

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 58

Complaint HA15-75

William Osler Health Centre - Brampton Civic

October 25, 2017

Summary: The complainant sought disclosure of the personal health information of her deceased brother. In this decision, the adjudicator decides that the complainant did not meet the conditions permitting disclosure of the personal health information of her deceased brother for health care purposes. In addition, the adjudicator finds that the custodian complied with its obligations in section 38(4)(b)(ii) and is not required to re-exercise its discretion to disclose additional personal health information.

Statutes Considered: *Personal Health Information Protection Act, 2004*, sections 38(4)(b)(ii) and (c)

Decisions Considered: PHIPA Decision 20, PHIPA Decision 22

BACKGROUND:

[1] The complainant submitted a request to the William Osler Health Centre – Brampton Civic (the hospital or custodian) on behalf of herself and her siblings for access to the medical records of their deceased brother (the deceased). The deceased died at the hospital. The complainant stated that she made her request under sections 38(4)(b)(ii) and 38(4)(c) of the *Act*. In particular, the complainant stated that she and her siblings

wish to have access to these records in order to have more information regarding the circumstances of [the deceased's] death, and to provide

information regarding their own health, as siblings often have similar medical conditions. In addition, [the deceased] was admitted to the mental health unit in the hospital. Although the siblings had no knowledge of any mental health issues, they would like to know if there were any mental health issues that they should be aware of.

[2] The hospital responded to the complainant by advising her "the records cannot be released to you because we have not been authorized by the deceased patient's substitute decision maker to do so."

[3] The complainant then filed this complaint with the IPC. In her complaint, the complainant stated that she and her siblings filed the request under section 38(4)(b)(ii) of the *Act* because her brother's death "was unexpected to the family." The complainant also stated that she and her siblings made the request under section 38(4)(c) "to have more information regarding their own health as siblings often have similar medical conditions."

[4] During mediation of the complaint, the custodian re-exercised its discretion and issued a revised decision to the complainant. The custodian disclosed the following records to the complainant: (1) Mental Health Consultation Report; (2) Mental Health Final Summary; and (3) Final Summary Report.

[5] The complainant reviewed the information the custodian disclosed to her and stated that these records did not fully explain the circumstances of her brother's death. For that reason, the complainant requested access to the following additional records:

1. The blood tests, detailed history and physical exam at the time of the deceased's first admission
2. Progress notes on the deceased's condition and treatment for an identified period of time
3. Notes from any other doctor consulted during the period identified in #2
4. Blood test results on the deceased's discharge
5. Notes on the deceased's condition when he was discharged with the plan for treatment and follow-up

[6] The hospital reviewed the complainant's request for the five additional records and issued a decision not to grant her access to the additional records. The hospital stated that the phrase in section 38(4)(b)(ii) regarding *circumstances of death* is not clearly defined in the *Act*. As such, the hospital stated that the phrase is open to interpretation regarding how much information is reasonable to disclose to fulfil that requirement. Given the lack of clarity in the meaning of *circumstances of death*, the hospital stated that the information it provided to the complainant is reasonable in that

it explains the circumstances around the patient's death and that broader disclosure would not provide additional information to the complainant regarding the circumstances of death.

[7] The complainant confirmed that she pursues access to the records she identified during mediation.

[8] Mediation did not resolve the complaint and it was forwarded to the adjudication stage of the IPC's processes. The adjudicator originally assigned to the complaint decided to initiate a review, during which she sought and received written submissions from the complainant and the hospital.

[9] The complaint was then transferred to me. In the discussion that follows, I decline to issue an order.

DISCUSSION:

[10] As a preliminary matter, I confirm that the hospital is a *health information custodian* as defined in section 3(1) of the *Act*. Further, there is no dispute that the information the complainant seeks is the *personal health information* of her deceased brother, within the meaning of section 4(1) of the *Act*.

Did the custodian comply with its obligations under sections 38(4)(b)(ii) and 38(4)(c) of the *Act*?

[11] Section 38(4) of the *Act* sets out circumstances in which health information custodians may disclose personal health information of an individual without consent. Although it may be reasonable for a health information custodian to advise an individual seeking disclosure of a deceased person's personal health information to try to obtain consent, consent is not a requirement for disclosure under section 38(4).

[12] The relevant paragraphs of section 38(4) state

A health information custodian may disclose personal health information about an individual who is deceased, or is reasonably suspected to be deceased,

(b) for the purpose of informing any person whom it is reasonable to inform in the circumstances of,

(ii) the circumstances of death, where appropriate; or

(c) to the spouse, partner, sibling or child of the individual if the recipients of the information reasonably require the information to make decisions about their own health care or their children's health care.

[13] Disclosure of a deceased individual's personal health information under section 38(4) is discretionary. This means that if the conditions of an exception under section 38(4) are met, a health information custodian may disclose personal health information about a deceased person without consent. The custodian may disclose information under section 38(4) verbally or in a record. Where an individual claims to qualify for disclosure under section 38(4), the health information custodian must consider whether the individual meets the conditions for disclosure. The health information custodian must also decide whether and how much information to disclose.

Section 38(4)(b)(ii) – circumstances of death

[14] Under section 38(4)(b)(ii), a health information custodian is given discretion to decide whether it is *appropriate* to disclose personal health information about the circumstances of a death to an individual. Disclosure under section 38(4)(b)(ii) is not limited to family members, but it is reasonable to expect family members to be included amongst those to whom disclosure under section 38(4)(b)(ii) may be appropriate. A health information custodian is entitled to take into account a compassionate need for information in deciding whether and how much disclosure is *appropriate*.¹

[15] The custodian reiterates its claim that the *Act* does not clearly define the term *circumstances of death*. As such, the custodian states that it is up to a health information custodian to interpret how much information is reasonable to disclose to fulfil the requirements of section 38(4)(ii). In the circumstances of this complaint, the hospital submits that it provided the complainant with reports that are "very detailed in describing the events that led up to the patient's death."

[16] In response, the complainant states that she and her siblings seek access to the records at issue for the following reasons:

1. To fully understand what occurred in the 18 days leading up to their brother's death;
2. To fully understand the conditions that their brother may have had that his siblings should be aware of to care for their own health; and
3. To allow the family to "properly grieve" their brother's death.

[17] To support her position, the complainant provides a detailed summary of her and her siblings' concerns regarding their deceased brother's treatment, medications prescribed and ultimate decline. The complainant submits that she has a right of access to the information relating to the deceased's treatment while in the hospital as well as information relating to his progress over the 18 days that ended with his death.

[18] In response to the complainant's representations, the custodian submits that it

¹ PHIPA Decision 22 at para. 25.

re-exercised its discretion to disclose some personal health information during mediation. The custodian states that it determined that it was appropriate for it to disclose some personal health information to the complainant under section 38(4)(b)(ii). Further, the custodian submits that the personal health information it disclosed to the complainant contains a summary of the events that occurred in the days prior to the patient passing away. The custodian submits that it met its statutory obligations by re-exercising its discretion and disclosing some personal health information to the complainant. Finally, the custodian submits that it based its exercise of discretion on relevant considerations and it did not do so in bad faith or for an improper purpose.

[19] The custodian's reply representations were shared with the complainant and she was provided with an opportunity to submit further representations. The complainant submits that the hospital failed to provide her with sufficient details regarding the death of her deceased brother. The complainant submits that the custodian should disclose information relating to the behaviours the deceased exhibited throughout his hospital stay, when hospital staff noticed the deceased's deterioration in health and the actions taken to counter the deterioration. The complainant further submits that she should have access to "other observations that any reasonable health care professional could provide." The complainant submits that the hospital failed to provide sufficient reasons to explain why it disclosed certain personal health information to her. As such, the complainant submits that one cannot evaluate whether the hospital exercised its discretion in a proper manner.

[20] Based on my review of the circumstances and the parties' representations, I find that the hospital complied with its obligations under section 38(4)(b)(ii) of the *Act*. The complainant provided this office with a copy of the three records the custodian disclosed to her. I reviewed the records and I am satisfied that they summarize the events prior to the death of the deceased. I find that the personal health information the hospital disclosed to the complainant serves the purpose of informing her and her siblings of the circumstances of their brother's death.

[21] In addition, I find that the complainant appears to seek information that is much broader than the *circumstances of death*. As stated previously, the complainant identified a wide range of information relating to her brother's hospital stays that she believed the hospital ought to disclose to her. However, based on my review of the information before me, I find that the custodian complied with its obligations under section 38(4)(b)(ii) by disclosing the Mental Health Consultation Report, Mental Health Final Summary and Final Summary Report to the complainant.

[22] I find support for my finding in PHIPA Decision 22, in which the adjudicator considered the issue of the breadth of disclosure that is supported by section 38(4)(b)(ii). The complainant in PHIPA Decision 22 sought access to her deceased mother's health records in the last seven months of her life. The adjudicator found that the custodian in that case failed to adequately consider the complainant's request in deciding that she was permitted to disclosure under section 38(4)(b)(ii) and directed

the custodian to consider the request again. However, in making this decision, the adjudicator stated as follows:

... I caution the complainant to not expect broad disclosure of her mother's records of personal health information. First, even if the custodian decides that it is appropriate to share some information, it is permitted to share the information verbally, without release of any records. Second, the disclosure is restricted to information about the "circumstances of death." While acknowledging the complainant's view that information about her mother's medical conditions in the 7 months leading to her death is all related to the "circumstances of death", I find it unlikely that section 38(4)(b)(ii) supports this breadth of disclosure.²

[23] In light of this finding and upon review of the information before me, I find that the custodian complied with its obligations under section 38(4)(b)(ii) by disclosing records that would inform the complainant of the circumstances of her brother's death.

[24] Furthermore, I find that the custodian exercised its discretion in good faith and based on relevant considerations in disclosing some of the deceased's personal health information to the complainant. While the complainant is concerned about the manner in which the hospital exercised its discretion, there is no evidence before me that the custodian exercised its discretion in bad faith or for an improper purpose. The hospital's representations establish that its exercise of discretion to disclose some personal health information to the complainant was based on relevant considerations, such as the complainant's interest in knowing the circumstances of her brother's death.

[25] I note that the adjudicator in PHIPA Decision 22 states that the wording of section 38(4)(b)(ii) confirms that custodians have "broad discretion."³ The adjudicator states that a custodian *may* disclose, where *appropriate*. In the circumstances of this appeal, I find that the custodian complied with its obligations under section 38(4)(b)(ii) of the *Act*.

Section 38(4)(c) – health care

[26] Under section 38(4)(c), a health information custodian may disclose the personal health information of a deceased individual to the sibling of that individual where the recipient requires it to make decisions about their own health care or their children's health care. The individual requesting disclosure must show a link between the disclosure of the personal health information of his or her family member and the ability to make informed decisions about their own health care to establish that disclosure is permitted. Section 38(4)(c) does not provide health information custodians with a broader discretion to disclose information for sympathetic or compassionate reasons.

² PHIPA Decision 22 at para. 27.

³ *Ibid.*, at para. 28.

[27] As stated above, the complainant claims that she and her siblings are entitled to disclosure under section 38(4)(c) to her brother's personal health information. The records that the complainant pursues access to include blood tests, detailed histories and notes regarding her brother's hospital visits, notes on his condition and the plan for treatment and follow-up. In her reply representations, the complainant submitted that the custodian should also disclose information relating to the behaviours the deceased exhibited throughout his hospital stay, when hospital staff noticed the deceased's deterioration in health and the actions taken to counter the deterioration.

[28] The complainant submits that an attending physician advised her sibling that the deceased suffered from kidney failure but the records disclosed do not indicate that diagnosis. The complainant states that she and her siblings wish to understand the physician's comment. The complainant raised a concern that she and her family members could be at a risk of kidney failure and the information relating to her brother's blood tests will assist her family in understanding her brother's condition.

[29] The custodian acknowledges that the privacy of a deceased patient's personal health information should not supersede the health care needs of living family members. However, in this case, the custodian submits that the complainant did not show a link between disclosure of the deceased's personal health information and the complainant and her sibling's ability to make informed decisions about their own health care.

[30] The custodian further acknowledges the complainant's concern regarding kidney failure. The custodian states that the complainant did not raise this concern in her original request. In any case, the custodian states that it is willing to review this matter if the complainant provides supporting documentation from a health care professional establishing what personal health information is required and how it is relevant to the complainant's ability to make informed decisions about the complainant's health care. The custodian submits that a health care professional is in a position to provide the best evidence of that need.

[31] Finally, the custodian states that it re-exercised its discretion and disclosed some of the deceased's personal health information to the complainant pursuant to section 38(4)(c) of the *Act*. The custodian submits that its exercise of discretion was based on relevant considerations and was not made in bad faith or for an improper purpose. The hospital states that it is unable to appreciate the link between disclosing additional personal health information to the complainant and her family's ability to make informed decisions about their health care.

[32] In response, the complainant states that family members believe that the deceased's father may have suffered kidney failure. Accordingly, the complainant submits that she and her siblings wish to know if kidney disease is a hereditary condition for her family. The complainant maintains that the information relating to her brother's blood work would assist in her and her siblings' decision-making in relation to

their own health care. The complainant states that she does not connect the issue of kidney failure with any kidney problems that they are experiencing. The complainant states that she and her family would like to be aware of any hereditary issues.

[33] I reviewed the information provided by the custodian and the complainant. Upon review, I agree with the custodian that the information provided by the complainant does not establish that she and her siblings *reasonably require* the additional personal health information they seek to make decisions about their health care.

[34] According to her representations, the complainant wishes to confirm whether her brother suffered kidney failure due to information the attending physician provided her sister. The complainant confirms that she and her siblings do not connect it to any kidney problems that they themselves may be experiencing. However, she submits that she would like to be aware of any potential hereditary issues.

[35] Upon review of the information before me and the issues raised, I find that the complainant did not show a link between the disclosure of her brother's personal health information and her and her siblings' ability to make informed decisions about their personal health. Therefore, I am satisfied with the hospital's conclusion that additional disclosure of personal health information relating to the deceased is not reasonably required for the complainant and her siblings to make decisions about their health.

[36] The hospital states that it is willing to review this matter if the complainant provides supporting documentation from a health care professional establishing what personal health information is required and how it is relevant to the complainant's ability to make informed decisions about the complainant's health care. In PHIPA Decision 20, the adjudicator considered a similar suggestion by a health information custodian and found that the suggestion is "a sensible approach." The adjudicator in PHIPA Decision 20 recommended "that if the complainant wishes to renew his request, he provide a statement from a health care practitioner describing specifically what kind of information is sought, and why that information is required by him in order to make decisions about his health care or the health care of his children."⁴

[37] Upon review of the circumstances and information before me, I adopt the same approach as that of PHIPA Decision 20. The hospital is willing to review its decision regarding section 38(4)(c) if the complainant provides supporting documentation from a health care professional establishing what personal health information is required and how it is relevant to the complainant's ability to make informed decisions about her health care. The complainant can choose to provide a statement from a health care practitioner describing the specific information she and her siblings seek and explaining why they require that information to make decisions about their health care. As stated by the adjudicator in PHIPA Decision 20, this additional information may help the complainant and her siblings demonstrate that the conditions permitting disclosure

⁴ PHIPA Decision 20 at para. 30.

under section 38(4)(c) exist, and a health care practitioner is in a position to provide the best evidence of that need.

[38] Therefore, I agree with the custodian's assessment that the complainant did not show that the conditions for disclosure under section 38(4)(c) are met.

NO ORDER:

For the foregoing reasons, no order is issued.

Original signed by _____
Justine Wai
Adjudicator

_____ October 25, 2017