

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 87

HA16-58

Toronto Foot Clinic

February 12, 2019

Summary: The complainant is seeking access under the *Personal Health Information Protection Act (PHIPA)* to a biomechanical assessment prepared by the Toronto Foot Clinic (the clinic). The clinic denied him access to it under section 54(6) of *PHIPA*, which gives a health information custodian the discretion to refuse access to a record of personal health information if the custodian believes on reasonable grounds that the request for access is frivolous or vexatious or is made in bad faith. It also denied him access to it under the exemption in section 52(1)(e)(i), which allows a custodian to refuse access to a record of personal health information if granting access could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person. In this decision, the adjudicator finds that the clinic cannot refuse to provide the complainant with access to the biomechanical assessment under section 54(6), because it has not established that it had reasonable grounds for believing that the complainant's request for access was made in bad faith. In addition, he finds that the biomechanical assessment is not exempt from disclosure under section 52(1)(e)(i). Accordingly, he orders the clinic to provide the biomechanical assessment to the complainant.

Statutes considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, ss. 52(1)(e)(i) and 54(6); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ss. 10(1), 20 and 49(d); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 4(1).

Cases considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

Decisions and orders considered: Order M-850 and PHIPA Decision 34.

BACKGROUND:

[1] The complainant had problems with his feet and saw a chiropodist at the Toronto Foot Clinic (the clinic), which is a private medical facility. The practice of chiropody involves the assessment of the foot and the treatment and prevention of diseases, disorders or dysfunctions of the foot by therapeutic, orthotic or palliative means.¹

[2] The complainant later submitted an access request under the *Personal Health Information Protection Act (PHIPA)* to the clinic for records of his personal health information. In response, the clinic sent a decision letter to him stating that it was providing him with “all of the notes that we have on your file.”

[3] The complainant then filed a complaint with the Information and Privacy Commissioner of Ontario (IPC), alleging, amongst other things, that the clinic had not provided him with all records of his personal health information. During the intake stage of the complaint, the clinic advised the IPC that another record of the complainant’s personal health information exists – a one-page biomechanical assessment, dated March 22, 2016. A biomechanical assessment is prepared by a chiropodist to determine whether custom orthotics are warranted and should be prescribed and dispensed to a patient.² The clinic refused to provide the complainant with access to the biomechanical assessment.

[4] The IPC assigned a mediator to assist the parties in resolving the issues in dispute. Both parties confirmed that the biomechanical assessment was the only record of personal health information at issue. They also agreed that the clinic is a “health information custodian”³ and the biomechanical assessment contains the complainant’s “personal health information,”⁴ for the purposes of *PHIPA*.

[5] During mediation, the clinic sent a supplementary decision letter to the complainant stating that it was denying access to the biomechanical assessment under section 54(6) of *PHIPA*, which gives a health information custodian the discretion to refuse access to a record of personal health information, if the custodian believes on reasonable grounds that a request for access to that record is frivolous or vexatious or is made in bad faith. The clinic asserted, in part, that the complainant was acting in bad faith by requesting access to a record of personal health information even though he had not paid for the services rendered to him by the clinic.

[6] In addition, the clinic’s supplementary decision letter stated that it was denying him access to the biomechanical assessment under the exemption in section 52(1)(e)(i)

¹ *Chiropody Act*, 1991, S.O. 1991, c. 20, s. 4.

² As explained at footnote 5 of the clinic’s representations.

³ See section 3 of *PHIPA*.

⁴ See section 4 of *PHIPA*.

of *PHIPA*, on the basis that granting access could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person.

[7] Finally, the clinic advised the mediator that the College of Chiropractors of Ontario (the college) may wish to make representations on the issues in dispute if the complaint moves to the review stage of the complaint process. This complaint was not resolved during mediation and was moved to the review stage. I sought representations from the clinic, the complainant and the college on the issues in dispute. I received representations from the clinic but not from the college or the complainant.

[8] In this decision, I find that the clinic cannot refuse to provide the complainant with access to the biomechanical assessment under section 54(6) of *PHIPA*, because it has not established that it had reasonable grounds for believing that the complainant's request for access to this record of personal health information was made in bad faith. In addition, I find that the biomechanical assessment is not exempt from disclosure under section 52(1)(e)(i). Accordingly, I order the clinic to provide the biomechanical assessment to the complainant.

RECORD:

[9] The record at issue is a one-page biomechanical assessment, dated March 22, 2016.

ISSUES:

- A. Was the complainant's request for access to the biomechanical assessment made in bad faith for the purposes of section 54(6) of *PHIPA*?
- B. Is the biomechanical assessment exempt from disclosure under section 52(1)(e)(i) of *PHIPA*?

DISCUSSION:

BAD FAITH

A. Was the complainant's request for access to the biomechanical assessment made in bad faith for the purposes of section 54(6) of PHIPA?

[10] The clinic is refusing to grant the complainant access to the biomechanical assessment under section 54(6) of *PHIPA*, which reads:

A health information custodian that believes on reasonable grounds that a request for access to a record of personal health information is frivolous

or vexatious or is made in bad faith may refuse to grant the individual access to the requested record.

[11] Specifically, the clinic submits that the complainant's request for access to the biomechanical assessment was made in bad faith.

[12] Although section 54(6) of *PHIPA* has not yet been interpreted by the IPC, it is helpful to consider the manner in which the IPC has interpreted similar provisions in the *Freedom of Information and Protection of Privacy Act (FIPPA)*⁵ and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*.⁶ Those provisions provide institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under those Acts, and therefore it should not be exercised lightly.⁷ An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.⁸ In my view, the same principles would apply to health information custodians that are invoking section 54(6) of *PHIPA* in response to a request for access to records of personal health information.

[13] "Bad faith" has been defined as:

The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.⁹

[14] For the reasons that follow, I find that the clinic cannot refuse the complainant access to the biomechanical assessment under section 54(6) of *PHIPA*.

[15] The clinic asserts that the complainant was acting in bad faith by requesting access to a record of personal health information even though he had not paid for the services rendered to him by the clinic. It claims that the complainant owed the clinic a total of \$380 in outstanding fees and provided a breakdown and explanation of those fees.

⁵ R.S.O. 1990, c. F.31. See, for example, section 10(1) of *FIPPA* and section 5.1 of Regulation 460.

⁶ R.S.O. 1990, c. M.56. See, for example, section 4(1) of *MFIPPA* and section 5.1 of Regulation 823.

⁷ Order M-850.

⁸ *Ibid.*

⁹ *Ibid.*

[16] The clinic also alleges that the complainant told its staff that he did not intend to use custom orthotics and simply wanted the clinic to document the consultation and assessment to assist him in disputes against the Ministry of Health and other healthcare providers. It claims that the complainant also told the clinic that he did not want to proceed with the order for the custom orthotics and did not intend to use them if dispensed by the clinic. The clinic submits that the complainant should not be entitled to have access to the biomechanical assessment because he intentionally misled and deceived the clinic as to the purpose of his visit and intention of acquiring and using the customs orthotics dispensed by the clinic.

[17] I do not find these submissions to be persuasive. The test in section 54(6) is whether a custodian has reasonable grounds for believing an individual's *request for access* to a record of personal health information is frivolous or vexatious or is made in bad faith, not whether that individual had allegedly engaged in acts of bad faith when they sought and received services from that custodian. In my view, the complainant's alleged failure to pay for the chiropodic services he received, and his decision to simply seek an assessment for his foot problems and not proceed with further treatment for various reasons, are not reasonable grounds for finding that his request for access to records of his personal health information was made in bad faith.

[18] In short, I find that the clinic cannot refuse to provide the complainant with access to the biomechanical assessment under section 54(6) of *PHIPA*, because it has not established that it had reasonable grounds for believing that the complainant's request for access to this record of personal health information was made in bad faith.

RISK OF SERIOUS HARM

B. Is the biomechanical assessment exempt from disclosure under section 52(1)(e)(i) of PHIPA?

[19] Section 52(1) of *PHIPA* sets out certain exemptions from the right of access to records of one's own personal health information. The clinic claims that the biomechanical assessment is exempt from disclosure under section 52(1)(e)(i), which reads:

Subject to this Part, 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,

(e) granting the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,

[20] In other words, under section 52(1)(e)(i), the complainant has a right of access

to the biomechanical assessment unless granting him access could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the complainant or a risk of serious bodily harm to him.

[21] For the reasons that follow, I find that the clinic cannot deny the complainant access to the biomechanical assessment under section 52(1)(e)(i) of *PHIPA*.

[22] The purpose of section 52(1)(e)(i) is to protect the treatment, recovery and physical security of a patient and others. This exemption is similar to section 49(d) of *FIPPA*, which provides an exemption from disclosure of medical information to the requester where it “could reasonably be expected to prejudice the mental or physical health of the individual.” It is also similar to section 20 of *FIPPA*, which applies “where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.”¹⁰

[23] The standard of proof required under section 52(1)(e)(i) is the same as the standard under sections 49(d) and 20 of *FIPPA* and other exemptions that contain the words “could reasonably be expected to . . .”¹¹ The health information custodian must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹²

[24] In its representations, the clinic focuses on a standard of practice issued by the college entitled, “Prescription Foot Orthoses.” This standard states that prescription custom foot orthoses are an integral part of patient care in the management of pedal pathologies and are used to improve gait and to alleviate pain and discomfort from abnormal foot function or structure. It further states that the standard reflects what should be performed by chiropodists and podiatrists with respect to the manufacturing and dispensing of orthotic devices.

[25] The clinic then cites a section of this standard which states that neither prescribing nor dispensing foot orthoses is a controlled act under the *Regulated Health Professions Act*. These functions can be lawfully performed by any regulated or unregulated practitioner. As a result, members of many different professions and practitioners with varying levels of competency prescribe and dispense foot orthoses. However, chiropodists and podiatrists are the only health care providers whose statutory scope of practice explicitly includes the provision of orthotic devices.

¹⁰ PHIPA Decision 34.

¹¹ *Ibid.*

¹² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[26] The clinic also cites another section of the standard which states that a best practice is to have "the custom foot orthoses both prescribed and dispensed by the same practitioner in order to provide patients with a seamless continuum of care and to ensure that there is no fragmentation or confusion of responsibility or liability for results."

[27] The clinic asserts that the fact that the college established a standard of practice with respect to prescribing custom foot orthoses and advised its members of a best practice to ensure continuity of care in order to avoid harm to patients, is "compelling." It further submits that because this standard of practice was developed following consultation and input from its professional members with expertise in the field (i.e., chiropodists and podiatrists), it should be presumed that the standard of practice reflects the best available clinical evidence.

[28] It points out that the complainant's insurer appears to agree with the college's best practice because its policies and procedures expressly provide that "all requests for orthotics must come directly from the approved Regulated Health Professional . . . who is solely responsible for the entire treatment plan." It asserts that the college and its implementation of the standard of practice should be entitled to deference.

[29] The clinic submits that if the biomechanical assessment is disclosed to the complainant, the expectation that he will suffer the type of harms set out in section 52(1)(e)(i) is "well beyond mere possibility or speculation." It provides the following reasons for denying the complainant access to the biomechanical assessment under section 52(1)(e)(i) of *PHIPA*:

. . . [I]f a copy of TFC's Biomechanical Assessment is provided, it could reasonably be expected to be used by you to have another person (including an unregulated practitioner lacking competence in the provision of orthotic devices) prescribe an orthotic prescription to be sent to an orthotic laboratory. As there is no assurance or certainty that the Biomechanical Assessment, if produced, would not be used for the purpose of preparing an orthotic prescription to be sent to the orthotic laboratory, TFC would not be able to ensure the proper design, composition and fabrication of the orthotic intended to treat your condition as contemplated by TFC's Biomechanical Assessment. This could be reasonably expected to result in a risk of serious harm to you.

[30] I do not find these submissions to be persuasive with respect to whether disclosing the biomechanical assessment to the complainant could reasonably be expected to lead to the harms set out in section 52(1)(e)(i) of *PHIPA*.

[31] I accept that the college's standard of practice for the prescription of foot orthoses stipulates that custom foot orthoses should be both prescribed and dispensed by the same practitioner in order to provide patients with a seamless continuum of care and to ensure that there is no fragmentation or confusion of responsibility or liability for

results. From a health care perspective, this appears to be a clinically sound best practice that aims to protect both the health care provider and the patient.

[32] In my view, however, the entire chain of events described in the clinic's submissions that it claims could reasonably be expected to occur if the biomechanical assessment is disclosed to the complainant, including the resulting harms set out in section 52(1)(e)(i), is at best, speculative, and at worst, unlikely.

[33] If the clinic discloses the biomechanical assessment to the complainant, it is possible that he might bring it to an unregulated foot care provider. However, the clinic has provided no evidence that he actually intends to do so or that another foot care provider could reasonably be expected to use the biomechanical assessment prepared by the clinic rather than conducting its own assessment.

[34] In fact, the clinic has adduced evidence which suggests that even if the complainant went to another foot care provider, it is unlikely that this provider would end up using the biomechanical assessment prepared by the clinic. As noted above, the clinic states that the complainant's insurer requires that all requests for orthotics come directly from a regulated foot care specialist who is solely responsible for the entire treatment plan. In such circumstances, it appears unlikely that the complainant would bring the biomechanical assessment done by the clinic to an unregulated provider for the prescribing and dispensing of orthotics, because if he did so, his insurer would not pay for these services and he would have to pay out of pocket.

[35] Under section 52(1)(e)(i), the complainant has a right of access to the biomechanical assessment unless granting him access could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the complainant or a risk of serious bodily harm to him. Given that the entire chain of events described in the clinic's submissions is at best, speculative, and at worst, unlikely, I find that it is not reasonable to expect that disclosing the biomechanical assessment to the complainant could reasonably be expected to lead to the harms set out in section 52(1)(e)(i).

[36] In short, I find that the biomechanical assessment is not exempt from disclosure under section 52(1)(e)(i).

ORDER:

For the foregoing reasons, pursuant to section 61(1) of *PHIPA*, I order the clinic to provide the biomechanical assessment to the complainant by **March 13, 2019**.

Original Signed by: _____
Colin Bhattacharjee
Adjudicator

February 12, 2019 _____