

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 31

HA15-63

Dr. Peter Michael Fenton

July 28, 2016

Summary: The complainant sought access to the records of personal health information of his deceased father from Dr. Peter Michael Fenton (Dr. Fenton). This order determines that Dr. Fenton is deemed to have refused the complainant's request for access. Dr. Fenton is ordered to provide a response to the complainant regarding the complainant's request for access to records of personal health information in accordance with the *Personal Health Information Protection Act, 2004* and without recourse to a time extension.

Statutes Considered: *Personal Health Information Protection Act, 2004*, ss. 2, 3, 4, 23, 53 and 54.

BACKGROUND:

[1] This is a complaint under the *Personal Health Information Protection Act, 2004* (the *Act*). The complainant seeks access to records of personal health information relating to his deceased father that are in the custody or control of Dr. Peter Michael Fenton (Dr. Fenton).

[2] On July 27, 2015 the complainant made a written request by fax to Dr. Fenton for access to his father's records of personal health information. The written request stated that he was requesting:

The outstanding medical records of my deceased father, [...], that were omitted from the records released to him prior to his death and which he initially requested in February 2015.

The outstanding medical records span the years 1991 (i.e. including his records as a patient of deceased Dr. [...]) to Fall 2014.

[3] The complainant advised the Information and Privacy Commissioner/Ontario (IPC) that Dr. Fenton did not respond to this request. On August 31, 2015, the complainant sent a second fax to Dr. Fenton regarding the records of his father, but again he did not receive a response.

[4] On September 2, 2015 the IPC received a deemed refusal complaint from the complainant indicating it had been more than 30 days since he made his request for access to medical records to Dr. Fenton and he had not received a response. As a result, this file was opened.

[5] On September 4, 2015, the IPC sent a Notice of Review to the complainant and Dr. Fenton. The Notice of Review stated that the complainant filed a complaint alleging that Dr. Fenton was deemed to have refused the complainant's request for access by not giving a response within the time period set out in section 54 of the *Act*. The Notice of Review requested that Dr. Fenton immediately respond to the complainant's request for access and to forward a copy to the Analyst at the IPC assigned to this complaint. The Notice of Review indicated that if Dr. Fenton failed to do so by September 21, 2015, the IPC may issue an order requiring Dr. Fenton to provide a response to the complaint. The IPC received no response from Dr. Fenton to this Notice of Review.

[6] The Analyst assigned to this complaint telephoned Dr. Fenton's office on October 1, 2, 5, 8 and 14, 2015 and May 9, 10 and 11, 2016 but was unable to speak with Dr. Fenton. The assigned Analyst was also not able to leave a voicemail message on any of the above noted dates because Dr. Fenton's voicemail was full. The assigned Analyst telephoned on May 31, 2016 and was able to leave a voicemail message requesting that Dr. Fenton contact the IPC. The message has not been returned.

[7] On June 3, 2016, the assigned Analyst sent a letter to Dr. Fenton by courier. The letter advised Dr. Fenton of the Analyst's preliminary view that he was deemed to have refused the complainant's access request and requested representations from Dr. Fenton. The letter included a copy of the Notice of Review and the IPC PHIPA practice direction - Drafting a Letter Responding to a Request for Access to Personal Health Information. This letter again noted that the IPC may issue an order requiring that Dr. Fenton issue a response to the complainant. Dr. Fenton has not responded to the June 3, 2016 letter.

DISCUSSION:

Issue A: Are the records at issue “records” of “personal health information” as defined in sections 2 and 4 of the *Act*?

[8] Section 2 of the *Act* defines a “record” as:

...a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record.

[9] Section 4(1) of the *Act* states, in part:

In this *Act*,

“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,
- (c) Is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,
- (d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,
- (e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,
- (f) is the individual's health number, or
- (g) identifies an individual's substitute decision-maker

[10] "Identifying information" is defined in section 4(2) of the *Act* as information that identifies an individual or for which it is reasonable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

[11] The IPC was advised that Dr. Fenton assumed the practice and patients of the deceased's former physician, and that the requested records relate to the provision of health care by Dr. Fenton and the deceased's former physician. I am satisfied that the records contain identifying information that relates to the provision of health care to the complainant's deceased father.

[12] As a result, I find that the records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*.

Issue B: Is Dr. Fenton a "health information custodian" as defined in section 3(1) of the *Act*?

[13] The *Act* provides an individual with the right of access to records of personal health information about the individual that are in the custody and under the control of a "health information custodian". The term "health information custodian" is defined in section 3 of the *Act*, which reads, in part:

In this *Act*,

"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:

1. A health care practitioner or a person who operates a group practice of health care practitioners.

...

[14] A "health care practitioner" is a term defined in section 2 of the *Act*, which reads in part as follows:

"health care practitioner" means,

- (a) A person who is a member within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care,

...

[15] "Health care" is also defined in section 2 of the *Act*, in part, to mean:

Any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,

- (a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition
- (b) is carried out or provided to prevent disease or injury or to promote health, or

...

[16] Section 1(1) of the *Regulated Health Professions Act, 1991* includes the following definitions of "member" and "college":

In this *Act*,

"College" means the College of a health profession or group of health professions established or continued under a health profession *Act*;

...

"member" means a member of a College:

[17] Applying the definitions, I find that Dr. Fenton is a "health care practitioner" within the meaning of the *Act* and therefore a health information custodian. He is a member of the College of Physicians and Surgeons of Ontario who provided health care to the complainant's deceased father and who has custody or control of the records of personal health information as a result of or in connection with the provision of health care to the complainant's deceased father.

Issue C: Did Dr. Fenton respond to the request for access in accordance with section 54 of the *Act*? Is Dr. Fenton in a deemed refusal situation pursuant to section 54(7) of the *Act*?

[18] Section 53(1) of the *Act* states that an individual may exercise a right of access to a record of personal health information by making a written request for access to the health information custodian that has the custody or control of the personal health information.

[19] Section 25 of the *Act* sets out the authority of a substitute decision-maker to make a request, give an instruction, or take a step under the *Act* on behalf of another individual, and provides:

25. (1) If this Act permits or requires an individual to make a request, give an instruction or take a step and a substitute decision-maker is authorized to consent on behalf of the individual to the collection, use or disclosure of personal health information about the individual, the substitute decision-maker may make the request, give the instruction or take the step on behalf of the individual.

(2) If a substitute decision-maker makes a request, gives an instruction or takes a step under subsection (1) on behalf of an individual, references in this Act to the individual with respect to the request made, the instruction given or the step taken by the substitute decision-maker shall be read as references to the substitute decision-maker, and not to the individual.

[20] Where an individual is deceased, pursuant to section 23(1) of the *Act*, a consent to collect, use, or disclose personal health information about that individual may be given, withheld, or withdrawn by the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.

[21] The complainant has explained that his father is deceased and his estate does not have an estate trustee. The complainant is one of four individuals who has assumed responsibility for the administration of the deceased's estate. The IPC has been advised by the three other individuals who have assumed responsibility for the administration of the deceased's estate that they consent to this request for access to the deceased's records of personal health information. Given that the complainant is one of the individuals who has assumed responsibility for the administration of his deceased father's estate, and the fact that the other individuals who have also assumed responsibility for the estate consent to this request, I find that the complainant has the authority under the *Act* to make a request for the records of personal health information of his deceased father.

[22] Section 54 of the *Act* requires a health information custodian that receives a request from an individual (including from an individual's substitute decision-maker pursuant to sections 23(1) and 25 of the *Act*) for access to a record of personal health information about that individual to provide a response as soon as possible in the circumstances, but no later than 30 days after receiving the request. In certain circumstances, within 30 days after receiving the request for access, a health information custodian may give the individual written notice extending the time for a response for a further period of time not to exceed 30 days.

[23] If a response or notice of extension is not given within 30 days after receiving a request for access, the health information custodian is deemed to have refused the individual's request for access pursuant to section 54(7) of the *Act*, which states:

If the health information custodian does not respond to the request within the time limit or before the extension, if any, expires, the custodian shall be deemed to have refused the individual's request for access.

[24] On July 27, 2015 the complainant made a written request for access to Dr. Fenton. The complainant sent a fax on August 31, 2015 after submitting the request. The fax included a copy of his original request of July 27, 2016. The complainant indicated, and I have concluded, that Dr. Fenton has not responded to the complainant's request for access in compliance with section 54 of the Act.

[25] There is no evidence to suggest that, within the 30 days of receiving the request for access, Dr. Fenton provided the complainant with written notice extending the time for a response for a further period of time not exceeding 30 days. In any event, this additional 30-day period would have expired long ago.

[26] In light of Dr. Fenton's continued failure to respond to the request for access by the complainant in compliance with the Act, and to respond to the numerous attempts made by this office to resolve this matter without recourse to a formal order, the following passage by then Assistant Commissioner Brian Beamish in Complaint HA13-93 is worth repeating:

[27] My office has encouraged Dr. Atkinson-Mantini to meet her statutory obligations under the Act by providing the complainant with a response to her request for access to records of personal health information. The lack of response from Dr. Atkinson-Mantini to the written request for access of the complainant which was made more than six months ago, on May 13, 2013, is unacceptable. This has been further exacerbated by the lack of response from Dr. Atkinson-Mantini to attempts by this office to contact her.

[27] I find that Dr. Fenton is deemed to have refused the complainant's request for access pursuant to section 54(7) of the *Act*. Accordingly, I will order Dr. Fenton to issue a response to the complainant within one week of this decision, and to provide a copy to my attention to verify compliance.

ORDER:

1. Dr. Fenton shall provide a written response to the complainant regarding his request for access to the records of his deceased father's personal health information in accordance with the *Act* and without recourse to a time extension no later than **August 5, 2016**.

2. In order to verify compliance of Provision 1 of this Order, Dr. Fenton shall provide me with a copy of the response referred to in Provisions 1 by **August 5, 2016**. This should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original Signed By: _____
Alanna Maloney
Analyst

_____ July 28, 2016