me are not attributed in the records to any particular individual. In the face of the hospital's explicit denial that CAAP team members make child abuse diagnoses or allegations, I am unable to arrive at the conclusion, urged by the appellant, that these statements reflect a CAAP clinician's (erroneous) diagnosis of child abuse.

[33] The appellant has described a troubling series of events, and I understand her wish for information to help her understand whether her experience is unique. For the reasons set out above, however, I see no reasonable basis to believe the hospital would locate the information she seeks through a broader interpretation of her request, or through searches of records in its custody or control. This is because I am satisfied that

[9] In addition to Order PO-4248, noted above, see for example Orders MO-2129, PO-2237, and PO-2256.

the hospital does not maintain or compile the information the appellant seeks, and that the hospital is not obligated in these circumstances to create a record containing the information she seeks.

[34] For all these reasons, I am satisfied the hospital has responded to the appellant's request in accordance with its obligations under *FIPPA*. I conclude that no inquiry is warranted in the circumstances.

NO INQUIRY:

For the foregoing reasons, I decline to conduct an inquiry into this matter under *FIPPA*. I dismiss the appeal.

Original Signed By: November 27, 2023

Jenny Ryu
Adjudicator