

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 48

Complaint HA15-56

Niagara Health System

August 4, 2017

Summary: The Niagara Health System received a request for all records relating to the complainant. It located records responsive to the request and granted complete access to them. The complainant requested a review on the basis that additional records should exist. Accordingly, the sole issue in this complaint is whether the Niagara Health System conducted a reasonable search for responsive records. In this decision, the adjudicator upholds the search as reasonable and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004 c3, Sched A, as amended, sections 53 and 54.

Decisions Considered: PHIPA Decisions 18 and 43.

BACKGROUND:

[1] The complainant submitted a request to the Niagara Health System (the custodian) under the *Personal Health Information Protection Act (PHIPA)* for access to his records of personal health information for the period of November 2011 to February 2012. The complainant specified that he sought access to:

All medical records including notes from all individuals from all departments including cross collaboration with other agencies[.] . . . No x-rays or imaging is required. Nursing notes, doctors' notes, admission notes, staff notes, correspondence.

[2] The custodian located records responsive to the request and disclosed all of them to the complainant. After reviewing the disclosed records, the complainant advised the custodian that certain medical records were missing. In response, the custodian sent a letter dated July 17, 2015 to the complainant enclosing a copy of his entire chart consisting of approximately 100 pages of records. Upon receipt and review of these records, the complainant advised the custodian that certain records were still missing; specifically, letters from a named clinical social worker in the custodian's inpatient mental health department that were sent to the Ontario Public Guardian and Trustee (OPGT). The complainant then filed a complaint about the matter with the Office of the Information and Privacy Commissioner (the IPC).

[3] The IPC attempted mediation of the complaint. During mediation, the custodian conducted additional electronic and physical searches of its records. The custodian also issued a supplementary response to the complainant confirming that it conducted additional searches but did not locate the social worker's letters or any additional responsive records. The custodian advised that the social worker had retired and no longer worked there. Finally, the custodian stated that it had disclosed all of the complainant's medical records and it denied his access request on this basis.

[4] As no further mediation was possible, this complaint was transferred to the review stage of the complaints process under section 57(3) of *PHIPA*. I decided to conduct a review and invited the representations of the custodian on the reasonableness of its search for responsive records. The custodian provided representations that it agreed to partially share with the complainant. The custodian asked that some computer software related information contained in its representations be kept confidential to protect the privacy and security of its patient database and personal health information files from risk of external intrusion. This information satisfied the confidentiality criteria in *Practice Direction Number 3* of the IPC's *Code of Procedure* for complaints under *PHIPA* and I did not share it with the complainant. The complainant also submitted representations in response to my Notice of Review and to the custodian's submissions.

[5] In this decision, I uphold the custodian's search as reasonable.

RECORDS:

[6] The records the complainant believes are responsive to his request made under *PHIPA* but that were not provided to him by the custodian are:

- a letter from the social worker to OPGT dated January 31, 2012
- a letter from the social worker to OPGT dated February 1, 2012
- notes from the social worker about a visit to the hospital by a lawyer to obtain a copy of the complainant's medical records

- any other medical notes relating to the complainant's care and/or correspondence from the social worker to other organizations.

DISCUSSION:

[7] The issue of whether a custodian conducted a reasonable search for records under *PHIPA* was recently addressed in PHIPA Decisions 18 and 43. In PHIPA Decision 18, the adjudicator concluded that the principles established in reasonable search orders issued under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are relevant and informative in determining whether a custodian has conducted a reasonable search under *PHIPA* – because the access provisions in all three acts are substantially similar – and she adopted them. PHIPA Decision 43, in turn, adopted and applied the approach set out in PHIPA Decision 18. I agree with this approach and apply it to this complaint.

[8] As the complainant claims that additional records exist beyond those identified by the custodian, the issue to be decided is whether the custodian conducted a reasonable search for records as required by sections 53 and 54 of *PHIPA*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the custodian's decision. If I am not satisfied, I may order further searches.

[9] Section 54 of *PHIPA* states, in part:

(1) A health information custodian that receives a request from an individual for access to a record of personal health information shall,

(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;

(b) give a written notice to the individual stating that, after a reasonable search, the custodian has concluded that the record does not exist, cannot be found, or is not a record to which this Part applies, if that is the case[.]

[10] *PHIPA* does not require the custodian to prove that further records do not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.² A further search will be ordered if the custodian does not provide sufficient

¹ Orders P-624 and PO-2559, PHIPA Decision 17 and PHIPA Decision18.

² Orders M-909, PO-2469 and PO-2592, PHIPA Decision 17 and PHIPA Decision18.

evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.³ Although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁴

The parties' representations

[11] The custodian states that it performed electronic searches of its files and hard copy records searches but did not locate the records noted by the complainant. The custodian also provides an affidavit from its Privacy and Freedom of Information Specialist. In it, the affiant affirms that she verified that an electronic records search was conducted by the Information and Communications Technology (ICT) Department and that a paper records search was conducted by the Health Information Management Department relating to this complaint. The custodian attaches several documents to its representations, including a letter from the Director of Patient Care Mental Health and Addictions, who had a search conducted of all Mental Health Department hard copy files, and a letter from the Supervisor of ICT Operations, who had a search conducted of all electronic Mental Health Department folders. Both letters confirm that the searches conducted were for all relevant files and folders from October 2011 to February 2012, and that no letters from January 31 and February 1, 2012 from the social worker or notes taken by the social worker in February 2012 regarding the complainant were located. Among the other attachments to the custodian's representations are emails documenting the parameters and progress of the custodian's search for records, including specific file paths used in the electronic records search.

[12] The custodian's representations also include a copy of its initial response to the complainant's access request and its supplemental response to the complainant following its additional searches for the letters noted by the complainant. These responses specify that the custodian searched for the letters and other records within the specified date range noted by the complainant, the searches conducted in response to the complainant's concerns, and the results of the searches.

[13] The complainant submits that the letters from the social worker to OPGT are critical documents that have been used to destroy his life. He states he is appalled that the records are not contained in his file with the custodian and that the custodian has no trail of these records being removed from his file. He provides copies of the records that he claims the custodian should have in his file, including the two letters from the social worker to OPGT, and copies of other documents that he believes are relevant to his complaint.

Analysis and finding

[14] Based on the evidence before me, I am satisfied that the search conducted by

³ Order MO-2185.

⁴ Order MO-2246, PHIPA Decision 17 and PHIPA Decision18.

the custodian for the letters and records noted by the complainant was reasonable and in accordance with its obligations under *PHIPA*. The custodian's representations, including its affidavit and its confidential submissions, demonstrate that it made a reasonable effort to locate the records noted by the complainant. The custodian's Privacy and Freedom of Information Specialist confirms in her affidavit that she verified that electronic and hard copy searches for records were conducted by a director and a supervisor. The attached letters from the director and supervisor to the Specialist specify the records searched for, which correspond to the complainant's request, as well as the results. Various emails attached to the custodian's representations also confirm the parameters of the searches conducted by the custodian, including the specific electronic files that were searched. I accept that the searches were conducted by experienced employees knowledgeable in the subject matter of the request and I further accept that the custodian made a reasonable effort to locate the responsive records noted by the complainant.

[15] The complainant's position is that the records he seeks, including the two specific letters that he already has in his possession, should be contained in his file. The complainant is troubled by the fact that the custodian does not have copies of the letters or any information on how these letters were removed from his file if they did at one time exist therein. I understand the complainant's concern and position. It is reasonable to expect that letters pertaining to him that were authored by an employee of the custodian should be contained in his file. The existence of these two letters is some evidence that could support a conclusion that the custodian failed to conduct a reasonable search for records as required by sections 53 and 54 of *PHIPA*. While it is clear that the custodian does not have the records sought by the complainant, the custodian has provided extensive evidence of having conducted multiple searches specifically seeking the records noted by the complainant. Considering the detailed and persuasive evidence of the custodian's searches, I am unable to conclude that the custodian's search was not reasonable. The existence of the two letters is not sufficient reason for me to doubt the thoroughness of the custodian's search and convince me that additional records may exist.

[16] Having reviewed the letters from the social worker in the complainant's representations, I note that they are administrative in nature and do not directly relate to the provision of health care to him; they are cover letters that enclose information required to be sent to OPGT under applicable legislation and their absence, in the circumstances of this complaint, does not warrant the initiation of a review of the custodian's health information practices.

[17] I find that the complainant has not provided a reasonable basis for me to conclude that the custodian's search was not reasonable and that I should order another search. I further find that, in conducting multiple targeted searches, and issuing an access decision and supplemental decision to the complainant indicating that the records could not be found, the custodian conducted a reasonable search in satisfaction of its obligations under section 54(1)(b) of *PHIPA*.

ORDER:

For the foregoing reasons, no order is issued.

Original signed by _____
Stella Ball
Adjudicator

_____ August 4, 2017