Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 53

HA16-10

Ministry of Health and Long-Term Care

September 29, 2017

Summary: An individual submitted a request to the Ministry of Health and Long-Term Care for access to records related to coverage under the *Health Insurance Act* for a procedure performed outside Canada. The ministry identified responsive records and granted partial access to them under *PHIPA*, relying on sections 52(1)(c) (ongoing proceedings) and 52(1)(f)(ii)(A), together with sections 49(a) (discretion to refuse requester's own information) and 19 (solicitor-client privilege) of *FIPPA* to deny access. The individual appealed the decision to this office. After the complaint was opened, the ministry issued several revised access decisions, disclosing more records and, ultimately, withdrew its claim to section 52(1)(c) in the last one.

In this decision, the adjudicator finds that the records contain the complainant's personal health information. She finds that one of the records remaining at issue is "dedicated primarily to" the personal health information of the complainant within the meaning of section 52(3) of *PHIPA,* but that the other two are not. The adjudicator concludes that the information severed from the one record must be disclosed because no exemption applies, but that the personal health information of the complainant that remains at issue in the other two records is exempt on the basis of solicitor-client privilege, pursuant to section 52(1)(f)(ii)(A).

Statutes considered: *Personal Health Information Protection Act, 2004*, sections 2, 3(1), 4(1), 4(3), 8(1), 52(1)(c), 52(1)(f) and 52(3); *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, as amended, sections 19 and 49(a).

Decisions considered: PHIPA Decision 17

BACKGROUND:

[1] The Ontario Health Insurance Plan (OHIP) pays for health care services provided to residents of Ontario if both the individual and the specific health service qualify under the *Health Insurance Act*.[1] If OHIP decides that an individual or health service is not eligible and that individual disagrees, that decision can be appealed to the Health Services Appeal and Review Board (HSARB).

[2] According to its website,[2] the HSARB is an adjudicative board that is independent of OHIP and the Ministry of Health and Long-Term Care (the MHLTC or the ministry). HSARB can change a decision made by OHIP on an insured service if it is satisfied that OHIP made a mistake in interpreting the *Health Insurance Act*.

[3] This decision addresses three parts of a four-part request submitted by an individual for records about a specific procedure – performed outside the province – that was not paid for as an insured health care service under the *Health Insurance Act*. The individual submitted a request under the *Personal Health Information Protection Act* (*PHIPA* or the *Act*) to the ministry for access to records relating to him, including those containing his personal health information.

[4] In particular, the request was for access to:

1. Policy directives and mandate plan documents issued to the MHLTC representatives and employees concerning Requests for Prior Approval for Full Payment of Insured Out-of-Country (OOC) Health Services. The request includes memos issued by the Minister, Deputy Ministry and General Manager and Program Manager of the Health Services Branch from January 1, 2008 to the date of the request.

2. All documents exchanged between the MHLTC representatives (OHIP) and [a named physician] concerning the application for the Request for Prior Approval for Full Payment of Insured Out-of-Country Health Services for [the requester] from August 10, 2015 to the date of the request.

3. All documents (including transcripts) exchanged between the MHLTC (OHIP) representatives and [the named physician] concerning [the requester] from June 5, 2014 to the date of the request.

4. All documents concerning [the requester] that are in the possession of the MHLTC, Negotiations and Accountability Management Division, Health Services Branch and OHIP representatives. These include internal documents (e.g. emails,

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[1] R.S.O. 1990, c. H. 6.
[2] www.hsarb.on.ca

hand written notes, briefing memos) exchanged between MHLTC officials, representatives and employees from August 10, 2015 to the date of the request.

[5] The ministry processed item one of the request separately under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), granting full access to the responsive records. Regarding items two to four, the ministry identified 30 responsive records and issued a decision under *PHIPA* granting partial access to some of the records. The ministry denied access to the remainder under sections 52(1)(c) (ongoing proceeding) and 52(1)(f)(ii)(A),[3] relying on section 49(a), in conjunction with section 19 (solicitor-client privilege) of *FIPPA*.

[6] The requester, now the complainant, filed a complaint with this office regarding the decision of the ministry under *PHIPA*.

[7] During the mediation stage of the complaint, the complainant confirmed that item 1 of his original request is not at issue. Regarding the denial of access, the complainant disputed the application of section 52(1)(c) because he considered any relevant proceeding to have concluded, an assertion refuted by the ministry. As for the denial of access under section 52(1)(f), the complainant disputed its application due to his view that no solicitor had been assigned to his HSARB appeal file until after he submitted the access request. In this context, a mediated resolution of the complaint was not possible.

[8] The complaint was transferred to the adjudication stage of the complaints process, where an adjudicator conducts a review. The adjudicator commenced her review by sending a Notice of Review to offer the ministry an opportunity to provide submissions. The ministry submitted representations, as well as a supplemental decision letter providing additional disclosure to records 18, 20, 21, 22, 23 and 28. The adjudicator provided a complete copy of the ministry's representations to the complainant to invite his response. The complainant submitted representations and these were provided to the ministry for reply, but the ministry decided not to add to its initial submissions.

[9] The complaint was then moved to the decision stage and was subsequently transferred to me. Based on information available to me, I decided to seek an update from the ministry regarding the status of the HSARB proceedings. Upon conducting its own review of the matter, the ministry confirmed that the proceedings were completed. A revised decision was issued in which section 52(1)(c) was withdrawn and new disclosures provided to the complainant. Only three records remain partly at issue, either based on the original claim of the solicitor-client privilege exemption in *FIPPA* under section 52(1)(f) of *PHIPA* or on the basis of section 8(1) of *PHIPA.*

[10] For the reasons that follow, I find that that the records contain the personal

[3] I will refer to this provision in short-form as section 52(1)(f).

health information of the complainant. I find that record 22 is "primarily dedicated to" personal health information about the complainant for the purpose of section 52(3), but that records 23 and 25 are not. I order the ministry to disclose the information remaining at issue in record 22 as no exemption is claimed or applies to it, but I uphold the ministry's decision to withhold portions of records 23 and 25 under section 52(1)(f) of *PHIPA*, relying on section 49(a), together with section 19 of *FIPPA*. Finally, I uphold the ministry's exercise of discretion.

RECORDS:

[11] The records remaining at issue consist of portions of emails in the records numbered 22, 23 and 25.

ISSUES:

A. Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?

B. Are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?

C. Does the exemption in section 52(1)(f) of *PHIPA* apply, such that the information is exempt under section 49(a), together with section 19 of *FIPPA*?

D. Did the ministry properly exercise its discretion?

DISCUSSION:

[12] *PHIPA* provides a general right of access to records of "personal health information" about an individual that are in the custody or under the control of a "health information custodian." Unlike the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) and its municipal equivalent, however, *PHIPA* does not provide a general right of access to information held by the organizations to which it applies. The only right of access under *PHIPA* is the right of individuals to obtain access to their own personal health information under section 52(1).[4]

[13] In this matter, the status of the Ministry of Health and Long Term Care as a "health information custodian" under *PHIPA* is not in dispute. As I am satisfied that the ministry is a health information custodian for the purposes of *PHIPA*,[5] I will proceed

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[4] PHIPA Decision 19.
[5] Pursuant to clause 7 of section 3(1) of *PHIPA*.

with my analysis on that basis.

A. Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?

[14] I must determine whether the records contain personal health information as defined in section 4(1) of the *Act*. The relevant parts of the definition in this complaint state:

> "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, …
> >
> > (d) relates to payments or eligibility for health care, or eligibility for the coverage for health care, in respect of the individual,

[15] In the circumstances of this complaint, section 4(3) of *PHIPA* is also relevant:

> Personal health information includes identifying information that is not personal information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[16] The ministry states that in the context of the IPC's interpretation of "relates to" as meaning "in some way" connected, all of the records at issue contain the complainant's personal health information as defined in paragraphs (a), (b) and (d) of section 4(1) of *PHIPA.*

[17] The complainant submits that all of the withheld records pertain to his personal health information, care and treatment.

Findings

[18] Having reviewed the parties' representations and the records, I find that they contain identifying information about the complainant which relates to his physical or mental health and to the provision of health care to him. I also find that there is identifying information in the records that relates to the complainant's eligibility for health care or coverage for that health care. Some of the records are what can be

described as "mixed" records, because they include identifying information about the complainant that is not personal health information by itself, but that is contained in a record that contains his personal health information. As a result, I find that the records at issue are records of personal health information as defined in sections 4(1)(a), (b) and (d), as well as section 4(3) of *PHIPA.*

B. Are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?

[19] As noted previously, the complainant has a right of access to the records containing his personal health information under section 52 of *PHIPA*, subject to certain limitations. One of those limitations is section 52(3), which is relied upon by the ministry in this complaint.

[20] To determine the extent of the complainant's right of access to the records under *PHIPA*, I must review each record to determine whether it is "dedicated primarily" to the personal health information of the complainant. This is because the right of access in *PHIPA* applies either to a whole record under section 52(1) or only to certain portions of a record of personal health information under section 52(3).

[21] Section 52(3) states:

> 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.

[22] 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.[6]

[23] This office's approach to the interpretation of section 52(3) was established in PHIPA Decision 17.[7] To determine whether a record is "dedicated primarily" to the personal health information of an individual 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;

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[6] Naturally, either of these rights of access are subject to any applicable exemptions.
[7] See also PHIPA Decisions 24, 30 and 33.

- 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.[8]

[24] This list is not exhaustive.

Representations

[25] The ministry relies on PHIPA Decision 17 in arguing that it would be a "mischaracterization" of the records to describe them as primarily dedicated to the complainant's personal health information. In the ministry's view, the records instead deal primarily with managing the administrative, procedural and legal issues arising from the complainant's HSARB Request for Hearing. The ministry also maintains that even though these records would not exist "but for" the personal health information in them, they cannot accurately be characterized as "primarily dedicated" to the complainant's personal health information as that term is now understood following PHIPA Decision 17.

[26] According to the ministry, applying the requisite "qualitative assessment" established by PHIPA Decision 17 here demonstrates that the content of the records is not qualitatively about the complainant's personal health information, but is instead about legal advice or issues management. The focus is on addressing legal, regulatory, communications and other issues arising, but several steps removed from, the health care issues that led to the creation of the records.

[27] Referring to the *Guide to the Ontario Personal Health Information Protection Act*[9] (the Guide to *PHIPA*), the ministry states that the phrase "dedicated primarily to" was intended to be narrowly interpreted to mean that the person seeking access is entitled to access all information in his or her own health record. In this context, where a record is "not a record dedicated to the patient, even though the record may contain information about the patient, it should generally not be considered 'a record that is dedicated primarily to personal health information about the [patient] requesting

[8] PHIPA Decision 17, para 95.
[9] Halyna Perun et al. (2005) Toronto: Irwin Law, at page 512.

access'."[10] The ministry argues, therefore, that the complainant is only entitled to access his own information subject to the severance of information that is exempt.

[28] The complainant disputes the ministry's position that the records are not "dedicated primarily" to personal health information about him and maintains that they all deal specifically with his personal health information.[11]

Analysis and findings

[29] Records 22, 23 and 25 consist of email communications between ministry staff and the complainant or individuals outside the ministry. Having reviewed the parties' representations and with consideration of the records from a qualitative perspective, I conclude that record 22 is "dedicated primarily" to the personal health information of the complainant, while records 23 and 25 are not.

[30] In this complaint, the ministry relies on PHIPA Decision 17 and the Guide to *PHIPA* in urging a narrow construction of the phrase "dedicated primarily to" – one in which the requester's entitlement to access is viewed through a lens focused on a patient care setting. Context matters, however. Past reviews of the phrase "dedicated primarily to," starting with PHIPA Decision 17, appear to have been conducted where the access request was submitted to a hospital or health care organization. In those settings, the ministry's excerpt from the Guide to *PHIPA* resonates more clearly. However, in this complaint, the access request is made to the ministry, which is both a custodian and an institution under *FIPPA,*[12] and the records are related to a program administered by the ministry's Health Services Branch. Due to the scope of its mandate, operations and programs, the ministry's record holdings are more diverse than those of a custodian that is a hospital, for example, even if the types of records that might be dedicated to a single individual would be more limited. Importantly, however, the mere fact that records may be created in the course of the ministry's administration of one of its programs, and not in a clinical setting, does not necessarily mean that such records are not dedicated primarily to the complainant's personal health information. The evaluation is still conducted on a record-by-record basis, based on the qualitative assessment described in PHIPA Decision 17, and with regard for the context in which the records arise.

[31] Turning to the facts of this complaint, it is apparent that none of the records would exist "but for" the complainant's personal health information in them: the HSARB matter is concerned specifically with determining the complainant's eligibility for health

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[10] Ibid.

[11] The complainant identified records 17, 18, 20-23 and 25-29 in his submissions and argued that since records 26 and 29, in particular, appeared to be exchanges between two identified physicians about his "medical condition and the availability of surgical treatment in Ontario," he should receive copies of the records in full. In the ministry's last revised decision, he did.

[12] *FIPPA*, section 2(1), clause (a).

care coverage under the *Health Insurance Act*, as contemplated by paragraph (d) of the definition in section 4(1). That said, this factor alone is not determinative under the qualitative approach to this issue.

[32] Record 22 consists of emails exchanged between the OHIP medical advisor and ministry staff and they review or describe the complainant's HSARB matter up to that point. Indeed, record 22 is generally concerned with the HSARB hearing and its process. From a quantitative perspective, however, I find that the majority of the content consists of personal health information about the complainant, whether by reason of the discussion of his eligibility for coverage for heath care or because it describes specific health care provided to him. The qualitative factors of purpose and function are also relevant to my consideration of the issue. Specifically, on my review of record 22, I conclude that the function of the email communications was to convey the medical advisor's professional views and his assessment of the complainant's case before the HSARB to ministry staff. In my view, the inclusion of the complainant's personal health information was both necessary and central to the record's purpose. Accordingly, I find that record 22 is dedicated primarily to the complainant's personal health information.

[33] Given my finding, above, the complainant has a right of access to the entire record, even if it incidentally contains information about other matters or other parties. In the ministry's last revised decision, the entire record was disclosed, except a brief portion of a sentence on the first page. The ministry claims that section 8(1) of *PHIPA* applies to it.[13] Section 8(1) is not an exemption. The purpose of section 8 is to define the relationship between *PHIPA* and *FIPPA/MFIPPA* and to make it clear that *PHIPA* ousts access rights under *FIPPA* and *MFIPPA.* This provision does not assist the ministry here. Indeed, if what the ministry is suggesting is that *FIPPA* does not apply in this situation, I agree. Therefore, in view of my finding that record 22 is primarily dedicated to the complainant's personal health information and there being no exemption claimed (or applicable) to this information, the complainant is entitled to full access to the record. I will order the ministry to disclose this withheld portion of record 22.

[34] Records 23 and 25 also consist of emails passed mainly between ministry staff, but they also include emails sent by the complainant. I note that the portions of the records where the complainant was a sender or a recipient have already been disclosed to him, along with several other emails in the chain. Notwithstanding this disclosure, records 23 and 25 are still considered as a whole because under the qualitative approach to the determination of this issue, "the inclusion (or not) of the complainant's own correspondence in a record is not the determinative factor." [14] In records 23 and

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[13] Section 8(1) of *PHIPA* states: "Subject to subsection (2), 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."

[14] PHIPA Decision 17, paras. 101 and 107.

25, the complainant's emails are forwarded between ministry staff for discussion or to legal counsel for advice. Several factors lead me to conclude that these records are mainly about other matters and are not dedicated primarily to the personal health information of the complainant. First, the quantity of the complainant's personal health information in records 23 and 25 is quite limited. Further, from a qualitative perspective, I conclude that the inclusion of the complainant's personal health information in records 23 and 25 is incidental to their purpose, which is mainly to address the administrative, procedural and legal issues connected to the complainant's HSARB application and hearing. In substance, I conclude that these records are qualitatively about matters of process. Therefore, I find that records 23 and 25 are not dedicated primarily to the personal health information of the complainant.

[35] Given the finding above, section 52(3) of *PHIPA* applies to records 23 and 25. In this context, the complainant's entitlement under *PHIPA* is limited to access to the portions of personal health information about him that can reasonably be severed from the record for the purpose of providing access.[15]

[36] I will now review the application of the exemption relied upon by the ministry to withhold the complainant's personal health information from records 23 and 25.

C. Does the exemption in section 52(1)(f)(ii)(A) of *PHIPA* apply to the complainant's reasonably severable personal health information, such that it is exempt under section 49(a), together with section 19 of *FIPPA*?

[37] The ministry denies the complainant access to information in records that are not dedicated primarily to his personal health information, but to which he exercises a right of access under section 52(3). The grounds were, at least initially, sections 52(1)(c) and (f)(ii)(A) of *PHIPA.* However, as noted previously, the claim to section 52(1)(c) was withdrawn by the ministry in its last revised decision. Accordingly, the sole exemption to consider is section 52(1)(f)(ii)(A), which states:

> 52. (1) 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,
>
> (f) the following conditions are met:
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> (i) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or is acting as part of such an institution, and

[15] The ministry is not required to sever and release undisclosed personal health information if that would result in disclosure of disconnected or meaningless snippets: PHIPA Decisions 17, 27 and 33.

> (ii) the custodian would refuse to grant access to the part of the record,
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> > (A) 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[.]

[38] Section 52(1)(f)(ii)(A) of *PHIPA* permits the ministry, as a body subject to both *PHIPA* and *FIPPA,* to claim the application of certain *FIPPA* exemptions (as "flow-through" *FIPPA* claims), including section 49(a), together with section 19, as in this matter.

Section 52(1)(f)(ii)(A) of PHIPA and section 49(a), together with section 19 of FIPPA

[39] As noted above, since the ministry is covered by *FIPPA* as an institution, as well as *PHIPA* as a custodian, section 52(1)(f) of the *Act* allows it to refuse access to information if certain provisions in *FIPPA* apply. Here, the ministry relies on the "flow through" exemptions in sections 19(a) and (b) (solicitor-client privilege) of *FIPPA*, in conjunction with section 49(a), to deny access to the portions of records 23 and 25.

[40] The relevant parts of *FIPPA* state:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
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> > (a) 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[.]
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> 19. A head may refuse to disclose a record,
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> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or…

[41] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel) is a statutory privilege. The ministry must establish that one or the other (or both) branches apply.

Representations

[42] The ministry submits that sections 19(a) and 19(b) apply to the email

communications in parts of records 23 and 25,[16] because they "consist of, contain, reflect or refer to legal advice obtained or requested" from ministry legal counsel. The ministry explains that the communications are exchanged between counsel and other ministry employees. The ministry claims that counsel from the ministry's legal services branch is identified and his legal opinions and advice are interspersed throughout the emails, whether as expressed directly by him or as paraphrased by others.

[43] The ministry submits that "internal communications to and from the legal department … [are presumed to be] confidential," even where the internal communications are not between a lawyer and a client.[17] The ministry maintains that such communications still fall within the "continuum of communications" if they are confidential communications made for the "dominant purpose of giving or receiving legal advice." According to the ministry, the communications reveal the sharing of confidential legal advice prepared by legal counsel to inform its client of the legal issues that are being addressed. As such, the ministry asserts, these portions of the records are part of a continuum of communications and are solicitor-client privileged. The ministry also submits that the privilege in the records has not been lost through waiver.

[44] The complainant argues that this exemption does not apply because no solicitor had been retained or assigned to his HSARB appeal file until after he submitted the access request. The complainant maintains that it was only the medical advisor (the physician named in the request) who responded to his appeal submission until a specific solicitor began to respond, "well after my request for information." In the complainant's view, the undisclosed information is not solicitor-client privileged in this situation and cannot be withheld on that basis.

Analysis and findings

[45] Based on my review of these records, I conclude that section 52(1)(f)(A)(ii) of *PHIPA* applies and that the withheld portions of records 23 and 25 are exempt under section 49(a), together with sections 19(a) and 19(b). Although I am satisfied that both of sections 19(a) and 19(b) apply, for brevity's sake, I limit the discussion below to the common law solicitor-client privilege in section 19(a).

[46] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[18] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal

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[16] The original representations provided also addressed the exemption's claimed application to records 27 and 28. However, since these records were disclosed in their entirety by the recent revised decision, only the records remaining at issue at the time of this decision are addressed.
[17] The ministry relies on Orders MO-1454 and MO-1258.
[18] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

matter.[19] Confidentiality is an essential component of the privilege. Therefore, the ministry was required to demonstrate that the communications were made in confidence, either expressly or by implication.[20]

[47] In the circumstances, I am satisfied that the withheld portions of records 23 and 25 consist of written communications of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[21] First, I accept that the identified lawyer from the ministry's legal services branch was acting as the "solicitor" and that the "client" in this situation consisted of various ministry staff or employees involved in the complainant's HSARB matter.[22] Next, the identified legal counsel was either the author or the recipient of each of these email communications and the clear purpose of each of them was the seeking or giving of legal advice. I am also satisfied that the communications were intended to be and, in fact, were confidential.

[48] The fact that the ministry's legal counsel may not have communicated with the complainant directly until after he (the complainant) filed his access request is not determinative of the application of privilege in relation to records created before that date. I am satisfied that the withheld portions of records 23 and 25 are covered by the legal privilege exemption because they contain the views or legal advice of the ministry's legal counsel regarding the specific proceedings initiated by the complainant. The privilege applies to "a continuum of communications" between a solicitor and client "… where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach."[23]

[49] Therefore, I find that the withheld information in records 23 and 25 is subject to solicitor-client communication privilege as contemplated by section 19(a) of *FIPPA*. I also accept that the ministry has not waived privilege in these records.

[50] As the section 52(1)(f) exemption in *PHIPA*, and the section 49(a) exemption in *FIPPA*, affords the ministry the discretion to deny access to the records on the basis of section 19 of *FIPPA*, this finding is subject to my review of the ministry's exercise of discretion under *PHIPA* and *FIPPA*.

D. Did the ministry properly exercise its discretion?

[51] As stated, the section 52(1)(f) exemption in PHIPA and the exemptions at

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[19] Orders PO-2441, MO-2166 and MO-1925.
[20] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[21] *Descôteaux, supra.*
[22] The term "litigation" may refer to, or include, proceedings in administrative tribunals as well as court proceedings: see PHIPA Decisions 17 and 33 and Order M-162.
23 *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

sections 49(a) and 19(a) of FIPPA are discretionary. Where an exemption is discretionary, a custodian has the discretion to grant access to information despite the fact it could withhold it. The custodian must exercise its discretion. As part of my review of this complaint, I must determine whether the ministry exercised its discretion under PHIPA and FIPPA.

[52] 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 (MFIPPA) may also be applicable to an exercise of discretion under PHIPA.24

Through orders issued under *FIPPA* and *MFIPPA* 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
- the historic practice of the institution with respect to similar information.

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[24] PHIPA Decision 17, paras 227-228.

[53] Not all these considerations will necessarily be relevant, and additional unlisted considerations may be relevant.25

[54] If I determine that the ministry 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 it for a re-exercise of discretion. I may not, however, substitute my own discretion for that of the ministry.26

Representations

[55] The ministry maintains that the head exercised discretion properly in applying section 19 to the records in this complaint. Specifically, the head took into account the following relevant considerations: the complainant's right of access to the information, the purpose and the importance of the solicitor-client privilege exemption (citing *Criminal Lawyers Association*),[27] and the fact that it "severed very few records based on this exemption." The ministry submits that, ultimately, it concluded that "the public interest in maintaining the integrity of the privilege, and thus not disclosing the records, should be protected."

[56] The complainant's representations do not specifically address the issue of the ministry's exercise of discretion. However, the submission that he is entitled to full access to the records because they are about him suggests that he considers the ministry not to have paid sufficient attention to the fact that he is seeking his own personal (health) information and, additionally, his sympathetic or compelling need to receive the information.

Findings

[57] I begin my findings by noting that the ministry issued two revised access decisions to the complainant. As a consequence of the last revised decision, the ministry disclosed the responsive records nearly in their entirety. Therefore, my review of the ministry's exercise of discretion in this matter is limited to approximately three pages of emails withheld from records 23 and 25 under section 52(1)(f) of *PHIPA*, with sections 49(a) and 19(a) of *FIPPA.*

[58] Based on the ministry's representations on the factors it considered in exercising its discretion under *PHIPA* and *FIPPA*, and the limited portions of the records that remain withheld on the basis of solicitor-client privilege at this point, I accept that the

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[25] Orders P-344 and MO-1573.

[26] 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's authority to review a custodian's exercise of discretion under *PHIPA* was affirmed in PHIPA Decisions 17, 19 (upheld on reconsideration in PHIPA Decision 25) and 27.

[27] *Ontario (Public Safety and Security) v. Criminal Lawyers Association* [2010] 1 SCR 815.

ministry properly exercised its discretion in these circumstances. I am satisfied that in deciding to withhold small portions of records 23 and 25, the ministry took into account relevant factors, such as the complainant's position and circumstances and his right of access to his own information, balanced against the importance of solicitor-client privilege. I accept that the ministry disclosed as much of these records as possible. Further, there is no evidence before me that the ministry took into account any irrelevant considerations, acted in bad faith or made an error in its exercise of discretion.

[59] Therefore, I am satisfied that the ministry appropriately exercised its discretion under section 52(1)(f) of *PHIPA*, with sections 49(a) and 19(a) of *FIPPA,* in withholding the portions of the records that I have found to be exempt from disclosure. For these reasons, I uphold the ministry's exercise of discretion in this complaint.

ORDER:

1. I order the ministry to disclose the non-exempt information severed from the first page of record 22.

2. I uphold the ministry's denial of access to information in records 23 and 25 under section 52(1)(f) of *PHIPA*, with sections 49(a) and 19(a) of *FIPPA.*

Original Signed by: September 29, 2017

Daphne Loukidelis
Adjudicator