

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 20

Complaint HA14-64

Queensway Carleton Hospital

January 8, 2016

**Summary:** The complainant sought disclosure of the personal health information of his deceased brother, without the consent of the estate trustee. In this decision the IPC decides that the complainant did not meet the conditions permitting disclosure of the personal health information of his deceased brother for health care purposes, or for purposes related to risk of bodily harm.

**Statutes considered:** *Personal Health Information Protection Act, 2004*, sections 38(4)(c) and 40(1).

**Cases Considered:** PHIPA Decision 19.

### INTRODUCTION

[1] This case concerns a request by an individual for the personal health information of a deceased family member, the obligations of a health information custodian under the *Personal Health Information Protection Act, 2004* (*PHIPA* or the *Act*) in considering a request for disclosure of such information, and the role of the Information and Privacy Commissioner of Ontario (the IPC or this office) in inquiring into the custodian's response to such a request.

## **BACKGROUND**

[2] Section 38(4)(c) of the *Act* permits a health information custodian to disclose the personal health information of a deceased individual to specified family members, if they reasonably require the information to make decisions about their own health care or that of their children:

A health information custodian may disclose personal health information about an individual who is deceased, or is reasonably suspected to be deceased,

....

(c) to the spouse, partner, sibling or child of the individual if the recipients of the information reasonably require the information to make decisions about their own health care or their children's health care.

[3] The complainant in this case submitted a letter to the Queensway Carleton Hospital (the "hospital", or the "custodian"), requesting that it release to him all available medical records pertaining to his deceased brother. The complainant referenced, in particular, "anything relating to the illness that preceded his apparent suicide." The complainant also stated that he was making the request under section 38(4)(c) of the *Act*.

[4] The hospital responded by advising the complainant that he needed approval from the executor of his brother's estate to be granted access to the records. Further, it stated that it had been in contact with the executor, who declined to grant access. With respect to section 38(4)(c), the hospital stated that if the complainant's family physicians feel they need to access specific information from his brother's health record in support of the complainant's health concerns, they should contact the hospital directly specifying which information they are requesting and the hospital would follow up with them.

[5] The complainant then filed this complaint with this office. In his complaint, he stated that the rights of his brother's executor, who is not a family member, should not supercede his right of access to medical information which could significantly affect his health care. Further, he stated that as the person primarily responsible for his own health care, he did not need his family doctor to make a request on his behalf. He expressed the view that knowledge about what happened medically to his brother could be very important in preventing him from suffering a similar life threatening illness.

[6] The IPC assigned a mediator to explore a resolution of the complaint. As no resolution was possible, it was forwarded to the adjudication stage of the IPC's processes. I decided to initiate a review of the complaint, during which I sought and

received written submissions from the complainant and the hospital.

[7] On this date, I am issuing this and three other decisions relating to disclosure under section 38(4)(c).

## **DISCUSSION**

[8] Unlike the *Freedom of Information and Protection of Privacy Act (FIPPA)* and its municipal equivalent, *PHIPA* does not provide a general right of access to information held by the organizations to which it applies. The only right of access established under *PHIPA* is the right, under section 52(1), of individuals to obtain access to their own personal health information.

[9] *PHIPA* draws a distinction between the provision of “access” to personal health information, and the “disclosure” of personal health information by a health information custodian. Individuals have a right of access to records of personal health information about themselves in the custody or control of health information custodians, subject to limited and specific exceptions. An individual’s right of access under section 52(1) of *PHIPA* must be exercised by the individual about whom the records relate or (if applicable) that person’s lawfully authorized substitute decision-maker on his or behalf.<sup>1</sup> The health information custodian is obliged to respond to the request for access and, if no exceptions apply, provide access.

[10] On death, the right of access may only be exercised by the estate trustee or, in the absence of an estate trustee, the person who has assumed responsibility for the administration of the deceased’s estate.<sup>2</sup> In this case, the complainant is not the estate trustee for his deceased brother’s estate, and he is therefore not entitled to request access under section 52(1) of *PHIPA*.

[11] In addition to the provisions of *PHIPA* governing “access” to records of personal health information, *PHIPA* contains provisions governing when health information custodians may “disclose” personal health information. Under *PHIPA*, disclosure is permitted with the individual’s consent or the consent of the individual’s substitute decision-maker (where applicable). In the case of a deceased individual, only the estate trustee (or, if there is no estate trustee, the person who has assumed responsibility for the administration of the deceased’s estate) may give consent. Disclosure without consent is also permitted, and in some cases required, under specific provisions in the *Act*.<sup>3</sup>

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<sup>1</sup> Section 25(1).

<sup>2</sup> See section 5(1), defining “substitute decision-maker” and paragraph 4 of section 23(1), regarding deceased individuals.

<sup>3</sup> Section 29.

[12] In this case, there is an estate trustee, and the estate trustee has not consented to disclosure of personal health information to the complainant. Accordingly, the issue before me is whether *PHIPA* permits disclosure to the complainant without consent. In the circumstances of this case, the complainant believes he qualifies for disclosure without consent under section 38(4)(c).

[13] This case raises issues about the obligations of a health information custodian when deciding whether or not to disclose information under section 38(4)(c), the rights of individuals to complain to the IPC about a custodian's decision to not disclose information to them under this section, and the extent of the IPC's authority to inquire into such a complaint.

### **Representations**

[14] The hospital stated that, based on its discussions with the complainant, it is concerned that there are multiple factors at play beyond health concerns raised by the complainant. It states that in conversations with the complainant, his primary concern centred on complex family dynamics between himself, his brother and the executor of his brother's estate, and the estate itself. The hospital believed it to be an unusual request and so advised the complainant to contact the executor to secure consent, offering to contact the executor on his behalf as well.

[15] The complainant raised section 38(4)(c) at a later date. The hospital told him that it would provide the brother's records to him provided that he work with his physician to demonstrate the medical need for this information.

[16] The hospital states that disclosure to the complainant may be permitted under section 38(4)(c). However, it is not clear whether the information requested is reasonably required to inform the complainant's decisions about his own health care. It has therefore suggested that the complainant work with a physician for two reasons: to validate that the information is indeed needed to support the complainant's decisions about his own health care, and to identify the components of his brother's records that are relevant to his request under section 38(4)(c).

[17] The complainant states in his representations that disclosure should be permitted under section 38(4)(c) because his brother is deceased and he reasonably requires the information to make decisions about his own health care. The complainant states that he would also like disclosure to be considered under section 40(1) of *PHIPA* ("disclosure related to risks").

[18] With his submissions, the complainant provides a number of documents that, he states, should be taken into account in the exercise of any discretion, and that also prove the existence of health and safety concerns. One document consists of a long letter which he states he wrote to the police officer who attended the scene of his brother's apparent suicide. In the letter, the complainant outlines a number of concerns

and events, including his belief that his ex-wife was involved with his deceased brother, concerns about his ex-wife's actions and motives, and disputes over the estate of his deceased mother. He describes medical conditions suffered by his late mother and aunt. He states that he wishes to find out whether his brother's illness was genetic or a result of the relationship with his ex-wife. The complainant states that he understands that his brother left a "derogatory" letter about him, and wishes to see any notes or letters left by his brother to confirm that they were in his brother's handwriting. He states that his brother's death seems very suspicious to him, and that although the suicide was most likely as it appeared and described in a Coroner's report, the illness that may have caused him to take his life is difficult to accept.

[19] From this letter, it appears that the complainant was estranged from his brother from 2003, until his brother's death in 2011. Although the complainant refers to his brother's "illness", he has not submitted any material showing what, if any, illnesses his brother suffered from in that period.

[20] The second document is a report of a private investigator hired by the complainant to confirm any relationship between his ex-wife and his now deceased brother. The third is a transcript of a number of phone messages from the complainant's son to the complainant, which he believes were instigated by his ex-wife. The fourth attachment is a letter the complainant states he received from his sister, shortly after the complainant had sent a letter notifying her of his intentions regarding the remainder of his mother's estate.

[21] The complainant submits that he has health and safety concerns that are "not only" hereditary ones. He states they relate to his now deceased's brother's involvement with his ex-wife and to what degree she may have affected the health of both him and his brother. He also suggests that section 40(1) (disclosure related to risk of serious bodily harm) of *PHIPA* may apply, based on his documents.

[22] The complainant also provides a letter from his lawyer dated in April 2012, addressed to his family doctor, and a handwritten note that he states is from his family doctor. The note states that the complainant expressed a concern that his brother and mother suffered from the same medical condition, and that this condition precipitated his brother's death. The doctor states that the complainant wishes to obtain information on his brother's medical conditions so as to ascertain whether he suffers from the same condition and to obtain appropriate treatment to prevent similar complications.

[23] The complainant states, in response to the hospital's submissions, that he is concerned that his brother's death (by suicide) has not been thoroughly investigated by the police. He states that his main concern is for his own health care, which is not just over hereditary issues, but arises out of a concern that his ex-wife has done "something noxious" to him. He states that he approached his brother's executor on several occasions about accessing his brother's medical information, and has been refused.

## Analysis

[24] There is no dispute that the information the complainant seeks is the “personal health information” of his deceased brother, within the meaning of the *Act*.

[25] Section 38(4)(c) is an exception to the general rule requiring consent for the disclosure of personal health information. If the conditions of this section are met, section 38(4)(c) permits a health information custodian to disclose personal health information about a deceased person, even without consent. Disclosure under any part of section 38(4) may be made verbally or through release of records. Where an individual claims to qualify for disclosure under section 38(4)(c), the health information custodian must consider whether the individual meets the conditions for disclosure, and decide whether and how much information to disclose.

[26] Since the provision is discretionary, the custodian is also permitted *not* to disclose that personal health information. However, its exercise of discretion must be based on proper considerations, not made in bad faith or for an improper purpose. In PHIPA Decision 19, also released on this date, I discuss in greater detail the nature of a health information custodian’s duties in considering a request for disclosure under this section, and the role of the IPC in inquiring into a complaint about a refusal to disclose.

[27] I turn now to the facts of the complaint before me. I agree with the hospital that the information provided by the complainant does not establish that he “reasonably requires” the personal health information at issue to make decisions about his own health care.

[28] The note from the complainant’s doctor does not provide evidence to support disclosure under section 38(4)(c). At most, it describes the concerns that the complainant expressed to the doctor. Those concerns, in turn, are based on the complainant’s speculations about his brother’s health in the years preceding his death. Although the complainant refers to his brother’s “illness”, there is no material before me identifying what illness(es) the complainant’s brother may have experienced in the time before his death. There is no information suggesting that any of his brother’s personal health information may be relevant to his own health care. There is therefore no basis to doubt the hospital’s conclusion that the personal health information in its possession is not reasonably required in order for the complainant to make decisions about his own health.

[29] I therefore agree with the hospital’s assessment that the complainant has not shown that the conditions for disclosure under section 38(4)(c) are met. As such, I find that the hospital did not have discretion to disclose this personal health information pursuant to section 38(4)(c).

[30] Having said that, the hospital has stated that it is willing to review the matter again if the complainant submitted a request for the information through his doctor,

providing reasons why the personal health information of his deceased brother is relevant to his own health care. I find the hospital's suggestion a sensible approach in the circumstances. I therefore recommend that if the complainant wishes to renew his request, he provide a statement from a health care practitioner describing specifically what kind of information is sought, and why that information is required by him in order to make decisions about his health care or the health care of his children.

[31] Although a complainant is not required to make a request for disclosure under section 38(4)(c) through a health care practitioner, nor provide evidence from a health care practitioner supporting the need for the information, this supporting documentation will help him to show that the conditions permitting disclosure under section 38(4)(c) exist. As disclosure under section 38(4)(c) must be based on a health care need, a health care practitioner is in a position to provide the best evidence of that need.

[32] Finally, I find that the complainant's submissions on section 40(1) (which he did not raise in his request to the hospital) provide no evidence that discretionary disclosure is permitted or justified under that section of the *Act*. The complainant may have questions and subjective concerns about members of his family, but they do not provide reasonable grounds for believing that disclosure of his brother's personal health information is necessary for the purpose of "eliminating or reducing a significant risk of serious bodily harm", as required by section 40(1).

**NO ORDER:**

For the foregoing reasons, no order is issued.

Original Signed by: \_\_\_\_\_  
Sherry Liang  
Assistant Commissioner

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January 8, 2016