

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 61

Complaint HA15-48

Dr. John D. Rizos

November 29, 2017

**Summary:** The custodian received a request under the *Personal Health Information Protection Act* for access to all records of personal health information pertaining to the complainant's deceased son. The custodian granted access to the complainant's son's medical record. The complainant filed a complaint regarding the custodian's decision on the basis that additional records responsive to the request should exist. Accordingly, the sole issue on review is whether the custodian conducted a reasonable search for responsive records. In this decision, the adjudicator upholds the custodian's search as reasonable and dismisses the complaint.

**Statutes Considered:** *Personal Health Information Protection Act, 2004* sections 53 and 54.

**Decisions Considered:** PHIPA Decisions 18, 43, 48 and 57.

### BACKGROUND:

[1] A physician (the custodian) received a request under the *Personal Health Information Protection Act (PHIPA or the Act)* for access to all records of personal health information pertaining to the requester's deceased son. The requester advised that he was submitting the request on behalf of his son. Attached to the request was a court registered document identifying the requester as the "successor personal representative" of his son's estate. Specifically, the requester sought access to:

...[A]ll medical documents including reports, correspondence, notes, opinions, memos, clinical notes, emails available in either hard copy or

electronic format that are in your possession pertaining to [complainant's son], his treatment(s) and/or condition(s).

[2] The request also referred to two other named physicians to whom his son, the requester suggested, was referred to by the custodian.

[3] The custodian granted access to the requested medical record, but advised that he did not have any records documenting contact between himself and the two physicians named in the request. He advised that he had neither spoken to the requester's son about those two physicians, nor had he referred him to either of them.

[4] The requester (now the complainant) filed a complaint regarding the custodian's decision on the basis that additional records responsive to the request should exist.

[5] During mediation, the custodian agreed to conduct another search in an attempt to locate additional records responsive to the request. Following that search, the custodian issued a supplementary access decision enclosing additional email records.

[6] The complainant advised that the additional disclosure did not satisfy his request and that he was of the view that additional responsive records should exist. In support of his position, the complainant provided copies of records that he obtained by other means. Specifically, these records include a number of email communications between the custodian and three physicians, including one of the physicians named in the original request with whom the custodian denied having contact. One email communication between the custodian and one of the other physicians named in the request indicates that the custodian was requesting that the physician provide a consultation on the complainant's son. The complainant also provided a copy of a record entitled "Outpatient Consultation" relating to his son, which identified the custodian and another physician as referring physicians.

[7] The complainant advised that he was of the view that in addition to copies of these documents, the custodian should have copies of reports or test results from one of the other physicians named in the request, as well as his own medical notes pertaining to the complainant's son's migraines and concussions which were referenced in one of the email communications between the custodian and the other physicians.

[8] In response, the custodian provided additional information relating to the search conducted for additional records including what email accounts were searched, whether any attempts were made to retrieve deleted emails and what folders were searched. The custodian also provided information about his record keeping practices.

[9] Despite the custodian's explanations regarding the search for responsive records, the complainant continued to believe that the following additional records responsive to the request should exist:

- email communications pertaining to his son between the custodian and a named physician dated October 26, 27 and November 2009;
- email communications pertaining to his son between the custodian and a named physician dated January 31, 2011;
- email communications pertaining to his son to the custodian from one of the physicians named in the request identifying the other physician named in the request as the referring physician dated September 28, 2009;
- a record pertaining to his son entitled "Outpatient Consultation" identifying a named physician and the custodian as the referring physicians;
- a report prepared by one of the physicians named in the request or results from his consultations with the complainant's son;
- medical notes prepared by the custodian relating to the complainant's son's migraines and concussions, as referred to in the custodian's email communications with one of the physicians named in the request; and
- other medical notes or correspondence pertaining to his son's care and/or referrals to other physicians.

[10] The complainant also advised that he is not satisfied with the details of the custodian's search. Specifically, he expressed the following concerns:

- the custodian did not confirm whether or not he searched the "sent" folders of his three email accounts;
- that some responsive emails may have been deleted as the custodian advised that he was not aware of a mechanism to retrieve deleted emails;
- that the custodian does not have medical notes pertaining to the complainant's concussions despite advising that he retains all records that "are important and relevant" to understanding a patient's injury and relevant to making appropriate referrals; and
- the custodian did not provide any details regarding his retention schedule for medical notes and the types of records that the custodian's representative believes must exist.

[11] As a mediated resolution could not be reached, the file was transferred to the review stage of the complaint process. After reviewing the complaint file, I decided to conduct a review and sent the parties a Notice of Review setting out the relevant facts and issues, inviting them to provide representations. Representations were initially sought and received from the custodian and then shared with the complainant.

Subsequently, the complainant's submissions were shared with the custodian, who provided submissions in reply. Finally, the complainant was granted an opportunity to provide submissions in sur-reply, which he did.

[12] The sole issue to be decided in this review is whether the custodian conducted a reasonable search for records responsive to the request. In this decision, I find that the custodian met his statutory obligation under *PHIPA* to conduct a reasonable search for responsive records and I uphold the search as reasonable.

## **DISCUSSION:**

### **Preliminary matter**

[13] *PHIPA* does not provide a general right of access to information held by the custodians to which it applies. The only right of access established under *PHIPA* is the right, under section 52(1), of individuals to obtain access to their own personal health information. An individual's right of access must be exercised by the individual about whom the records relate, or that person's lawfully authorized substitute decision-maker on his or her behalf.<sup>1</sup>

[14] Under paragraph 4 of section 23(1), on death, the right of access may only be exercised by the estate trustee or, in the absence of an estate trustee, the person who has assumed responsibility for the administration of the deceased's estate. In this case, as this office has been provided with a court order appointing the complainant as "successor personal representative," I accept that the complainant has established that he has assumed responsibility for the administration of his son's estate. Therefore, I find that he is entitled to request access to his deceased son's personal health information under section 52(1) of *PHIPA*.

### **Did the custodian conduct a reasonable search for records responsive to the complainant's representative's request?**

[15] Since the complainant's representative claims that additional records exist beyond those identified by the custodian, I must decide 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.

[16] For reviewing the adequacy of a custodian's search for records responsive to a request, the relevant part of *PHIPA* is section 54, which 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,

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<sup>1</sup> Section 25(1). See also section 5(1), defining "substitute decision-maker."

(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;

[17] The issue of whether a health information custodian has conducted a reasonable search for records under *PHIPA* has been addressed in several orders issued by this office, including PHIPA Decisions 18, 43, 48 and 57. In PHIPA Decision 18, I 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 in determining whether a custodian has conducted a reasonable search under *PHIPA*. I concluded that the access provisions in all three acts are substantially similar and, therefore, that the principles articulated under *FIPPA* and *MFIPPA* provide useful guidance in reviewing the search issue under *PHIPA*. I agree with and I adopt the approach taken in PHIPA Decisions 18, 43, 48 and 57 in this complaint.

### ***Representations***

[18] The custodian provided representations, as well as an affidavit providing further details regarding the search for responsive records.

[19] The custodian submits that he “personally conducted searches and provided full access to all records in his possession which contain personal health information relating to [the complainant].”

[20] He submits that he located and produced all of his email communications relating to the complainant, “even though most of these documents do not appear to contain ‘identifying information’ or constitute ‘personal health information’ as those terms are defined in section 4 of [*PHIPA*].”

[21] In his affidavit the custodian explains that he is a physician consultant for the National Hockey League Players’ Association (NHLPA) and that one of his main duties for that organization is to review player injury or illness with a player or his agent and, where needed or requested, to make a referral to an appropriate consultant based on the information obtained in a discussion or email. He submits that most of these communications are conducted by telephone and he keeps “a paper file on the communications that are important and relevant to understanding player illness or injury, and relevant to making an appropriate referral.”

[22] The custodian submits that he “provided no direct medical care to [the

complainant's son] at any point." He submits that he never met with him or examined him, never ordered tests or wrote any prescriptions for him. He submits that he acted as a "triage agent" and spoke with him over the telephone along with another physician to help refer him to the other physician. He submits he also helped refer the complainant to a second physician at the request of yet another physician.

[23] The custodian submits that his records relating to the complainant consist of a "small paper file with [his] handwritten notes and limited email correspondence regarding referrals to other physicians." He submits that he does "not have any written medical notes pertaining to [the complainant's son's] migranes or concussions as [he] did not speak to [the complainant's son] about these issues." He also submits that he "did not receive any consultation reports or test reports relating to [the complainant's son]."

[24] With respect to the searches that he undertook as a result of the complainant's request and subsequent complaint, the custodian explains that upon receipt of the request, he disclosed to the complainant's representative a copy of his entire paper file related to the complainant. He further explains that subsequently he undertook a more extensive review of his email correspondence and discovered that he had exchanged emails with two named physicians (identified by the complainant) regarding a referral of the complainant although he states that in those emails he did not reference the complainant's son by name and did not include any information identifying him.

[25] The custodian submits that after being advised by this office that the complainant filed a complaint of the matter because he believed that the custodian was in possession of additional emails or documents pertaining to his son, he:

...carefully reviewed [his] electronic documents to determine whether any additional electronic records that were responsive to the request exists, and [he] reviewed [his] paper files to confirm that [he] had released to [the complainant] a copy of all paper records in [his] possession relating to [the complainant].

[26] The custodian submits that his search confirmed that he had released a copy of all paper records in his possession relating to the complainant's son, and identified several additional emails relating to the complainant's son that had not previously been disclosed. He submits that he disclosed these emails to the complainant.

[27] In his affidavit, the custodian states that he confirms the following:

(a) he provided the complainant with full access to all records in his possession which contain personal health information relating to his son;

(b) he searched his three "non-hospital" email accounts for responsive emails and advised that it has not his practice to send outgoing emails from a fourth identified email account;

(c) he undertook an extensive review of his emails in order to locate and produce all email correspondence relating to the complainant's son, even though such emails do not necessarily contain personal health information as defined in the PHIPA, in particular:

- he searched emails from 2009 using a number of search terms including the word "concussion", the last name of an identified physician, and the first name of complainant's son;
- he manually reviewed his emails from 2009 to locate communications related to the complainant's son;
- he searched his emails from 2011 and 2009 using a number of physician's last names as a search term;
- that his only email account that he did not search was his hospital based account which would not contain any emails relevant to the complainant's son or the NHLPA;
- that, to date, he has kept a copy of all his files pertaining to his role as a liaison between a member of the NHLPA and an appropriate consultant and has also kept a copy of all significant emails relating to this role; and
- he does not believe that he has deleted, destroyed or lost any documents (including email communications) that are responsive to the request for records.

[28] The custodian submits that he provided the complainant with emails relating to the complainant's son between himself and three named physicians. He submits that he has provided the complainant with copies of all documents, including electronic correspondence, in his possession, that relates to the complainant's son, including emails that do not contain the complainant's son's personal health information as that term is defined in *PHIPA*.

[29] Finally, he submits that despite having extended invitations to the complainant to contact him directly to clarify any issues that were raised in the complaint, the complainant has not done so.

[30] In his representations, the complainant details his son's injuries and subsequent death and indicates that he seeks his son's medical records to find answers. He submits that initially, although the custodian provided him with hand written notes regarding a back issue, "he denied having referred the complainant to two physicians for concussion issues in 2009, even though medical records and emails show otherwise."

[31] The complainant also submits that there is an inconsistency in the custodian's

representations. He submits that in one instance, the custodian states that as a "triage agent" he would often not create either a paper or electronic chart as the referrals are typically based on informal communications. The complainant submits that later in his representations, the custodian states that he keeps a file on spoken or electronic communications that are important and relevant to understanding player illness or injury and relevant to making an appropriate referral.

[32] The complainant also states that in emails to physicians the custodian asked "to be put in contact with a 'concussion neurologist' as 'this is a more complicated concussion'" and noted that the complainant's concussion is "a little more complicated than most." He states that in another email, the custodian wrote: "will need to pursue this further for clarity with a 'concussionologist.'" He also states that in yet another email to an identified physician the custodian stated that he had spoken with a third physician about the complainant's son's case.

[33] The complainant submits that as the custodian himself characterized the concussion as out of the ordinary, this suggests that to take notes of such concussion would be important and relevant to understanding the injury and making the appropriate decision for treatment.

[34] The complainant also states that there is currently a class action in the United States being brought by former National Hockey League [NHL] players against the NHL regarding concussions and that, as a result, the NHL has asked the Superior Court of Ontario to request that the NHLPA medical consultants (which include the custodian) provide it with documents and communications relating to the complainant and other players regarding head injuries. He submits that this "further illustrates [his] belief that [the custodian and another named physician] hold medical records relative to [the complainant] and other players.

[35] The complainant concludes his representations by stating that, as the custodian has been involved in the Concussion Study Program with the NHLPA for a number of years, "it would stand to reason that he would have taken notes especially given his comments about [the complainant's] concussion being more complex and needing further examination." He further states:

As a medical consultant employed by the players' union, who are responsible for welfare and safety of its player, I think it would be paramount for [the custodian] to accurately document serious medical issues and most certainly concussion related issues.

[The custodian] made seven detailed entries comprised of three pages of hand written notes, over roughly a three-week period regarding [the complainant's] herniated disc. It makes no sense that he would have made no notes on a "*more complicated concussion*."



[36] In reply, the custodian reiterates much of the representations he made initially. However, he submits that he never met the complainant in person and was never his "treating physician." He also submits that he never spoke to the complainant's son about his concussion and that is why there are no written records with regards to that issue. He submits that his involvement with facilitating the consultation in 2009 "was so brief, minimal, and several years removed that he had simply forgotten" that he had referred him to another physician. He submits that once he performed a more extensive search he was able to locate related records, even though they did not mention the complainant by name or contain any of his personal health information. The custodian reiterates that he has conducted a careful and extensive search of his records, and has provided full access to all records related to the complainant that are in his possession.

[37] In sur-reply, the complainant states that the custodian has provided several separate and somewhat contradictory rationales as to why he has no documents. These can be summarized as follows:

- as he is a "triage agent" involved in referring players to other physicians he would often not create a paper or electronic chart;
- he keeps note that are important and relevant to understanding a player's illness or injury and relevant to making the appropriate referral;
- he never spoke to the complainant's son or his agent so no notes were required;
- he did not discuss any details about the complainant's son's concussions with another physician as he had no information about them.

[38] Regarding the last point indicated above, the complainant asserts that while the custodian references "concussions" in the plural, correspondence he has from another physician refers to only one concussion, and that this indicates that the custodian had discussions with the other physician about the complainant's son's concussions.

[39] The complainant concludes his sur-reply representations by stating:

I find it implausible to believe that [the custodian] would have no records about [the complainant's son's] concussions. [The custodian indicated he keeps notes that are important and relevant to understanding a player's illness or injury and relevant to making the appropriate referral. It would stand to reason that a concussion would be considered to be "important and relevant."

A reasonable person would expect that persons engaged in the medical profession are obligated to do whatever they can in their power to assist an individual by personally providing care or alerting those in a position to ensure the individual receives care. Part of that care, as noted by the College of Physicians and Surgeons, is to maintain medial records as they

are a powerful tool allowing a physician to track a patient's medical history and identify problems or patterns that determine the course of health care. They are an integral part of a patient's care.

Based on the information in this letter, I continue to believe that [the custodian] has records relative to my son's concussions and am seeking a copy of any and all documentation pertaining to my son.

### ***Analysis and findings***

[40] In accordance with PHIPA Decision 18 and others,<sup>2</sup> a reasonable search under *PHIPA* is one in which an experienced individual (in this case, the custodian or employee of the custodian), knowledgeable in the subject matter of the request, extends a reasonable effort to locate records which are reasonably related to the request.<sup>3</sup> To be responsive, a record must be "reasonably related" to the request.<sup>4</sup> If the custodian does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control, I have the authority to order a further search.<sup>5</sup>

[41] Based on the evidence before me, I am satisfied that the search for responsive records conducted by the custodian for the records sought by the complainant was reasonable and in accordance with his obligations under PHIPA. The custodian's representations, including his affidavit, demonstrate that he made a reasonable effort to locate all records within his custody and control, including records identified by the complainant, and I will not order a further search.

[42] The evidence provided by the custodian demonstrates that he personally conducted searches for records responsive to the request.

[43] The custodian explains that despite his involvement in the Concussion Study Program with the NHLPA, he never met the complainant's son in person or spoke to him about his medical concerns. He also explains that his involvement in facilitating the consultation in 2009 "was so brief, minimal, and several years removed that he had simply forgotten" that he had referred the complainant's son to another physician. He describes how, upon being advised that the complainant believed that additional records exist, he reviewed his electronic records as well as his paper files to confirm that he had located the records sought and identified a number of additional records. He explains that during his initial search, he had not located the records provided by the complainant to this office as evidence that additional records exist, because they did not contain any of the complainant's son's personal health information as defined in *PHIPA* and did not contain his name.

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<sup>2</sup> See also PHIPA Decisions 17, 43, 48 and 57.

<sup>3</sup> Orders M-909, PO-2469 and PO-2592. See also PHIPA decision 17.

<sup>4</sup> Order PO-2554.

<sup>5</sup> Order MO-2185.

[44] The custodian explains that once he was provided with more detail, he undertook an additional and more extensive review of his records, including emails. He submits that it was during this search that he located additional records, not containing the personal health information of the complainant's son, that relate to the referral. In his representations, the custodian clearly detailed his searches, including the specific locations or email accounts that he searched, the search terms and dates applied, and advised that he does not believe that he has deleted, destroyed or lost any documents that are responsive to the request. He submits that he has provided the complainant with all records in his possession, including some which do not contain the complainant's son's personal health information as that term is defined in *PHIPA*.

[45] Past decisions issued by this office on the issue of search establish that although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>6</sup> In this complaint, I accept that the custodian made a reasonable effort to clarify and confirm the scope of the request; that is, to determine what records that complainant sought. New information was provided during the complaint process which permitted the custodian to understand more precisely how to search for records the complainant thought should exist, but which had not been located, and additional records were located. In my view, the complainant has not provided me with evidence to support a reasonable basis that further additional records, in addition to those that have already been provided to him, should exist.

[46] I understand that the complainant continues to believe that additional records responsive to his request exist. I acknowledge that he questions how the custodian, who is involved in the NHLPA concussion study program, could have made the comment about the complexity of his son's concussion in the email to the referral doctor but not create a paper or electronic chart regarding his son's concussions. I acknowledge that he questions why the custodian made what he describes as "detailed" notes about some of his son's other injuries but does not have any notes on his son's concussion(s). I also acknowledge that the complainant finds the custodian's explanations that he acts as a "triage agent" and that he never acted as the complainant's son's "treating physician" to be inadequate explanations and that he takes the view that more detailed and extensive records regarding his son's concussion should exist within the custodian's records. However, *PHIPA* does not require the custodian to prove with absolute certainty that further records do not exist. *PHIPA* requires only that the custodian provide sufficient evidence to demonstrate that he has made a reasonable effort to identify and locate records responsive to a request made under the *Act*. Based on my review of the custodian's representations and my reasoning expressed above, I accept that he has.

[47] For the reasons outlined above, I am satisfied that the custodian has discharged his onus and has demonstrated that he has conducted a reasonable search in

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<sup>6</sup> Order MO-2246. See also, *PHIPA* Decision 17 and 18.

compliance with his obligations under *PHIPA*. On that basis, I uphold the custodian's search for records responsive to the complainant's request.

**NO ORDER:**

For the foregoing reasons, no order is issued

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_  
November 29, 2017