

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 24

Complaint HA15-16

City of Ottawa

February 9, 2016

Summary: This complaint deals with access to records of personal health information. The complainant made a request to the City of Ottawa (the city) for her records of personal health information from the city's Health Unit. The city granted access in part and denied access to portions of the records, claiming the application of sections 52(1)(a), 52(1)(e)(iii) and 52(3) of the *Personal Health Information Protection Act (PHIPA)*. In this decision, the adjudicator finds that the records are dedicated primarily to the complainant's personal health information. The adjudicator also finds that most, but not all, of the withheld information is exempt under sections 52(1)(a) and 52(1)(e)(iii), and orders the city to disclose the non-exempt information to the complainant.

Statutes considered: *Personal Health Information Protection Act, 2004*, sections 3(1), 4(1), 52(1)(a), 52(1)(e)(iii) and 52(3).

Decisions considered: PHIPA Decision 17.

BACKGROUND:

[1] This decision disposes of the issues raised as a result of a complaint filed with this office relating to an access decision made by the City of Ottawa. The requester initially made an access request to the City of Ottawa under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for all records relating to her over a specified time period, including those with the City of Ottawa's Health Unit.

[2] The City of Ottawa issued two access decisions to the requester. The first decision was issued under *MFIPPA*, and the second decision was issued under the *Personal Health Information Protection Act (PHIPA)*. The decision at issue in this complaint relates to the City of Ottawa's decision made under *PHIPA*, in which it provided partial access to responsive records from its Health Unit. It denied access to other portions of the records, claiming the application of sections 52(1)(a) (legal privilege), 52(1)(e)(iii) (identification of a confidential source), 52(1)(f)(ii)(B) (refusal to provide access under section 38(a) or 38(b) of *MFIPPA* and 52(3) (record not dedicated primarily to personal health information) of *PHIPA*.

[3] The requester, now the complainant, filed a complaint of the City of Ottawa's (now the custodian) decision to this office.

[4] During the mediation of the complaint, the custodian issued a revised decision, disclosing additional portions of the records. The complainant received and reviewed the additional information and advised the mediator that she should have access to the records in their entirety. As a result, the complaint moved to the adjudication stage of the complaints process, where I decided to conduct a review. I sought and received representations from the custodian and the complainant, which were shared.

[5] For the reasons that follow, I find that the City of Ottawa's Health Unit is a health information custodian. I also find that the records contain the personal health information of the complainant and are primarily dedicated to personal health information about her. I uphold the custodian's access decision to withhold portions of the records under sections 52(1)(a) and 52(1)(e)(iii) of *PHIPA*, in part. I do not uphold the custodian's application of section 52(3) to withhold portions of the records, and I order it to disclose some of the withheld portions of the records to the complainant.

RECORDS:

[6] The records at issue consist of:

- Client Intake Discharge Forms;
- Public Health Nurse notes;
- Email correspondence; and
- An Ottawa Hospital Mobile Crisis Team referral.

[7] These records were disclosed to the complainant, in part. At issue are the portions of these records which were withheld.

ISSUES:

- A. Is the Medical Officer of Health for the Board of Health of the City of Ottawa a "health information custodian" as defined in section 3(1) of PHIPA?
- B. Do the records contain personal health information as defined in section 4(1) of *PHIPA*?
- C. Are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of PHIPA?
- D. Do any of the exemptions in section 52(1) of PHIPA apply to the records?

DISCUSSION:

Issue A: Is the Medical Officer of Health for the Board of Health of the City of Ottawa a "health information custodian" as defined in section 3(1) of PHIPA?

[8] As there is some dispute as to whether the City of Ottawa's Health Unit is a health information custodian, this issue must be addressed. Section 3(1) of PHIPA defines the term "health information custodian" and states, in part:

"health information custodian", subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any:

...

6. A medical officer of health of a board of health within the meaning of the *Health Protection and Promotion Act*.

[9] The custodian submits that the Medical Officer of Health for the Board of Health is a "health information custodian" as defined in section 3(1) of *PHIPA*. It goes on to state that the "City of Ottawa Health Unit" is the designated health unit for the city and that the Board of Health for the City of Ottawa Health Unit has a full-time medical officer of health as required by the *Health Protection and Promotion Act*. For purposes of complying with access requests under *PHIPA*, the Medical Officer of Health has designated the City Clerk and Solicitor to facilitate that process. In addition, the City of Ottawa provided representations in this complaint on behalf of the Medical Officer of Health.

[10] The complainant argues that because the City of Ottawa did not seek her consent to become her health information custodian, it is not entitled to claim that it is, in fact, a health information custodian as defined in *PHIPA*. She goes on to state that if the City has obtained her consent, it must provide evidence of such consent.

[11] I find that in the circumstances of this complaint, the City of Ottawa Health Unit and its Medical Officer of Health of a board of health within the meaning of the *Health Protection and Promotion Act* is a health information custodian within the meaning of paragraph 6 of section 3(1) of *PHIPA*. I also note that the complainant's consent to designate the City of Ottawa Health Unit as a health information custodian is neither a relevant consideration nor a requirement in determining whether one is a health information custodian as contemplated in *PHIPA*.

Issue B: Do the records contain personal health information as defined in section 4(1) of *PHIPA*?

[12] The custodian submits that the records at issue contain the personal health information of the complainant as defined in section 4(1) of *PHIPA* which states, in part:

“personal health information” subject to subsections (3) and (4), means 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,

. . .

[13] In the circumstances of this complaint, section 4(3) of *PHIPA* is also relevant, which states:

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

[14] The custodian states that the records were created by a Public Health Nurse (PHN) who works in the Health Promotion and Disease Prevention Unit of the city's

Health Unit. The custodian goes on to state that the PHN made three "interventions" with the complainant and that the records at issue document the interventions. The documentation includes intake/discharge forms, nurses notes and email correspondence. The PHN also completed a referral form following one of the interventions. The custodian advises that the complainant refused the PHN's services.

[15] The custodian also argues that all of the records at issue consist of the complainant's personal health information because they contain information relating to her physical and mental health and/or to providing health care to her by the PHN. The custodian states:

Although treatment/referrals were not actually provided to the [complainant], the notes of the PHN contain observations that were made for a health related purpose and that were carried out to promote health. The City has provided the [complainant] with the entire PHN's file, subject to exempting portions of some records. The PHN's file includes notes and emails that relate to her interactions with other City employees . . . As these notes and emails include the [complainant's] personal information, they may be considered a mixed record of personal and personal health information that is subject to *PHIPA*.

[16] The complainant states only that the "so-called health record" which she received from the custodian is not accurate, complete or up-to-date.

[17] Having reviewed the representations of the parties and the records, I find that they contain identifying information about the complainant which relates to her physical or mental health and to the provision of health care to her. I also find that some of the records are what can be described as "mixed" records, because they include identifying information about the complainant that is not personal health information but that is contained in a record that contains her personal health information. As a result, I find that the records at issue are records of personal health information as defined in sections 4(1) and 4(3) of *PHIPA*.

Issue C: Are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?

[18] In its decision letter issued to the complainant, the custodian withheld portions of the records, claiming the application of section 52(3) of *PHIPA* which states:

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.

[19] Under section 52(3) of *PHIPA*, if a record is not dedicated primarily to personal health information about the individual requesting access, the requester only has a right to access any personal health information that can reasonably be severed.

[20] The custodian advises that all of the records consist of the entire contents of the PHN's file relating to the complainant. The PHN, the custodian states, created the records in responding to a health issue relating to the complainant. The records document how the issue was brought to the PHN's attention and how she attempted to make contact with the complainant. The custodian goes on to state that on occasion the records refer to activities that were carried out by other city employees that do not concern the provision of health care, but that the primary purpose of the records was to document the provision of health services. Consequently, contrary to the position taken by it in the decision letter, the custodian submits that the records are primarily dedicated to personal health information about the complainant.

[21] The complainant's representations do not address this issue.

[22] In PHIPA Decision 17, Assistant Commissioner Sherry Liang interpreted the meaning of section 52(3) of *PHIPA*, which limits one's access rights under section 52(1).¹ She examined the distinction between records that are or are not primarily dedicated to personal health information about an individual, and noted that if a record is dedicated primarily to personal health information about an individual, that individual has a right of access to the entire record. Assistant Commissioner Liang stated:

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*.

[23] Assistant Commissioner Liang found that the preferred approach in taking this step is a qualitative, rather than a quantitative, approach in which the total quantity of personal health information in a record is only one factor to be considered in determining whether it is dedicated primarily to personal health information about an individual. Other factors which ought to be considered include:

- whether the personal health information of the individual is central to the purpose for which the record exists;

¹ Subject to any of the applicable exemptions set out in section 52(1).

- whether the record would exist “but for” the personal health information of the individual in it;
- whether the record is qualitatively related to other matters, for example, scheduling, legal advice and strategies for communicating with the complainant;
- whether the record was created in the usual course of clinical interaction; and
- whether the record arises indirectly and several steps removed from the actual clinical experience.

[24] Assistant Commissioner Liang further found that if, after consideration of all the circumstances, a record is not dedicated primarily to the personal health information of the individual seeking access, the right of access applies only to the individual’s personal health information that can be reasonably severed from the record.

[25] Having reviewed the custodian’s representations and the records, I find that all of the records are dedicated primarily to the personal health information of the complainant. The records comprise her file with the City of Ottawa’s Health Unit, and are directly related to the provision of health care by the Health Unit’s PHN. In making this finding, I have taken into consideration that:

- the complainant’s personal health information is central to the purpose for which the records exist;
- the records would not exist but for the complainant’s personal health information in them;
- the records were directly created contemporaneously in the usual course of clinical interaction, and are not removed from the clinical experience; and
- the records are not qualitatively related to other matters.

[26] Having found that the records are dedicated primarily to the personal health information of the complainant, she has a right of access to them in their entirety, subject to any applicable exemptions in section 52(1). As previously stated, the records were disclosed in part to the complainant. The custodian withheld certain portions of them, claiming the application of only section 52(3). The custodian did not claim the application of any of the exemptions in section 52(1) to this information and on the material before me I find that none apply. Consequently, I order the custodian to disclose these withheld portions to the complainant.

[27] With respect to other portions of the records, the custodian claimed three of the exemptions in section 52(1), which I consider below.

Issue D: Do any of the exemptions in section 52(1) of PHIPA apply to the records?

[28] Section 52(1) of *PHIPA* sets out certain exemptions from the right of access to records of one's own personal health information. The custodian is claiming the application of the exemptions in sections 52(1)(a), (e)(iii) and (f)(ii)(B) of *PHIPA*, which state:

Subject to this Part, 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;

(e) granting access could reasonably be expected to,

(iii) lead to the identification of a person who provided information in the record to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the identity of the person be kept confidential;

(f) the following conditions are met:

(i) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or is acting as part of such an institution, and

(ii) the custodian would refuse to grant access to the part of the record,

(B) under clause 38(a) or (c) of the *Municipal Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record.

Section 52(1)(a) – legal privilege

[29] The custodian submits that portions of the records are subject to the solicitor-

client communications privilege under section 52(1)(a) of *PHIPA*. The custodian submits that solicitor-client communications privilege is established under *PHIPA* and *MFIPPA* as well as under the common law. In particular, the custodian states that legal counsel for the City of Ottawa provided legal advice to the PHN,² along with other city staff, in regard to the challenges they were encountering with a matter relating to the complainant. In this context, the custodian argues that the PHN was the client receiving legal advice.

[30] The custodian goes on to submit that the solicitor-client privilege applies to:

- the entire continuum of communications between a solicitor and client, including requests from the client for advice;
- any background work, including interviews, working notes, or research and inquiries that legal counsel has completed in the course of providing advice; and
- not only direct communications with clients, but also to the notes the PHN made, as they disclose the substance of the communications that are subject to the privilege.

[31] Further, the custodian argues that it applied appropriate discretion in applying the exemption and that the privilege has never been waived. The custodian states:

. . . Although a number of City staff including the PHN were privy to the advice as they were involved in the matter, the content including the fact that advice was sought on the particular legal issues remains confidential. The City applied the exemption to protect the interests of the City to protect the ability of City staff to confidentially consult with legal counsel while at the same time disclosing detailed information about the PHN's involvement including how she attempted to provide services and her recommendations in respect of the client's situation.

[32] The custodian also provided further representations, detailing the legal advice that was provided to the PHN, but I will not reproduce their contents in this order, as they meet this office's confidentiality criteria.

[33] The complainant submits that none of the information at issue is subject to solicitor-client privilege because:

² The PHN is a member of the custodian's staff.

- she finds it hard to imagine that such brief encounters between she and the PHN could be subject to solicitor-client privilege;
- the custodian has not cited a specific authority to support its position that the information at issue is subject to solicitor-client privilege;³
- including legal counsel in an email that is widely circulated does mean that it is privileged;
- the custodian has not provided evidence that there was a designated client seeking legal advice;
- privilege does not apply to in-house counsel under European Union Law;
- legal advice provided by government lawyers is privileged, but not policy or other advice; and
- email communications cannot be considered to be confidential.

[34] The custodian has withheld five small portions of records on the basis that they are exempt because they are subject to solicitor-client communication privilege. I have reviewed these portions and I am satisfied that they are exempt from disclosure on this basis. In particular, the withheld information consists of:

- communication between the PHN and her supervisor for the purpose of seeking legal advice; and
- direct communications between the PHN and the custodian's legal counsel made for the purpose of obtaining and giving legal advice.

[35] I am also satisfied that the custodian has not waived privilege in any withheld information. Consequently, I find that the portions the custodian withheld under section 52(1)(a) are exempt from disclosure.

[36] I am also satisfied that the custodian properly exercised its discretion in balancing the complainant's access rights to her personal health information with the custodian's interests that the solicitor-client privilege protects. I am mindful that the custodian disclosed as much of these records as possible, withholding only that limited information which I have found to be subject to solicitor-client privilege.

³ The complainant cites a paper prepared for the Canadian Bar Association entitled "*Solicitor Client Privilege in Canada.*"

Section 52(1)(e)(iii) – identification of a confidential source

[37] The custodian submits that the records contain information that directly or indirectly identifies individual(s) who provided information in confidence to it. In particular, the custodian states that an issue relating to the complainant was reported by the referral source(s) to the City's Health Unit, who in turn provided the information to the PHN. The PHN's role, the custodian advises, was to contact the individual who reported the issue and provide assistance to the complainant, including referring her to other health professionals. The custodian goes on to state that it withheld the name of the referral source(s) because those individual(s) had contacted the custodian in a personal capacity and implicitly provided information about the issue relating to the complainant in confidence. The exempt portions in the records include the name of the source as well as other passages, the disclosure of which would reveal that identity of the confidential referral source(s). The custodian further submits that it is clear on the face of the records that some of the individual(s) who provided information to it did so with an expectation of confidentiality.

[38] Lastly, the custodian provided more detailed information concerning the referral source(s), but I will not reproduce this information in this order, as it meets this office's confidentiality criteria.

[39] The complainant states that she is entitled to know the "information of alleged informants" when there is a legal action commenced by her, and that the custodian has refused to provide her with this information.

[40] For ease of reference, I reproduce section 52(1)(e)(iii) of *PHIPA* as follows:

Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

(e) granting access could reasonably be expected to,

(iii) **lead to the identification of a person** who provided information in the record to the custodian **explicitly or implicitly in confidence** if the custodian considers it appropriate in the circumstances that the identity of the person be kept confidential;

[emphasis added]

[41] I have reviewed the portions of the records for which the custodian has claimed this exemption and I am satisfied that granting access to this information would lead to the identification of individuals who provided information to the custodian. Based on the custodian's representations and on my review of the records, I am also satisfied that

some of the information provided to the custodian was done so in confidence either explicitly or implicitly, and that it is appropriate for the custodian to keep this information and the identity(ies) of the provider of the information confidential.

[42] Conversely, I find that the custodian has not provided sufficient evidence that the information that was provided to it by one source was done so either explicitly or implicitly with an expectation of confidentiality, nor is this evident on the face of the record. In fact, the information contained in the record suggests otherwise. On this basis, it is not appropriate in these circumstances that the identity of this individual be kept confidential. Consequently, I find that the information provided by this individual, including their identity is not exempt from disclosure under section 52(1)(e)(iii) and I order the custodian to disclose it to the complainant.

[43] With respect to the information that I have found to be exempt under section 52(1)(e)(iii), I am satisfied that the custodian properly exercised its discretion in balancing the complainant's access rights to her personal health information with protecting the privacy of the identity of individuals who provide information to custodians in confidence. I am mindful that the custodian disclosed as much of these records as possible, withholding only that limited information which I have found is exempt under section 52(1)(e)(iii).

Section 52(1)(f)(ii)(B) – access to own information would be denied under MFIPPA

[44] The custodian made reference to this exemption only with respect to the information it claims is exempt because it is subject to solicitor-client privilege. Having found that these portions of the records are already exempt under section 52(1)(a), it is not necessary to determine whether they are also exempt under *MFIPPA*, as contemplated by section 52(1)(f)(ii) of *PHIPA*.

[45] In sum, I uphold the custodian's access decision to withhold portions of the records at issue under sections 52(1)(a) and 52(1)(e)(iii) of *PHIPA*, in part. I do not uphold the custodian's application of section 52(3) to withhold portions of the records.

ORDER:

1. I order the custodian to grant the complainant access to certain records or portions of records. I have enclosed copies of the records that are to be disclosed to the complainant, in full. Where only portions of the records are to be disclosed, I have enclosed copies of those records and highlighted the portions that are to be disclosed to the complainant.

2. I reserve the right to require the custodian to provide me with copies of the records it discloses to the complainant.

Original Signed by: _____

Cathy Hamilton
Adjudicator

February 9, 2016 _____