

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 17

Complaint/Appeal PA12-256

Mackenzie Health

November 10, 2015

Summary: This decision addresses a number of issues arising in a complex complaint and appeal of a decision made by a hospital in response to a request for access to records relating to the birth and death of an infant and the care given to the mother and child at the hospital. As the hospital is subject to both the *Personal Health Information Protection Act (PHIPA)* and the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the adjudicator in this decision addresses matters arising under both statutes through a combined review under *PHIPA* and inquiry under *FIPPA*. Among these are preliminary issues concerning the status of the hospital under the acts, the proper understanding of the request made to the hospital, the application of *PHIPA* and *FIPPA* to the records, and the entitlement of the complainant to make an access request for records of personal health information of his wife and daughter.

In this decision, the adjudicator finds that the complainant's request is a request for records of personal health information of his wife and daughter, which is governed by *PHIPA*, as well as a request for his own personal information, which is governed by *FIPPA*. She also finds that the complainant is the substitute decision-maker for his wife and daughter for the purposes of the *PHIPA* component of the request. As a result, she finds that the complainant exercises rights of access to the records under both *PHIPA* and *FIPPA*.

The adjudicator then determines that most of the records at issue in this review are records of personal health information of the complainant's family, subject to *PHIPA*, with a subset of the *PHIPA* records also containing the complainant's personal information, and so subject to both *PHIPA* and *FIPPA*. She also finds that a small number of records contain only the complainant's personal information, and are subject only to *FIPPA*.

She then considers a number of issues arising in this review under *PHIPA* and *FIPPA*, including the claims made by the hospital to deny access to information in the records. In the result, she largely upholds the hospital's decision made under both acts. She finds that the hospital properly refused access to most of the information at issue on the basis of exclusions and exemptions in *PHIPA* and *FIPPA*. She finds that the public interest override in *FIPPA* does not apply, and she upholds the hospital's exercise of discretion under *PHIPA* and *FIPPA*. She does not uphold the hospital's decision on the fee charged for access, and orders a reduction of the fee, but she upholds the hospital's denial of a fee waiver. The adjudicator orders that the hospital grant the complainant access to a limited number of records or portions of records.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, ss 1-5 (purposes, definitions), 8(4), 23(1), 25, 51, 52, 53, 54(10), 54(11), 54(12); *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, as amended, ss 2 (definitions), 10, 13, 14, 19, 20, 21, 24, 47, 49, 57(1), 57(4), 65(6)5; RRO 1990, Reg 460, ss 6, 6.1, 8; *Public Hospitals Act*, RSO 1990, c P.40, ss 1, 32.1(2); RRO 1990, Reg 964, s 1(2); *Quality of Care Information Protection Act, 2004*, SO 2004, c 3, Sched B, ss 1 (definitions), 1.1.

Orders and Investigation Reports Considered: HO-009, HO-014.

Cases Considered: *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991 (CanLII); *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

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INTRODUCTION:

[1] This decision disposes of the issues in a complex complaint and appeal that involves applying both the *Personal Health Information Protection Act, 2004 (PHIPA)* and the *Freedom of Information and Protection of Privacy Act (FIPPA)* to a request for access to information. As it is the first decision of this nature made by this office, it will address a number of issues, including the application of the two statutes and the interpretation of certain provisions of *PHIPA* that have not previously been considered by this office. I will begin by setting out in this introduction a summary of the request

giving rise to this matter, the records deemed responsive to the request, and the information contained in those records that is at issue in this complaint and appeal.

[2] First a note on terminology: Although this matter was originally opened as an appeal under *FIPPA*, as will be seen below, the majority of my findings are made under *PHIPA*. I will therefore refer throughout this decision to my review of a complaint made under *PHIPA* which includes, in part, my inquiry in an appeal made under *FIPPA*.

The request

[3] The complainant in this matter is the father of an infant girl who was delivered at York Central Hospital (now known as Mackenzie Health)¹ in the fall of 2009. The baby died shortly after delivery.

[4] This incident gave rise to a number of proceedings. The hospital reported the death to the coroner's office and produced an internal investigation report for that office. The complainant filed complaints about doctors and nurses involved in the care of his wife and baby to the College of Physicians and Surgeons of Ontario (CPSO) and the College of Nurses of Ontario (CNO). The complainant also filed a lawsuit against the hospital and certain hospital staff. At the time this matter came before me, the complainant's lawsuit was in progress. The hospital also advised that the findings of the CPSO and CNO had been appealed by the complainant to the Health Professions Appeal and Review Board.

[5] This matter came to this office as a result of an access-to-information request made to the hospital in March 2012. The complainant submitted a written request to the hospital attributing his daughter's death to negligence and system failure, and asking for hospital records relating to her birth and death, and the care given to her and to his wife. Through discussions between the complainant and the hospital, the request was clarified to include records generated by specified hospital teams, an internal review report, records of the hospital's board, and email communications of named individuals.

The records

[6] The hospital identified 1,473 pages of records as being responsive to the clarified request described above. In an index of records shared with the complainant, the hospital grouped the responsive records into two categories: "Group A" records (non-email records) and "Group B" records (email records only).

[7] In all, between the date of receiving the request and the close of my review into

¹ York Central Hospital was renamed Mackenzie Health in June 2012. This decision is directed to the hospital under its current name. In this decision, "the hospital" refers to York Central Hospital or Mackenzie Health as appropriate.

this matter, the hospital has issued seven decisions on access and related matters under *FIPPA* and *PHIPA*, resulting in the full or partial release of 1,075 pages to the complainant.

[8] In this decision, among other issues, I must determine the complainant's right of access, under *PHIPA* and/or *FIPPA*, to the remaining records and parts of records to which the hospital continues to deny access. With this decision, I provide the hospital and the complainant with an Appendix listing all the records containing information at issue in this review, with a general description and my decision on access for each one. I also provide a general summary of the records here for ease of reference. The records identified by the hospital as being responsive to the request fall into the following categories:

- Records relating to the CNO/CPSO investigation (e.g., correspondence to or from the colleges concerning their investigations);
- Records relating to the complainant's lawsuit (e.g., statements of claim or defence, correspondence with hospital lawyers, memos and notes);
- Internal and external email communications involving hospital staff;
- Minutes of board meetings;
- Letters and memos about employment-related matters involving hospital staff; and
- Records that the hospital claims contain quality of care information.

The hospital's decision

[9] The hospital seeks to withhold the information at issue in this review, which is contained in the above records, on the basis of various exemptions and exclusions in *PHIPA* and *FIPPA*. These claims, and the information the hospital wishes to withhold based on these claims, can generally be described as follows:

- *Information for which the hospital claims legal privileges*

Examples include: chart and nursing reviews; email correspondence with legal counsel; updates to hospital staff about the complainant's lawsuit; minutes of closed meetings where legal advice was discussed; and correspondence and other documents for which legal advice was sought or obtained.

- *Information the hospital seeks to withhold on the basis of law enforcement and/or threat to safety or health claims*

Examples include email correspondence and updates to hospital staff about measures to ensure staff safety.

- *Advice or recommendations of hospital staff or related individuals*

This information is mainly contained in emails. It also includes drafts of correspondence and other documents.

- *Employment-related records*

These include memos and correspondence from senior hospital staff to employees about staff training and other matters.

- *Personal information of individuals other than the complainant, the complainant's wife or his infant daughter*

Examples include: personal email addresses of hospital staff (as distinct from email addresses associated with the hospital, which have generally been released to the complainant); and notations on nurse assignment charts.

- *Other claims*

- Records that the hospital claims contain quality of care information are sought to be excluded pursuant to the *Quality of Care Information Protection Act, 2004*.
- A draft press release is sought to be withheld on the basis it reveals pending policy decisions.
- Meeting minutes are sought to be withheld on the basis they reveal the substance of closed meeting deliberations.
- Information in the records relating to other matters (e.g., other patients) is sought to be withheld on the basis it is not responsive to the complainant's request.

My findings

[10] In this decision, I find that, with one limited exception, *PHIPA* applies to the information covered by the complainant's request. The right of access to that information is thus governed by *PHIPA*. This finding flows from my decision that the complainant's request must be viewed as a request on behalf of his wife and infant daughter for access to their personal health information, arising out of their experience as patients at the hospital.

[11] However, one part of the request is a request for the complainant's own personal information, contained in email records. The complainant's right to that information is

governed by *FIPPA*.

[12] On my review of all the material before me, including the records, the parties' representations and the two statutes, I find that the hospital properly withheld most of the information at issue in this review on the basis of exclusions and exemptions available in *PHIPA* or *FIPPA*. I order the hospital to grant access to a limited number of records or portions of records under *PHIPA* or *FIPPA*.²

[13] In addition, I find that the public interest override does not apply in these circumstances. I find that the hospital reasonably exercised its discretion under *PHIPA* and *FIPPA*, and I also uphold the reasonableness of its search for records. Finally, I do not uphold the hospital's decision on the fee charged for access and order a reduction in the fee; however, I uphold its decision to deny the request for a fee waiver.

[14] In the next section of this decision, I describe in greater detail the chronology of events, including the hospital's various access decisions, and the conduct of my review into this matter. I then address some preliminary issues, including the interpretation of the request giving rise to this review, and the application of the two statutes to the records responsive to the request. Finally, I consider each of the issues arising under *PHIPA* and *FIPPA*. In the result, I largely uphold the hospital's decision made under both statutes.

BACKGROUND:

[15] In March 2012, the complainant submitted a request to the hospital on a form entitled "Freedom of Information Request." The form contained check-boxes enabling a requester to categorize a request as being one for access to "General Records" or "Personal Records," or a request for "Correction to Own Personal Information." The complainant checked the box indicating his request is for access to "Personal Records."

[16] Within his lengthy submission, the complainant indicated that he seeks access to records relating to the birth and death of his infant daughter, and the care given to his daughter and wife. After discussion between the hospital and complainant, the request was clarified as being for the following records:

² For ease of reading, in this decision I will use the terms "refuse access to" and "withhold" interchangeably when referring to a denial of access in response to a request for one's own personal health information made under *PHIPA*, or for one's own personal information made under *FIPPA* or its municipal counterpart the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. For the same reason, in this decision (except for my discussion in Issue A2.ii), I will use the terms "grant access to" and "disclose" interchangeably when referring to a release of information to an individual in response to a request for access to one's own personal health information under *PHIPA* or to one's own personal information under *FIPPA* or *MFIPPA*.

1. The Labour and Delivery staff meeting minutes, reports and notes from a specified date in 2009;
2. The 2009 Internal Review Report provided to the coroner's office for the complainant's infant daughter;
3. Labour and Delivery and/or Risk Management and/or Executive Leadership Team documents that relate to the complainant's wife and/or the complainant's infant daughter over a specified date range between 2009 and 2012;
4. Records relating to a meeting of the hospital's board held on a specified date in 2011 regarding the death of the complainant's infant daughter, including "all notes, discussions, in-camera discussions and meeting minutes," and records of subsequent board meetings where the death and care of the complainant's infant daughter was discussed; and
5. Email communications over a specified date range between 2009 and 2012 that mention the complainant, and/or the complainant's wife, and/or the complainant's infant daughter that were sent and received by a list of 16 [later 17] named individuals, including to or from internal hospital staff and external organizations, colleges and other bodies.

[17] The hospital issued a number of decisions in response to the request.

[18] The hospital initially issued an interim access decision and fee estimate under *FIPPA*. In its interim access decision, the hospital provided a fee estimate of \$1,090.00 for processing the request, advising the complainant that he could apply for a fee waiver.

[19] The complainant submitted a fee waiver request to the hospital, which the hospital denied.

[20] The complainant subsequently paid the fee deposit and did not further pursue the fee waiver request with the hospital.

[21] The hospital then issued its decision on access and on the fee for processing the complainant's request under *FIPPA*. Its decision was to grant partial access to the requested records and to fix the total fee at \$368.30.

[22] In its decision, the hospital stated that it had identified a total of 1,473 pages of responsive records, and was granting full access to 513 pages and partial access to 92 pages. The hospital refused access to 869 pages in full.³ It provided with its decision an

³ These figures are cited in the hospital's May 25, 2012 decision. I recognize that the page totals provided by the hospital add to 1,474 pages in all, and not 1,473. This discrepancy has no bearing on my findings that follow.

index of records setting out the details of the complainant's request and the hospital's decision for each record.

[23] In respect of item 1 of the complainant's request (the 2009 Labour and Delivery staff meeting minutes, reports and notes), the hospital stated that no records exist.

[24] The hospital granted full access to records responsive to item 2 of the complainant's request.

[25] The hospital withheld records responsive to the remaining items of the complainant's request (items 3, 4 and 5), in whole or in part. For item 4, the hospital identified the correct date of the board meeting to which the complainant refers, and addressed access to those records. For item 5, the hospital indicated that it had identified responsive records comprising email messages sent and received by 17 named individuals: the 16 individuals named in the complainant's clarified request, and one additional individual.

[26] In its decision letter and index of records, the hospital relied on sections 13(1) (advice or recommendations), 14(1)(a) (interfere with a law enforcement matter), 18(1)(c) and (j) (economic and other interests), 18.1 (information with respect to closed meetings), 19(a) and (c) (solicitor-client privilege), and 21 (invasion of privacy) of *FIPPA*, some in conjunction with section 49(a) (discretion to refuse requester's own information). It also cited sections 65(6)3 and 5 of *FIPPA* (employment-related exclusions), and section 1.1 of the *Quality of Care Information Protection Act, 2004*, to deny access to the information.

[27] The hospital also provided a breakdown of costs making up the total fee. As the complainant had paid a deposit in excess of the total fee, the hospital indicated it would provide a refund to the complainant.

[28] The complainant filed an appeal of the hospital's *FIPPA* decision to this office.

[29] During mediation, a mediator from this office spoke to the parties about the possible application of *PHIPA*, given the nature of the records at issue.

[30] The hospital agreed to review all the records again in light of the possible application of *PHIPA*. The hospital also advised the mediator that the complainant had submitted a separate request in 2009 for access to the medical records of his wife and infant daughter, which it dealt with as a request under *PHIPA*. The hospital reported that full access to the medical records was granted to the complainant at that time by the hospital's medical records department, and that the complainant was not charged any fees for processing the *PHIPA* request. Those medical records are not at issue in this review.

[31] As a result of and during the course of mediation, the hospital issued two more revised decisions on access. First the hospital issued a revised decision for those

records it considered to be subject to *PHIPA*, as well as a revised decision under *FIPPA*. The hospital granted access to certain records under *PHIPA* and denied access to others, citing sections 51(1)(a) and (c) (exclusions from *PHIPA*), and 52(1)(a), (c), (d), (e) and (f) (exemptions from right of access to own personal health information) of *PHIPA* in support of its severances. The hospital also revised its decision made under *FIPPA*, releasing an additional 264 pages in full and 61 pages in part.

[32] The hospital then issued a second revised decision under both *PHIPA* and *FIPPA*. In this decision, the hospital released another 17 pages in full and 2 pages in part, and revised or clarified its reliance on sections of *PHIPA* and *FIPPA* for some of the records remaining at issue.

[33] In this decision the hospital also reduced its final fee to \$257.50, based on the complainant's agreement to receive the records in electronic form. Based on the new final fee, the hospital recalculated the refund owing to the complainant in light of his initial deposit.

[34] During mediation, the hospital provided this office with a copy of a consent form signed by the complainant's wife, which it described as her consent for disclosure of her personal information and personal health information to the complainant.

[35] The complainant confirmed to the mediator that he wishes to pursue access to all the withheld records, including those identified by the hospital as being non-responsive to his request, with the exception of individual cell phone numbers. As the complainant does not seek access to cell phone numbers, certain records and portions of records are no longer at issue.

[36] The complainant raised certain issues during mediation, which were incorporated into this review. As the complainant is of the view that disclosure of the records would be in the public interest, the application of section 23 of *FIPPA* (public interest override) was added as an issue.

[37] The complainant also indicated that he believes additional records exist relating to item 1 of his request (the 2009 Labour and Delivery staff meeting minutes, reports and notes), as well as his request for an email from a specified date in 2010 from one named doctor to another. As the parties were unable to resolve these issues through mediation, the reasonableness of the hospital's search was added as an issue.

[38] The complainant also contests the amount of the fee, and the hospital's denial of a fee waiver.

[39] As mediation did not fully resolve the outstanding issues, the matter was transferred to me for a combined review under *PHIPA* and inquiry under *FIPPA*. During this process, I received submissions from both the hospital and the complainant. The hospital also issued a further revised decision, which resulted in the release of an additional 119 pages in full and 7 pages in part. According to the hospital, with this

latest release, the hospital has granted the complainant full or partial access to a total of 1,075 pages.

[40] As indicated above, I uphold, in part, the hospital's decisions on access and other matters made under *PHIPA* and *FIPPA*. My reasons are as follows.

INFORMATION AT ISSUE:

[41] A general description of the records and information at issue is set out in the Introduction, above, at page 5.

[42] The parties will also receive an Appendix to this decision, setting out my decision on access to each record containing information at issue in this review.

ISSUES:

A. Preliminary Issues

1. Does *PHIPA* apply, or *FIPPA*, or both?

- i. Is the hospital subject to *PHIPA* or *FIPPA*?
- ii. What is the proper understanding of the request?

2. Application of *PHIPA*

- i. Are any of the records "records of personal health information" within the meaning of *PHIPA*?
- ii. Is the complainant entitled to make an access request for records of personal health information of his wife and daughter under *PHIPA*?
- iii. For each record subject to *PHIPA*, is the record "dedicated primarily to personal health information about the individual requesting access" within the meaning of section 52(3)?

3. Application of *FIPPA*

B. Access under *PHIPA*

1. Do any of the exclusions in section 51(1) apply to any of the records?
2. Do any of the exemptions in section 52(1) apply to any of the records?

C. Access under *FIPPA*

1. Does the section 65(6) exclusion apply to any of the information?
 2. Does the discretionary exemption at section 19, in conjunction with section 49(a), apply to any of the information?
 3. Does the discretionary exemption at section 13(1), in conjunction with section 49(a), apply to any of the information?
 4. Do the discretionary exemptions at sections 14(1) and/or 20, in conjunction with section 49(a), apply to any of the information?
 5. Does the discretionary exemption at section 18(1), in conjunction with section 49(a), apply to any of the information?
 6. Does the discretionary exemption at section 18.1(1), in conjunction with section 49(a), apply to any of the information?
 7. Is some of the information at issue outside the scope of the complainant's *FIPPA* request?
 8. Does the discretionary exemption at section 49(b) apply to any of the information?
 9. Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 13, 18, 20 and 21 exemptions?
- D. Did the hospital properly exercise its discretion under *PHIPA* and *FIPPA*?
- E. Did the hospital conduct a reasonable search for records?
- F. Fee and Fee Waiver
1. What is the applicable statute for making determinations on fee and fee waiver?
 2. Should I uphold the hospital's fee?
 3. Should I uphold the hospital's denial of fee waiver?

DISCUSSION:

A. PRELIMINARY ISSUES

1. Does *PHIPA* apply, or *FIPPA*, or both?

i. Is the hospital subject to *PHIPA* or *FIPPA*?

ii. What is the proper understanding of the request?

The hospital is subject to PHIPA and FIPPA

[43] *PHIPA* grants an individual a right of access to records of his or her own personal health information that are in the custody or under the control of a health information custodian, subject to limited exceptions (Part V).

[44] *FIPPA* grants an individual a right of access to records of general information (Part II) and to an individual's own personal information (Part III) in the custody or under the control of an institution, subject to certain exceptions.

[45] There is no dispute that the records containing the information at issue in this review are in the custody or under the control of the hospital.

[46] There is also no dispute that the hospital is a body that is subject to both statutes. It is operated by a person who is a health information custodian within the meaning of *PHIPA* (section 3(1)).⁴ It is also an institution within the meaning of *FIPPA* (section 2(1)).⁵

[47] Therefore, a requester's right of access to information held by the hospital may be governed by *PHIPA* or *FIPPA*. Since it is subject to both these statutes, the threshold question for the hospital, when it receives a request for access to records, is whether *PHIPA* or *FIPPA*, or both, applies to the request.

[48] In some circumstances, there will be no difficulty deciding at the outset which of these statutes applies to a request. For example, a request for access to a contract entered into between a hospital and a commercial supplier will readily be understood as a request for a record of general information of the hospital. A request for this kind of information is governed by *FIPPA*.⁶

[49] In other circumstances, however, determining the answer to this threshold question is more complex. For example, a requester may be seeking access both to her own personal health information, as well as to other general information held by the hospital, such as its operational policies. If the health information custodian is also an

⁴ The hospital is a hospital within the meaning of the *Public Hospitals Act*. I find that the person who operates the hospital is a health information custodian pursuant to paragraph 4.i of section 3(1) of *PHIPA*, having regard to the *Public Hospitals Act*, section 32.1(2); Regulation 964 to the *Public Hospitals Act*, section 1(2); and the inclusion of the hospital on the list of hospitals under the *Public Hospitals Act* maintained by the Minister of Health and Long-Term Care, here:

<http://www.health.gov.on.ca/en/common/system/services/hosp/>.

⁵ Section 2(1) includes a "hospital" at paragraph a.1 of the definition. I find the hospital is an institution within the meaning of *FIPPA*, having regard to the definition of hospital set out at section 2(1) of *FIPPA*, and the sections of the *Public Hospitals Act* and Regulation 964 to which I refer in footnote 4.

⁶ See, for example, IPC Orders PO-3185, PO-3237, PO-3286 and others involving requests made to hospitals for access to contracts.

institution subject to *FIPPA* or *MFIPPA*, the requester may have rights of access to both kinds of information under the different statutes (*PHIPA*, section 8(4)). In every case, it is essential to begin with the request, and, where necessary, to clarify with the requester the scope of the request and her intent in making the request.

[50] In this case, it is possible to view the complainant's request as either a request for "personal information" under *FIPPA* (as the hospital did), or a request for "personal health information" under *PHIPA*. In such a circumstance, which statute governs? As I will explain below, beginning with the complainant's request and in considering all the circumstances, I decide that the request is properly understood as a request for access under *PHIPA* that includes, as a discrete component, a request for access under *FIPPA*.

The request

[51] As noted above, before this matter came to this office, the hospital issued a number of decisions under *FIPPA* in response to the complainant's request. The hospital explained that it initially processed the complainant's request under *FIPPA* because it considered the request as having been made to it under *FIPPA*, and not under *PHIPA*. This treatment appears to have been based on the name of the form ("Freedom of Information Request") on which the complainant submitted his request. The hospital also explained that the complainant had submitted a previous request for access to the medical records of his wife and daughter, which it treated as a request for access under *PHIPA*. The hospital viewed the complainant's subsequent request (the request giving rise to this review) as a separate request, made under *FIPPA*.

[52] I find that the hospital's initial treatment of the complainant's request was too narrowly focused on the form of the request rather than on its substance. In order to determine whether *PHIPA* applies, or *FIPPA*, or both, the hospital ought to have focused instead on the context out of which the request arose and the nature of the information sought by the requester.

[53] The complainant's clarified request is set out above. The enumerated list of items clarifies the complainant's request for various records relating to the birth and death of his infant daughter, and the care given to his daughter and wife. Items 1 to 5 of the clarified request comprise records generated by or for the hospital in the course of discussions or meetings about the care provided to the complainant's wife and daughter. The complainant's interest in the records is rooted in the experience of his wife and daughter as recipients of health care. Given this, and the type of information sought, the complainant's request is properly understood as a request for information relating to his wife and daughter, arising out of their experience as patients of the hospital. Such a request is a request for access to the personal health information of the complainant's wife and daughter, governed by *PHIPA*.

[54] In addition, item 5 of the complainant's request includes a request for emails to or from hospital staff that mention the complainant. This part of the request can be

understood as a request for the complainant's own personal information under *FIPPA*.

[55] Having decided that the request must, with the above limited exception, be understood as a request for access under *PHIPA*, I will review the records at issue in this review to determine whether they are records of personal health information of the complainant's wife and daughter. For any records of their personal health information, I will determine the extent of their right of access under *PHIPA*. As the access request was made by the complainant, I will also consider whether the complainant is entitled to exercise, on their behalf, their right of access under *PHIPA*.

[56] In addition, I will consider whether the complainant has a right of access, under *FIPPA*, to any of his own personal information contained in records of personal health information of his wife and daughter. I will also address the extent of his right of access under *FIPPA* to any records that do not contain any personal health information of his wife and daughter, and are subject only to *FIPPA*.

[57] I will begin by addressing the application of *PHIPA* to the records at issue.

2. Application of *PHIPA*

- i. Are any of the records "records of personal health information" within the meaning of PHIPA?***
- ii. Is the complainant entitled to make an access request for records of personal health information of his wife and daughter under PHIPA?***
- iii. For each record subject to PHIPA, is the record "dedicated primarily to personal health information about the individual requesting access" within the meaning of section 52(3)?***

Most of the records are subject to PHIPA

[58] The right of access in *PHIPA* applies to "records" of "personal health information." As described above, the hospital initially responded to the request as a request for personal information under *FIPPA*. In addressing the application of *PHIPA* to the records remaining at issue, it maintains that only some of them contain the personal health information of the complainant's wife and daughter. As a result, the hospital believes that the right of access in *PHIPA* can only apply to some records.

[59] "Personal health information" is defined in section 4(1) of *PHIPA* to mean:

identifying information about an individual in oral or recorded form, if the information,

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

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

(c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual's health number, or

(g) identifies an individual's substitute decision-maker.

[60] In addition, sections 4(2) and (3) of *PHIPA* provide:

(2) In this section,

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

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[61] In reviewing the records at issue, I apply the "record-by-record" method of analysis adopted by this office.⁷ Under this method, the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record. In addition, where the information at issue is the withheld portion of a record that has

⁷ The "record-by-record" approach for dealing with requests for records of personal information is set out in Order M-352. This approach calls for an institution to analyze each record identified as responsive to a request and determine whether any part of it contains personal information pertaining to the requester. It enables an institution to determine whether the access decision for a record is to be made under the parts of public sector access statutes dealing with access to personal information, or the parts dealing with access to general information.

been partially released, the whole of the record (including released portions) is analyzed in determining a requester's right to access the withheld information.

[62] Applying the "record-by-record" method of analysis to the records at issue in this review, I find that most of them contain the personal health information of the complainant's wife and daughter.

[63] Some of the records consist of reviews of the care provided to the complainant's wife and daughter during their time at the hospital,⁸ and emails containing details of that care.⁹ The hospital agrees these records contain the personal health information of the complainant's wife and daughter. I find these records contain their personal health information as described in sections 4(1)(a) and (b) of *PHIPA*.

[64] The hospital submits that the remaining records do not contain the personal health information of the complainant's wife and daughter. Among these records are: correspondence between the hospital and the CNO,¹⁰ lawyers¹¹ and other bodies;¹² emails about measures to ensure staff safety;¹³ minutes of board meetings;¹⁴ and drafts of letters and other documents.¹⁵

[65] I find that most of these records are also records of personal health information within the meaning of paragraphs (a) and (b) of section 4(1). I conclude that the phrase "relates to," as it appears in these paragraphs, and read in its grammatical and ordinary sense, includes information that is connected in some way to the health of the complainant's wife and daughter, or to the provision of health care to them.

[66] This interpretation of the phrase "relates to," as it appears in sections 4(1)(a) and (b) of *PHIPA*, accords with the interpretation this office has applied to this phrase and to analogous phrases in provincial access-to-information legislation.¹⁶ This interpretation best gives effect to one of the purposes of *PHIPA*, which is to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions.¹⁷ Such an interpretation is supported by

⁸ Records A.12-A.14, A.66.

⁹ Records A.59, B.56, B.87 and others.

¹⁰ Records A.2, A.4 and others.

¹¹ Records B.157, B.158 and others.

¹² Records A.51, A.54 and others.

¹³ Records B.240, B.241 and others.

¹⁴ Records A.68 and A.69.

¹⁵ Records B. 113, B.261 and others.

¹⁶ The Ontario Divisional Court defined the phrases "relating to" and "in respect of," as they appear in section 65(5.2) of *FIPPA*, as requiring "some connection" between records and the subject matter of the section of *FIPPA* in which they appear: *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991 (CanLII). This office has adopted this definition for the same phrases and analogous ones ("in relation to," "relates to") appearing in *MFIPPA* and *FIPPA*: see, for example, Orders MO-2537, MO-2589, MO-3088.

¹⁷ Section 1(b) of *PHIPA*.

PHIPA's inclusion, in the definition of personal health information, of non-health-related information about an individual contained in "mixed records" (section 4(3)).¹⁸

[67] I also find support for such a reading of the definition of personal health information for the purposes of *PHIPA* in the *Guide to the Ontario Personal Health Information Protection Act*.¹⁹ I observe that a more restricted interpretation would, in this case, still leave the complainant's wife and daughter with the right to access their personal information through a *FIPPA* request. However, it would limit the information available to individuals seeking their personal health information from health information custodians that are not subject to *FIPPA* or its municipal equivalent. I am not convinced that there are policy reasons to favour a more restrictive understanding of the right of access under *PHIPA*.

[68] I also find support for a liberal interpretation of the definition of personal health information, as a threshold question supporting the right of access, in Part V of *PHIPA*, which sets out rules governing the right of access. As will be seen below, balanced against a liberal understanding of the type of *record* which is subject to the right of access under *PHIPA* is a limitation on the right of access to the *information* in the record, based on the nature of the record and whether it is "dedicated primarily" to the personal health information of the individual requesting access.²⁰

[69] I apply this approach to the definition of personal health information to the records at issue in this review, each of which I consider on its own and in accordance with the record-by-record method of analysis described above. I find that most of the records contain the personal health information of the complainant's wife and daughter within the meaning of sections 4(1)(a) and (b) of *PHIPA*. These records contain information that relates to, or has some connection to, their physical or mental health or to the providing of health care to them. At the very least, they identify the complainant's wife and daughter as patients of the hospital.²¹ The records contain information about them precisely because they were patients receiving health care from

¹⁸ See sections 4(2) and (3). Alternatively, even if I were to adopt a more restrictive interpretation of the phrase "relates to" in sections 4(1)(a) and (b) of *PHIPA*, I would find that most of the information discussed in the preceding paragraphs is personal health information by virtue of section 4(3). This is because the non-health-related information about the complainant's wife and daughter appears in records containing other information that is their personal health information within the meaning of section 4(1).

¹⁹ Halyna Perun et al. (Toronto: Irwin Law Inc., 2005) (Perun). See for example the authors' discussions of: the interpretation of sections 4(1)(a) and (b) of the definition of personal health information (at pages 79-84); the expansion of the definition through the "mixed records" provisions in *PHIPA* (at pages 88-89); and more generally about the right of access to information about oneself as a fundamental right (at pages 508-514).

²⁰ Section 52(3) of *PHIPA*. See discussion at Issue A2.iii, below.

²¹ This includes records where the complainant's wife and daughter are not explicitly named, or are referred to by descriptors such as "the patient" instead of by name (as, for example, in Records A.77 and B.148). All these records are covered by the request for records of their personal health information.

the hospital, and arise out of that relationship. Although these records may not have been created for the purpose of, or required for, their care, they contain information about the complainant's wife and daughter that arises out of their experience as patients of the hospital, and is thus "related to" the hospital's provision of health care to them.

[70] In this review, therefore, *PHIPA* records include the hospital's responses to the CNO's requests for information during the CNO's reviews of complaints lodged about the nurses involved in the care of the complainant's wife and daughter. They also include any records of correspondence between lawyers and the hospital that are referable to the complainant's wife and daughter – for example, those about the CNO reviews, the complainant's lawsuit against the hospital and staff, and other matters arising from the time his wife and daughter spent at the hospital and the health care that they received. Some of the emails about ensuring the safety of hospital staff are also *PHIPA* records, because they relate the hospital's concerns about the complainant's behaviour to the care provided to his wife and daughter.²² The board records consist of meeting minutes reflecting discussions that are referable to the wife as a patient of the hospital, and the complainant as the husband of the patient.²³ The records of draft correspondence and other documents include the hospital's responses to various issues arising from, and that are referable to, the provision of health care to them at the hospital.²⁴ These records also contain information identifying the hospital and particular hospital staff as providers of health care to the complainant's wife and daughter.

[71] All these records contain information that is sufficiently connected to the health of the complainant's wife and daughter, or to the providing of health care to them, to "relate to" these matters within the meaning of paragraphs (a) and (b) of section 4(1) of *PHIPA*. Non-health-related information about the complainant's wife and daughter contained in these records is also their personal health information, as contemplated by section 4(3). Given this, I find that most of the records at issue in this review are records of personal health information of the complainant's wife and daughter. They are records to which his wife and daughter have a right of access under *PHIPA*.

[72] Other records do not contain any personal health information of the complainant's wife and daughter within the meaning of *PHIPA*, and instead refer only to the complainant. These are records that are only about the hospital's relationship with the complainant and that, considered on their own, are not referable to the complainant's wife or daughter. They include records communicating concerns about the complainant's conduct toward some hospital staff members²⁵ and about scheduling

²² For example, Record A.49 contains references to the complainant's wife and the hospital; Records B.240 and B.241 include references to the death of the complainant's daughter.

²³ Records A.68 and A.69.

²⁴ For example, Record B.113 contains a draft letter containing extensive details of the incident at the hospital; Record B.261 contains a draft press release referring to the loss of the complainant's child.

²⁵ Records B.54, B.55 and others.

meetings to address these concerns.²⁶

[73] Although the underlying incident giving rise to these records is the complainant's dissatisfaction with the care given to his wife and daughter while they were patients of the hospital, the question is whether each record, on its own, contains identifying information of his family members that falls within the definition of personal health information. Where a record is about the complainant only, it is not subject to *PHIPA* but may be subject to the *FIPPA* component of his request. Where a record is about the complainant but includes any personal health information of his wife or daughter (as, for example, an email about scheduling that refers to his wife by name,²⁷ or a record about addressing the complainant's behaviour that alludes to the underlying incident²⁸), the record is a *PHIPA* record that may also be subject to his *FIPPA* request.

[74] I note here that the result of the approach described above is that some records that are otherwise almost identical in content are classified differently – as a *PHIPA* record or not a *PHIPA* record – based on the presence of a mere snippet of personal health information. This is the case where, for example, the subject line of one email names both the complainant and his wife but the subject line of another email, containing substantively the same content, names only the complainant.²⁹ Although this result might appear to treat similar records inconsistently, I have decided to adopt this approach for the reasons expressed above. Thus, the presence of any personal health information of the complainant's wife and daughter in the record makes it a record of personal health information that is responsive to the complainant's *PHIPA* request.³⁰

The complainant is the substitute decision-maker for his wife and daughter for the purposes of the PHIPA request

[75] Having found that most of the records at issue in this review are records of personal health information within the meaning of *PHIPA*, the next question is whether the complainant is entitled to make a *PHIPA* request for access to the records on behalf of his wife and daughter. This is because the right of access in *PHIPA* belongs to the individual to whom the personal health information in the records relates; *PHIPA* does not otherwise provide any right of access to the records. *PHIPA* provides, however, that an individual may authorize another person to make a request for access under *PHIPA* on the individual's behalf (section 25(1)). Such an authorized person is called the individual's substitute decision-maker in *PHIPA* (section 5(1)).

[76] The hospital agrees that the complainant has a right of access to records of

²⁶ Records B.110, B.195 and others.

²⁷ Record B.172 and others.

²⁸ Record B.240 and others.

²⁹ Compare B.174 and B.185, and others.

³⁰ It may also be a record subject to his *FIPPA* request, if it contains personal information of the complainant.

personal health information of his daughter. The hospital argues, however, that the complainant does not have a right of access to records of personal health information of his wife. This is because, in the hospital's submission, the complainant has not complied with the requirements in *PHIPA* to act as her substitute decision-maker. In particular, the hospital states that the complainant has not provided a written authorization from his wife for this purpose, as required under *PHIPA* (section 23(1)1.ii).

[77] The hospital takes this position in the alternative to its submissions about the exemptions and exclusions discussed later in this decision.

[78] In its representations on this issue, the hospital refers to a consent form signed by the complainant's wife during the course of this review process. The signed document, a copy of which it provided to me, is a hospital form entitled "Consent For Disclosure Of Personal Health Information." The form states that the complainant's wife consents to the disclosure of her personal health information to the complainant "for the purpose of" the request giving rise to this review. The hospital submits that the consent form is evidence of the wife's consent to the *disclosure* of her personal health information to the complainant, but is not an authorization to make an *access* request on her behalf. The distinction is relevant because disclosures of personal health information are governed by a different part of *PHIPA* than the part governing access.³¹

[79] The hospital states that the complainant therefore lacks the authority to make a *PHIPA* request, on his wife's behalf, for records of her personal health information. In the hospital's view, any release of her personal health information to him is a disclosure to the complainant as a third party, rather than a grant of access to him as her authorized substitute decision-maker.

[80] In another case, this type of written consent may not provide a person with the authority to act as a substitute decision-maker for an individual for the purposes of *PHIPA*. On the facts before me, however, I am satisfied that the complainant's wife provided written authorization to the complainant to act on her behalf for the purpose of making this request for access to records of her personal health information.

[81] First, throughout the dealings between the hospital and the complainant with respect to the requests for information, the hospital has treated the complainant as the substitute decision-maker for both his wife and daughter. I find significant the hospital's

³¹ In this section (Issue A2.ii) only, for the purposes of determining the complainant's status in relation to the *PHIPA* request, I make a distinction between a disclosure of his family's personal health information to him under Part IV of *PHIPA*, and a grant of access of their personal health information to him, on behalf of his family members, under Part V.

In all other parts of this decision, after determining in Issue A2.ii that the complainant is the substitute decision-maker for his wife and daughter for the purposes of this *PHIPA* request, I use the terms "grant access to" and "disclose" interchangeably to refer to a release of information in response to a request for access to one's own personal health information under *PHIPA* or to one's own personal information under *FIPPA*. See my footnote 2, above.

treatment of the complainant in relation to an earlier access request he made for records of his wife's personal health information. In a request made in 2009 shortly after his daughter's death, the complainant sought access to the medical records of his wife and daughter. The hospital granted the complainant full access to these records under *PHIPA*.

[82] The hospital has confirmed that it did not require any written authorization from the complainant's wife before it released the records to the complainant in 2009. It appears to have treated the 2009 request as a *PHIPA* request made by the complainant on behalf of his wife (and daughter). In granting the complainant full access to his wife's medical records under *PHIPA* at that time, the hospital effectively treated him as her substitute decision-maker under *PHIPA*, despite the lack of written authorization. The hospital also dealt with the complainant's subsequent request for correction to these records as a correction request under *PHIPA*.

[83] Second, I am not persuaded that the complainant's wife contemplated the distinction between disclosure and access under *PHIPA* when she signed the form authorizing the complainant to receive her personal health information from the hospital. The form was supplied by the hospital and signed by the complainant's wife, at the hospital's request and during this review process, to formalize, in writing, her oral consent to the releases of her personal health information that had already been made to the complainant. The distinction between a "consent to disclosure" and a "written authorization to pursue a request for access" is not one that would be readily apparent to most people. In the context in which it was signed, I find it reasonable to view this consent as confirmation that the complainant's wife views him as having the authority to make a request for access to her personal health information on her behalf.

[84] Therefore, based on the hospital's treatment of the complainant's past *PHIPA* requests regarding his wife's personal health information, the expectations of the complainant and his wife based on the past treatment of his requests, and the apparent mutual understanding of all the parties of his authority to act on her behalf, I accept the signed consent before me as confirmation of the complainant's wife's intent that he act as her substitute decision-maker in making this *PHIPA* request for her personal health information.³² In these circumstances, I accept that the complainant may exercise, on behalf of his wife and for the purpose of this request, her right of access under *PHIPA*.

³² In any event, as will be seen later in this decision, only a limited amount of the wife's personal health information is ordered disclosed to the complainant as a result of this treatment. In the circumstances of this review, the treatment of the complainant as the substitute decision-maker for his wife, rather than a party to whom she consents to disclosing her personal health information, has very little material effect on the ultimate outcome.

Most of the PHIPA records at issue are not "dedicated primarily to personal health information about the individual" within the meaning of section 52(3)

[85] Subject to any applicable exceptions (which I will consider later this decision), the right of access in *PHIPA* applies either to the whole record, or only to certain portions of it. This is because while section 52(1) of *PHIPA* confers a right of access to the entire record, section 52(3) limits access where the record is not primarily about the individual's personal health information:

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

[86] The distinction is important because if a record is dedicated primarily to the personal health information of the individual, the individual has a right of access to the entire record, even if it incidentally contains information about other matters or other parties. If a record is not dedicated primarily to the personal health information of the individual, the right of access only applies to the information about the individual that can reasonably be severed from the record.

[87] In this case, I note that the complainant's wife and daughter may still have a right of access, under *FIPPA*, to the part of a record severed under section 52(3) of *PHIPA*. However, in other circumstances, where requested records are held by health information custodians that are not also subject to *FIPPA* or its municipal equivalent, the remainder of any records that are not "dedicated primarily" to personal health information about the individual requesting access would not be accessible under any of these statutes. The determination of whether a record is or is not dedicated primarily to personal health information about an individual is therefore an important first step in defining the individual's right of access in *PHIPA*.

[88] The phrase "dedicated primarily to personal health information about the individual" is not defined in *PHIPA*, and the concept "dedicated primarily" does not appear in the other statutes administered by this office. In this review I must decide how to interpret this phrase as it appears in section 52(3).

[89] On one approach, "dedicated primarily" could be read to require only an assessment of the quantity of a requester's personal health information in a record, with the result that a record is found to be dedicated "primarily" to personal health information if the amount of the requester's personal health information in it exceeds the amount of other kinds of information. I will describe this approach as a "quantitative" approach.

[90] On another approach, "dedicated primarily" could be read to require

consideration of various factors: not only the quantity of a requester's personal health information in a record, but also its context, such as the function of the personal health information in the record and the purpose of the record's creation. On this approach, a record might contain a large quantity of personal health information of the individual requesting access, but nonetheless not be a record qualitatively "dedicated" to the personal health information of that individual. I will describe this second approach as a "qualitative" approach.

[91] In deciding which of these approaches to apply to the interpretation of section 52(3), I begin with the purposes of *PHIPA*. Section 1(b) sets out the purpose of the access regime in *PHIPA*, which is:

to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions set out in [*PHIPA*].

[92] Canadian courts have long endorsed a purposive approach to statutory interpretation.³³ A purposive approach aims to establish the Legislature's intent by reading the words of the statute in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its purposes and the intention of the Legislature. A purposive interpretation is one that best serves the purposes of the statute read in this way.

[93] In Ontario, a number of decisions have affirmed that a purposive approach must be taken to the interpretation of *FIPPA* and its municipal counterpart.³⁴ These decisions support an interpretation of access-to-information legislation that furthers the intent of the Legislature to provide citizens with a meaningful right of access to information, including information about themselves, held by government institutions.

[94] One of the intentions of the Legislature in enacting *PHIPA* is to establish a statutory right of access to one's own personal health information. In interpreting section 52(3) of *PHIPA*, I adopt the purposive approach to statutory interpretation endorsed by the courts and applied by this office in interpreting access-to-information statutes.

[95] A purposive reading is one that best serves the purposes of the access regime in *PHIPA* of which section 52(3) is a part. Applying what I described above as a

³³ The Supreme Court of Canada affirmed this approach to statutory interpretation in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), and in many others.

³⁴ Among other examples, see: *Ministry of Community and Social Services v Doe*, 2014 ONSC 239 (Div Ct) [upheld in 2015 ONCA 107 (CA)], endorsing a purposive interpretation of section 65(6) of *FIPPA* in IPC Order PO-2917; *Ontario (Criminal Code Review Board) v Doe*, 1999 CanLII 3805 (ON CA), in which the Ontario Court of Appeal adopted a purposive approach to the question of "control" in section 10(1) of *FIPPA*; *Toronto Police Services Board v (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII), upholding Order MO-1989 on the interpretation of "record" in section 2(1) of *MFIPPA*.

“qualitative approach” to section 52(3), an individual has a right of access in *PHIPA* to a whole record only where the record is mainly related, in a qualitative (and not merely quantitative) way, to the individual’s own personal health information, and not to other information. The quantity of personal health information of the individual in the record is one (but not the only) factor in this determination, others being the purpose the information serves in the record, the reason for the record’s creation and the uses of the record. This analysis takes into account considerations such as whether the personal health information of the individual is central to the purpose for which the record exists, and whether the record would exist “but for” the personal health information of the individual in it. If, on this analysis, a record is not mainly related to the personal health information of the individual but rather to other matters, then the individual only has a right of access to her own information that can reasonably be severed from the record.

[96] I find support for this reading of section 52(3) in the *Guide to the Ontario Personal Health Information Protection Act*, which counsels an interpretation that is aligned with the qualitative approach:

It is evident that the phrase “a record that is dedicated primarily to personal health information about the [patient] requesting access” was meant to be interpreted narrowly as referring to records such as a patient’s health record, in which the patient would be justified in being able to access all information in the record, including information about third parties. Clearly, access to such information would be justified where it is found in a patient’s health record or dedicated patient file, since the patient should be able to see everything in his or her “own” record. Where the record is not a record *dedicated* to the patient, even though the record may contain information about the patient, it should generally not be considered “a record that is dedicated primarily to personal health information about the [patient] requesting access.”³⁵

[97] I am also bolstered in this view by the wording of section 52(3). The choice of the word “dedicated,” to qualify “primarily,” suggests a qualitative approach. Had the Legislature intended that a purely quantitative approach be taken to interpreting this section, it would have been a simple matter to use words clearly signalling that purpose. A qualitative reading of section 52(3) best serves the purpose of *PHIPA* to provide a statutory right of access to one’s own personal health information – which, as I described above, is defined broadly – but *only* to that information. *PHIPA*’s purpose is not to provide a general means of access to other kinds of information, including information about other individuals, held by health information custodians. A qualitative approach to the interpretation of section 52(3) furthers this purpose of the access

³⁵ Perun, cited above at footnote 19, at page 513.

regime in *PHIPA*.³⁶

[98] A quantitative approach, focused only on the amount of personal health information of an individual in a record, regardless of context, may sometimes align with the qualitative approach. For example, both approaches would result in the conclusion that an individual's hospital chart is dedicated primarily to her own personal health information, enabling the individual to exercise a right of access to the whole record. Both approaches would also result in a conclusion that a database containing the information of many different hospital patients is not a record dedicated primarily to the personal health information of any particular patient. In this second scenario, each patient would only have a right of access, under *PHIPA*, to any severable portions of the database relating to her, and not to the whole database.

[99] In other cases, however, the qualitative and quantitative approaches lead to different results. Applying the quantitative approach in these cases would not best serve the purpose of the access regime in *PHIPA*. Some examples from the records at issue illustrate this point.

[100] Many of the records I identified as *PHIPA* records at Issue A2.i., above, are email chains involving members of hospital staff. Some of these email records include, often as a forwarded component in an email chain, email exchanges between the hospital and the complainant.³⁷ Other email records do not.³⁸ The complainant's own emails to the hospital typically contain a very large quantity of information about his wife and daughter. In most cases, the portions of the email records to which the complainant was privy (either by being the sender of an email, or a recipient) have already been released to him by the hospital, with only the withheld portions of these email records remaining at issue.³⁹

[101] I regard each email chain in its entirety as one record. On a record-by-record analysis, the whole of a record, including disclosed portions, is considered in determining the right of access to withheld information. As a result, the inclusion of the complainant's own emails in some of these records leads to the result that these records contain a greater quantity of personal health information of the complainant's wife and daughter than other information. On a quantitative approach, all the email chains that include the complainant's own emails would be "dedicated primarily" to that personal health information. The complainant would have a right of access, on behalf of his wife and daughter, to the records in their entirety (subject to any applicable exemptions) under section 52(1), sweeping in other emails that do not contain their

³⁶ I note here that in the circumstances of this review, the total amount of personal health information to which access is granted would not be materially different if I were to adopt instead a quantitative approach to the interpretation of section 52(3).

³⁷ Records B.80, B.115, B.134 and others.

³⁸ Records B.119, B.120 and others.

³⁹ Records B.80, B.115, B.134 and others.

health-related personal health information falling within the section 4(1) categories (or that contain only snippets of that information).⁴⁰

[102] On the other hand, the complainant would not have a right of access, on their behalf, to similar email chains that do not contain his own emails, since, as a whole, such email chains contain only a minimal quantity of personal health information of the complainant's wife and daughter.⁴¹ The quantitative approach would treat this second category of email records as records not "dedicated primarily" to the personal health information of his wife and daughter.

[103] In this way, the quantitative approach would treat these two categories of email records differently, even where there is no significant difference in the content of the withheld information, or (other than the inclusion or not of the complainant's own emails) the amount of health-related personal health information of his wife and daughter in the records.⁴² Similarly, a quantitative approach could treat differently email records that are substantially similar in content, based solely on whether there are attachments – even if the attachments are letters from the complainant that constitute the main source of health-related personal health information about them in the record.⁴³ On a quantitative approach, the innocuous decision by an author of an email to extend an email string or start a new one, to include an attachment or not, may lead to greater or lesser access rights under *PHIPA* to the record as a whole.

[104] By contrast, on a qualitative approach, the total quantity of personal health information, in a record, about the individual requesting access is only one factor among others that assists in determining whether a record is or is not "dedicated primarily" to personal health information of that individual. On this approach, the complainant's right of access, on behalf of his family, to a whole record of their personal health information, or only to portions of it, depends on whether the record is qualitatively about the personal health information of his wife and daughter, or instead qualitatively about other matters, such as scheduling, legal advice and strategies for communicating with the complainant.⁴⁴

[105] On a qualitative approach, email records that include the complainant's own correspondence, and that as a result contain a large quantity of personal health information about them, are not for that reason alone records dedicated primarily to their personal health information. For example, some email records contain the complainant's own emails that are forwarded from one hospital staff member to

⁴⁰ As in Records B.136, B.190 and others. These records may contain non-health-related identifying information about the complainant's wife and daughter that still qualifies as their personal health information through sections 4(2) and (3).

⁴¹ Records B.42, B.43 and others.

⁴² Compare Records B.120 and B.134, for example, and others.

⁴³ Records B.64, B.80, B.150 and others.

⁴⁴ Records B.115, B.129, B.177 and others.

another for discussion,⁴⁵ or to legal counsel for advice.⁴⁶ Although there may be a large quantity of their personal health information in the records (treating each email chain as a record), it mainly originates from the complainant in the form of his own correspondence. The personal health information about them in these records not originating from the complainant is mainly in the form of snippets (such as the family surname or the name of the hospital and caregivers), or consists of non-health-related identifying information about them. In either event, their personal health information appears in the records in the context of addressing the complainant's correspondence.⁴⁷ The remainder of these records addresses matters unrelated to their personal health information, such as legal strategy and approaches to dealing with the complainant. This type of information withheld in the records is not the personal health information of the complainant's wife and daughter.⁴⁸

[106] Applying a qualitative approach to section 52(3), I find these records are not dedicated primarily to the personal health information of the complainant's wife and daughter contained in them. The complainant exercises a right of access on their behalf, under section 52(3), only to the personal health information about his family that can reasonably be severed from the records. I observe that most of that information in these records is contained in his own correspondence, much of which has already been disclosed to him.⁴⁹ Applying section 52(3) to these records only disentitles the complainant's wife and daughter from a right of access to information unrelated to them in the records, which is not their personal health information.

[107] The qualitative approach treats in a like manner email records that do not contain the complainant's own emails. Under the qualitative approach – in contrast to the quantitative approach – the inclusion (or not) of the complainant's own correspondence in a record is not the determinative factor. Where, based on consideration of all the circumstances, a record is not qualitatively about the personal health information of the individual requesting access, the right of access is under section 52(3) and not 52(1). Thus section 52(3) applies to email records that contain personal health information of his wife and daughter but are substantively about other matters, such as other patients,⁵⁰ personnel issues,⁵¹ meeting arrangements,⁵² and strategies for future communications with the complainant.⁵³

⁴⁵ Records B.80, B.143 and others.

⁴⁶ Records B.154, B.163 and others.

⁴⁷ In Records B.163, B.170 and others.

⁴⁸ However, some of this information is responsive to the complainant's *FIPPA* request for email records containing his own personal information. I address the complainant's right of access to that information at Issue C, below.

⁴⁹ In Records B.80, B.143 and others.

⁵⁰ Record B.43 and others.

⁵¹ Records B.50, B.53 and others.

⁵² Record B.120 and others.

⁵³ Record B.47 and others.

[108] Applying the qualitative approach to all the email records subject to *PHIPA*, I find that none is dedicated primarily to the personal health information of the complainant's wife and daughter.⁵⁴

[109] I also find that a majority of the *PHIPA* records in "Group A" (non-email records) are not dedicated primarily to the personal health information of the complainant's wife and daughter. The main purpose of these records is to address legal, regulatory, staffing, communications and other issues arising, but several steps removed, from the experience of the complainant's wife and daughter at the hospital.

[110] For example, emails between the then-chief of staff and hospital physicians refer to the complainant's family (as well as to other patients) by name, but apart from this reference are about personnel matters.⁵⁵ Similarly, minutes of hospital board meetings contain discrete references to the personal health information of the complainant's wife and daughter, but also address a number of other, unrelated, items of hospital business.⁵⁶ In these records, the overwhelming majority of information is not about the wife and daughter, but rather about unrelated matters. The personal health information of the complainant's wife and daughter in these records is not central to the purpose of the records, which would exist independently of the inclusion of their personal health information in them. Instead, the central purpose of these records is to address employment-related matters between the hospital and its staff, or (in the case of the minutes) to document meetings of the governing body of the hospital to discuss hospital business.

[111] Other records contain a larger quantity of personal health information of the complainant's wife and daughter than in the records described above. These records include: the hospital's correspondence with the CNO in relation to the CNO's investigation;⁵⁷ records relating to the complainant's lawsuit against the hospital;⁵⁸ and draft correspondence to the complainant and his wife, shared among hospital staff for comment.⁵⁹ Nonetheless, I find these records are not dedicated primarily to the personal health information of the complainant's wife and daughter. Although not determinative factors on their own, I observe that these records were not created in the usual course of a clinical interaction, and would not typically be found in patient files alongside medical charts and other records that are qualitatively about the wife and daughter as patients of the hospital. Their personal health information is instead included in these records for legal, communications and other purposes. Although it

⁵⁴ Some "Group A" records contain emails as a component but were not classified by the hospital as being email records (e.g., Records A.38, A.66). I will use the hospital's classification and will address these records as non-email records in the next paragraphs.

⁵⁵ Records B.42 and B.43.

⁵⁶ Records A.68 and A.69.

⁵⁷ Records A.2, A.4 and others.

⁵⁸ Records A.37, A.42 and others.

⁵⁹ Record A.38.

could be said that these records would not exist “but for” the experience of the complainant’s wife and daughter as patients of the hospital, the creation of these records arises indirectly and several steps removed from that experience.

[112] My finding that all the above records are not dedicated primarily to the personal health information of the complainant’s wife and daughter still entitles them to a right of access to the information about them, where it is reasonably severable, in the records. A finding that section 52(3) applies only denies the complainant’s wife and daughter a right of access, under *PHIPA*, to other information in the records that is *not* qualitatively about them. In the records I have described above, I find this result is in keeping with the purpose of *PHIPA* to grant a right of access to one’s own personal health information, and not to unrelated information directly through *PHIPA*.

[113] This purpose is also served by the right of access, in section 52(1), to the whole record where the record is qualitatively about the individual whose personal health information is contained in it. I find that some records at issue in this review are dedicated primarily to the personal health information of the complainant’s wife and daughter. These are chart reviews,⁶⁰ a nursing review,⁶¹ a letter from a physician concerning the care he provided to the complainant’s wife,⁶² and a report the hospital describes as containing quality of care information.⁶³ Also included is a memo from the hospital’s then-chief of staff documenting issues raised by the complainant and seeking staff input on addressing these issues,⁶⁴ and records containing this memo as an attachment to an email.⁶⁵

[114] Each of these records contains a great deal of personal health information about the complainant’s wife and daughter. More significantly, the personal health information in the records is central to the purpose of these records, which is to review the care provided to them during their time in the hospital. Although some of these records may not be contained in their patient file, these records are qualitatively about the clinical experience of the complainant’s wife and daughter in the hospital, and are not primarily about other matters. As such, the complainant exercises a right of access, on their behalf, to the records in their entirety under section 52(1), subject to any applicable exemptions. I recognize that information about matters unrelated to his wife and daughter contained in these records may incidentally be accessible to them under section 52(1). Given that any unrelated information is contained in records that are primarily about the complainant’s wife and daughter, I find this result is compatible with the purpose of the access regime in *PHIPA*.

⁶⁰ Records A.12 and A.13.

⁶¹ Record A.14

⁶² Record A.81.

⁶³ Record A.72.

⁶⁴ Record A.80.

⁶⁵ Records B.104 and B.111.

[115] In summary, I find that the purposes of *PHIPA* are furthered by a qualitative reading of section 52(3). In this review, applying a purposive interpretation to this section, I find that most of the *PHIPA* records at issue are not dedicated primarily to the personal health information of the complainant's wife and daughter. For these records, the complainant only exercises a right of access, on behalf of his wife and daughter, to the personal health information about them that can reasonably be severed from the records. For the discrete number of *PHIPA* records that are dedicated primarily to the personal health information of the complainant's wife and daughter, the complainant exercises a right of access, on their behalf, to the records in their entirety under section 52(1), subject to any applicable exemptions.⁶⁶

[116] Before I go on to examine the complainant's entitlement, on behalf of his wife and daughter, to their personal health information in each *PHIPA* record under either section 52(1) or 52(3), I will briefly address the application of *FIPPA* to both the *PHIPA* records and the non-*PHIPA* records at issue in this review.

3. Application of *FIPPA*

[117] I found above that most of the records at issue in this review are records of personal health information of the complainant's wife and daughter, and that the complainant may exercise a right of access to them, under *PHIPA*, on their behalf.

[118] The hospital is also subject to *FIPPA*. In the circumstances of this review, *FIPPA* applies in two distinct ways: first, because one component of the complainant's request is a request made under *FIPPA* for his own personal information in certain records; and second, because section 52(1)(f) of *PHIPA* allows the hospital to rely on certain exemptions in *FIPPA* to deny access to the personal health information of his wife and daughter in the records.

The complainant has a right of access to his personal information in some of the records under FIPPA

[119] As noted, one discrete component of the complainant's request (specifically, part of item 5) is a request for emails to or from hospital staff that mention the complainant.

[120] The information about the complainant in email records is his "personal information" as that term is defined in *FIPPA*. In particular, information about the complainant in email records includes: references to his ethnic origin and marital and family status;⁶⁷ his personal opinions or views;⁶⁸ correspondence sent to the hospital that he asked be kept confidential;⁶⁹ the views or opinions of other individuals about

⁶⁶ My findings for each record are set out in the Appendix sent to each party with this decision.

⁶⁷ In Records B.134, B.202 and others.

⁶⁸ In Records B.136, B.205 and others.

⁶⁹ In Records B.80, B.136 and others.

him;⁷⁰ and his name as it appears with other personal information about him.⁷¹

[121] All this information is personal information about the complainant within the meaning of section 2(1) of *FIPPA* (including particularly paragraphs (a), (e), (f), (g) and (h) of the definition at section 2(1)).

[122] *FIPPA* grants an individual a right of access to his personal information held by an institution. Later in this decision, at Issue C, I will consider the complainant's right of access to this kind of information under *FIPPA*.

Some exemptions from access in FIPPA are available to the hospital under PHIPA

[123] Apart from the request made on the complainant's own behalf for emails to or from hospital staff that mention him, *FIPPA* is also relevant to this review in that the hospital relies on section 52(1)(f)(ii)(A) of *PHIPA* to claim the application of some *FIPPA* exemptions (as "flow-through" *FIPPA* claims) to deny access to the personal health information of the complainant's wife and daughter in the records.

B. ACCESS UNDER PHIPA

[124] Under this heading I will consider the claims made by the hospital to deny access to the personal health information of the complainant's wife and daughter in the records. This includes the exclusions and exemptions at sections 51 and 52 of *PHIPA*, as well as the "flow-through" *FIPPA* claims.

1. Do any of the exclusions in section 51(1) apply to any of the records?

If so, can the excluded information be severed under section 51(2)?

[125] Certain types of information are excluded from the right of access in *PHIPA* (section 51(1)). In this review the hospital relies on the exclusion at section 51(1)(a), which states:

This Part [Part V of *PHIPA*, setting out the rights of access and correction to records of one's personal health information] does not apply to a record that contains,

(a) quality of care information[.]

[126] "Quality of care information" is defined at section 2 of *PHIPA* as having the same meaning as in the *Quality of Care Information Protection Act, 2004 (QCIPA)*. The definition of "quality of care information" in *QCIPA* includes information that is collected

⁷⁰ In Records A.54, A.56 and others.

⁷¹ In Records A.54, B.134 and others.

by or prepared for a quality of care committee for the sole or primary purpose of assisting the committee in carrying out its functions. "Quality of care committee" is also defined in *QCIPA*.

[127] The hospital identifies two records as containing quality of care information within the meaning of section 51(1)(a) of *PHIPA*: Record A.72, a chart entitled "Quality of Care Review" and marked as being confidential under *QCIPA*; and pages 489-493 of Record A.66, which the hospital describes as a "Patient Relations Report Summary" containing excerpts from that review. The hospital submits that both these records contain information relating to a *QCIPA* review conducted by the committee designated by the hospital's board of directors as a quality of care committee for the purposes of *QCIPA*.

[128] On my review of the information before me, I am satisfied that both records contain information collected by or prepared for a quality of care committee within the meaning of *QCIPA*, and that is "quality of care information" within the meaning of section 51(1)(a) of *PHIPA*. As a result, Record A.72 is excluded, in its entirety, from the right of access in *PHIPA*, as is the portion of Record A.66 containing references to the quality of care review.

[129] Section 51(2) of *PHIPA* provides that where a record contains information excluded under section 51(1), an individual has a right of access to the part of the record that can reasonably be severed from the part containing excluded information. I will therefore consider under the next heading the complainant's right of access, on behalf of his wife and daughter, to the part of Record A.66 that can reasonably be severed from the excluded information.

2. Do any of the exemptions in section 52(1) apply to any of the records?

If so, can the exempt information be severed under section 52(2)?

[130] Section 52(1) of *PHIPA* sets out certain exemptions from the right of access to records of one's own personal health information. The hospital relies on sections 52(1)(a) and (c), which permit it to withhold information subject to a legal privilege, or that relates to legal proceedings:

Subject to [Part V of *PHIPA*], 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,

(a) the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual;

(c) 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[.]

[131] Because the hospital is also subject to *FIPPA*, it is able to rely on some additional exemptions in *FIPPA* (through section 52(1)(f)(ii)(A) of *PHIPA*, as “flow-through” exemptions) to deny access to personal health information in the records.⁷² In this review the hospital relies on section 49(a) in conjunction with sections 13 and 19 of *FIPPA* to withhold personal health information that reveals advice or recommendations or that is subject to solicitor-client privilege.⁷³

[132] Finally, section 52(2) of *PHIPA* provides that despite the application of any exemptions in section 52(1), the individual has a right of access to that part of a record of personal health information that can reasonably be severed from the part containing the exempt information. In my review I asked the hospital to consider whether any part of an exempt record could be severed under section 52(2), which the hospital did.

[133] Personal health information in the records that would, if released, comprise only disconnected or meaningless snippets is not reasonably severable within the meaning of section 52(3). Such snippets are not required to be released, and I will not address them in this decision.⁷⁴

[134] In this section I will summarize my findings on each of the *PHIPA* claims made to deny access to the personal health information of the complainant’s wife and daughter in the records.⁷⁵

[135] I will begin by considering the hospital’s legal privilege exemption claims, which it has applied to withhold most of the records at issue in this review, in their entirety.

⁷² This section permits a health information custodian that is also an institution under *FIPPA* to rely on exemptions available at sections 49(a), (c) or (e) of *FIPPA*.

⁷³ In its representations the hospital claimed some of these exemptions directly through *FIPPA* instead of through *PHIPA* via the “flow-through” in section 52(1)(f)(ii)(A). Where these claims are made to exempt personal health information (as defined above at Issue A2.i) in the records, I will consider the hospital’s *FIPPA* claims as if they were made through section 52(1)(f)(ii)(A) of *PHIPA* and section 49(a) of *FIPPA*. Dealing with the hospital’s section 13 and 19 claims in this way has no material effect on my findings regarding the application of these exemptions to the records.

⁷⁴ The concept of reasonable severability in the context of access-to-information statutes has been considered by the courts, including in: *Ontario (Minister of Finance) v Ontario (Information and Privacy Commissioner)* (1997), 102 OAC 71 (Div Ct); *Montana Band of Indians v Canada (Minister of Indian & Northern Affairs)* (1988), 51 DLR (4th); and *Canada (Information Commissioner) v Canada (Solicitor General)* [1988] 3 FC 551. The IPC has applied this approach in interpreting the severance provisions in *FIPPA* and *MFIPPA*: see Orders PO-1735, PO-1663 and many others.

⁷⁵ The hospital’s exemption claims under *PHIPA* and my findings for each record are set out in the Appendix sent to the parties with this decision.

Do any of the legal privilege exemptions apply to the records?

[136] The hospital submits that most of the records are subject to legal privilege exemptions in *PHIPA* and *FIPPA*. To withhold personal health information of the complainant's wife and daughter in the records, the hospital relies on the legal privilege exemptions in sections 52(1)(a) and (c) of *PHIPA*, and sections 19(a) and (c) of *FIPPA* through section 52(1)(f) of *PHIPA*. For any parts of these records that are also subject to the complainant's *FIPPA* request, the hospital relies on the legal privilege exemptions in sections 19(a) and (c), in conjunction with section 49(a) of *FIPPA*.⁷⁶

[137] The hospital describes the baby's compromised birth at the hospital and her death shortly after delivery as having given rise to a reasonable contemplation of litigation, due to the significant litigation risks associated with labour and delivery incidents and the concerns raised almost immediately by the complainant. The hospital states that most of the records contain confidential communications with its legal counsel, or were prepared by or for legal counsel in connection with proceedings begun by the complainant after his daughter's death – specifically, his lawsuit and complaints to the health regulatory colleges and the Health Professions Appeal and Review Board. The hospital advises that a settlement has been reached in the complainant's lawsuit, but that it is not privy to the status of proceedings before the review board.

[138] The hospital also states that it has not waived any legal privileges.

Analysis and findings

[139] On my review of the records and the hospital's representations made for each record, I find that most of them (with some exceptions that I will address below) are properly withheld, in full, on the basis of solicitor-client privilege. In particular, I accept that sections 19(a) and (c) of *FIPPA*, available to the hospital through the "flow-through" in section 52(1)(f) of *PHIPA*, apply to the personal health information of the complainant's wife and daughter contained in the records, and that sections 19(a) and (c) of *FIPPA*, in conjunction with section 49(a), apply to any personal information of the complainant in the records to which he has a right of access under *FIPPA*.⁷⁷

[140] Sections 19(a) and (c) of *FIPPA* read as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

⁷⁶ Section 49(a) of *FIPPA* permits the hospital to deny access to the personal information of a requester on the basis of certain exemptions in *FIPPA*. See my discussion at Issue C, below.

⁷⁷ In this case, the legal privilege exemptions in *FIPPA* are available for both the personal health information of the wife and daughter and the complainant's personal information in the records. Where I found the *FIPPA* privilege applies to personal health information, it was not necessary to also consider whether the privileges in sections 52(1)(a) and (c) of *PHIPA* apply.

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[141] The exemption in section 19 of *FIPPA* contains two branches.

[142] Branch 1, reflected in section 19(a), arises from the common law. The common law solicitor-client privilege encompasses two types of privilege:

- *solicitor-client communication privilege*, which protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice;⁷⁸ and

- *litigation privilege*, which protects records, including a lawyer's work product and material going beyond solicitor-client communications,⁷⁹ created for the dominant purpose of litigation and within a "zone of privacy" intended to be protected by the litigation privilege.

[143] Branch 2, reflected in section 19(c), is a statutory privilege that applies where the records were prepared by or for counsel employed or retained by the hospital for use in giving legal advice or in contemplation of or for use in litigation. This branch also encompasses two types of privilege: a statutory solicitor-client communication privilege and a statutory litigation privilege.

[144] The statutory and common law privileges, though not necessarily identical, exist for similar reasons.

[145] Unlike the common law litigation privilege, which generally comes to an end with the termination of litigation,⁸⁰ termination of litigation does not end the statutory litigation privilege in section 19.⁸¹

[146] Most of the records at issue in this review contain or reveal legal advice from hospital counsel, and I accept the hospital's evidence that others were prepared by or for counsel for use in giving legal advice or in litigation, which encompasses court proceedings as well as proceedings before administrative tribunals.⁸² I also accept that where litigation privilege has been claimed for the records, it has been claimed in

⁷⁸ *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

⁷⁹ *Ontario (Attorney General) v Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 OR (3d) 167 (CA).

⁸⁰ *Blank v Canada (Minister of Justice)* (2006), 270 DLR (4th) 257 (SCC) (also reported at [2006] SCJ No 39).

⁸¹ *Ontario (Attorney General) v Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

⁸² Order M-162.

connection with all the various proceedings, which arise from the same incident. Although at least one of these proceedings has concluded, the statutory privilege available to the hospital at section 19(c) survives the termination of litigation.

[147] Applying the above reasoning, I find that the following general categories of records are exempt from disclosure, in full, because of solicitor-client communication privilege and/or litigation privilege:

- *Chart reviews of the care provided to the complainant's wife and daughter*, which the hospital states (and that I accept on the basis of the evidence before me) were conducted after the death of the baby for the dominant purpose of litigation. These reviews are contained in Records A.12, A.13 and A.14.
- *Communications* from the hospital reporting the incident and its potential for litigation to external parties sharing a common interest with the hospital.⁸³ These are contained in Records A.34 and A.35.

Also falling into this category are the partially-disclosed records sent by the hospital to external parties to keep them informed of developments in the various proceedings begun by the complainant, including the CNO complaint and the lawsuit. Examples include Records A.39, A.40 and A.44.

I am satisfied that these types of records are exempt from disclosure as they were created for the dominant purpose of litigation. The purpose of these records was to keep the records' recipients apprised of actual litigation matters begun by the complainant, and were created by the hospital with this dominant purpose in mind.

- *Communications between hospital staff* for the purpose of obtaining legal advice, or that contain a summary of legal advice, or that were created to update staff on the various litigation matters. Examples include the handwritten notes contained in Record A.37 and the memos to staff in Records A.45 and A.47.

I am satisfied that these types of communications are subject to the solicitor-client communication or litigation privileges.

- Other internal hospital records, consisting of the following:
 - The remaining part of the "Patient Relations Report Summary" in Record A.66 after severance of the portion excluded under section 51(1)(a). I find the remainder of this record is subject to litigation privilege on the basis of

⁸³ The common interest exception to waiver applies where privileged communications are shared with a party who has a common interest in the defence of a proceeding, for example: Order M-1112; *General Accident Assurance Co. v Chrusz* (1999), 45 OR (3d) 321 (CA).

the hospital's submission, which I accept, that the record contains discussions of the hospital's concerns, approach and strategy regarding potential litigation matters.

- Records A.68 and A.69, minutes of meetings of the hospital's board of directors. I find that these minutes reveal legal advice and are subject to solicitor-client communication privilege.
- Record A.71, a draft press release for which legal advice was sought, which I consider in combination with Record B.165, an email containing the comments of legal counsel on Record A.71.⁸⁴
- Record A.81, correspondence that I accept was prepared for use in litigation and was intended to be protected by litigation privilege.
- *Email strings, some of which contain attachments, between hospital staff, concerning requests for legal advice or that would reveal legal advice sought or received from legal counsel, or that are about litigation matters. Examples include Records A.36, B.92, B.118, B.123, B.138 and B.212.*

Some of these strings incorporate the complainant's own emails, which typically contain personal health information of his wife and daughter, as well as his own personal information. Examples include Record A.43, B.134 and B.211. Where the complainant's own emails have been withheld from him in the records, I accept that they form part of the "continuum of communications" between the hospital and its legal counsel, aimed at keeping both informed so that advice can be sought and given.⁸⁵ The withheld information in the complainant's own emails is thus covered by the legal privilege exemption.

⁸⁴ In some cases, the hospital identified as one record all the pages making up one transmission or one email message: for example, Record A.2 is a letter to the CNO and the accompanying documentation; Record B.261 is an email and its attachment. In other cases, the hospital treated as separate records pages that were transmitted together, or that refer to one another: for example, Record A.71 is a draft press release that was considered by legal counsel in Record B.165.

In the interests of consistency, and in line with this office's record-by-record approach to examining each record in its full context, I have grouped together records where appropriate – for example, I have combined Records B.165 and A.71, and analyzed the complainant's rights of access under *PHIPA* and *FIPPA* to them together as if they were one record. Where I have grouped together records in this manner, I have indicated so in the Appendix sent to the parties.

This treatment of the records does not have a significant impact on the total amount of access granted as a result of this decision. Where grouping records together does make a difference in the result, its effect is to grant greater rights of access to the complainant, not lesser. (This is because combining a non-email record with an email record to which it refers makes both records subject to the complainant's *FIPPA* request.)

⁸⁵ *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

- *Email strings, some of which include attachments, between the hospital and legal counsel.* These records contain legal advice in respect of specific proceedings begun by the complainant, or on draft documents for which legal review is or has been sought. Examples include Records A.38, A.42, B.135, B.151 and B.235. I am satisfied that these types of records are covered by the legal privilege exemption.

Some of the email strings contain the complainant's own emails. Some of these records have been withheld in full (for example, Records B.170, B.171 and B.239). In other records, the portions comprising the complainant's own emails have been disclosed to him (for example, Records B.163 and B.202).

For each of these records, I accept that the withheld information in them is subject to solicitor-client privilege. As described above, I accept that the complainant's own emails, where they have been withheld in the email strings, are exempt on the basis of solicitor-client privilege.

[148] For other records, I either find it unnecessary to decide, or do not accept, the hospital's legal privilege claims.

[149] In the first category are records where the information sought to be withheld comprises only snippets (which I will not order disclosed), or is not responsive to the complainant's request.⁸⁶ As a result, I uphold the hospital's denial of access to these records, in full. Examples include Records A.49, A.55 and A.73.

[150] In the second category are records for which I do not accept the hospital's claims of solicitor-client privilege for the withheld information. On my review of these, I find they do not reveal confidential legal advice or matters having to do with litigation, and are not otherwise subject to legal privilege.⁸⁷ For two of these, Records A.80 and B.126, the hospital has not claimed any other exemptions for the withheld information, and I find no other exception to access applies. As a result, I order the hospital to grant access to the withheld portions of Record A.80 and all of Record B.126 (which was withheld in full) to the complainant.

[151] Records B.104 and B.111 are partially-disclosed email records to which Record A.80 is attached. Above, at Issue A2.iii, I found that these records, like Record A.80, are records dedicated primarily to the personal health information of the complainant's wife and daughter. Directly above I rejected the hospital's solicitor-client privilege claims for the withheld portions of Record A.80; for the same reasons, I reject the same claims made for the portions of Records B.104 and B.111 containing Record A.80. I will

⁸⁶ For example, because the withheld personal health information of the complainant's wife and daughter comprises only snippets in a non-email record that is not subject to the complainant's *FIPPA* request.

⁸⁷ For the same reasons, any personal health information in these records does not qualify for the legal privileges in sections 52(1)(a) or (c) of *PHIPA*.

consider the hospital's severances to the remaining portions of Records B.104 and B.111 (namely, those portions that do not contain Record A.80) under the appropriate heading below.

[152] For other records, the hospital has made claims in the alternative to the solicitor-client privilege claims that I have rejected. I will consider the alternate claims made for the withheld information in Records B.43, B.47, B.48, B.56, B.82, B.87, B.113, B.144, B.246, B.247, B.248, B.249, B.250, B.251, B.253, B.254 and B.266 under the appropriate headings below.

[153] In summary, I have upheld, in part, the hospital's decision to withhold most of the records at issue in this review on the basis of the solicitor-client privilege exemption at section 19 of *FIPPA*, applicable to the withheld personal health information of the complainant's wife and daughter in the records through section 52(1)(f) of *PHIPA*, and, through section 49(a) of *FIPPA*, to any other withheld information to which the complainant has a right of access under *FIPPA*. I also accept that the hospital has not waived privilege in any withheld information. As the section 52(1)(f) exemption in *PHIPA*⁸⁸ and the section 49(a) exemption in *FIPPA* confer a discretion on the hospital to deny access to the records on the basis of section 19 of *FIPPA*, my finding is subject to my review of the hospital's exercise of discretion under *PHIPA* and *FIPPA*. I will consider the hospital's exercise of discretion under both statutes at Issue D, below.

Does the discretionary exemption at section 13 of FIPPA, available through section 52(1)(f) of PHIPA and section 49(a) of FIPPA, apply to the personal health information of the complainant's wife and daughter in the records?

[154] One of the alternative bases on which the hospital relies to withhold personal health information of the complainant's wife and daughter in the records is section 13 of *FIPPA*, available through section 52(1)(f) of *PHIPA* and section 49(a) of *FIPPA*. Section 13(1) of *FIPPA* provides an exemption for advice or recommendations:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[155] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of institutional decision-making and policy-making.⁸⁹

⁸⁸ This is evident in the language of section 52(1)(f) of *PHIPA* and section 19 of *FIPPA*. See also the commentary in Perun, above note 19, at page 526 (particularly footnote 85).

⁸⁹ *John Doe v Ontario (Finance)*, 2014 SCC 36, at para 43.

[156] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations": it includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁹⁰ "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[157] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations.

[158] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).⁹¹

[159] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. On my review of the records, I am satisfied that none of the exceptions to the section 13 exemption applies.

[160] At my request, the hospital provided copies of organizational charts setting out the names and titles of hospital staff who the hospital claims provided advice or recommendations within the meaning of section 13(1).

Analysis and findings

[161] Under this heading I only address the application of section 13 of *FIPPA*, through section 52(1)(f) of *PHIPA* and section 49(a) of *FIPPA*, to personal health information of the complainant's wife and daughter that I have not already found to be exempt as a result of solicitor-client privilege.

[162] On my review of the records and the hospital's representations, I uphold its decision to withhold the personal health information of the complainant's wife and daughter in Records B.56, B.87 and B.113 on the basis of section 13 of *FIPPA*. These records are email strings between hospital staff attaching draft letters for discussion. The personal health information in the records either comprises snippets, or conveys advice or recommendations of one hospital staff member to the others about the documents attached to the emails. Any objective information or factual material in the records is so intertwined with the exempt personal health information that severance is not reasonably possible.

⁹⁰ *John Doe v Ontario (Finance)*, cited above, at paras 26 and 47.

⁹¹ *John Doe v. Ontario (Finance)*, cited above, at paras 50-51.

[163] I therefore uphold the hospital's denial of access to their personal health information in these records pursuant to section 13 of *FIPPA* through the "flow-through" in section 52(1)(f) of *PHIPA*. This finding is subject to my review of the hospital's exercise of discretion under these sections of the acts.

Are any other exemptions or exclusions in FIPPA available through the operation of section 52(1)(f) of PHIPA?

[164] The hospital relies on sections 21 (personal privacy exemption) and 65(6) (exclusions for employment-related records and records relating to hospital privileges) of *FIPPA*, through section 52(1)(f) of *PHIPA*, to deny access to some of the personal health information. These sections of *FIPPA* are not applicable to the personal health information at issue in this review, for the following reasons.

[165] As set out above, section 52(1)(f)(ii)(A) of *PHIPA* makes available to the hospital, as a body subject to both *PHIPA* and *FIPPA*, certain exemptions contained in sections 49(a), (c) and (e) of *FIPPA*. Sections 49(c) and (e) of *FIPPA* are not relevant in the circumstances of this review. Section 49(a) of *FIPPA* sets out a list of exemptions in *FIPPA* from the right of access of an individual to his or her own personal information.⁹² Section 49(a) does not refer to sections 21 or 65 of *FIPPA*. (In addition, section 52(1)(f)(ii)(A) of *PHIPA* does not refer to section 49(b) of *FIPPA*, which is the exemption claim corresponding to a denial of access to one's own personal information based on the application of section 21.) On a plain reading of these sections of *PHIPA* and *FIPPA*, I conclude that sections 21 and 65 of *FIPPA* are not available to the hospital, through section 52(1)(f) of *PHIPA*, to deny access to personal health information in the records.

[166] In any event, it would have been unnecessary to address the above claims for Records A.2, A.4 and A.7. I found at Issue A2.iii that these records of personal health information of the complainant's wife and daughter are not dedicated primarily to their information. As a result, there is only a right of access under section 52(3) of *PHIPA* to any of their personal health information that can reasonably be severed in the records. The severances made by the hospital to the nurse staffing lists in Records A.2 and A.4, and to a letter to a nurse in Record A.7, do not consist of the personal health information of the complainant's wife and daughter, but rather the personal information of nurses who provided care to them (such as reasons for absences). The complainant has no right of access to the withheld personal information of the nurses under section 52(3). Moreover, the records are not covered by the complainant's *FIPPA* request.⁹³ As a result, the withheld information in these records is not accessible under either *PHIPA* or *FIPPA*. I uphold the hospital's severances to these records.

⁹² Section 49(a) of *FIPPA* is reproduced below at page 45.

⁹³ This is because Records A.2 and A.7 are not email records, and Record A.4, though an email record, does not contain any personal information of the complainant.

[167] The hospital withheld all or parts of Records A.73-A.79, B.42 and B.43, relying on the exclusion for labour or employment records. It is not necessary to address A.73-A.79 as I upheld the hospital's claim of legal privilege to these records.

[168] Record B.42 is not dedicated primarily to the personal health information of the complainant's wife and daughter, which comprises only snippets in the record. As mentioned at Issue B2, I will not address access to mere snippets of personal health information.

[169] For the reasons given under this heading above, I reject the hospital's claims under sections 21 and 65(6)5 of *FIPPA* for the withheld personal health information in Record B.43. In addition, I reject the hospital's claim that this personal health information is not responsive to the complainant's request. As no other exception to access applies, I order disclosure of the discrete portion of Record B.43 comprising his family's personal health information.

[170] I will consider the complainant's right of access under *FIPPA* to his own personal information in the email records comprising Records B.42 and B.43 at Issue C, below.

[171] I find that the hospital cannot rely on section 21 (or 49(b)) of *FIPPA* to deny access to information in Records B.104 and B.111, which are records dedicated primarily to the personal health information of the complainant's wife and daughter. As I have found no basis to deny access to the severed portions, I will order the hospital to grant access to all the withheld information in Records B.104 and B.111.

[172] Having now addressed all the personal health information of the complainant's wife and daughter in the records at issue in this review, I will next consider the complainant's right of access under *FIPPA* to his own personal information in some of these records.

C. ACCESS UNDER *FIPPA*

[173] I found above that the component of the complainant's request seeking emails to or from hospital staff that mention him is a request for the complainant's own personal information within the meaning of *FIPPA*. As a result, the complainant has a right of access under section 47(1) of *FIPPA* to his personal information in some of the records.

[174] Under this heading I will consider the claims made by the hospital to deny access to undisclosed personal information in email records to which the complainant does not otherwise have access through his wife's and daughter's *PHIPA* request.⁹⁴ In denying the complainant access to his personal information in some of the records, the hospital relies on section 49 of *FIPPA*, which provides a number of exemptions from the right of

⁹⁴ With the exception of any withheld information whose disclosure would amount to the release of meaningless snippets, which I will not address in this review. See my comments above, at footnote 74.

access in section 47(1).

[175] Section 49 of *FIPPA* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy[.]

[176] These sections of *FIPPA* recognize the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their personal information.⁹⁵

[177] In this review the hospital relies on the exemptions at sections 13 (advice or recommendations), 14 (law enforcement), 18 (economic and other interests), 18.1 (information with respect to closed meetings of hospitals), 19 (solicitor-client privilege) and 20 (threat to safety or health), through section 49(a), and section 49(b) (personal privacy of another individual)⁹⁶ of *FIPPA* to deny access to the complainant's personal information in email records.

[178] Where access is denied under section 49(a) or (b), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. I will consider the hospital's exercise of discretion under sections 49(a) and (b) of *FIPPA* at Issue D, below.

[179] For some undisclosed personal information the hospital also relies on section 65(6)5, which excludes from the application of *FIPPA* records about individuals with hospital privileges, including personnel records of those individuals. It also claims that some of the undisclosed information is not responsive to the complainant's request.

[180] In this section I will summarize my findings on each of the *FIPPA* claims made by

⁹⁵ Order M-352.

⁹⁶ In its representations the hospital relies on section 21 of *FIPPA*, rather than section 49(b), to deny access to information based on a claim that disclosure would constitute an unjustified invasion of another individual's personal privacy. However, as the hospital's severances made on the basis of section 21 are contained in records of personal information of the complainant, the appropriate claim is section 49(b), which is the exemption claim corresponding to a denial of access to one's own personal information based on the application of section 21. Addressing the hospital's exemption claim through section 49(b) rather than section 21 makes no material difference to my findings in this decision.

the hospital to deny access to records subject to the complainant's *FIPPA* request.⁹⁷

1. Does the section 65(6) exclusion apply to any of the information?

[181] The hospital relies on paragraph 5 of section 65(6), relating to hospital privileges, to exclude Records B.42 and B.43 from the application of *FIPPA*. This section of *FIPPA* states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

5. Meetings, consultations, discussions or communications about applications for hospital privileges, the appointments or privileges of persons who have hospital privileges, and anything that forms part of personnel file of those persons.

[182] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of *FIPPA*. I find that none of the exceptions in section 65(7) applies in these circumstances.

[183] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in this section, it must be reasonable to conclude that there is "some connection" between them.⁹⁸

[184] On my review, I accept that some information in these records consists of hospital communications with physicians about personnel-related matters arising from its review of the care provided to the complainant's wife and daughter, or to other patients. Accordingly, I find that Record B.42 is excluded, in its entirety, from the application of *FIPPA* as a result of section 65(6)5. I also find that the remaining portion of Record B.43 (after disclosure of the severable personal health information of the complainant's wife and daughter that I addressed at Issue B2), is also excluded from the application of *FIPPA* on this same basis.

[185] I therefore uphold the hospital's denial of access to the remaining withheld information in these records.

2. Does the discretionary exemption at section 19, in conjunction with section 49(a), apply to any of the information?

[186] Because of my findings, above,⁹⁹ regarding the application of the solicitor-client privilege exemption to certain records in their entirety, it is unnecessary for me to

⁹⁷ My findings under *FIPPA* for each record are set out in the Appendix sent to the parties.

⁹⁸ Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star*, cited above.

⁹⁹ See my discussion of the hospital's legal privilege exemption claims at Issue B2.

consider the hospital's separate legal privilege claims made under this heading for the personal information of the complainant in those records.

3. Does the discretionary exemption at section 13(1), in conjunction with section 49(a), apply to any of the information?

[187] Section 13(1) of *FIPPA* provides an exemption from disclosure for records that reveal the advice or recommendations of a public servant or other person employed or retained by an institution. The text of section 13(1) and an overview of its application are set out above in my consideration of the hospital's section 13 claims to withhold the personal health information of the complainant's wife and daughter in the records.

[188] On my review of the records and the hospital's representations, I uphold, in part, the hospital's decision to withhold under section 13(1) of *FIPPA*, in conjunction with section 49(a), personal information of the complainant in email records. This includes the withheld portions of email records containing the views or opinions of hospital staff on suggested courses of action,¹⁰⁰ and portions of those records that would reveal those views or opinions.¹⁰¹ Also exempt under this heading are draft versions of correspondence and other materials circulated to hospital decision-makers for review and comment.¹⁰² I also accept that none of the exceptions at sections 13(2) and (3) applies to the withheld information. As a result, I uphold the hospital's denial of access to the withheld information in these records, subject to my review of the hospital's exercise of discretion under section 13(1).

[189] I reject the hospital's section 13(1) claims for the withheld portions of Records B.47 and B.48. I do not accept its claim that the withheld communications from the hospital's then-chief of staff to other hospital personnel qualify as advice or recommendations that could ultimately be accepted or rejected by its recipients. I find these communications contain directions from the then-chief to his staff, and not merely suggested courses of action. I have also rejected the hospital's section 19 claims for the same information, as its disclosure would not reveal privileged communications with legal counsel or about litigation matters, and does not otherwise qualify for legal privilege. As no mandatory basis for withholding this information applies, I order disclosure of the severances in these records.

[190] I also reject the hospital's exemption claim under this heading for one severance in Record B.249 containing communications between the hospital's vice-president and a director. This severance does not reveal a suggested or preferred course of action qualifying for the section 13(1) exemption. For this severance the hospital has made a claim in the alternative to its section 13 claim, which I will consider under the next heading.

¹⁰⁰ Records B.67, B.137 and others.

¹⁰¹ In Records B.240, B.241 and others.

¹⁰² Records B.87, B.113 and others.

4. Do the discretionary exemptions at sections 14(1) and/or 20, in conjunction with section 49(a), apply to any of the information?

[191] The hospital relies on sections 14(1)(a), (e) and (l) and section 20 of *FIPPA*, in conjunction with section 49(a), to withhold personal information of the complainant on the basis that its disclosure may give rise to certain harms.

[192] These sections of *FIPPA* state:

14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to, interfere with a law enforcement matter;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

20 A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[193] The term "law enforcement" in section 14 is defined at section 2(1) of *FIPPA* to include policing.

[194] Generally, the section 14 exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁰³

[195] However, it is not enough for an institution to take the position that the harms under section 14 are self-evident from the record, or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁰⁴ For both the section 14 and section 20 exemptions, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of the harms in sections 14 and 20 that is well beyond the merely possible or speculative, although it need not prove that disclosure 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.¹⁰⁵

[196] The hospital relies on the history of its interactions and communications with the complainant in support of the application of these sections of *FIPPA*. It advises that certain conduct of the complainant, and the frequency and content of his

¹⁰³ *Ontario (Attorney General) v Fineberg* (1994), 19 OR (3d) 197 (Div Ct).

¹⁰⁴ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁰⁵ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-54.

communications with hospital staff, have given rise to concerns about the safety of its staff and the complainant's own health and safety. It describes the records as generally relating to the complainant's behaviour and steps to address this behaviour. The hospital says it has significant concerns that disclosure of the records will escalate these behaviours and the risk that the harms set out in these sections will come to pass.

[197] The hospital provided more details in the confidential portions of its representations, which I have not reproduced here but which I have considered in arriving at my findings.

[198] The complainant did not directly address this issue in his representations.

Analysis and findings

[199] On my review of the records, I am not satisfied that the hospital has established a reasonable basis for finding that any of the harms described in sections 14(1)(a), (e), (l) or 20 could result from disclosure.

[200] I accept the hospital's submission that its interactions with the complainant were a matter of concern for the hospital and its staff. While the hospital's perception of the threat posed by the complainant is relevant, it is insufficient evidence, by itself, to conclude that disclosure of the records could reasonably be expected to endanger the safety or health of hospital staff, or the complainant, or any other individual.¹⁰⁶ I am not satisfied the hospital has established a connection between the particular information sought to be withheld under this heading and the claimed threat.

[201] The information at issue reveals that hospital staff had concerns about the complainant's conduct, and its actions in response to these concerns.¹⁰⁷ From the records and the parties' submissions, it is clear that the complainant is already aware of certain information sought to be withheld from him under these headings.¹⁰⁸ The hospital has not shown how disclosure of the records would create a risk of interference with law enforcement matters or facilitate the commission of an unlawful act by the complainant or any other individual. In all, I find the hospital has failed to provide the kind of detailed and convincing evidence about the potential for harm required to establish the application of these exemption claims in *FIPPA*.

[202] As I reject the hospital's section 14(1) and 20 claims for this information, I will order most of it disclosed to the complainant, with the exception of some discrete portions that may qualify for the personal privacy exemption in *FIPPA* (see discussion in Issue C8).

¹⁰⁶ Order PO-2003.

¹⁰⁷ Records A.51, A.52 and A.53 (email and attachment), B.253 and others.

¹⁰⁸ I cannot describe these records in greater detail without revealing the information at issue.

5. Does the discretionary exemption at section 18(1), in conjunction with section 49(a), apply to any of the information?

6. Does the discretionary exemption at section 18.1(1), in conjunction with section 49(a), apply to any of the information?

[203] Given my findings made under other headings, above, it is unnecessary for me to consider the hospital's exemption claims under section 49(a) in conjunction with sections 18(1) or 18.1(1) of *FIPPA*.

7. Is some of the information at issue outside the scope of the complainant's *FIPPA* request?

[204] The hospital claims that all or portions of Records A.68, A.69, B.43, B.50 and B.144 are outside the scope of the complainant's request. Because of my understanding of the complainant's request and my findings above regarding the application of *PHIPA* and *FIPPA* to the records, it is unnecessary for me to address this claim for Records A.68-69 and B.43.¹⁰⁹

[205] Record B.50 is a partially-disclosed email string between hospital staff. The withheld portion contains information about matters entirely unrelated to the complainant (or to his wife and daughter). I accept the hospital's claim that the withheld information is not responsive to the complainant's request, and I uphold the hospital's denial of access to it.

[206] Record B.144 is an email string between hospital staff about organizing an education session for the hospital's board of directors. The hospital submits that this record is not reasonably related to the complainant's request.

[207] Although I agree the discussion in the email string is about administrative matters not directly related to the complainant or his family, the passing reference to the complainant by name in one of the emails makes the record responsive to his request for any emails to and from hospital staff that mention him. As I have also rejected the hospital's section 19 claim for this record, and no mandatory basis for withholding this information applies, I order the hospital to disclose Record B.144 to the complainant.

[208] Finally, one discrete sentence in the withheld portions of Record B.249 is unrelated to either component of the complainant's request, and I uphold the denial of access to it.

¹⁰⁹ This is because I have already upheld, on other grounds, the denial of access to the information subject to the complainant's *FIPPA* request that the hospital claimed is non-responsive in these records.

8. Does the discretionary exemption at section 49(b) apply to any of the information?

[209] Some of the email strings that mention the complainant also contain information about hospital staff, such as their personal cell phone numbers, their personal email addresses and other information relating to them in a personal (rather than professional) context, unrelated to their duties as employees of the hospital. This type of information about hospital staff qualifies as their personal information within the meaning of *FIPPA*.

[210] The complainant has already indicated that he is not interested in the personal cell phone numbers of hospital staff. However, as he has not been asked about his interest in the other types of personal information about staff appearing in the records, I will consider his right of access to it here.^{110,111}

[211] Since the records contain personal information of the complainant and other individuals, section 49(b) of *FIPPA* may apply. Section 49(b) provides a discretionary exemption from disclosure of information where doing so would constitute an unjustified invasion of another individual's personal privacy. Sections 21(2) and (3) of *FIPPA* set out factors and presumptions for consideration in determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹¹² Section 21(4) sets out exceptions from the application of the exemption in section 49(b).

[212] I am satisfied that none of the presumptions in section 21(3), nor any of the exceptions in section 21(4), applies to the information. I have considered whether any of the factors weighing in favour of or against disclosure in section 21(2) applies to the withheld personal information of hospital staff.

[213] Some of the severances to the records made under this heading consist of staff members' personal email addresses¹¹³ and information about their personal activities.¹¹⁴ Other severances consist of references to hospital staff that reveal something personal

¹¹⁰ The "record-by-record" approach to requests for access to one's own personal information made under section 47(1) of *FIPPA* means that requesters have a right of access under Part III of *FIPPA* to entire records (or the withheld portions of records) that contain their own personal information, subject to any applicable exceptions. See my discussion at footnote 7.

¹¹¹ It is unnecessary to address the complainant's right of access under *FIPPA* to certain information in Records B.104 and B.111 that the hospital sought to exempt on the basis of section 21 (or 49(b)) of *FIPPA*. I found above that these *FIPPA* exemptions have no applicability to Records B.104 and B.111. See my discussion at Issue B2.

¹¹² Order MO-2954.

¹¹³ In Records B.53, B.80, B.263 and others.

¹¹⁴ In Records B.267, B.269 and others.

about them.¹¹⁵ On my review of these severances and in consideration of all the circumstances, I find applicable the factor at section 21(2)(f) of *FIPPA*, which weighs against the disclosure of highly sensitive personal information of staff members. Given the difficult relationship between the complainant and some current and former members of the hospital's staff, which the hospital has described in its representations and which is evident to me from my review of the records, I accept that there is a reasonable expectation of significant personal distress on the part of these staff members if their information were disclosed to the complainant.¹¹⁶ The complainant has not provided any representations in support of disclosure of this information to him, and I find no other factors favouring disclosure applies. As a result, I uphold the hospital's denial of access to the personal information of hospital staff in the records.¹¹⁷

[214] My finding on the application of section 49(b) to this information is subject to my review of the hospital's exercise of discretion under this section, which I address below at Issue D.

9. Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 13 and 21 exemptions?

[215] The complainant raised a potential public interest in disclosure of the withheld information. Given this, I asked the hospital to address the application of section 23 in these circumstances. This section of *FIPPA* reads:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[216] Section 23 of *FIPPA* operates as a public interest override that allows the disclosure of records that could otherwise be withheld under certain exemptions in *FIPPA*. Under this heading I will consider the possible application of the section 23 override to the information exempt under section 13, in conjunction with 49(a), and section 49(b) of *FIPPA*.¹¹⁸

[217] As no equivalent section exists in *PHIPA*, it is unnecessary for me to consider

¹¹⁵ In Records A.50, B.247 and others. I am unable to provide more details without revealing the exempt information.

¹¹⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹¹⁷ Except in Records B.104 and B.111. See footnote 111 above.

¹¹⁸ Although section 23 of *FIPPA* does not refer to sections 49(a) or (b), the IPC has interpreted section 23 as including the listed exemptions where they are claimed to deny access to the requester's own personal information through section 49(a) of *FIPPA*, or section 49(b). This is because failing to read sections 49(a) and (b) into the public interest override would result in an individual having a lesser right of access to records containing his or her own personal information than to general records: see Order P-541 and many others.

whether a public interest override could apply to the personal health information I found is properly withheld under *PHIPA*.

[218] For section 23 of *FIPPA* to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the applicable exemption.

[219] In considering whether there is a “public interest” in disclosure of a record, the first question to ask is whether there is a relationship between the record and *FIPPA*’s central purpose of shedding light on the operations of the institution.¹¹⁹

[220] A public interest does not exist where the interests being advanced are essentially private in nature.¹²⁰ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹²¹ The public interest must be a “compelling” one.

[221] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.¹²²

[222] The hospital characterizes the complainant’s interest in the records as private in nature, having to do with the circumstances surrounding the delivery and death of his infant daughter. The hospital refers to the significant amount of information that has already been provided to the complainant, both through this process and as a result of other proceedings involving the parties, including the complainant’s lawsuit. The hospital submits that the information provided to the complainant as a result of all these proceedings, and the reviews undertaken by the coroner’s office and the health regulatory colleges of the baby’s death and the care provided to the complainant’s wife and daughter, are adequate to address any public interest considerations that may exist.

[223] The complainant indicates that he wants access to all the withheld information in order to understand the events leading to his daughter’s death, and to hold any wrongdoers to account.

[224] In these circumstances, I am satisfied that the public interest override has no application to the limited amount of information I found is properly exempt under sections 13, through section 49(a), and 49(b). I find that the complainant’s interest in the records is essentially a private one, rooted in his desire to come to terms with the

¹¹⁹ Orders P-984 and PO-2607.

¹²⁰ Orders P-12, P-347 and P-1439.

¹²¹ Order MO-1564.

¹²² Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

circumstances of his daughter's death. I do not find evidence of a wider interest in the private matter between the complainant's family and the hospital, or a broader public interest in systemic issues surrounding the care provided by the hospital, for example.

In any event, I am satisfied that disclosure of the limited and specific information at issue here would not serve any public interest that might exist. I also accept the hospital's submission that the existence of a number of other proceedings examining the events surrounding his daughter's death, and the significant amount of information released to the complainant to date, including the 1,075 pages disclosed under *PHIPA* and *FIPPA*, should satisfy any potential public interest. By comparison, a minimal amount of information has been properly withheld on the basis of exemptions serving the important purposes of enabling confidential decision-making processes within institutions, and protecting the personal privacy of other individuals.

In these circumstances, I find the section 23 override does not apply.

D. EXERCISE OF DISCRETION

[225] As noted above, the exemptions at section 52(1)(f) of *PHIPA* and sections 49(a) and (b) of *FIPPA* are discretionary. The section 13 and 19 exemptions in *FIPPA*, claimed through section 52(1)(f) of *PHIPA* and section 49(a) of *FIPPA*, are also discretionary.

[226] Where an exemption is discretionary, the hospital has the discretion to disclose information despite the fact it could withhold it. The hospital must exercise its discretion. As part of my review, I will determine whether the hospital exercised its discretion under *PHIPA* and *FIPPA*, and whether its exercise of discretion was proper.

[227] Past orders of this office have addressed an institution's exercise of discretion under *FIPPA* and its municipal equivalent. Through these orders, this office has developed a list of considerations that may be relevant to the exercise of discretion under those statutes. They include:

- the purposes of the acts, including the principles that:
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;

- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[228] Many of these considerations are applicable to the exercise of discretion under *PHIPA*.

[229] The hospital states that it exercised its discretion under *PHIPA* and *FIPPA* in good faith, taking into account relevant factors and not taking into account irrelevant ones. Among other things, the hospital considered: the importance of maintaining its legal privileges in light of the proceedings brought by the complainant against the hospital; the complainant's sympathetic need for information relating to this incident; and the sensitive nature of the information withheld on the basis of legal privileges or to protect the personal privacy of other individuals, or because the information consists of confidential advice or recommendations.

[230] The hospital also considered whether disclosure would increase public confidence in the hospital and its processes, and concluded that it would not. In addition to the significant amount of information released to the complainant in response to this access request and through his lawsuit, the hospital notes there are a number of other processes in place to ensure hospital accountability and transparency, and foster public trust. These include the disclosure and reporting obligations under the *Public Hospitals Act* and the *Excellent Care for All Act* (which includes an internal process to address complaints), independent oversight by the coroner and the health regulatory colleges, and the hospital's own quality assurance and patient complaint mechanisms.

[231] I accept that the hospital properly exercised its discretion in these circumstances. I am satisfied that in arriving at its decision to withhold limited amounts of information under *PHIPA* and *FIPPA*, the hospital took into account relevant factors. These include the rights of access of the complainant and his family members to their own information, the sensitivity of the limited amount of information it chose to withhold under these acts and the availability of other mechanisms to satisfy the complainant's need for information about his daughter's death. There is no evidence the hospital took

into account any irrelevant considerations, acted in bad faith or made an error in its exercise of discretion.

[232] For these reasons I uphold the hospital's exercise of discretion in withholding information under discretionary exemptions in *PHIPA* and *FIPPA*.

E. SEARCH FOR RESPONSIVE RECORDS

[233] The complainant claims that additional records exist relating to item 1 of his request (Labour and Delivery staff meeting minutes, reports and notes from a specified date in 2009) and item 5 (email communications to or from hospital staff over a specified date range between 2009 and 2012). For item 5, the complainant particularly refers to an April 2010 email from one named doctor to another, which he obtained from another source and that he believes ought to have been located by the hospital in its search for records.

[234] In light of the complainant's claims I asked the hospital to provide representations on its search for responsive records, including a written summary of all steps taken in response to the request, in the form of an affidavit sworn by the person who conducted or coordinated the actual searches. The hospital provided an affidavit of the privacy consultant who was acting as the hospital's *FIPPA* leader/privacy analyst at the time of the complainant's request. The hospital's representations and the consultant's affidavit evidence provide a detailed account of the hospital's search for records responsive to the complainant's request.

[235] To locate records responsive to item 1, the privacy consultant contacted the operations director of the hospital's Women and Child Program, of which the Labour and Delivery unit is a part. Searches were conducted of the paper and electronic records of the entire Program, as well as of designated Program committees. As maintenance of OBGYN committee meetings transitioned to the Medical Affairs department during the relevant time period, that department also conducted its own search for OBGYN committee records. None of these searches yielded any records relating to a meeting of Labour and Delivery staff on the date specified by the complainant. The hospital states there is no indication that a formal meeting was held on that date within the Program. In addition, the hospital notes it is not part of the hospital's internal process to discuss specific patient cases at departmental meetings.

[236] To locate records responsive to item 5, the privacy consultant first contacted the complainant to clarify the request and to discuss the hospital's search procedure with him. The complainant agreed with the hospital's proposal to use certain key words – the first names of the complainant, his wife and daughter, and the family surname – in the hospital's search for responsive emails. The privacy consultant contacted the hospital staff identified in the complainant's request and instructed them to conduct email searches for records using the agreed-upon key words.

[237] The hospital acknowledges that the particular email referred to by the complainant did not turn up in the hospital's search for records, despite the fact that the two doctors involved in the email exchange conducted searches of their hospital email accounts using the agreed-upon key word search method. One of the doctors, who was chief of staff at the time of the email in question, was succeeded in the position by a new chief of staff, to whom the former chief of staff's emails were forwarded. The privacy consultant asked the new chief of staff to conduct a search of his hospital email account using the same search method. In addition, the hospital's director of Quality, Patient Safety and Risk Management conducted her own search for any records, including email records, responsive to the complainant's request. The specific email identified by the complainant did not turn up in any of these searches.

[238] The hospital affirms that at the time period in question, there was no hospital policy or expectation that physicians would retain emails containing personal information for any particular length of time. The hospital indicates it is possible that the 2010 email, though responsive to the complainant's request, no longer existed within the hospital's custody or control by the time the complainant filed his request to the hospital in 2012.

[239] The complainant did not provide representations on this issue.

Analysis and findings

[240] Where a requester claims that additional records exist beyond those identified, the issue to be decided is whether a reasonable search was conducted. A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹²³ Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹²⁴

[241] Based on the information before me, I am satisfied that the hospital conducted a reasonable search for records as required by section 53 of *PHIPA* and section 24 of *FIPPA*. I find that the hospital's account of the steps taken in response to the complainant's request demonstrates reasonable efforts to locate responsive records. The searches were coordinated by the hospital employee with responsibility for access-to-information requests, and were conducted by hospital staff named in the complainant's request (as well as others who might reasonably be expected to have responsive records), in accordance with a search protocol approved by the complainant. These were reasonable approaches to locating any records responsive to his request.

[242] The hospital is not required to prove with absolute certainty that further records

¹²³ Orders M-909, PO-2469, PO-2592.

¹²⁴ Order MO-2246.

do not exist. I find the hospital has provided a credible explanation for its failure to locate the 2010 email during its search for email records, and that the complainant has not provided me with any reason to find otherwise. As there is no reasonable basis to conclude that additional records exist, I am satisfied that the searches carried out by the hospital were reasonable in the circumstances. I uphold the hospital's search for records.

F. FEE AND FEE WAIVER

- 1. What is the applicable statute for making determinations on fee and fee waiver?**
- 2. Should I uphold the hospital's fee?**
- 3. Should I uphold the hospital's denial of a fee waiver?**

[243] The final issues for determination in this review are the reasonableness of the fee charged by the hospital for access, and of its decision to deny the complainant's request for a fee waiver.

[244] Both *PHIPA* and *FIPPA* address the payment of fees by a requester, and provide for a waiver of payment of all or any part of the fees in certain circumstances. To begin, I must decide under which statute to make my determinations on the reasonableness of the hospital's fee and fee waiver decisions.

[245] In the discussion that follows, I conclude that the fee and fee waiver provisions in *PHIPA* are the appropriate bases for my determination of the issues around the fee charged by the hospital for access to records responsive to the complainant's request. I also conclude that the hospital's final fee of \$257.50 exceeds the amount of "reasonable cost recovery" within the meaning of *PHIPA*, and I order that the fee be reduced. Finally, I uphold the hospital's denial of a fee waiver.

Applying the fee and fee waiver provisions in PHIPA is appropriate

[246] As described in detail above, *PHIPA* governs the right of access to most of the records at issue in this review, while *FIPPA* governs the right of access to some information in some of the *PHIPA* records and the non-*PHIPA* records. While both statutes contain provisions addressing fees for access and fee waiver, they differ in important ways.

[247] First, the fee and fee waiver provisions in *PHIPA* are discretionary, while the analogous provisions in *FIPPA* are mandatory. Together, sections 54(10) and (11) of *PHIPA* confer a discretion on the hospital to charge an individual who requests access to records of her own personal health information a fee for access that cannot exceed the "prescribed amount," if one exists, or the "amount of reasonable cost recovery." Similarly, section 54(12) of *PHIPA* 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."

[248] By contrast, *FIPPA* requires the hospital to charge fees for requests made under *FIPPA*, including requests for access to an individual's own personal information (section 57(1)). Regulations to *FIPPA* prescribe specific charges for tasks associated with fulfilling a request for access to one's own personal information (section 6.1 of Regulation 460 to *FIPPA*). *FIPPA* also requires the hospital to waive fees, in whole or in part, if, in the hospital's opinion, it is "fair and equitable to do so." *FIPPA* and its regulations set out the matters for consideration in determining whether a fee waiver is required (section 57(4) of *FIPPA*; section 8 of Regulation 460).

[249] In processing the complainant's request, the hospital applied fee and fee waiver provisions in *FIPPA* to arrive at its final fee of \$257.50 and its decision to deny the complainant's fee waiver request. Although this was based on its initial treatment of the complainant's request as a *FIPPA* request, in its representations the hospital submits that its decisions on fee and fee waiver made under *FIPPA* can also be upheld under *PHIPA*. This is because, in the hospital's submission, the final fee calculated under *FIPPA* meets the standard of "reasonable cost recovery" referred to in *PHIPA*, and the considerations in *FIPPA* for determining whether a fee waiver is "fair and equitable" in the circumstances are applicable in making the same determination under *PHIPA*.

[250] In the circumstances of this review, I find it appropriate to apply the fee and fee waiver provisions in *PHIPA* to the complainant's requests for access to information and for waiver of the fee. As I found above, nearly all the records at issue in this review are subject to *PHIPA*, with some of the *PHIPA* records also being subject to the complainant's *FIPPA* request. In addition, a small number of the records are subject only to *FIPPA*. For the subset of records subject to both acts, or only to *FIPPA*, although access may be granted under *PHIPA* or *FIPPA*, or both, I find it an unnecessary exercise to allocate specific fees between the two statutes. This is because the vast majority of the total amount of information released to the complainant as a result of his request is the personal health information of his wife and daughter, with access being granted under *PHIPA*, with only a small amount being the complainant's own personal information disclosed under *FIPPA*. This result is consistent with the understanding of his request, set out above, as a request primarily for the personal health information of his wife and daughter, made on their behalf, with only a discrete component being a request for his own personal information.

[251] In addition, in the absence of a prescribed amount for fees under *PHIPA*, the hospital's final fee, though calculated under *FIPPA*, may fall within the "amount of reasonable cost recovery" as contemplated by *PHIPA*. I will consider the hospital's submission to this effect under the next heading. Finally, I find it appropriate to consider whether the hospital's decision to deny a fee waiver under *FIPPA* is reasonable based on the consideration of what is "fair and equitable" as provided in *PHIPA*. Considerations of fairness and equity are explicitly incorporated into the fee waiver provisions of *FIPPA*, which also set out factors that may be relevant to a decision on fee

waiver under *PHIPA*.

The hospital's fee exceeds the amount of reasonable cost recovery

[252] The fee provisions at sections 54(10) and (11) of *PHIPA* read as follows:

(10) A health information custodian that makes a record of personal health information or a part of it available to an individual under [Part V of *PHIPA*] or provides a copy of it to an individual under clause (1) (a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.

(11) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed.

[253] As there are currently no prescribed fee amounts under *PHIPA*, in this review I must determine whether the fee charged by the hospital exceeds the "amount of reasonable cost recovery" as contemplated by section 54(11).

[254] The hospital's final fee, which it based on the regulations under *FIPPA*, is \$257.50.¹²⁵ While the hospital acknowledges that it might have been more appropriate to calculate the fee under *PHIPA*, rather than under *FIPPA*, it maintains that the fee calculated under *FIPPA* still constitutes "reasonable cost recovery" within the meaning of *PHIPA*. Among other things, the hospital notes that its original fee estimate for processing the request, based on a representative sample of responsive records, was \$1,090.00, and that it has worked with the complainant throughout this process to produce a number of revised fee estimates to lower the total costs to the complainant. The hospital also notes that it did not claim the total amount of time it spent searching for responsive records, or charge the complainant for the time it spent extracting responsive emails, removing non-responsive documents and duplicates, and transferring emails to a user-friendly PDF format, all of which required significant time and effort by the hospital.

¹²⁵ The hospital's calculation is based on: 7 hours and 15 minutes to locate responsive records (at \$7.50 for each 15 minutes); 1 hour to sever records (at \$7.50 for each 15 minutes); and provision of one CD-ROM (\$10).

In making its fee calculation under *FIPPA*, the hospital applied section 6 of Regulation 460 to *FIPPA* rather than section 6.1. Based on the nature of the request, it should have applied section 6.1 instead. Section 6 of the regulation sets out the fees for access to records of *general* information under *FIPPA*, whereas section 6.1 sets out the fees for access to a requester's own *personal* information under *FIPPA*. Using the fee structure in section 6.1, the total fee is \$10, rather than the \$257.50 calculated by the hospital under section 6. The disparity is due to the fact that Regulation 460 to *FIPPA* does not allow an institution to claim the costs of searching for or severing ("preparing for disclosure") records of a requester's personal information. The absence in *FIPPA* (and *MFIPPA*) of a scheme to permit recovery of costs associated with reviewing and severing records of a requester's personal information was one of the reasons this office rejected those fee schemes, in Order HO-009, for determining the amount of "reasonable cost recovery" for fees for access in *PHIPA*.

[255] The “amount of reasonable cost recovery” in section 54(11) is not defined in *PHIPA*. However, this office has previously considered the meaning of this phrase for the purposes of the fee provisions in *PHIPA*.¹²⁶ Applying the purposive approach to statutory interpretation described above, this office has concluded that the phrase “reasonable cost recovery” in *PHIPA* does not mean “actual cost recovery,” or full recovery of all the costs borne by a health information custodian in fulfilling a request for access to an individual’s own personal health information. This office has also concluded 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 manner that avoids creating a financial barrier to the important purpose of *PHIPA* to grant a right of access to one’s own personal health information.

[256] These past orders concluded that a fee scheme set out in a proposed regulation to *PHIPA*, published by the Minister of Health and Long-Term Care in 2006 (the “2006 framework”),¹²⁷ though never adopted, provides the best framework for determining the amount of “reasonable cost recovery” under *PHIPA*. I agree with the reasoning in IPC Orders HO-009 and HO-014, and apply it to my review of this issue. The 2006 framework adopted in those orders and in this review reads as follows:

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:

1. Receipt and clarification, if necessary, of a request for a record.
2. Providing an estimate of the fee that will be payable under subsection 54(10) of [*PHIPA*] in connection with the request.
3. Locating and retrieving the record.
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.

¹²⁶ Orders HO-009 and HO-014.

¹²⁷ Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol 139-10 (11 March 2006). Available online here: http://files.ontariogovernment.ca/gazette_docs/139-10.pdf.

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.

11. Supervising the individual's examination of the original record for not more than 15 minutes.

(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

ITEM	COLUMN 1	COLUMN 2
1.	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages
2.	For making and providing a paper copy of a record from microfilm or microfiche	50 cents per page
3.	For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form	\$10
4.	For making and providing a microfiche copy of a record stored on microfiche	50 cents per sheet

5.	For making and providing a copy of a microfilm of a record stored on microfilm that is,	
	i. 16 mm	\$25 per reel
	ii. 35 mm	\$32 per reel
6.	For printing a photograph from a negative or from a photograph stored in electronic form, per print,	
	i. measuring 4" x 5"	\$ 10
	ii. measuring 5" x 7"	\$ 13
	iii. measuring 8" x 10"	\$ 19
	iv. measuring 11" x 14"	\$ 26
	v. measuring 18" x 20"	\$ 32
7.	For making and providing a copy of a 35 mm slide	\$ 2
8.	For making and providing a copy of an audio cassette	\$ 5
9.	For making and providing a copy of a ¼", ½" or 8 mm video cassette,	
	i. that is one hour or less in length	\$ 20
	ii. that is more than one hour but not more than two hours in length	\$ 25
10.	For making and providing a copy of a ¾" video cassette,	
	i. that is not more than 30 minutes in length	\$ 18
	ii. that is more than 30 minutes but not more than one hour in length	\$ 23
11.	For producing a record stored on medical film, including x-ray, CT and MRI films	\$5 per film

12.	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 or shall be refused	\$45 for every 15 minutes after the first 15 minutes
13.	For supervising examination of original records	\$6.75 for every 15 minutes

[257] Applying the 2006 framework to the hospital's account of the steps it took to fulfil the complainant's *PHIPA* request made on behalf of his wife and daughter, I arrive at a total fee of \$175.¹²⁸

[258] I therefore find that the final fee of \$257.50 calculated by the hospital exceeds the amount of reasonable cost recovery contemplated by section 54(11) of *PHIPA*.¹²⁹ I order a reduction in the fee to the amount of reasonable cost recovery, \$175.

[259] I note that this decision on fee affects only the amount of the refund owing to the complainant, as he has already paid a deposit in excess of the disputed fee, and no disclosure of records was contingent on receipt of any fee.

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

[260] Section 54(12) of *PHIPA* allows the hospital to waive payment of all or any part of the fee. It reads:

A health information custodian mentioned in [section 54(10)] may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so

[261] Unlike the fee waiver provision in *FIPPA*, which requires the waiver of all or part of a fee upon determination that a waiver is "fair and equitable" in light of listed

¹²⁸ This calculation is based on: 7 hours and 15 minutes to locate responsive records (a charge of \$30 according to the 2006 framework); 1 hour to sever records for disclosure (a charge of \$45 x 3 = \$135); and provision of one CD-ROM (\$10).

¹²⁹ And, as noted above, is also considerably higher than the allowable fee of \$10 had the hospital applied the section of the *FIPPA* regulation that deals with access to a requester's own personal information.

considerations (section 57(4); section 8 of Regulation 460 to *FIPPA*), *PHIPA* does not prescribe factors for determining whether a waiver is fair and equitable within the meaning of *PHIPA*. Most significantly, the fee waiver provision in *PHIPA* is discretionary, and not mandatory as in *FIPPA*.

[262] In denying the complainant's request for a fee waiver, the hospital took into account the listed considerations in *FIPPA* and determined that the request did not satisfy the criteria for waiver. The hospital found that the complainant's stated reasons for seeking a fee waiver (among them, a desire to better understand the events surrounding his daughter's death and to take further action against hospital staff, and because of the effects of these events on his career and earnings) do not establish a proper basis for fee waiver under any of the grounds in section 57(4), including the financial hardship ground at paragraph (b).

[263] The hospital also concluded that the complainant had failed to establish that a fee waiver would be "fair and equitable" within the meaning of *FIPPA*. In its representations the hospital describes some of the factors it considered in arriving at this determination, including: the cooperative manner in which the hospital attempted to work with the complainant in responding to his request; the significant number of records responsive to his request; the large number of records already disclosed to him without charge; the significant amount of time and effort expended by the hospital to respond to the request, much of which has not been charged to the complainant; and the unreasonable burden of the cost to the hospital if the fee waiver were granted.

[264] Although these considerations were made under *FIPPA*, I find they are equally applicable to a determination of whether a fee waiver is "fair and equitable" under *PHIPA*. Based on the evidence before me, I accept that the hospital exercised its discretion under *PHIPA* in denying the complainant's request for a fee waiver, and did so properly by taking into account relevant considerations and not taking into account irrelevant factors. I note that given the language of section 54(12), my review of the hospital's decision to deny the complainant's fee waiver request is limited to a review of its exercise of discretion under this section.¹³⁰ I also note that even if I were empowered to order the hospital to waive its fee under *PHIPA*, I would not do so in these circumstances.

[265] In light of all the foregoing considerations, I uphold the hospital's decision to deny the complainant's request for a fee waiver.

¹³⁰ The office has on a number of occasions addressed its authority to review the application of discretionary provisions in public sector access-to-information statutes: see Orders MO-1573, PO-3402 and many others.

ORDER:

I uphold the hospital's decision in part. In particular:

1. I uphold, in part, the hospital's denial of access to information in the records under *PHIPA* and *FIPPA*.

I order the hospital to grant the complainant access to a limited number of records or portions of records. With this decision I provide each of the parties with an Appendix setting out my findings on access to each record. I also provide the hospital with a copy of the records to be released in whole or in part, with the portions to be withheld from the complainant highlighted in yellow.

2. I uphold the hospital's exercise of discretion under *PHIPA* and *FIPPA*.
3. I uphold the hospital's search for records.
4. I do not uphold the hospital's fee. I order a reduction of the fee to \$175, and that the hospital make the appropriate refund to the complainant in light of the new fee.
5. I uphold the hospital's denial of a fee waiver.

Original Signed by: _____
Sherry Liang
Assistant Commissioner

_____ November 10, 2015