

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 26

Complaint HA14-59

Dr. Byron M. Hyde

April 19, 2016

**Summary:** This decision considers whether a fee charged by a doctor in relation to a medical-legal report is a fee for making available a record of personal health information under the *Personal Health Information Protection Act* (the *Act*). In this decision, the adjudicator finds that the fee charged for the creation of the medical-legal report is not a fee governed by the *Act*. In the result, no order is issued.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, sections 52, 53 and 54.

### BACKGROUND:

[1] Through her solicitor, the complainant submitted a written request to Dr. Byron M. Hyde for a "complete copy" of Dr. Hyde's "clinical notes and records" for the complainant from January 1, 2008 to the date of the request, September 13, 2013. Enclosed with the request was a direction executed by the complainant, authorizing the release of the requested information from Dr. Hyde to her solicitor. After not hearing from Dr. Hyde, the solicitor wrote to him again on December 9, 2013, reiterating the request and enclosing a copy of the first letter.

[2] On July 21, 2014, staff of Dr. Hyde's office wrote to the complainant advising that the file was ready for pick-up and enclosing an invoice seeking payment of \$825. In the invoice, the fee is described as "Report Fee: \$825 for medical-legal work."

[3] Although the complainant disputed having requested any medical-legal work from Dr. Hyde, she paid the fee after requesting, and receiving, a revised invoice from Dr. Hyde's secretary. The revised invoice specified that a "Report fee" of \$825 was charged "to organize all patient data into a comprehensive chart and copy the entire file at the request of" the complainant's lawyer. The fee of \$825 was unchanged. The complainant reports having received 141 pages of records after paying the fee.

[4] She subsequently filed a complaint with this office under the *Personal Health Information Protection Act* (the *Act*) in respect of the fee and her view that the records she received after paying the fee did not satisfy her request.

[5] During the mediation stage of the complaint process, counsel for Dr. Hyde provided the complainant with additional records and details of the search that was conducted for records responsive to her request. The complainant agreed that the additional records satisfy her request. Those records are not at issue in this complaint.

[6] On the matter of the fee, the complainant is of the view that a charge of \$825 for the release of 141 pages of records is excessive and unreasonable. The complainant maintains that she repeatedly requested from Dr. Hyde a copy of her records of personal health information, and not a report of any "medical-legal work." The complainant seeks a reimbursement of \$760, as she accepts a copying charge of \$65 as being reasonable in the circumstances.

[7] Dr. Hyde maintains that he received in-person requests from the complainant for preparation of a medical-legal report. According to Dr. Hyde, to his knowledge, the complainant never made a request for "a straight copy of her medical records" directly to him. He submits that the fee of \$825 is for the preparation of a medical-legal report at the complainant's request, and is not "fees for making the record available" to the complainant under the *Act*. He thus suggests that the guidance provided by this office regarding "reasonable cost recovery" for fees for access under the *Act* has no application in these circumstances.

[8] As no further mediation was possible, this complaint was transferred to the review stage of the complaint process under section 57(3) of the *Act*. During my review I sought, and received, representations from Dr. Hyde and the complainant, which I have considered in arriving at my decision. In this decision, I find that the September and December, 2013 requests made by the complainant (through her solicitor) were requests for access to records of her personal health information under the *Act*. I find that the "medical-legal report" created by Dr. Hyde is not responsive to the complainant's access request under the *Act*, and the fee for its creation is not subject to the fee provisions of the *Act*. As a result, no order is issued under the *Act*.

## **RECORD:**

[9] At issue in this complaint is a 141-page report created by Dr. Hyde, which he describes as a "medical-legal report."

## **DISCUSSION:**

[10] As a preliminary matter, I confirm that Dr. Hyde, in providing health care to patients, is a "health information custodian" as defined in section 3(1) of the *Act*. There is no dispute between the parties that the report created by Dr. Hyde contains "personal health information" of the complainant, as that term is defined in section 4 of the *Act*.

[11] Section 52 provides that individuals have a right of access to records of their personal health information in the custody or under the control of health information custodians, subject to limited exceptions. An individual may exercise her right of access under section 52 by making a written request under section 53.

[12] The issue in this complaint is whether the fee of \$825 charged by Dr. Hyde for creation of the report should be upheld under the *Act*. This depends on whether the fee was a charge for making available a record of personal health information under section 54(10) of the *Act*. This section states:

A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part [Part V of the *Act*, which among other things grants an individual a right of access to records of her personal health information] 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.

[13] Section 54(1)(a) requires a health information custodian who receives a request from an individual for access under section 53 to make the record available to the individual, including by providing her with a copy of the record upon request.

[14] During the course of my review, I asked the parties for representations on issues including the proper interpretation of the complainant's request, whether the *Act* applies to the request and whether the report produced by Dr. Hyde is responsive to the request.

[15] Through his solicitor, Dr. Hyde takes the position that the complainant requested that he prepare a medical-legal report, and that he created the record at issue in satisfaction of that request. He submits that, in keeping with his standard practice and prior to preparation of the report, he advised the complainant of his fee of \$200 per hour for preparation of a medical-legal report, and gave her a time estimate of four hours. He describes the \$825 fee as a charge of \$800 for the time spent preparing the

report, and \$25 for making a copy of the report. He notes that the copying charge is in accordance with the fee framework that has been applied by this office in past decisions considering the fee provisions of the *Act* (including most recently in PHIPA Decision 17)—he makes this observation in spite of the fact he disputes that the fee provisions of the *Act* apply in this case.

[16] The complainant provided this office with copies of letters from her solicitor, dated September and December 2013, requesting from Dr. Hyde “a complete copy of [Dr. Hyde’s] clinical notes and records” for the complainant. Dr. Hyde acknowledges that these letters were received by his office, but states that they were misfiled by his staff and that he was not made aware of these requests until during this complaint process. He submits that his first notice of a request from the complainant was an oral request she made to him in June 2014, and that it was a request for a medical-legal report and not for a copy of her records. He provides extracts of what he describes as his contemporaneous notes of her visits to him, which he says confirm his recollection of events.

[17] The complainant contests Dr. Hyde’s account of events. She denies ever having asked him to prepare a medical-legal report, or having received an estimate from him for the preparation of such a report. She also denies that she would ever make such a request orally rather in writing, given her understanding that a request for a report of this nature ought to be accompanied by explicit instructions to the report-writer. She suggests that Dr. Hyde’s notes do not accurately reflect their interactions. Instead, she reports having raised, repeatedly and during many subsequent visits with Dr. Hyde, her requests for access to records of her personal health information, as Dr. Hyde had not fulfilled her solicitor’s written requests. She makes a number of other allegations about Dr. Hyde’s conduct in this matter, some of which have more relevance to another complaint involving the same parties for which the review is ongoing.

[18] I am not in a position to resolve the parties’ differing accounts and recollections of events, including on the question of whether the complainant did in fact make oral requests for a “medical-legal report” in addition to the written requests for “clinical notes and records” relating to her. I find that the written requests clearly qualify as requests for access to records of the complainant’s personal health information within the meaning of section 53 of the *Act*. Based on these written requests, Dr. Hyde was obligated, under section 54, to grant access to the records or to provide written notice of his reasons for not doing so. There is no dispute that Dr. Hyde did not respond to these requests in accordance with Part V of the *Act*.

[19] During the mediation stage of this complaint, Dr. Hyde provided to the complainant records of her personal health information in response to those requests, and in satisfaction of her right of access under section 52 of the *Act*. I observe that Dr. Hyde had the discretion to charge the complainant a fee for access to those records at that time under section 54(10). My understanding is that he did not charge a fee for access.

[20] The records of the complainant's personal health information that were released to her at mediation are not at issue here. The record at issue in this complaint is a different document, one which Dr. Hyde maintains he created in response to his understanding that the complainant requested that he prepare a "medical-legal report," and not merely a "straight copy" of his clinical notes and records. From the parties' representations, I understand the preparation of a medical-legal report to require certain time, effort and skill on the part of a physician. The parties refer to guidance provided by the College of Physicians and Surgeons of Ontario and the Ontario Medical Association on the preparation of such documents, which these organizations describe as "third party reports." This guidance, while not binding on me, indicates that, in the absence of any legal requirements, the fee to be paid by patients for third party reports is a matter of negotiation between patients and physicians.

[21] I conclude that the record at issue here is a medical-legal report, created by Dr. Hyde in response to what he says he understood was a request for such a report, and that the fee was a charge for preparation of that report. The medical-legal report did not exist and was not, at the time the complainant made her request for access under the *Act*, a "record" of "personal health information" in the doctor's custody or under his control to which she had a right of access under section 52 of the *Act*. An individual may request the creation of a medical-legal report from her physician, but such a request is made outside the *Act*, and is not governed by the *Act*. This means that the *Act's* requirements concerning the timing of response and the right of access do not apply to a request for the creation of a medical-legal report, and that the *Act's* provisions regarding the fee for access (at sections 54(10), (11) and (12)) do not apply to the creation of such a report. In particular, I find that a charge for the creation of a medical-legal report is not a fee for making a record of personal health information available to an individual under section 54(10) of the *Act*.

[22] In the result, the main issues of concern for the parties—whether the complainant ever requested the creation of a medical-legal report, and the amount of the fee that Dr. Hyde can charge for creation of that report—are not matters for determination under the *Act*. Given this, no order can be issued to settle these disputes under the *Act*.

[23] I wish to emphasize that this decision makes no findings on the credibility of either party, or on the validity of the fee charged for the medical-legal report. While I have found the *Act* does not provide a remedy in these circumstances, there may be other avenues available to the complainant to resolve this dispute.

**NO ORDER:**

[24] For the foregoing reasons, no order is issued.

Original Signed By: \_\_\_\_\_  
Jenny Ryu  
Adjudicator

\_\_\_\_\_ April 19, 2016