Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 32

Complaint HA14-47

September 22, 2016

Summary: The complainants, on behalf of their daughter, submitted a written request for access to their daughter's hospital records and subsequently complained that the hospital did not respond to their access request within 30 days as required by section 54 of the *Personal Health Information Protection Act*. No review of the complaint is warranted in accordance with sections 57(3) and 57(4)(a) because the hospital satisfied its obligations under sections 54(1)(a) and 54(2).

Statutes Considered: *Personal Health Information Protection Act, 2004*, sections 54(1)(a), 54(2), 57(3) and 57(4)(a).

BACKGROUND:

[1] On the evening of April 29, 2014, the complainants faxed a written request to a hospital (the hospital) for access to their daughter's record of personal health information (the records) relating to a visit in October 2013.[1] The hospital received the access request when its Access to Information Office, Privacy Section (the Access Office) opened the next morning, on April 30, 2014. This was the complainants' third

[1] The daughter was under sixteen years of age at the time of the hospital visit but was over sixteen at the time of the access request. Along with the access request, the complainants enclosed a signed letter from their daughter authorizing them to access the records on her behalf. For easy reading, I will refer to the parents as the persons requesting access, although the request was made by the daughter through her parents.

request for the records in fewer than six months.[2]

[2] On May 26 and 27, 2014, the complainants received voicemail messages from the hospital asking them to telephone the Access Office. On May 28, 2014, the Access Office also sent the complainants correspondence inviting the complainants to "call to book an appointment in order to review the file." The complainants telephoned the hospital on June 2, 2014, and scheduled an appointment for June 4, 2014 to review the records. The complainants attended the hospital on June 4 and had a meeting with a representative of the Access Office who provided them with a copy of the records.

[3] The complainants subsequently complained to the Office of the Information and Privacy Commissioner (the IPC) that the hospital had not responded to their access request within the 30-day time period mandated by sections 54(1) and (2) of the *Personal Health Information Protection Act* (the *Act*).

[4] Upon receipt of the complaint, the IPC assigned it to an analyst and then to a mediator. After being notified of the complaint, the hospital submitted that it responded to the complainants' access request on May 14, 2014, within the time dictated by the *Act*, and that it provided the complainants with a copy of the records on June 4, 2014. A mediated resolution of the complaint was not possible and at the request of the complainants, their complaint was moved to the adjudication stage for a review under the *Act.*

[5] After reading the complaint file, I sent the complainants a letter dated June 14, 2016, advising them of my preliminary view that their complaint does not warrant a review pursuant to sections 57(3) and (4)(a) of the *Act* because there are no reasonable grounds to review their complaint and because the hospital has responded adequately to their complaint. In my letter, I invited the complainants to provide written submissions to explain why their complaint should proceed to the review stage in the event that they disagreed with my preliminary view. In response, the complainants provided extensive submissions.

[6] Having considered the complainants' submissions, I find that their complaint does not warrant a review under the *Act* in accordance with sections 57(3) and (4)(a) because there are no reasonable grounds for a review and the hospital has responded adequately to the complaint.

DISCUSSION:

[7] There is no dispute that the hospital is a "health information custodian" and that the records comprise "personal health information" under the *Act*. Accordingly, as a

[2] The complainants first requested the records on November 8, 2013, and received a copy of them that same day. They again requested the records on December 24, 2013, and received a copy of them on December 31, 2013.

preliminary matter I find that the hospital is a "health information custodian" under paragraph 4.i. of section 3(1) of the *Act*, and that the records at issue are "personal health information" under section 4(1)(a) of the *Act.* There is also no dispute, and I find that, the complainants' fax of April 29 was a request for access under section 52 of the *Act*, and that they were entitled to act on their daughter's behalf in respect of the access request.

[8] The issue in this complaint is whether the hospital responded to the complainants' access request as required by sections 54(1)(a) and (2) of the *Act*. These sections state:

> 54.(1) A health information custodian that receives a request from an individual for access to a record of personal information shall,
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> (a) make the record available to the individual for examination and, at the request of the individual, provide a copy of the record to the individual and if reasonably practical, an explanation of any term, code or abbreviation used in the record[.]
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> (2) Subject to subsection (3), the health information custodian shall give the response required by clause 1(a), (b), (c) or (d), as soon as possible in the circumstances but no later than 30 days after receiving the request.

[9] The hospital was required by sections 54(1)(a) and (2) to make the records available to the complainants for examination – and, if requested, provide them with a copy of the records – no later than 30 days after receiving the request.

[10] To determine the date by which the hospital had to respond to the complainants' request, it is first necessary to determine when the hospital received the request. The complainants faxed their access request to the hospital after regular business hours the evening of April 29, 2014. The Access Office was closed at that time. It received the request when it opened the following day, April 30, 2014. To calculate the 30-day response period, the receipt date counts as the first day and the thirtieth day is the last day of the time period.[3] Since April 30 was the first day of the 30-day response period mandated by section 54(2), the hospital was required to respond to the complainants' request in accordance with section 54(1)(a) by May 29, 2014. The question therefore is: did the hospital make the records available to the complainants for examination by May 29?

[11] The meaning of making the record "available" for the purposes of section 54(1)(a) of the *Act* is described in the PHIPA Guide as "giving the patient an

[3] The calculation of the response time for access requests under the *Act* is explained at page 536 of the *Guide to the Ontario Personal Health Information Protection Act*, Halyna Perun, Micheal Orr & Fannie Dimitriadis (Toronto: Irwin Law Inc., 2005) (the PHIPA Guide).

opportunity to view the record."[4] I adopt this interpretation in this complaint.

[12] The hospital states that it sent the complainants a letter on May 14, 2014, indicating that the records were ready, however, it did not retain a copy of its May 14 letter and was only able to provide a template version of the letter recreated after the fact. In support of its submission that it sent the letter, the hospital provides a screen capture of its Release of Information Desktop Log for the complainants' daughter's file that shows, in the "Letter History" category, that a letter was printed on May 14, 2014. The hospital also submits that its telephone calls to the complainants on May 26 and 27 were intended to set up a meeting to process the complainants' correction request (which they filed on May 13, 2014) and to confirm whether they had received the May 14 letter regarding their access request. It adds that it followed up with faxed correspondence on May 28, 2014, when the complainants did not respond to the two voicemails.

[13] The complainants assert that they did not receive the May 14 letter and that the voicemail messages of May 26 and 27, and the letter of May 28 that they received from the Access Office do not constitute a response as required by sections 54(1)(a) and (2) because these communications related to their May 13 correction request. In particular, the complainants argue that the voicemails cannot be considered a response to their access request because they lack any reference to the access request.

[14] The May 26 and 27 voicemail messages, which form part of the complaint file, indicate they are from the Access Office and ask that the complainants telephone the Access Office at a specified number and extension. The May 27 voicemail does not specify a purpose for the call, while the May 26 voicemail indicates that it pertains to the complainants' correction request. The May 28 letter, which indicates it is in reply to the complainants' correction request, contains a category entitled "other" which contains a written invitation to the complainants to "call to book a[n] appointment in order to review the file."

[15] I accept that the Access Office generated and printed the May 14 letter; however, it is possible it was not sent. Even if the letter was sent, I have no reason to doubt the complainants' submission that they did not receive it. I also accept that the hospital called the complainants on May 26 and 27 to confirm whether they had received the letter in addition to calling to discuss the complainants' correction request. The fact that the May 26 voicemail said that it related to the correction request does not preclude the call from also relating to the access request. Similarly, I accept that the May 28 letter which related to the complainants' correction request also addressed the access request by specifically inviting them to call to book an appointment to review the records.

[16] I conclude that the hospital's communications with the complainants on May 26,

[4] Page 540.

27 and 28 all relate to their access request even though the May 26 and 28 communications also clearly relate to their correction request. Moreover, I accept that all of these communications, which took place before the 30-day deadline of May 29, were intended to give the complainants an opportunity to view the records. I accept that the hospital had the records ready and available for the complainants' examination as early as May 14, 2014. I also accept that had the complainants contacted the Access Office in response to any of these communications, the hospital would have scheduled an appointment for the complainants to examine the records and receive a copy of them just as it did on June 2, 2014, when the complainants called the hospital in response to the voicemails of May 26 and 27 and the letter of May 28. Accordingly, even though the complainants did not receive a copy of the records until June 4, 2014, I find that the hospital's communications with the complainants about their access request and repeated invitations for them to contact the Access Office prior to May 29 amounted to the hospital giving the complainants an opportunity to view the records and thereby making the records "available for examination" in accordance with sections 54(1)(a) and (2) of the *Act.*

[17] The complainants maintain that the hospital was required to provide them with a written response to their access request and they take the position that the hospital breached the *Act* because it did not do so. I reject this argument. First, regardless of whether the May 14 letter was sent, the hospital's correspondence of May 28 contains a written invitation to review the file. If the *Act* requires a written response to their request, the letter of May 28 is sufficient to meet that requirement.

[18] I find, in any event, that in circumstances such as these no written response is required. Although the *Act* requires a health information custodian to provide a written response to an access request in some situations, such as where access is refused, a written response is not required where the custodian intends to make the record available under section 54(1)(a) in a timely manner. In this case, the hospital decided to make the records available to the complainants and went to some lengths to communicate that to the complainants within the timelines under the *Act*, thus meeting its obligations under sections 54(1)(a) and (2).[5]

[19] I also reject the complainants' allegation that the hospital prevented them from reviewing the original copy of the records during their meeting of June 4, 2014. The complainants received a copy of the records and the original records, by their own admission, lay on the desk positioned between them and the Access Office representative. Had the appellants wanted to view the original records, even though they already had a copy of them at that meeting, all they had to do was ask.

[20] Sections 57(3) and (4)(a) set out my authority to decline to review a complaint

[5] The complainants rely on the IPC's Practice Direction Number 2, which suggests that a written response is required in all circumstances once an access request is made. The *Act* prevails over this Practice Direction, and I have found that sections 54(1)(a) and (2) do not contain such a requirement.

as follows:

> 57(3) If the Commissioner does not take an action described in clause 1(b) or (c) or if the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified, the Commissioner may review the subject-matter of a complaint made under this Act if satisfied that there are reasonable grounds to do so.
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> 57(4) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,
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> > (a) the person about which the complaint is made has responded adequately to the complaint[.]

[21] In accordance with my authority under sections 57(3) and (4)(a) of the *Act*, I decline to review this complaint because there are no reasonable grounds for the complaint and the hospital adequately responded to the complaint. I issue this decision in satisfaction of the notice requirement in section 57(5) of the *Act.*

NO REVIEW:

For the foregoing reasons, no review of this matter will be conducted under Part VI of the *Act.*

Original Signed by: September 22, 2016

Stella Ball
Adjudicator