

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 71

HA16-115

Royal Victoria Regional Health Centre

March 15, 2018

Summary: The complainant submitted a correction request under the *Personal Health Information Protection Act* to the Royal Victoria Regional Health Centre. The complainant asserted that records prepared by physicians working in the emergency department when he was admitted in December 2015 contain errors, including several incorrect diagnoses. The hospital denied the correction requests, pursuant to the exception for good faith professional opinions or observations in section 55(9)(b) of *PHIPA*. The adjudicator finds that section 55(9)(b) applies to the information and upholds RVH's decision not to make the requested corrections.

Statutes considered: *Personal Health Information Protection Act, 2004*, sections 55(1), 55(9)(b), 55(11).

Decisions considered: PHIPA Decisions 36 and 37; Alberta IPC Order H2005-007, 2006 CanLII 80867 (AB OIPC).

BACKGROUND:

[1] This decision addresses the issues raised by an individual's request to his local hospital, the Royal Victoria Regional Health Centre (RVH), to have certain corrections made under the *Personal Health Information Protection Act* (*PHIPA* or the *Act*) to his personal health information (PHI). His concerns centre on the use of certain phrases or diagnoses in records created during a specific visit to RVH's Emergency Room (ER) that he believes are incorrect and misleading. The individual was particularly concerned

about the physicians using that information to report him to the Ministry of Transportation (MTO), which resulted in the suspension of his driver's license.

[2] In response to the request, RVH issued a decision advising the individual that the three relevant physicians had reviewed his request for corrections and that his request was being denied under section 55(9)(b), of the *Act*, because "the information consists of a professional opinion or observation that a custodian has made in good faith." RVH advised the individual that he had the right to include the information provided with his correction request as a "Statement of Disagreement" to be added to the health records, pursuant to section 55(11) of the *Act*.

[3] The individual then contacted this office and filed a complaint about the hospital's decision, which led to the appointment of a mediator to seek a resolution. During the mediation stage, the mediator discussed the complaint with both parties and assisted the complainant in identifying the specific items in the records that he wanted to have corrected under section 55 of *PHIPA*. Based on a review of the materials submitted to this office with the complaint and discussions with the complainant, the mediator summarized the aspects of the complainant's health records to which he objected. The complainant wanted references to a certain aspect of his social history and a specific diagnosis removed from the records, and he wanted to add certain information relating to the cause of one past medical event and his condition upon arrival at RVH's ER on the specified date.¹

[4] The mediator's list of the entries in the records relevant to the complainant's concerns was attached as an appendix to the Mediator's Report and provided to RVH for consideration. However, since RVH maintained its decision to refuse to correct the records, it was not possible to resolve the complaint through mediation and it was moved to the adjudication stage of the complaints process, where an adjudicator conducts a review. I began the review by giving RVH the opportunity to provide submissions in response to the issues, as I outlined them in a Notice of Review. RVH did not submit representations. The complainant advised this office that his driver's license had been reinstated, but that he still wished to pursue his complaint. He subsequently submitted representations in which he summarized his earlier concerns and efforts to have the records corrected.

[5] In this decision, I uphold the hospital's decision not to make the requested corrections to the record because I find that the good faith professional opinion and observation exception at section 55(9)(b) of *PHIPA* applies to this information. Accordingly, the hospital is not required to correct this information.

¹ Although the complainant's requested corrections were specifically detailed in documents exchanged during the review, including in the Notice of Review sent to invite submissions, it is not necessary to include these details of personal health information in this decision.

RECORDS:

[6] There are four records related to the complainant's December 2015 admission to RVH through its ER that contain entries he would like corrected. The six pages of records consist of reports detailing his assessment, referral and admission, as well as a report to the MTO.

DISCUSSION:

[7] There is no dispute that the RVH is a "health information custodian" as defined in section 3(1) of *PHIPA* and that the records at issue are the complainant's personal health information under section 4(1) of *PHIPA*.

[8] As another preliminary point, I note that in his written submissions and his communications with this office, the complainant raised several issues that fall outside of the *PHIPA* correction provisions that are the proper subject of my review. Specifically, aspects of the complaint raise questions about the actions or competence of the physicians that treated the complainant in the RVH emergency department. However, my authority does not include reviewing matters of professional conduct or competence. Accordingly, the scope of this decision is limited to reviewing the correction issue raised by the complainant in his request to RVH.

Does the hospital have a duty to make the requested correction under section 55 of PHIPA?

[9] Section 55(1) of the *Act* permits an individual who has received access to his personal health information to request that a custodian correct a record "if the individual believes that the record is inaccurate or incomplete for the purposes for which the custodian has collected, uses or has used the information ..."

[10] The purpose of section 55 of *PHIPA* is to impose a duty on health information custodians to correct records of personal health information that are inaccurate or incomplete for the purposes for which they use the information, subject to the limited and specific exceptions set out in section 55(9) of *PHIPA*.

[11] Section 55(8) sets out the right of correction to records of personal health information, as follows:

The health information custodian shall grant a request for a correction under subsection (1) if the individual demonstrates, to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information and gives the custodian the information necessary to enable the custodian to correct the record.

[12] In all cases where a complaint regarding a custodian's refusal to correct records of PHI is filed with this office, the individual seeking the correction has the onus of establishing that the "record is incomplete or inaccurate for the purposes for which the custodian uses the information" for the purpose of section 55(8). If the individual asking for correction provides sufficient evidence to establish section 55(8), the question becomes whether or not any of the exceptions in section 55(9) apply.

[13] Section 55(9) of *PHIPA* sets out the two exceptions to the obligation to correct records. The relevant exception in this complaint is section 55(9)(b), which states:

Despite subsection (8), a health information custodian is not required to correct a record of personal health information if, ...

(b) it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[14] As the wording indicates, a health information custodian is not required to correct PHI if it consists of a professional opinion or observation that a custodian has made in good faith about the individual. Where a custodian claims that section 55(9)(b) applies, as here, the custodian bears the burden of proving that the PHI at issue consists of a "professional opinion or observation" about the individual. However, once this is established, the onus is on the individual seeking a correction to establish that the "professional opinion or observation" was not made in good faith. If the exception applies, it does not matter whether or not the individual has met the onus in section 55(8) because even if the complainant satisfies this office that the information is incorrect or inaccurate under section 55(8), a finding that the exception in section 55(9)(b) applies will resolve the complaint.

[15] Depending on the circumstances of the correction request, the information that the individual is seeking corrected and the reasons for the custodian's refusal to correct the records, this office may approach the analysis initially under section 55(8) or under section 55(9) of *PHIPA*.² In this complaint, my review focusses on section 55(9)(b).

The submissions of the parties

[16] As indicated previously, I sent the hospital a Notice of Review that set out the tests under which its decision to deny the complainant's request for corrections would be reviewed. The RVH decided not to submit representations for my consideration at the review stage, instead choosing to rely on its comments from the earlier stages of the complaint. The hospital's position was rather briefly stated. In the decision issued to the complainant, RVH advised him that the three physicians who had contributed to the records in question had "reviewed your request for corrections" and that, following that review, RVH refused to grant the correction request on the basis that the exception in

² PHIPA Decision 37.

section 55(9)(b) of the *Act* applies to the information. That is, "the information consists of a professional opinion or observation that a custodian has made in good faith."

[17] In his submissions, the complainant acknowledges that section 55(9)(b) appears to present a high threshold to be cleared before corrections to records will be made. However, the complainant believes that this threshold has been met based on the materials he submitted to this office when he filed the complaint initially. These materials consist of written comments, annotated copies of the records, and correspondence to and from physicians, including ones not identified in the RVH records.

[18] The complainant outlines the concerns he has about aspects of the assessment, referral and emergency reports, as well as the report to the MTO. These relate to information recorded in sections of the records titled Most Responsible Diagnosis, Past Medical History, Hospital Course, Reason for Referral, History of Presenting Illness, Social History, Assessment and Plan, MD Assessment and Medical Conditions. The complainant disputes the cause of the medical event he experienced that resulted in his admission to RVH. He believes the cause is inaccurately or incorrectly recorded in several parts of these records and that it ought to be removed from the record and replaced by an accurate description of what was actually wrong with him. In his description of the medical event leading to the admission and an earlier event reported in his past medical history at that time, the complainant attributes them to the use of a medication he was taking and its interaction with something he consumed and to a blood infection. The complainant also disputes the veracity of another diagnosis related to cognition that is included as part of his medical history.

[19] The complainant believes that the physicians improperly attributed the cause of the medical event he suffered to a personal habit that he denies. Further, he says that this erroneous attribution and diagnosis, derived as they were from aspects of his allegedly inaccurate past medical history, social history and presenting history, were submitted to the MTO as a medical condition making him unfit to drive. The complainant expresses his great concern with the prejudicial effect of this report to the MTO, because he lost, for a time, his driver's license.³

[20] In the complainant's view, the entries inaccurately identifying the cause of his medical event, the related details of his social history, and a named cognitive diagnosis should be removed from the records. The complainant also seeks the addition of details that he believes better explain the cause of an earlier medical event, as well as the medical event that resulted in him being brought to the ER and admitted to the hospital

³ Other concerns raised by the complainant regarding the driving suspension include actions he believes the physicians (and other physicians not connected to his care at the time of the December 2015 admission to RVH) ought to have taken or information they should have provided to him to assist in getting his driver's license reinstated. As noted above, these issues are outside the scope of this correction request under *PHIPA*.

for treatment.⁴

[21] Regarding the exception claimed by RVH in refusing to grant his correction request, the complainant asserts that the physicians did not act as professionals because they did not test him to determine the real cause of his symptoms and made assumptions instead. In this way, he suggests that although "anything can be said to be their professional opinion," their opinions here were not professional.

Analysis and findings

[22] Under section 55(1) of *PHIPA*, individuals are entitled to request correction of their PHI. Using the paraphrased language of the provision, I understand the complainant's concern to be that parts of the records are "inaccurate ... for the purposes for which the custodian ... uses or has used the information." As the complainant sees it, the inaccurate facts and incorrect diagnosis documented in his health records during the December 2015 ER visit at RVH were conveyed to the MTO, which relied on the information to suspend his driver's license, and all of this reflects poorly and unfairly on him.

[23] As stated above, section 55(9)(b) of *PHIPA* provides that a health information custodian is not required to correct a record of PHI "...if it consists of a professional opinion or observation that a custodian has made in good faith about the individual." The purpose of section 55(9)(b) is to preserve "professional opinions or observations," accurate or otherwise, that have been made in good faith. This purpose is based on sound policy considerations, including the need for documentation that may explain treatments provided or events that followed a particular observation or diagnosis. A request for correction or amendment should not be used to attempt to appeal decisions or professional opinions or observations with which a complainant disagrees and cannot be a substitution of opinion, such as a complainant's view of a medical condition or diagnosis.

[24] The determination of whether the exception at section 59(9)(b) applies involves a two-part analysis. The first question is whether the PHI consists of a "professional opinion or observation." The second question is whether the "professional opinion or observation" was made "in good faith." This office's approach to the interpretation of section 55(9)(b) of *PHIPA* in the form of a two-part test was established in *PHIPA* Decisions 36 and 37 by Adjudicator Jennifer James. The test in those decisions has

⁴ The complainant was advised during the review stage that there is no right in *PHIPA* to have the incorrect information in a record removed. In particular, section 55(10)(a) of *PHIPA* states that upon granting a request for a correction, the health information custodian shall make the requested correction by recording the correct information in the record and striking out the incorrect information in a manner that does not obliterate the record.

been adopted in subsequent decisions,⁵ and I do so here.

Does the information consist of professional opinion or observation?

[25] PHIPA Decisions 36 and 37 applied established principles of statutory construction to the wording used in section 55(9)(b). This requires consideration of them in their grammatical and ordinary sense, harmoniously with the scheme of *PHIPA*, the object of that statute and the intention of the Legislature.⁶ In this context, the adjudicator concluded that for PHI to fit within the exception in section 55(9)(b), it must consist of a “professional opinion” or “professional observation.” She concluded that only observations and opinions derived from the exercise or application of special knowledge, skills, qualifications, judgment or experience relevant to the profession should be defined as “professional observations” or “professional opinions” within the meaning of section 55(9)(b). The adjudicator found this interpretation to be consistent with the purpose of the exception within the overall scheme of *PHIPA*.

[26] In arriving at this interpretation, Adjudicator James also considered decisions of the Alberta Information and Privacy Commissioner’s office that interpreted the words “professional,” “opinion,” and “observation,” in the context of correction complaints under section 13(6)(a) of Alberta’s *Health Information Act (HIA)*, which is similar to section 55(9)(b) in *PHIPA*. The adjudicator noted that in Alberta decisions such as Order H2005-007,⁷ former Alberta Commissioner Frank Work held that an “opinion” is “a belief or assessment based on grounds short of proof; a view held as probable.”⁸ The former Alberta Commissioner also concluded that an “observation” means a “comment based on something one has seen, heard or noticed, and the action or process of closely observing or monitoring.” In Order H2005-007, Commissioner Work explained that:

[O]pinions and observations are subjective in nature. Opinions, even those based on the same set of facts, can differ. Dr. X may see a patient and form the opinion that the patient has the flu. Dr. Y may see the same patient and form the opinion that the patient has a cold. HIA does not compel custodians to resolve these differences of opinion by forcing physicians to change their opinions under the guise of correction.⁹

⁵ PHIPA Decisions 39, 43, 47 and others.

⁶ Elmer A. Driedger, *The Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, at 87.

⁷ Also cited as 2006 CanLII 80852 (AB OIPC).

⁸ See also Orders H2004-004, H2005-006 and H2017-01.

⁹ Order H2005-007 at para 48. This approach to correction under *PHIPA* shares similarities with the approach to correction requests under *MFIPPA* and *FIPPA*. When reviewing correction requests related to opinions and observations in records of an investigatory nature under those acts, it is not the truth of the recorded information that is determinative of whether a correction request should be granted, but rather whether or not what is recorded accurately reflects the observations and views of the individuals whose impressions are set out in the record. See Orders MO-3042, MO-3251, PO-2258 and PO-2549.

[27] Accordingly, the question is whether the PHI the complainant seeks to correct accurately represents the professional opinion or professional observation of the physician who recorded it. Based on the circumstances and content of these ER records, I am satisfied, first, that the three named physicians possess special qualifications, knowledge, judgment and experience in medicine. Second, I am satisfied that they applied their professional knowledge in documenting what was "seen, heard or noticed" during their assessment of the complainant when he presented at the ER. In particular, I find that the particular observations and diagnosis in the complainant's ER records that he seeks to have corrected were derived from the exercise of the physicians' professional knowledge and judgment and that they constitute "professional opinions and observations" for the purpose of section 55(9)(b) of *PHIPA*. In effect, the complainant's request to correct this information seeks to substitute or rewrite the physicians' opinions or observations contained in the records.

[28] There is a temporal consideration to this determination in the sense that the time for assessing whether or not what is recorded accurately reflects the opinions or observations of the professionals whose impressions are set out in the record is *the time at which those observations and opinions are recorded, not afterwards* or in hindsight. Whatever developments there may have been afterwards, including opportunities to verify the PHI collected, does not determine the first part of the test under section 55(9)(b) of *PHIPA*; that is, whether the PHI consists of "professional opinions or observations."

[29] Since I am satisfied that the PHI the complainant seeks to have corrected consists of the "professional opinions or observations," of the attending physicians during the complainant's visit to RVH's ER in December 2015, I find that part one of the test for the application of the exception in section 55(9)(b) is met.

[30] I must now determine whether the professional opinions or observations contained in the records were made in good faith.

Were the professional opinions or observations made in good faith?

[31] According to decisions by the courts, a finding that someone has not acted in good faith can be based on evidence of malice or intent to harm another individual, as well as serious carelessness or recklessness. The courts have stated that individuals are assumed to act in good faith unless proven otherwise. Therefore, the burden of proof rests on the individual seeking to establish that a person has acted in the absence of good faith to rebut the presumption of good faith.¹⁰ In the context of section 55(9)(b) of *PHIPA*, the burden rests on the individual seeking the correction to establish that the custodian did not make the professional opinion or observation in good faith.

¹⁰ *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII).

[32] In the circumstances of this complaint, what was recorded in the complainant's ER records had consequences for him; specifically, the reporting of the complainant's medical condition to the MTO led to his driver's license being suspended for a time. It should be acknowledged that this chain of events inconvenienced the complainant and, further, that he appears to have taken offence to the specific items recorded. Nonetheless, neither the complainant's submissions nor the circumstances described above are sufficient to rebut the presumption of good faith on the part of the physicians whose assessment of him led to the correction request.

[33] In reaching this conclusion about the "good faith" requirement, I also considered the fact that *all* physicians, including the RVH physicians who prepared the records here, are subject to mandatory reporting requirements under Ontario's *Highway Traffic Act*.¹¹ Section 203(1) of the *HTA* imposes a duty on all medical practitioners to report the name, address and clinical condition of any patient 16 years of age or older who "is suffering from a medical condition that may make it dangerous for the person to operate a motor vehicle." The complainant challenges what is recorded as the cause of the medical event in the Medical Condition Report to the MTO (and the other records), but does not dispute the fact that this medical event occurred. The MTO form includes the medical event as a reportable condition under section 203(1), regardless of its cause.

[34] Simply put, there is not sufficient evidence before me to support a finding that the RVH physicians acted in bad faith. There is no evidence of malice, intent to harm, serious carelessness or recklessness on the part of these physicians. As the complainant has not provided sufficient evidence to rebut the presumption of good faith, I find that the second part of the test under section 55(9)(b) has been met in the circumstances of this appeal.

[35] In sum, I find that the information the complainant seeks to correct contains the good faith professional opinions and observations of the RVH physicians who assessed him in the ER at RVH in December 2015. Accordingly, the exception under section 55(9)(b) of *PHIPA* applies. This means that even if the complainant were to establish that the information at issue was inaccurate or incomplete for the purpose for which it used by the hospital, the hospital is not obligated to make the requested corrections under section 55(8). As a result, I uphold RVH's decision to refuse to correct the complainant's PHI in these records.

[36] In addition to providing individuals with a right to access their PHI, section 55(11) of *PHIPA* gives individuals the right to attach a statement of disagreement to the record conveying their disagreement with any information contained in the record. In the complaint before me, I note that although the complainant was advised in the

¹¹ Indeed, one of the documents provided by the complainant is a letter from his former family physician, part of which advises him of the mandatory nature of reporting under the *Highway Traffic Act*.

RVH's decision letter that this was an option available to him, I have no evidence before me that he exercised his right to do so.¹² This step remains available to the complainant, should he wish to take it.

NO ORDER:

For the foregoing reasons, no order is issued.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

_____ March 15, 2018

¹² The complainant did advise this office that he has exercised his right under the "lock box" provisions in *PHIPA*. Under sections 37(1)(a) and 38(1)(a), an individual may request that a custodian not use or disclose specified personal health information to another health information custodian for a particular purpose, including the provision of health care. Additionally, section 50(1)(e) gives individual the right to direct a custodian not to disclose his or her PHI outside of Ontario.