

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 30

Complaint HA14-96

Mackenzie Health

July 8, 2016

Summary: The daughter of a deceased patient made a request to the hospital for access to records of a meeting between the daughter and the hospital to discuss its treatment and care of her mother. The hospital denied access to two records, in full, on the basis of solicitor-client privilege.

In this decision, the adjudicator finds that the records contain the personal health information of the complainant's mother, to which the complainant exercises a right of access, on her mother's behalf, under section 52(3) of *PHIPA*. The records also contain the complainant's own personal information, to which she has a right of access, on her own behalf, under section 47(1) of *FIPPA*. However, the adjudicator concludes that both the personal health information of the complainant's mother and the complainant's own personal information are exempt on the basis of solicitor-client privilege. In the result, the adjudicator upholds the hospital's denial of access to the records, in full.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, as amended, ss 2 (definitions), 3, 4, 5(1), 8(1), 8(4), 23(1), 24, 25, 52; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, as amended, ss 2 (definitions), 19, 47(1), 49.

Decisions Considered: PHIPA Decision 17, PHIPA Decision 27.

BACKGROUND:

[1] The daughter of a patient of Mackenzie Health (the hospital) made a request to

the hospital for a number of records relating to her deceased mother's care. This complaint addresses the portion of the daughter's request seeking the notes of a May 10, 2013 meeting between hospital staff and the daughter, along with two individuals who accompanied the daughter, held after her mother's death.

[2] In response to this aspect of the request, the hospital issued a decision under the *Personal Health Information Protection Act, 2004 (PHIPA)*, denying access to the records on the basis of the exemptions at section 52(1)(c) (continuing proceedings) of *PHIPA* and sections 13(1) (advice or recommendations) and 19(b) and (c) (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, available to the hospital through section 52(1)(f) of *PHIPA*.

[3] The daughter complained about the hospital's denial of access to this office, becoming the complainant in this matter.

[4] As the parties were unable to resolve the issues through mediation, the complaint was transferred to the review stage of the complaint process under section 57(3) of *PHIPA*. During the course of my review, I sought and received representations from the hospital and the complainant on the complainant's right of access to the records under *PHIPA* or *FIPPA*, or both.

[5] By the end of the review process, the hospital had revised its position. It continues to deny access to the records in full. The hospital submits that the records contain only snippets of personal health information of the complainant's mother, which it is not required to release to the complainant, and that the remainder of the records are protected by solicitor-client privilege.

[6] In this decision, I find that the records contain both the personal health information of the complainant's mother and the personal information of the complainant, and that the complainant is entitled to request access to both kinds of information under *PHIPA* and *FIPPA*, respectively. I conclude, however, that the records are exempt in full on the basis of solicitor-client privilege. As a result, I uphold the hospital's decision to deny access to the records, in full.

RECORDS:

[7] At issue in this complaint are two sets of meeting notes from a May 10, 2013 meeting between hospital staff, the complainant and two attendees who accompanied the complainant.

ISSUES:

A. Does *PHIPA* or *FIPPA*, or both, apply in the circumstances of this complaint?

- B. What is the extent of the complainant's right of access to the records under the applicable statute(s)? Are the records exempt by reason of solicitor-client privilege? If so, did the hospital exercise its discretion under the applicable statute(s)?

DISCUSSION:

A. Does *PHIPA* or *FIPPA*, or both, apply in the circumstances of this complaint?

[8] Under this heading, I will address the preliminary question of whether *PHIPA* or *FIPPA*, or both, apply in the circumstances of this complaint.

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

[10] Under *PHIPA*, the right of access to personal health information belongs to the individual to whom the information relates (*PHIPA*, section 52), or to his or her "substitute decision-maker"—a person authorized to make a request for access on the individual's behalf (*PHIPA*, sections 5(1), 23, 25). *PHIPA* does not otherwise provide any right of access to records of personal health information.

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

[12] In this complaint, there is no dispute that the hospital is a body subject to *PHIPA* pursuant to section 3(1) of *PHIPA*, and is an institution subject to *FIPPA* within the meaning of section 2(1) of *FIPPA*.¹

[13] There is also no dispute that the records are records of "personal health information" of the complainant's mother within the meaning of section 4 of *PHIPA*. I find specifically that the records contain identifying information about the complainant's mother relating to her physical or mental health, within the meaning of paragraph (a), as well as information relating to the providing of health care to her, within the meaning of paragraph (b) of the definition at section 4(1) of *PHIPA*. The hospital also agrees that the records contain other identifying information about the complainant's mother that is not personal health information described in section 4(1), but that

¹ Specifically, under paragraph 4.i of section 3(1) of *PHIPA*, and under paragraph a.1 of section 2(1) of *FIPPA*. See also *PHIPA* Decision 17, footnotes 4 and 5, where this office considered, in detail, the status of a public hospital under both statutes.

nonetheless qualifies as her personal health information under section 4(3).² As a result, in accordance with the guidance provided by this office in PHIPA Decision 17,³ the hospital agrees that the presence of personal health information of the complainant's mother in the records means they are records to which the complainant's mother has a right of access under *PHIPA*.

[14] The parties also agree that the complainant acts as the substitute decision-maker for her deceased mother within the meaning of *PHIPA*. The complainant provided a copy of the will of her deceased mother, naming the complainant as a trustee of her mother's estate. The complainant is therefore entitled under *PHIPA* to exercise, on her mother's behalf, the right of access to records of her mother's personal health information.⁴

[15] The records also contain the personal information of the complainant. They are records of a meeting requested by the complainant to discuss her mother's health care, and contain, among other things, the complainant's name and an account of her role at the meeting. The information about the complainant in the records is her "personal information" as that term is defined in *FIPPA*, including at paragraphs (g) and (h) of the definition at section 2(1).⁵ As a result, the complainant has a right of access, under *FIPPA*, to her own personal information contained in the records of personal health information of her mother.

[16] Having found that the complainant may exercise a right of access to the records under *PHIPA* (on behalf of her deceased mother) and under *FIPPA* (on her own behalf), I will next determine the extent of her right of access to the records under both statutes.

B. What is the extent of the complainant's right of access to the records under the applicable statute(s)? Are the records exempt by reason of

² Section 4(3) of *PHIPA* states: "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."

³ Including, particularly, at paragraphs 71 and 74.

⁴ Section 23(1)4 of *PHIPA* sets out the authority of a deceased person's estate trustee (or the person who has assumed responsibility for the administration of the estate, if there is no estate trustee) to exercise powers with respect to a deceased person's personal health information. These powers include the authority to make a request for access to the personal health information of the deceased person (*PHIPA*, sections 25, 52, 53).

The complainant provided a copy of the will of her deceased mother, naming the complainant and her sister as executors of the will and estate trustees. The complainant also provided the consent of her sister (the joint executor and estate trustee) to the complainant's making a request for access to the personal health information of their deceased mother.

⁵ Personal information is defined at section 2(1) of *FIPPA* to mean recorded information about an identifiable individual, including, at paragraph (g), "the views or opinions of another individual about the individual;" and, at paragraph (h), "the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual."

solicitor-client privilege? If so, did the hospital exercise its discretion under the applicable statute(s)?

[17] The complainant requests access to the records both in her capacity as substitute decision-maker for her mother (under *PHIPA*), and in her own capacity as the person to whom personal information in the records belongs (under *FIPPA*).

[18] The complainant's right of access, on behalf of her mother, to her mother's personal health information is governed by section 52 of *PHIPA*. This section reads, in part:

(1) 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 [...]

(2) Despite subsection (1), an individual has a right of access to that part of a record of personal health information about the individual that can reasonably be severed from the part of the record to which the individual does not have a right of access as a result of clauses (1) (a) to (f).

(3) 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] For any of her own personal information in the records to which the complainant does not otherwise have access through her mother's *PHIPA* request, the complainant's right of access is under section 47(1) of *FIPPA*, which gives an individual a right of access to her own personal information held by an institution.

[20] Where records are subject to rights of access in both *PHIPA* and *FIPPA*, as in this case, the hospital must consider the interaction between the two statutes. Sections 8(1) and 8(4) of *PHIPA* provide guidance in this task. These sections state:

(1) Subject to subsection (2) [containing certain exceptions that are not relevant in this complaint], the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise.

(4) This Act does not limit a person's right of access under section 10 of the Freedom of Information and Protection of Privacy Act or section 4 of the Municipal Freedom of Information and Protection of Privacy Act to a

record of personal health information if all the types of information referred to in subsection 4 (1) are reasonably severed from the record.

[21] Read together, sections 8(1) and 8(4) of *PHIPA* preserve an individual's right of access, under *FIPPA* (and its municipal counterpart), to certain information in records of personal health information, the right of access to which is otherwise governed by *PHIPA*.⁶

[22] Where a requester seeks access to records of personal health information under both statutes, this office first considers the extent of any right of access under *PHIPA*, and then considers the extent of any right of access under *FIPPA* (or its municipal counterpart) to any remaining portions of the record to which the requester does not otherwise have access under *PHIPA*.^{7,8}

[23] The hospital agrees that both *PHIPA* and *FIPPA* apply to the complainant's request, and it considered the right of access under both statutes. In other words, the hospital first considered the extent of the complainant's right of access under section 52 of *PHIPA* to her mother's personal health information in the records, and then, applying section 8(4) of *PHIPA*, it considered the extent of her right of access under section 47(1) of *FIPPA* to the remainder of the records.⁹ It concluded that the complainant has no right of access to either the personal health information of her mother or to her own

⁶ Section 8(4) of *PHIPA* is read to include the right of access to one's own personal information at section 47(1) of *FIPPA* (and the equivalent section 36(1) in its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*), in addition to the right of access to general information at section 10 of *FIPPA* (and section 4 of *MFIPPA*). This interpretation was applied in *PHIPA* Decision 17 and *PHIPA* Decision 27. This is because reading section 8(4) narrowly, so that it does not include the right of access to one's own personal information in *FIPPA* and *MFIPPA*, would result in an individual having a lesser right of access to records containing his or her own personal information than to general records.

For similar reasons, this office interpreted the public interest override at section 23 in *FIPPA* to include sections 49(a) and (b), in addition to the exemptions listed in that section: see Order P-541 and many others.

⁷ This approach was applied in *PHIPA* Decision 17 and *PHIPA* Decision 27.

⁸ This office applies the "record-by-record" method of analysis to records subject to an access-to-information request. Applied to requests for access to one's own personal information, the "record-by-record" approach gives requesters a right of access to entire records (or the withheld portions of records) that contain their own personal information, subject to any applicable exceptions. See *PHIPA* Decision 17, particularly paragraph 61 and footnotes 7 and 110, for a good summary of the "record-by-record" approach.

⁹ This is because section 8(4) preserves the right of access under *FIPPA* (and *MFIPPA*) to any portions of a record of personal health information remaining after the personal health information is reasonably severed from it. By acknowledging the complainant's right of access to the records under *FIPPA*, the hospital implicitly takes the position that the personal health information in the records is reasonably severable within the meaning of section 8(4).

I recognize that the hospital later takes the position that the personal health information in the records cannot reasonably be severed under section 52(3) of *PHIPA*. (I make a different finding on this issue, below.) These two positions are compatible because the concepts of reasonable severability in section 8(4) and section 52(3) differ. See my discussion at paragraph 41, below.

personal information in the records, for different reasons.

[24] First, the hospital takes the position that the records of the complainant's mother's personal health information are not "dedicated primarily" to that personal health information, and that none of the personal health information in the records is reasonably severable for the purpose of providing access under section 52(3) of *PHIPA*. Then, for the remainder of the records, which are subject to the complainant's right of access under section 47(1) of *FIPPA*, the hospital claims the exemption at section 49(a) of *FIPPA* (discretion to refuse requester's own information), in conjunction with the exemption for solicitor-client privilege at section 19 of *FIPPA*. In the result, the hospital denies access to the records in full.

[25] The complainant argues that records generated from a meeting to discuss her mother must relate to her mother's personal health information. More generally, she believes that records of a meeting of a public organization should be available to all participants, regardless of their content.

[26] As any right of access to the records is under both *PHIPA* and *FIPPA*, I will consider the extent of the complainant's right of access, on behalf of her mother, to the records under *PHIPA*, as well as the extent of her right of access, on her own behalf, to any remaining portions of the records under *FIPPA*.

Access under *PHIPA*

Are the records of personal health information "dedicated primarily" to the complainant's mother's personal health information within the meaning of section 52(3) of PHIPA?

[27] Determining whether records of personal health information are "dedicated primarily" to the individual's personal health information is an important threshold question in determining the extent of the right of access under *PHIPA*. This is because, subject to any applicable exemptions, the right of access in *PHIPA* applies either to a whole record, or only to certain portions of a record of personal health information. 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, on the other hand, 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.

[28] *PHIPA* Decision 17 set out this office's approach to the interpretation of section 52(3). In order to determine whether a record is "dedicated primarily" to the personal health information of a requester within the meaning of section 52(3), this office takes into consideration various factors, including:

- the quantity of personal health information of the requester in the record;

- whether there is personal health information of individuals other than the requester in the record;
- the purpose of the personal health information in the record;
- the reason for creation of the record;
- whether the personal health information of the requester is central to the purpose for which the record exists; and
- whether the record would exist “but for” the personal health information of the requester in it.¹⁰

[29] This list is not exhaustive.

[30] Having applied this approach, the hospital concludes that the records are not dedicated primarily to the personal health information of the complainant’s mother. Although the records contain some personal health information of the complainant’s mother, the hospital states that they were created strictly for legal purposes, and are not qualitatively about the personal health information in them.

[31] The hospital explains that the records were generated by hospital staff following a meeting requested by the complainant to discuss her concerns about her mother’s health care. Hospital staff did not take notes during the meeting, as it is not the hospital’s practice to do so during family meetings. After the meeting, a senior hospital staff member asked the attending hospital staff members to provide her with their recollections of the meeting, in anticipation of a litigation claim by the complainant.

[32] The hospital describes the records as containing staff members’ accounts of the meeting, mainly referring to the conduct of the individuals present. The central purpose of the records, the hospital submits, is to document the meeting in order to address potential legal matters (which have since materialized) between the hospital and the complainant. These legal matters are several steps removed from the clinical experience of the complainant’s mother in the hospital. For all these reasons, the hospital takes the position the records are not qualitatively about the personal health information of the complainant’s mother in the records, but are instead about other matters.

[33] The complainant disputes that a meeting held to discuss her concerns about her mother’s care could generate records that are not “dedicated primarily” to her mother’s personal health information. She finds unfair the hospital’s decision not to release records of a meeting held at a public organization, at which she was a participant, and that was convened for the purpose of addressing these very concerns. She also notes that the meeting, and the various legal proceedings to which to the hospital refers, would not have arisen but for her mother’s experience at the hospital. She concludes

¹⁰ PHIPA Decision 17, para 95.

that her mother's personal health information must be central to the records.

[34] I have reviewed the records at issue and conclude they are not dedicated primarily to the personal health information of the complainant's mother within the meaning of section 52(3). Although the complainant requested the meeting in order to discuss her concerns about her mother's treatment and care, I accept the hospital's evidence that the records were not created to document any health care issues arising from that treatment and care, or another purpose for which the mother's personal health information would be central to the records. Instead, I accept that hospital staff generated the records at a later date, at the request of a senior-level staff member, for the purpose of documenting the meeting in order to seek legal advice in anticipation of litigation. The mother's personal health information in the records is incidental to this purpose. This is also evident from my review of the records, which are marked as privileged and confidential and prepared for litigation purposes, and from the records' contents, which I confirm are mainly devoted to recording hospital staff's recollections of the meeting and the comments and conduct of meeting participants.

[35] I appreciate the complainant's observation that her mother's experience at the hospital was the impetus for the events that followed, including the family meeting documented in the records and the various proceedings commenced by the complainant. The hospital acknowledges that the records contain some personal health information of the complainant's mother, because this was the topic of discussion at the meeting. Nonetheless, the main purpose of the records was to address legal matters arising, but several steps removed, from the experience of the complainant's mother at the hospital. Although it can be said that these records would not exist "but for" that clinical interaction, the records are not directly about the personal health information contained in the records, and are instead qualitatively about other matters.¹¹

[36] I conclude that the records are not "dedicated primarily" to the personal health information of the complainant's mother. As a result, the complainant only exercises a right of access, on her mother's behalf, to any reasonably severable personal health information in the records under section 52(3).

Is there any personal health information of the complainant's mother that can reasonably be severed from the records for the purpose of providing access?

[37] The hospital takes the position that there is no reasonably severable personal health information in the records, as the personal health information would, if released, comprise only meaningless snippets. It also notes that the complainant was present at the meeting and that any personal health information in the records would already be known to her, so that granting access to this personal health information is unnecessary.

¹¹ A similar analysis was applied in PHIPA Decision 17 (see particularly paragraph 111).

[38] The complainant asserts that all the records related to her mother are important to her, and objects to the hospital's characterization of any portions as meaningless snippets.

[39] In PHIPA Decision 17, this office applied the concept of reasonable severability considered in other access-to-information statutes, including *FIPPA* and its municipal counterpart, to personal health information. The adjudicator concluded that personal health information that would, if released, comprise only disconnected or meaningless snippets is not reasonably severable within the meaning of section 52(3), and, as a result, such snippets are not required to be released.¹²

[40] In this case, I find that some of the mother's personal health information in the records can reasonably be severed within the meaning of section 52(3) for the purpose of providing access. Some of this information comprises entire, or near-entire, sentences that can be meaningfully severed from the remainder of the records in order to consider whether there is a right of access under *PHIPA*. I also find relevant the complainant's submission that access to any such severances is of value to her. I find irrelevant the hospital's argument that the complainant was present at the meeting and is therefore already aware of the personal health information it seeks to withhold. This has no bearing on the question of reasonable severability for the purpose of providing access under section 52(3).

[41] I recognize that the hospital's position that the records cannot reasonably be severed under section 52(3) may appear to contradict its earlier acknowledgment of the complainant's right of access to the records under *FIPPA*, which requires that the records be reasonably severable within the meaning of section 8(4). In fact, these two positions are compatible. This is because the concept of reasonable severability in section 8(4) is applied for the purpose of preserving a right of access under *FIPPA* or *MFIPPA*, whereas a different concept of reasonable severability is applied in section 52(3), for the purpose of providing access under *PHIPA*. Personal health information is reasonably severable within the meaning of section 8(4) where the record contains discrete, meaningful portions of information that is not personal health information; in that case, the right of access in *FIPPA* or *MFIPPA* applies to the information that is not personal health information. Personal health information is reasonably severable within the meaning of section 52(3) where there are discrete, meaningful portions of personal health information in a record that is not dedicated primarily to that personal health information; in that case, the right of access in *PHIPA* applies to the personal health information.

[42] In this complaint, I have found that the records are not dedicated primarily to the personal health information contained in them, and that access to the reasonably severable personal health information in the records is under section 52(3) of *PHIPA*. I will therefore consider whether the hospital properly denied access to the personal

¹² PHIPA Decision 17, paragraph 133 and footnote 74.

health information under *PHIPA*. Before I do this, I will briefly comment on the complainant's right of access to her own personal information in the records under *FIPPA*, and the exemption claims that the hospital makes for the records in their entirety.

Access under *FIPPA*

[43] Section 47(1) of *FIPPA* gives individuals a general right of access to their own personal information held by an institution. This right of access in *FIPPA* is relevant in this case because the records contain personal information about the complainant, as an attendee of the meeting, in addition to the personal health information of the complainant's mother. Given this, the hospital also considered the complainant's right of access under *FIPPA* to her own personal information in the records.

[44] Section 49 of *FIPPA* provides a number of exemptions from the right of access in section 47. Section 49(a) of *FIPPA* reads:

A head may refuse to disclose to the individual to whom the information relates personal information [...] 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.

[45] In this case, the hospital relies on the discretionary exemption at section 49(a) of *FIPPA*, in conjunction with the exemption at section 19 (solicitor-client privilege), to deny access to the complainant's personal information in the records.

[46] Prior to taking the position that there is no reasonably severable personal health information in the records, the hospital initially sought to exempt any reasonably severable personal health information in the records under section 19 of *FIPPA*, available to the hospital under section 52(1)(f)(ii)(A) of *PHIPA*. This section states:

Subject to [Part V of *PHIPA*, governing the right of access], 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 [...] the following conditions are met:

the custodian would refuse to grant access to the part of the record under clause 49 (a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record[.]

[47] This section permits the hospital, as a body subject to both *PHIPA* and *FIPPA*, to claim the application of some *FIPPA* exemptions, as "flow-through" *FIPPA* claims, to deny access to personal health information in records.

[48] In accordance with the hospital's claim that the records are exempt, in full, on the basis of solicitor-client privilege, I will consider the application of section 49(a), in conjunction with section 19 of *FIPPA*, to the personal information of the complainant in the records, and, through section 52(1)(f)(ii)(A) of *PHIPA*, to the personal health information of the complainant's mother in the records.

Are the records exempt as a result of solicitor-client privilege?

[49] The hospital claims that the records are exempt by reason of statutory solicitor-client privilege. The applicable claim is section 19(c) of *FIPPA*, which states:

A head may refuse to disclose a record [...] 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.

[50] Section 19(c) encompasses two types of statutory privilege: statutory solicitor-client communication privilege, and statutory litigation privilege. The statutory litigation privilege survives the termination of litigation.¹³

[51] The hospital states that even before the complainant's mother's death in late 2012, the hospital reasonably contemplated that litigation may arise, based on the family's belief that their mother was being provided with substandard care. In its representations filed in a related complaint to this office (involving the same request and the same parties), the hospital reports that the complainant advised the hospital that she would be lodging formal complaints against physicians and nurses, and consulting her legal options. She also requested copies of her mother's records of personal health information "for legal purposes." Based on this, the hospital identified the matter as a potential legal matter before the complainant's mother's death, and took steps to investigate the complainant's concerns in anticipation of litigation.

[52] After the mother's death, the hospital received copies of complaints filed by the complainant to the regulatory colleges for physicians and nurses in Ontario (the findings of which the complainant has since appealed to the Health Professions Appeal and Review Board). The complainant also brought complaints to several other offices, including the Ministry of Health and Long-Term Care and the Ontario Ombudsman's office. While each of these proceedings is separate, the hospital states that they involve the same parties and arise from the same allegations.

[53] The meeting documented in the records occurred after these various processes had been commenced. The hospital states that it became clear to hospital staff during the May 10, 2013 meeting that the matter would move to litigation. As a result, the Operations Director of Enterprise Risk for the hospital asked participating staff to provide her with their recollections of the meeting in order to provide them to legal

¹³ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002), 62 O.R. (3d) 167 (C.A.).

counsel. Hospital staff created the records for this purpose shortly after the meeting, and the records were provided to legal counsel in order to obtain legal advice and to prepare for litigation. The hospital also reported the matter as a potential claim, and was later served with a statement of claim naming the hospital and certain hospital staff members as defendants.

[54] The complainant challenges the hospital's claim that it anticipated litigation immediately after the meeting, and that it requested the production of the records for that purpose. She disputes the reasonableness of this assumption, opining that many families express the belief that their family members received substandard care, and that this would not trigger a reasonable expectation of litigation in every case. She proposes that the hospital be required to provide more evidence to substantiate its claim.

[55] The complainant also identifies certain discrepancies in the dates cited in the hospital's representations—specifically, those relating to when the hospital began to anticipate that litigation may arise, when the operations director requested notes from meeting participants, when it reported the matter as a potential legal claim, and when it was served with a statement of claim.

[56] I have reviewed the records and the parties' representations, and particularly the discrepancies identified by the complainant in the hospital's representations. In one case, the complainant asserts that the hospital misidentified the date of the meeting. In fact, on my review of the hospital's representations, it is evident that the hospital is instead referring to the date of creation of one of the records, a few days after the date of the meeting. The other discrepancies are typographical errors on the part of the hospital—for example, where the hospital reports having made a claim on May 14 and later states that the claim was made on May 23 of the same year. Hospital legal counsel has since confirmed to this office that the date of submission of its claim was May 14, 2013, and that the May 23 date is an error in its representations.

[57] More significantly, the hospital in its representations stated that it contemplated litigation "as early as October 2013"—several months after the date of creation of the records. Hospital legal counsel has since confirmed that the date it first anticipated that litigation would arise was November 20, 2012, after the complainant contacted the hospital's patient relations office to file a complaint and to advise of her intention to take legal action against the hospital. Hospital legal counsel states that the reference to October 2013 in its representations is a typographical error. Although the complainant is inclined to disbelieve the hospital, I observe that the corrected date aligns with the chronology of events described by the hospital in the related complaint, arising from the same facts. In its representations filed in that complaint, the hospital states that it began to anticipate litigation after the complainant indicated that she was dissatisfied with the care provided to her mother, and that she intended to take legal action and to file complaints with the relevant regulatory colleges, which the complainant has since done. In those representations, the hospital states that it reasonably contemplated

litigation as early as November 20, 2012.

[58] In these circumstances, I accept the hospital's evidence that the records at issue in this complaint were prepared for legal counsel for use in giving legal advice or in litigation, which encompasses court proceedings as well as proceedings before administrative tribunals.¹⁴ I find credible the hospital's claim that it contemplated litigation several months before the date of creation of the records, and its explanation that the reference to October 2013 was made in error. The hospital reasonably perceived the complainant's words and actions in November 2012 as an indication that she might file complaints against the hospital and its staff, which she did. I also accept the hospital's submission that the May 10, 2013 meeting gave rise to a reasonable expectation that the complainant would follow up with legal action. In fact, the hospital reported the matter as a potential legal claim a few days after the meeting, and was subsequently served with a statement of claim from the complainant.

[59] The complainant states that the hospital mistakenly identifies the date of service of the statement of claim as June 10, 2014, when in fact service occurred in December 2014. If the date of service in the hospital's representations is an error, I find it immaterial to my finding that the records at issue were prepared for legal counsel in contemplation of or for use in litigation, and are protected by litigation privilege. The purpose of the records was to keep the hospital's lawyers apprised of contemplated litigation matters, and were created by hospital staff with this dominant purpose in mind. They also qualify for solicitor-client communication privilege, having been prepared for legal counsel for the purpose of obtaining legal advice. It is evident from the hospital's representations, and from the notations on the records themselves, that they were prepared in confidence, and I accept that privilege in the records has not been waived. Although the complainant, having been present at the meeting, may be aware of some of the records' contents, I am satisfied that any such portions are part of the communications from the hospital to its legal counsel, and are also protected by solicitor-client privilege.

[60] I therefore find that the records are exempt, in full, on the basis of solicitor-client privilege. Specifically, I find that that sections 49(a) and 19(c) of *FIPPA*, available to the hospital through the "flow-through" in section 52(1)(f)(ii)(A) of *PHIPA*, applies to the personal health information of the complainant's mother contained in the records, and that section 19(c) of *FIPPA*, in conjunction with section 49(a), applies to the personal information of the complainant in the records.

[61] This finding is subject to my review of the hospital's exercise of discretion under these sections, which I will consider next.

¹⁴ Order M-162.

Exercise of Discretion

[62] The section 52(1)(f) exemption in *PHIPA*¹⁵ and the exemptions at sections 49(a) and 19(c) of *FIPPA* are discretionary. Where an exemption is discretionary, the hospital has the discretion to grant access to information despite the fact it could withhold it. The hospital must exercise its discretion. As part of my review, I must determine whether the hospital exercised its discretion under *PHIPA* and *FIPPA*.

[63] In *PHIPA* Decision 17, this office found that considerations which may be relevant to an institution's exercise of discretion under *FIPPA* and its municipal equivalent may also be applicable to an exercise of discretion under *PHIPA*.¹⁶

[64] Through orders issued under *FIPPA* and its municipal equivalent, this office has developed a list of such considerations. These include:

- the purposes of the legislation, 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

¹⁵ *PHIPA* Decision 17, paragraph 153 and footnote 88.

¹⁶ *PHIPA* Decision 17, paras 227-228.

- the historic practice of the institution with respect to similar information.

[65] Not all these considerations will necessarily be relevant, and additional unlisted considerations may be relevant.¹⁷

[66] If I were to determine that the hospital failed to exercise its discretion, or that it erred in exercising its discretion (for example, by doing so in bad faith or for an improper purpose, by taking into account irrelevant considerations, or by failing to take into account relevant considerations), I may send the matter back to the hospital for a re-exercise of discretion. I may not, however, substitute my own discretion for that of the hospital.¹⁸

[67] 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 factors, it considered: the underlying principle of access to one's own information and the complainant's sympathetic need for information relating to her mother; the importance of maintaining its legal privileges, particularly in light of the ongoing proceedings involving the complainant; and the information about the complainant and about her mother that has already been released to the complainant in response to other aspects of her request. The hospital also considered whether release of the information would be beneficial for public transparency purposes. It observes that there are a number of other avenues being pursued by the complainant to address her concerns about her mother's care, and that release of the information at issue in this complaint will not increase public confidence or address any public interest concerns that may exist in relation to this matter.

[68] I accept that the hospital exercised its discretion under *PHIPA* and *FIPPA*, and did so properly. While the complainant makes a number of allegations against the hospital, including about the care it provided to her mother and its conduct in relation to her access-to-information requests, these are not relevant to my review of the hospital's exercise of discretion under *PHIPA* and *FIPPA*. The complainant emphasizes the importance of the records to her, which I find the hospital took into account in considering her right of access to the records, and her sympathetic need for them, in making its decision on access. 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. I uphold the hospital's exercise of discretion.

[69] Given all the above, I uphold the hospital's decision to withhold the records, in full, under *PHIPA* and *FIPPA*.

¹⁷ Orders P-344 and MO-1573.

¹⁸ Orders MO-1573, P-344 and MO-1573, in relation to this office's review of an institution's exercise of discretion under *FIPPA* and *MFIPPA*. This office also confirmed its ability to review a health information custodian's exercise of discretion under *PHIPA* in *PHIPA* Decision 17, *PHIPA* Decision 19 (upheld on reconsideration in *PHIPA* Decision 25) and *PHIPA* Decision 27.

DISPOSITION:

1. No order is issued under *PHIPA*.
2. I uphold the hospital's decision under *FIPPA*.

Original Signed By: _____
Jenny Ryu
Adjudicator

July 8, 2016 _____