

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 34

HA15-28

Royal Ottawa Health Care Group

November 25, 2016

**Summary:** The complainant requested access to his personal health information, specifically, his interdisciplinary notes to the date of his request. The health information custodian, Royal Ottawa Health Care Group, denied access under section 52(1)(e)(i) (harm to patient and others) of the *Personal Health Information Protection Act, 2004*. In this decision, the adjudicator has determined that section 52(1)(e)(i) applies, and no order is issued.

**Statutes considered:** *Personal Health Information Protection Act, 2004*, section 52(1)(e)(i).

**Cases considered:** *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31

### BACKGROUND:

[1] The complainant is a patient at a mental health facility operated by Royal Ottawa Health Care Group (ROHCG). He was remanded to ROHGC after he was found not criminally responsible on account of mental disorder on two charges relating to physical violence.

[2] The complainant submitted a request for his personal health information to the ROHCG under section 53(1) of the *Personal Information Protection Act (PHIPA or the Act)*. In particular, he requested "my inter-disciplinary notes (staff) from admission to now. . . ."

[3] The ROHCG denied access under section 52(1)(e)(i) of the *Act* (harm to patient or others), explaining that:

Granting access could reasonably be expected to result in: Serious harm to the treatment or recovery of the patient. Serious bodily harm to another person.

[4] In response to the ROHCG's decision, the complainant submitted a complaint to this office under section 54(8)(a) of the *Act*.

[5] The complaint was assigned to a mediator pursuant to section 57(1)(c) of the *Act*. Mediation did not resolve the complaint.

[6] The file therefore moved on to the adjudication stage of the complaint process. As the assigned adjudicator, I decided to conduct a review under the *Act*. I sent a Notice of Review to ROHCG, inviting them to provide representations, which they did. Subsequently, at my request, they provided a signed statement by the complainant's treating psychiatrist. I then sent a Notice of Review to the complainant, along with the ROHCG's representations and the psychiatrist's signed statement, and invited the complainant to provide representations. Despite follow-up inquiries from this office, he did not do so.

[7] The sole issue in this appeal is whether section 52(1)(e)(i) of the *Act* applies.

## **RECORDS:**

[8] The records at issue, identified as responsive by ROHCG, are the Interdisciplinary Progress Notes and the Case Conference Notes found in the complainant's chart, totalling approximately 113 pages.

## **DISCUSSION:**

### **HARM TO PATIENT AND OTHERS**

#### **Does the exemption to the right of access to one's own personal health information in section 52(1)(e)(i) of the Act apply?**

[9] The ROHGC relies on section 52(1)(e)(i) of the *Act* to deny access to the records. This section states:

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 the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,

[10] The purpose of section 52(1)(e)(i) is to protect the treatment, recovery and physical security of a patient and others. Like the law enforcement exemption found at section 14 of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, this exemption must be approached in a sensitive manner given the difficulty of predicting future events.<sup>1</sup>

***Standard of Proof under section 52(1)(e)(i)***

[11] Both section 14(1) of *FIPPA* and section 52(1)(e)(i) of the *Act* apply where disclosure could *reasonably be expected to* cause harm. In order to meet the standard of proof in section 14(1) of *FIPPA*, it is not enough for the institution to take the position that the harms are self-evident from the record. The institution must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>2</sup>

[12] Section 52(1)(e)(i) of the *Act* is similar to section 49(d) of *FIPPA*, which provides an exemption from disclosure of medical information to the requester where it “could reasonably be expected to prejudice the mental or physical health of the individual.” It is also similar to section 20 of *FIPPA*, which applies “where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.”

[13] I therefore find that the standard of proof required under section 52(1)(e)(i) of the *Act* is the same as the standard under section 49(d) and 20 of *FIPPA*: the evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.

***Representations***

[14] ROHCG submits:

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<sup>1</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>2</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

At the time of the refusal to grant the complainant access to his personal health information he was acutely ill. Specifically, the complainant requested copies of interdisciplinary notes that are drafted by health care professionals, which are primarily nursing staff. Should the ROHCG have granted him access, the complainant would likely have misinterpreted the content of these notes and potentially incorporated the content into his delusional beliefs ultimately affecting nursing staff. Importantly, this could expose the authors of the drafted notes to violence by the complainant. Therefore, the ROHCG maintains its decision to withhold disclosure of the requested records to the complainant.

[15] The ROHCG also provided a statement by the complainant's treating psychiatrist. This individual provided the opinion that resulted in the denial of access at the request stage. He refers to the opinion, and states:

The opinion was based on evidence gleaned from multiple sources namely my findings on repeated mental state examination, opinions of members of the interdisciplinary team expressed during various clinical meetings (for instance, a case conference on [date]), the concerns expressed directly to me by [identified individuals] etc.

[16] The psychiatrist's statement provides further particulars of the complainant's history that support the application of section 52(1)(e)(i).

[17] As I have already noted, the complainant did not provide representations, although he was invited to do so.

[18] Based on the evidence provided by the ROHCG, I am satisfied that section 52(1)(e)(i) applies to the records at issue. The ROHCG has provided a statement from the complainant's treating psychiatrist to the effect that the complainant would likely misinterpret the records and potentially incorporate the content into his delusional beliefs ultimately affecting nursing staff, with the result of possible violence against the authors of the drafted notes.

[19] I find that this evidence, provided by an expert, demonstrates a risk of harm that is well beyond the merely possible or speculative. In particular, I am satisfied that disclosure could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the complainant, and/or a risk of serious bodily harm to another person.

[20] In making this finding, I note that ROHCG need not prove that disclosure will in fact result in such harm; rather, it must demonstrate a reasonable expectation of harm. I am satisfied that it has done so.

[21] This complaint is therefore dismissed.

**NO ORDER:**

For the foregoing reasons, no order is issued.

Original Signed by: \_\_\_\_\_  
John Higgins  
Adjudicator

\_\_\_\_\_ November 25, 2016