

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 111

Complaint HA16-82

City of Toronto – Long-Term Care Homes and Services

February 19, 2020

Summary: A daughter, acting as estate trustee, made a request to the City of Toronto, Long-Term Care Homes and Services (the custodian) under the *Personal Health Information Protection Act (PHIPA)* for access to her deceased mother's personal health information records. Her mother had been a resident at a city-run long-term care home for over 18 years. The custodian granted access to the records subject to the payment of a fee that it estimated at \$3,960. The daughter requested a review of the custodian's fee estimate.

In this decision, the adjudicator finds that the custodian's fee estimate of \$3,960 exceeds the amount of "reasonable cost recovery" under section 54(11) of *PHIPA*.

The adjudicator finds that the custodian is entitled to charge photocopy fees for records that need to be scanned to be put onto CD and she upholds the manner in which it calculated those fees. However, she does not allow it to charge photocopy fees for any records available in electronic form that do not require severances and are transferrable onto CD.

The adjudicator also finds that while the custodian is entitled under *PHIPA* to conduct a review of the records prior to granting access to them, the time spent to review each record must be assessed on a record-type-by-record-type basis, taking into account the information that each record type contains. She determines that records requiring only a straightforward review must be distinguished from those requiring a more detailed review. In this case, she finds for some types of records, the custodian's estimate of the time required for review results in a charge that exceeds "reasonable cost recovery."

With respect to records that require a straightforward review, the adjudicator establishes the time for review should be calculated at five seconds per page. With respect to records that require a more detailed review, she establishes that the time for review should be calculated at two minutes per page. She also confirms that the fee for review should be calculated at the rate

set out in the 2006 framework for fees, \$45 for every 15 minutes of review, after the first 15 minutes.

Based on the principles set out in this decision, the adjudicator reduces the custodian's fee estimate to \$2,831.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, sections 54(10) and (11).

Decisions Considered: Health Orders HO-009 and HO-014; PHIPA Decision 17, PHIPA Decision 30, PHIPA Decision 33; Orders MO-2530, MO-2577, MO-3440, MO-3446 and PO-3480.

BACKGROUND:

[1] A daughter made a request to the City of Toronto – Long-Term Care Homes and Services (the custodian), under the *Personal Health Information Protection Act, 2004 (PHIPA)*, for access to her deceased mother's personal health information records. Her mother had been resident at a city-run long-term care home for over 18 years.

[2] With her request, the daughter enclosed information that established that she is her mother's estate trustee, and is therefore entitled to exercise her mother's right of access to records containing the mother's personal health information under section 52(1) of *PHIPA*, pursuant to section 5(1), paragraph 4 of section 23(1) and section 25.

[3] The custodian issued a decision advising that under section 54(10) of *PHIPA* it was charging a fee for access to the records and its fee estimate was \$7,673.30. It explained that "[t]he fee estimate was based on searching for, processing and photocopying the requested records; and removing unrelated information."

[4] The daughter, now the complainant, filed a complaint with this office regarding the custodian's fee estimate.

[5] During mediation, the custodian revised its fee estimate. It provided this office with a chart outlining a breakdown of the revised fee, which it had reduced to \$7,120, for photocopying and reviewing the 3,160 pages of records identified as responsive to the complainant's request prior to granting access to them.

[6] In response to the mediator's request for additional information relating to the custodian's fee, the custodian made the following statement:

Please be aware that long-term care residents have charts that are quite lengthy due to the longer lengths of stays compared to admissions in acute care facilities or other sectors. Therefore, the time that is required to review the chart is extensive to ensure accurate release of information and adherence to the legislation. There is a large section of clinical

documentation that requires review contrasted to other sections (diagnostic results, orders, etc.).

[7] Despite this statement, the custodian advised that it was prepared to revise its fee estimate again, applying a review time of one minute per page (instead of the previously applied two minutes per page). Deducting the charge for the first 15 minutes of review,¹ the custodian estimated it required 52.42 hours of review time charged at a rate of \$60 per hour for a further revised amount of \$3,145. As a result, when added to the estimated photocopy charges, the custodian assessed the revised total fee estimate, including for copying and reviewing, at \$3,960.

[8] The complainant advised that she is not satisfied with the reductions made to the fee and continues to be of the view that the fee for access to the records is excessive.

[9] As a mediated resolution was not reached, the matter was transferred to the adjudication stage of the complaint process. As the adjudicator, I sent a Notice of Review setting out the facts and issues on review to the custodian, seeking representations. The custodian provided representations that I shared in their entirety with the complainant, together with a copy of the Notice of Review. The complainant chose not to submit representations.

[10] Upon consideration of the information before me, and as the custodian did not provide me with a copy of the records, I decided that I required additional information from the custodian in order to determine whether its fee estimate of \$3,960 exceeds "reasonable cost recovery" as that term is used in section 54(11) of *PHIPA*. I wrote to the custodian with specific questions about the responsive records, requesting detailed descriptions of the different types of records and their contents. I also requested that it provide more information about the steps taken in its review of the records and about its calculation of the fee for that review. The custodian submitted a thorough response providing me with sufficient information to make a determination on the matter. I decided that it was not necessary to seek representations from the complainant on the additional information provided to me by the custodian. The relevant portions of that additional information are discussed in this decision.

[11] In this decision, I find that the custodian's fee estimate exceeds "reasonable cost recovery" under section 54(11) of *PHIPA*. I find that the custodian is entitled to charge photocopying fees to scan records onto CD and I uphold the manner in which it calculated those fees. However, I do not allow it to charge photocopying fees for any

¹ As will be discussed later in this decision, section 25.1(1) of a guideline for fees to be charged under *PHIPA* (the 2006 framework) provides a set fee of \$30 for a number of tasks required in the processing of a request, including for the first 15 minutes of review.

records that are available in electronic form, do not require severances and are transferrable onto CD. I also find that while the custodian has a duty under *PHIPA* to conduct a review of the records prior to granting access to them, the time spent to review each page must be assessed on a record-type-by-record-type basis, taking into account the information that each record type contains. I find that for some types of records at issue, the custodian's estimate of the time required for review results in a charge that exceeds "reasonable cost recovery." I order the custodian to distinguish between records requiring only a straightforward review and those requiring a more detailed review. With respect to the records that require a straightforward review, I find that the time for review should be calculated at five seconds per page. With respect to records that require a more detailed review, I accept that the time for review should be calculated at two minutes per page. Based on the principles set out in this decision, I reduce the fee estimate to \$2,831.

PRELIMINARY ISSUES:

[12] There is no dispute that the custodian is a health information custodian within the meaning of section 3(1) of *PHIPA* [paragraph 4.ii]². There is also no dispute that the records at issue contain personal health information of the complainant's mother as defined in section 4(1) of *PHIPA*. Finally, there is no dispute that as estate trustee, the complainant is entitled to exercise her mother's right of access to the mother's health records under section 52(1) of *PHIPA*, pursuant to section 5(1), paragraph 4 of section 23(1) and section 25.

DISCUSSION:

The records at issue

[13] The complaint before me relates to the custodian's fee estimate for processing over 3,000 pages of records that make up the complainant's mother's Resident Health Care Record (the RHC Record), compiled over the course of the approximately 18 years that she was a resident of a City of Toronto-run long-term care facility. The custodian explains that an RHC Record tracks any care and services that a resident receives over the course of their time at the facility. The custodian has not provided me with a copy of the RHC Record that is at issue, but it did provide me with detailed information about it.

[14] The custodian explains that each resident of a long-term care home has their

² Section 4.ii. reads, in part:

A person who operates one of the following facilities, programs or services:

ii. A long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*.[.]

own RHC Record which, despite being referred to in the singular, is made up of a collection of different types of records that typically fall into 11 different categories. The custodian stresses that every person's RHC Record is unique and may or may not contain all of the categories or types of records and may contain additional records that do not fall into the 11 identified categories of records. It explains that the length and complexity of an RHC Record can vary based on a number of factors including the resident's length of stay, condition, or the specific elements of the care and services that they require.

[15] The custodian provided me with two detailed charts identifying the categories of records that make up an RHC Record and examples of the types of records expected to fall within each of those categories. One chart provides a listing and overview of the categories and types of records that are typically included in an RHC Record. The other chart sets out the same categories but identifies the types of records that are contained in the specific RHC Record at issue.³ At a glance, both charts list the following 11 categories which may include, among others, the following types of records which are typically contained in an RHC Record:

- Category 1 – Title Records: These include immunization records, a “do not resuscitate” form and records about the level of intervention plan of care.
- Category 2 – Medical Orders: These include physicians’ orders, pharmacist communication sheets and Tamiflu records.
- Category 3 – Progress Notes: These include notes on medical physical examinations, resident conferences and multidisciplinary progress notes.
- Category 4 – Nursing Data: These include vital signs records, a weight record, nursing and personal care records, medication or treatment administration records and nursing assessment records.
- Category 5 – Consultations: These include transfer notes or referrals.
- Category 6 – Final Notes: These include hospital discharge notes.
- Category 7 – Paramedical Notes: These include physiotherapy, occupational therapy and social work assessments and consultations.
- Category 8 – Administration Records: These include pre-admission information and consent regarding vaccinations.

³ In the Appendix to this decision, I have reproduced, in part, the chart submitted by the custodian that provides an overview of the categories and types of records that it submits are included in the specific RHC Record at issue.

- Category 9 – Miscellaneous: These include private hired worker sign-in sheets.
- Category 10 – X-Ray and ECG Reports: These include X-Rays, ECGs and ultrasound records.
- Category 11 – Laboratory reports.

Does the total fee estimate of \$3,960 for access to the complainant's mother's RHC Record exceed "reasonable cost recovery" as that term is used in *PHIPA*?

[26] The custodian takes the position that its fee estimate of \$3,960 is in keeping with the principle of "reasonable cost recovery" as that term is used in *PHIPA*. It reiterates that the RHC Record records all care and services that the complainant's mother would have received over the course of her time at a city-run long-term care facility and notes that, as the complainant's mother was a resident at that facility for approximately 18 years, her RHC Record is significant, comprising over 3,000 pages of records. For the reasons set out below, I disagree with the custodian's position and find that its fee estimate of \$3,960 exceeds "reasonable cost recovery."

Reasonable cost recovery for access as set out in PHIPA

[16] Sections 54(10) and (11) of *PHIPA* address fees that may be charged by a custodian for access to personal health information. Those sections read:

54 (10) A health information custodian that makes a record of personal health information or a part of it available to an individual under [Part V of *PHIPA*] or provides a copy of it to an individual under clause (1)(a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.

(11) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed.

[17] Section 54(11) of *PHIPA* prohibits a health information custodian from charging a fee that exceeds "the prescribed amount" or the "amount of reasonable cost recovery." Given the absence of a regulation prescribing the amount of the fee that may be charged, this office has the authority pursuant to Part VI of *PHIPA* to conduct a review to determine whether the fee charged exceeds "the amount of reasonable cost recovery" within the meaning of *PHIPA*.

[18] The expression "amount of reasonable cost recovery" in section 54(11) is not defined in *PHIPA*. However, this office has previously considered the meaning of this

phrase for the purposes of the fee provisions in *PHIPA*.⁴ Applying the modern rule of statutory interpretation, this office has concluded that the phrase “reasonable cost recovery” in *PHIPA* does not mean “actual cost recovery,” or full recovery of all the costs borne by a health information custodian in fulfilling a request for access to an individual’s own personal health information.⁵ This office has also concluded that the use of the word “reasonable,” to describe cost recovery, suggests that costs should not be excessive, and that, as a whole, section 54(11) must be interpreted in a manner that avoids creating a financial barrier to the important purpose of *PHIPA* to grant a right of access to one’s own personal health information.⁶

[19] These past orders have also concluded that a fee scheme set out in a proposed regulation to *PHIPA*, published by the Minister of Health and Long-Term Care in 2006 (the “2006 framework”),⁷ though never adopted, provides the best framework for determining the amount of “reasonable cost recovery” under *PHIPA*.⁸

[20] The 2006 framework adopted in those orders establishes a set fee of \$30 that the custodian may charge to complete specifically defined work required to respond to a request, as well as fees that a custodian may charge over and above that set fee. The 2006 framework reads, in part, as follows:

Fees for access to records

25.1(1) For the purposes of subsection 54(11) of [*PHIPA*], the amount of the fee that may be charged to an individual shall not exceed \$30 for any or all of the following:

1. Receipt and clarification, if necessary, of a request for a record.
2. Providing an estimate of the fee that will be payable under subsection 54(10) of [*PHIPA*] in connection with the request.
3. Locating and retrieving the record.
4. Review of the contents of the record for not more than 15 minutes by the health information custodian or an agent of the

⁴ Orders HO-009 and HO-014.

⁵ Orders HO-009, HO-014 and PHIPA Decision 17.

⁶ Orders HO-009, HO-014 and PHIPA Decision 17.

⁷ Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol. 139-10 (11 March 2006). Available online here: <https://files.ontario.ca/books/139-10.pdf>

⁸ Orders HO-009, HO-014 and PHIPA Decision 17.

custodian to determine if the record contains personal health information to which access may be refused.

5. Preparation of a response letter to the individual.
6. Preparation of the record for photocopying, printing or electronic transmission.
7. Photocopying the record to a maximum of the first 20 pages or printing the record, if it is stored in electronic form, to a maximum of the first 20 pages, excluding the printing of photographs from photographs stored in electronic form.
8. Packaging of the photocopied or printed copy of the record for shipping or faxing.
9. If the record is stored in electronic form, electronically transmitting a copy of the electronic record instead of printing a copy of the record and shipping or faxing the printed copy.
10. The cost of faxing a copy of the record to a fax number in Ontario or mailing a copy of the record by ordinary mail to an address in Canada.
11. Supervising the individual's examination of the original record for not more than 15 minutes.

(2) In addition to the fee charged under subsection (1), fees for the services set out in Column 1 of Table 1 shall not, for the purposes of subsection 54(11) of [PHIPA], exceed the amounts set out opposite the service in Column 2 of the Table.

[21] I note that section 25.1(2) of the 2006 framework indicates that a custodian may charge fees over and above the set \$30 in amounts set out in an attached table.⁹ The following three items set out in that table are of particular note in the circumstances of this review:

ITEM	COLUMN 1	COLUMN 2
1	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages

⁹ I have reproduced Table 1 in its entirety in the Appendix to this decision.

3	For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form	\$10
12	For the review by a health information custodian or an agent of the custodian of the contents of a record to determine if the record contains personal health information to which access or disclosure may or shall be refused	\$45 for every 15 minutes after the first 15 minutes

The custodian's breakdown of its fee estimate of \$3,960.00

[22] The custodian provides the following breakdown of its fee estimate for 3,160 pages:

Cost for photocopies or computer printouts of the first 20 pages (Flat rate)		= \$30.00
Calculation for photocopies or computer printouts of the remaining pages	$(3,160\text{pgs} - 20\text{pgs}) \times \0.25	= \$785.00
Charge for copying		= \$815.00
Calculation for time reviewing the contents of the records/Time required to sever the record. (Initial 15min to be accounted for)	$3,160\text{pgs} \times 1\text{min}$ $= 3,160\text{mins}$ $(3,160\text{min} - 15\text{min}) / 60$ $= 52.42\text{hrs}$	
Charge for review	$52.42\text{hrs} \times \$60.00/\text{hr}$	=\$3,145.00
Total Cost of Processing Request	$\$815.00 + \$3,145.00$	=\$3,960.00

[23] The custodian submits that I should uphold its fee estimate as "reasonable cost recovery." It submits that although it considered the 2006 framework as a guide to reach its calculations, it did not apply the framework in a mechanical manner. It submits that it made the following modifications to reduce the fee as much as possible so that the fee would not be a barrier to the complainant's access:

- it waived the \$10 fee for providing records on CD;
- it reduced the fee for the review from the recommended \$45 for every 15 minutes, after the first 15 minutes, to \$15 for every 15 minutes, after the first 15 minutes; and
- it estimated the time required to review and sever the record at an average of one minute per page instead of the two minutes per page that this office has previously determined to be reasonable.¹⁰

[24] The custodian submits it tried to encourage the complainant to narrow the request parameters to a more specific timeframe in an effort to reduce the fee but that she continues to request access to the entire chart covering 18 years. The custodian also submits it considered providing the complainant with a fee waiver but she declined to provide the necessary supporting documentation.

The fact that the fee estimate is significantly less than a fee that would permit the custodian to recover its actual costs is not sufficient to demonstrate that it is in keeping with the principle of "reasonable cost recovery."

[25] The custodian argues that its fee estimate of \$3,960 is in keeping with "reasonable cost recovery," in part, because it does not equate to "actual cost recovery." It submits that even were it to recover the amount of the fee estimate quoted to the complainant, it would incur a loss.

[26] The custodian provides substantial representations on the comparison between the estimated costs quoted to the complainant and the actual costs that it has already incurred to arrive at its fee estimate. With its representations, it includes a detailed chart that sets out the actual institutional resource costs based on the number of hours required to perform the necessary tasks to respond to the request.

[27] The custodian estimates its total actual costs to process this request would amount to \$10,735.58 and submits that when compared to its proposed cost of \$3,960, which is based on the 2006 framework and the concept of "reasonable cost recovery" in section 54(11) of *PHIPA*, the fee estimate represents a reduction of \$6,775.58.

¹⁰ Although this standard has not, to date, been addressed in decisions issued under *PHIPA*, orders issued under the *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Municipal Freedom of Information and Protection of Privacy Act (MFPPA)* have recognized and applied the guideline of two minutes per page to review and sever records, requiring multiple severances, in preparation of disclosure. See, for example, Orders MO-1169, PO-1721, PO-1834 and PO-1990. Note however, that pursuant to section 6.1 of Regulation 460 under *FIPPA* and section 6.1 of Regulation 823 under *MFIPPA*, when granting access to a requester's own personal information, an institution is not permitted to charge a fee for preparing the record.

[28] The custodian explains that it based its estimate of actual costs on a number of factors, including costs for the following:

- to cover the hourly rate of staff members assigned to respond to the request,
- to backfill the positions of staff members assigned to respond to the request,
- for storage, transportation, and couriers,
- for staff training and orientation,
- for legal consultation, and
- to perform an environmental scan to ensure its response to the request is in alignment with other jurisdictions.

[29] The custodian states that in addition to the actual costs that it incurred to calculate its fee estimate, it incurred further costs in order to respond to my request for supplemental information about the records in order to determine the reasonableness of its fee and that it cannot recover those costs. It also states that even if I were to uphold its initial estimate, "at this point [it] will result in extensive costs to [the custodian] which will need to be paid by [the custodian], and indirectly the public at large."

[30] In my view, the fact that the fee estimate set out by the custodian is less than its actual costs does not demonstrate in and of itself that it is in keeping with "reasonable cost recovery" in section 54(11) of *PHIPA*.

[31] As noted above, this office has concluded that the expression "reasonable cost recovery" in section 54(11) does not mean "actual cost recovery," or full recovery of all the costs borne by a health information custodian in fulfilling a request for access to an individual's own personal health information. This office has also concluded that the use of the word "reasonable," to describe cost recovery, suggests that costs should not be excessive. It has also concluded that section 54(11) must be interpreted in a manner that avoids creating a financial barrier to the important purpose of *PHIPA* to grant a right of access to one's own personal health information.¹¹

[32] I acknowledge that the custodian's actual costs, when considering such factors as the number of hours taken in light of an individual's overall salary, give a picture of a much more significant cost than that which is reflected in the fee estimate that it has quoted. However, in my view, if the legislature had intended to permit a health information custodian to charge for all of the actual costs that it is required to incur

¹¹ Orders HO-009 and HO-014.

when responding to a request for access from an individual seeking their own personal health information, it would be clearly stated in *PHIPA*.

[33] Additionally, I do not accept that there are any circumstances where the principle of "reasonable cost recovery" would permit a custodian to charge an individual requesting access to their own personal health information fees for some of the tasks itemized in the custodian's representations. In my view, it would be absurd to conclude that charging a requester costs for training staff, legal consultations or conducting "environmental scans," in order to obtain access to their own records of personal health information,¹² is in keeping with the intentions of the legislature, especially in light of the wording of section 54(11).

[34] Accordingly, I find that the fact that the custodian's fee estimate is significantly less than a fee that would permit it to recover its actual costs is not sufficient to demonstrate that the fee estimate accords with the principle of "reasonable cost recovery."

The fact that the fee is calculated taking into consideration the principles set out in the 2006 framework and Order HO-009 is not sufficient to demonstrate that it is in keeping with the principle of "reasonable cost recovery."

[35] The custodian submits that its fee estimate of \$3,960 for access to the complainant's mother's RHC Record is in keeping with the principle of "reasonable cost recovery" set out in section 54(11) because, in arriving at that fee estimate, it considered and applied the 2006 framework and the principles in Order HO-009. The custodian argues that it had no choice but to apply those principles to this case because alternative options such as applying a maximum ceiling cost or a sliding scale based on the number of years requested are not available. It submits, however, that in an effort to reduce the fee estimate as much as possible, it did not apply the 2006 framework and principles set out in Order HO-009 strictly: instead, it modified these principles in ways that it believed were available to it, in an attempt to limit the barrier to access that might result from their direct application.

[36] I acknowledge that in reaching the fee estimate for its review of the responsive records, the custodian was diligent in considering and applying the guidance provided by the 2006 framework and the principles set out in Order HO-009. I also acknowledge that it considered the principles of "reasonable cost recovery" and, where it felt it could, reduced the fees below those set out in the 2006 framework or applied in Order HO-009.

¹² Or any records to which they are entitled access under *PHIPA*.

[37] Even accepting the 2006 framework as a guideline for calculating permissible fees under *PHIPA*, it does not provide a complete answer to all of the issues raised by this complaint. Moreover, in applying the guideline when calculating fees, the only principle that custodians are legislatively obliged to comply with is the requirement in section 54(11) of *PHIPA* that a fee not exceed the amount of "reasonable cost recovery."

[38] It is with this principle in mind that I have reviewed the separate components of the custodian's fee estimate: the fee estimate for photocopying the records and the fee estimate for reviewing the contents of the records to determine whether they contain personal health information to which the individual requesting access, in this case the complainant, does not have a right of access.

[39] In the circumstances of this complaint, although I accept that the custodian made an effort to apply the guideline in a manner that would arrive at a fair fee, I find that its fee estimate of \$3,960 for processing the request exceeds the principle of "reasonable cost recovery" mandated by section 54(11) of *PHIPA*.

The fee estimate of \$785 for photocopying the records reflects "reasonable cost recovery" provided that none of the records is available in an electronic format that is transferrable to CD.

The custodian is entitled to charge for photocopying records available in hard-copy format that it must scan to transfer onto CD but not for electronic records that do not require severances and are transferrable to CD.

[40] The custodian has estimated \$785 for photocopying at a fee of \$0.25 per page for 3,140 pages. It explains that the fee for photocopying the first 20 pages is included in the \$30 set fee described in section 25.1(1) of the 2006 framework. It submits that although it is prepared to provide the complainant with the records on CD, the photocopy fee reflects the fact it must scan the records in order to sever them and transfer them onto CD.

[41] The 2006 framework does not specifically refer to costs for scanning records in order to provide the information on CD. It states that the \$30 set fee includes "preparation of the record for photocopying, printing or electronic transmission" as well as "electronically transmitting a copy of the electronic record instead of printing a copy of the record" if the record is "stored in electronic form."¹³ Table 1, which outlines fees that a custodian can charge over and above the \$30 set fee, includes fees "[f]or making and providing photocopies or computer printouts of a record"¹⁴ as well as a flat fee of

¹³ See section 25.1(1) of the 2006 framework.

¹⁴ See Item 1 of Table 1 to the 2006 framework.

\$10 “[f]or making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form.”¹⁵

[42] Whether a custodian can charge a fee for scanning records in order to put them onto CD has not yet been addressed under *PHIPA*. However, orders issued by this office under *FIPPA* and the *MFIPPA* have allowed institutions to charge fees for scanning records in some cases, provided the records are not available in an electronic format.¹⁶

[43] Specifically, in Order MO-2530, Adjudicator Laurel Cropley found that although the fees legislated under *MFIPPA* did not specifically refer to scanning hard-copy records in order to provide the information on CD, the activity was a necessary component of producing hard-copy records on CD. As a result, she allowed the institution to charge fees for scanning. Adjudicator Cropley also found that when the records were already available in electronic format and would not require scanning in order to transfer them onto CD, the institution could not charge fees over and above the legislated fee of \$10 for each CD required to contain the information. This reasoning has been applied in subsequent orders such as Orders MO-2577, MO-3440, MO-3446 and PO-3480.

[44] Although the reasoning applied in the above orders relates to the fee provisions set out in *FIPPA* and *MFIPPA* and their corresponding regulations, I accept that it is helpful in determining whether a custodian can charge such fees under *PHIPA*; I will consider it in this complaint.

[45] I accept that the custodian’s fee estimate for photocopying is in keeping with the reasoning expressed in the orders issued under *FIPPA* and *MFIPPA* that permit an institution to charge fees for scanning hard-copy records to allow them to be put onto CD. I also accept that it has been calculated at the same rate as the photocopying charges set out in the 2006 framework. I find that it is reasonable for a custodian to charge fees in this way, where the records exist in hard copy and need to be scanned in order for them to be put onto CD. However, I do not accept that it is reasonable for a custodian to charge photocopying fees for any records that are currently available in electronic format, do not require severance, and are transferrable onto CD. Therefore, I find that the custodian cannot charge photocopying fees for transferring such records onto CD.

[46] The custodian has not specifically identified whether any of the 3,160 pages of records are available in electronic format, do not require severances, and are transferrable to CD. I note, however, that the custodian refers to the RHC Record at issue as a “paper-based health care record.” I also acknowledge that it dates back 18

¹⁵ See Item 3 of Table 1 to the 2006 framework.

¹⁶ See for example Orders MO-2530, MO-2577, MO-3440, MO-3446, and PO-3480.

years. For these reasons, I accept that the RHC record at issue is largely, if not entirely, composed of hard-copy records.

[47] Taking all of these considerations into account, I am prepared to accept that the custodian's fee estimate of \$785 for photocopying the records to facilitate granting access to them reflects "reasonable cost recovery" and I will uphold it. However, the custodian is advised that in processing the request, should it encounter responsive records that are in electronic format, do not require severance, and are transferrable to CD without scanning, it is to reduce its final fee accordingly.

The fee estimate of \$3,145 for reviewing the records does not reflect "reasonable cost recovery."

[48] The custodian takes the position its fee estimate of \$3,145 for reviewing the records is in keeping with the principle of "reasonable cost recovery" in section 54(11). It submits that this part of the fee estimate resulted from its efforts to limit the barrier to access that a fee for a request of this nature might cause. Specifically, the custodian submits that the fee is reasonable because the request involves a large number of records that require a page-by-page review prior to access being granted.

The custodian is entitled to conduct a review of records prior to granting access to the records.

[49] The custodian argues that the primary reason that its fee estimate is significant is because prior to granting access to the complainant's mother's RHC Record, it must complete a comprehensive page-by-page review of the more than 3,000 pages of records. It submits that, for a number of reasons, it is required to conduct this page-by-page review even though the RHC Record should primarily be made up of the complainant's mother's personal health information.

[50] First, it submits that a page-by-page review is necessary for it to redact the records pursuant to sections 52(1)(a) to (f) of *PHIPA*, which set out exemptions to an individual's right of access.

[51] Second, the custodian takes the position that a page-by-page review is required to ensure that the personal information or the personal health information of individuals other than the complainant's mother is redacted. The custodian explains that "[a]s a matter of 'routine,' personal health information or personal information of other identifiable individuals, would not be included in the RHC Record of another individual" but that there is a "potential risk" that other residents' information could be found throughout the more than 3,000 pages of the record. Specifically, it identifies a resident's progress notes as an example of a type of record in the RHC Record that might contain the personal information or personal health information of others. The custodian explains that progress notes may contain information about a resident's day-to-day interactions and involvement with staff, visitors and other residents.

[52] Another example of a type of record contained in the RHC Record that the custodian submits might contain the personal information or personal health information of individuals other than the individual requesting access are records that detail incidents between residents, including resident-on-resident abuse or residents wandering into other residents' rooms.

[53] Third, the custodian states that a page-by-page review of the RHC Record is required to ensure that all of the records belong to the individual requesting access to the record. It states that due to the nature of this "paper-based" health care record, there is a risk of another individual's personal health information having been included in error by, for example, pages having been misfiled.

[54] Finally, the custodian submits that an RHC Record sometimes contains other types of information that might require redaction; for example, information that is financial in nature, such as credit card information.

[55] The custodian submits that all of these circumstances demonstrate that it needs to undertake a page-by-page review of the RHC Record to ensure it redacts the appropriate information and to avoid any privacy breaches. It submits that as a health information custodian under *PHIPA*, it has "the obligation to review the health record prior to releasing it to ensure that the confidentiality of the health information is protected and that the content of the information is responsive to the request."

[56] I acknowledge that in considering whether access should be granted to a record, a custodian must be cognizant of its general responsibilities under *PHIPA*. I accept that for the custodian to fulfill its obligations under *PHIPA* and to ensure that it is granting access to only the personal health information to which the requester is entitled under *PHIPA*, it is entitled to conduct a review of the RHC Record. I find, however, that the time required for such a review will vary according to the nature and type of the record. The custodian must determine the extent of the necessary review on a record-type-by-record- type basis. I will discuss this in further detail below.

[57] I also acknowledge that occasionally, records are misfiled and mistakes occur where unrelated information might be included in a requester's record in error. I accept that the custodian must conduct a review of the records to ensure that a record does not contain information that has been included in error or that is otherwise not responsive to the request. However, considering the interpretation of the term "reasonable cost recovery" set out above, I find that it is not reasonable for a custodian to charge fees to an individual seeking their own personal health information for the time taken to remedy the custodian's own inadvertent errors. In my view, any review required to remedy errors made on the part of the custodian is encompassed in a custodian's general responsibilities under *PHIPA*.

The custodian's fee estimate for its review of the records is not, in these circumstances, in keeping with the principle of "reasonable cost recovery."

[58] The custodian submits that its fee estimate of \$3,145 for the review of the complainant's mother's RHC Record is in keeping with the principle of "reasonable cost recovery" set out in section 54(11).

[59] With respect to how it calculated its fee estimate for the review of the records, the custodian states that it followed the 2006 framework for the first 15 minutes of review; this part of the fee, it explains, is encompassed in the \$30.00 set fee in the 2006 framework that had already been charged under the heading for photocopying. It states that it based its fee estimate for its review time beyond the 15-minute mark on the principles set out in the 2006 framework but on a reduced scale. It explains that under the 2006 framework, Item 12 of Table 1 allows for a charge of \$45 for every 15 minutes but that instead of applying that charge, it reduced it to \$15 for every 15 minutes of review, allowing that it would take one minute per page to review its contents and make severances. The custodian submits that the resulting fee estimate of \$3,145 for review is significantly less than the fee of \$18,914.40 that it would have reached had it strictly applied the recommended rate for review set out in Item 12 of Table 1 of the 2006 framework.

[60] I acknowledge that, in reaching its fee estimate for the review of responsive records, the custodian was diligent in considering and applying the guidance provided by the 2006 framework and the principles set out in prior decisions. I also acknowledge that it considered the principles of "reasonable cost recovery" and, where it felt it could, reduced the fees below the amounts set out in the 2006 framework or applied in Order HO-009. Despite this, in my view the custodian's fee estimate for reviewing the records to determine whether they contain personal health information to which access may be refused exceeds the principle of "reasonable cost recovery" mandated by section 54(11) of *PHIPA*.

[61] Having considered the different types of records that make up the RHC Record, I do not accept that the principle of "reasonable cost recovery" permits the custodian to claim the same amount of time for review for every type of record. Rather, I find that the custodian must determine the extent of the necessary review on a record-type-by-record-type basis. Based on the custodian's description of the RHC Record at issue, I conclude that the vast majority of the records are of a nature that requires only minimal review time in order to determine whether they contain information to which access may be refused.

[62] An RHC Record includes certain records with standard, predictable content. A twenty-page record of vital signs taken over many years is unlikely to require more than a brief review per page to confirm whether it contains information to which access may be refused. An RHC Record may also include other records, such as images, which for different reasons are unlikely to require more than a brief review to confirm whether access may be refused.

[63] Records of this nature may include immunization records, vital signs records, weight records, medical imaging records and reports such as X-rays, ECGs and ultrasounds, as well as laboratory reports. Considering the usual contents of such records, I have no reason to think that more than a brief review is necessary to establish whether or not they contain information to which the complainant may not have a right of access. I will describe this category of records as those requiring only a "straightforward" review.

[64] Without the specific records before me, my categorization of the types of record that would fall under this type of straightforward review is based only on the evidence that has been presented to me. Based on the descriptions provided, it would be reasonable to expect that the majority of the types of records in the following categories identified by the custodian as being part of the complainant's mother's RHC Record would require only a straightforward review:

- Category 1: Title Records
- Category 2: Medical Orders
- Category 3: Progress Notes
- Category 4: Nursing Data
- Category 5: Consultations
- Category 6: Final Notes
- Category 10: X-Ray and ECG Reports
- Category 11: Laboratory Reports

[65] Based on the evidence provided to me about the types of records in these categories, I find that they require only a straightforward review.

[66] Taking into account the principle of "reasonable cost recovery" and given the fact that a review of most of these types of records should require only minimal time for a straightforward review, I find that a more reasonable expectation of the time required for reviewing these types of records is five seconds per page. Applying this calculation, in one minute, 12 pages can be visually scanned to determine whether they contain information to which the person requesting access does not have a right of access under *PHIPA*.

[67] Other records which merit more than a "straightforward" review are those which, by their nature, have the potential to contain information to which access may be refused. Such records include incident reports which document relations and interactions between residents. They may include reports which document complaints about staff, or legal or professional matters. I do not suggest that all of these exist in

the RHC Record, and merely describe these as illustrations of the general principles I apply here.

[68] Considering the description of the records that form part of a typical RHC Record, including the specific RHC Record that is at issue in this complaint, I recognize it could reasonably be expected that the remaining categories identified by the custodian as being part of the complainant's mother's RHC Record may contain records that might require a more detailed review:

- Category 7: Paramedical Records
- Category 8: Administration
- Category 9: Miscellaneous

[69] The custodian does not claim that all of the records in Categories 7, 8 and 9 have the potential to contain information to which access may be refused. I estimate that 50 per cent of the records in the above categories may require a review to determine if they contain information to which access may be refused. Based on the evidence provided to me about the type of records in these categories, accepting that 50 per cent of the records in these categories may require a more detailed review, and considering the percentage of the total RHC Record that each of these categories represents, I arrive at the conclusion that seven per cent of the total records that make up the RHC Record may require a more detailed review.

[70] For these types of records, I find that the time required to review them is two minutes per page.¹⁷

[71] I have determined that seven per cent of the records contained in the RHC record require a more detailed review. I have determined that the remaining 93 per cent of the records contained in the RHC Record require a straightforward review. My determination of the type of review that the records in the different categories of records might require is based on the evidence that the custodian has provided to me in this review; namely, its representations, including its description of the RHC Record in the charts that it created and which have been reproduced, in part, in the Appendix to this decision. My finding in this decision is not intended to be a blueprint to be applied stringently in future circumstances. For example, in other circumstances or for another custodian, their records might be such that there are paramedical or administrative records that require only a straightforward review or there may be progress notes that warrant a more detailed review. The appropriate level of review must be assessed based on each type of record, taking into consideration the specific information that it

¹⁷ See note 10. Two minutes per page of review for a record requiring multiple severances is the standard that has been applied under *FIPPA* and *MFIPPA*.

contains in the context of each custodian's record-holdings.

Summary Conclusion

[72] In summary, I do not uphold the custodian's fee estimate of \$3,960 to grant the complainant access to the requested records as it exceeds "reasonable cost recovery" as that term is used in section 54(11) of *PHIPA*. I reduce the fee estimate to \$2,831.

[73] I uphold the custodian's fee estimate of \$785 to photocopy the records in order to scan them onto a CD. However, I note that if, when reviewing the RHC Record prior to granting access, the custodian notes that any of the records are in electronic form, do not require severances and are able to be transferred CD without being scanned, it must revise its final fee accordingly.

[74] I do not uphold the custodian's fee estimate of \$3,145 for conducting a page-by-page review of the 3,160 pages of records to determine whether they contain personal health information to which access may or shall be refused. Applying the principles set out above to the evidence that has been provided to me about the various categories of records results in a fee estimate of \$2,016 for review.

[75] The fee estimate of \$2,016 can be explained as follows. I have found that 93 per cent of the records (or 2,939 pages) that make up the RHC Record warrant a straightforward review, at five seconds per page. This amounts to 245 minutes of review. I have found that seven per cent of the records (or 221 pages) of the RHC Record warrant a more detailed review at two minutes per page. This results in 442 minutes of review. As result, the total review time required is 687 minutes, minus the first 15 minutes which is included in \$30 flat fee, which comes to 672 minutes of required review time. Applying the fee of \$45 for every 15 minutes, the standard set out in Item 12 of Table 1 of the 2006 framework, I find that the appropriate fee estimate for the review of the records in the RHC Record at issue comes to \$2,016.

[76] For greater clarity, I have created a chart setting out the revised fee estimate:

Cost for photocopies or computer printouts of the first 20 pages (Flat rate)		= \$30
Calculation for photocopies or computer printouts of the remaining pages	$(3,160\text{pgs} - 20\text{pgs}) \times \0.25	= \$785
Charge for copying (including flat rate fee of \$30)		= \$815

Calculation for time reviewing the contents of the records. (Initial 15min included in flat rate fee of \$30 already accounted for)	2,939 pgs @ 5sec/pg =245min of review 221 pgs @ 2min/pg =442min of review (687min-15min)=672min of review =11.2hrs of review	
Charge for review	11.2hrs × \$180/hr	=\$2,016
Total Cost of Processing Request	\$815 + \$2,016	=\$2,831

[77] In conclusion, I acknowledge that while the revised fee estimate that has resulted from applying the principles set out in this decision is a reduction from the custodian's fee estimate that was the subject of this review, it is still a considerable sum. In my view, it fairly recognizes the efforts required to grant access to approximately 18 years' worth of records while remaining true to principles regarding fees as set out in the 2006 framework and as previously discussed by this office.

[78] From the evidence provided to me by the custodian, which was not refuted by the complainant, it appears that although the custodian was prepared to consider granting the complainant a fee waiver, either in full or in part, had she demonstrated that one was warranted, she declined to provide it with the necessary documentation. Should the complainant continue to be dissatisfied with the revised fee estimate for the requested records, she is encouraged to either apply to the custodian for a fee waiver or narrow the request parameters in an effort to reduce the fee.

ORDER:

1. I do not uphold the custodian's fee estimate of \$3,960 and I order the custodian to reduce it to \$2,831. I arrive at this revised fee estimate by making the following findings:
 - a. I uphold the custodian's \$785 fee estimate to photocopy the records to scan them onto CD.
 - b. I do not uphold the custodian's fee estimate of \$3,145 to review the records to determine whether they contain personal health information to

which access may or shall be refused. I order the custodian to reduce its fee estimate for review to \$2,016.

Original signed by: _____
Catherine Corban
Adjudicator

February 19, 2020 _____

APPENDIX

Chart prepared by the custodian detailing records contained in the specific RHC Record at issue in this complaint, reproduced in part.¹⁸

Category	Types of records contained in the RHC Record at issue	Estimated number of pages of this type in the RHC Record at issue	Percentage of total record
1: Title Records		30	0.95
	Immunization record	2	0.06
	Do Not Resuscitate Confirmation Form - DNR	2	0.06
	Levels of Intervention Plan of Care	6	0.19
	Admission, discharge and death record	5	0.16
	Institution patient death record	3	0.10
	Admission package	12	0.38
2: Medical Orders		170	5.38
	Physicians' orders	143	4.53

¹⁸ The column that sets out the possible severances and reasons for those severances has not been included.

	Pharmacist communication sheet	9	0.28
	Tamiflu record	18	0.57
3. Progress Notes		570	18.03
	Medical Physical Examination	44	1.39
	Resident Conference	6	0.19
	Progress notes – multidisciplinary	483	15.28
	MDS section V – mandatory government assessment	37	1.17
3. Nursing Data ¹⁹		1840	58.23
	Vital signs record	4	0.13
	Weight record	5	
	Nursing and personal care record & food & fluid intake	1559	49.30
	Medication/treatment administration record	201	6.36
	Nursing assessment (pain, head to toe,	72	2.28

¹⁹ For Category 4: Nursing Data, the custodian provided the following detailed list of the types of records that would be included in this category: Resident Continence Assessment, Voiding Diary, Head Injury Routine, Fluid Balance Record, Self-Medication Assessment Record, Smoking Assessment/Screening, Enteral Feed Intake Bedside Worksheet, Monitoring Record, 24 Hour Admission Care Plan, Hot Weather Risk Assessment, Nursing Rehabilitation/Restorative Flowsheet (10 different sheets), Mini-cog Dementia Screening, Sig E Caps, Cohan-Mansfield Agitation Inventory Disruptive, Assess for Cause of Delirium, Cornell Scale for Depression, Modified Dementia Observational System (DOS), Monitoring of Antipsychotics and Resident Turning/Repositioning Schedule Worksheet.

	Morse fall scale)		
5. Consultation		41	1.30
	Transfer notes, Consultation Referral/Reports Dental, Eye, etc.	41	1.30
6. Final Notes ²⁰		0	0
7. Paramedical Notes ²¹		229	7.25
	PR/OT/RD/Social Worker Assessment, consultations	141	4.46
	Recreation activity sheet	88	2.79
8. Administration ²²		57	1.8
	Pre-Admission Information (Home and Community	37	1.17

²⁰ For Category 6: Final Notes, the custodian provided a more detailed list of the types of records that would be included in this category: Hospital Medical Discharge and Correspondence related to resident care.

²¹ Under Category 7: Paramedical Notes, the custodian also listed: PT/OT Assessment, Treatment Plan and Discharge Notes, Metro Mobility Index, Referral Form, Q3M Nutrition and Hydration Review, 3 Day Meal Intake Assessment, Dysphasia Team Assessment, Montreal Cognitive Assessment (MoCA), Geriatric Depression Scale (GDS), Dietitian Referral Form, Quality of Life In-Late Stage Dementia (QUALID) Score, Activity Attendance, Nutrition Assessment Worksheet and Initial Calculations for Tube Feeding/Quarterly Calculations for Tube Feeding.

²² Under Category 8: Administration, the custodian also listed: Pre-Admission Information (Home and Community Care), Vaccination Against Influenza for Type A or Type B Influenza – Consent Form, Vaccination against Pneumococcal pneumonia, Vaccination against Tetanus and Diphtheria – Consent Form, Consent to obtain medical information (Resident), Consent to obtain medical information (Legal Representation), Consent for Temporary Absence, Acceptance of Responsibility for Resident during Leave and for Resident's Medication, Consent for Photos, Consent to Collect, Use and Disclose Personal Health Information, Consent Directive to Sharing RAI-MDS 2.0 Assessment Data, Pre-Admission Checklist and Disclosure Consent.

	Care)		
	Consent – Vaccination, LOA	20	0.63
9. Miscellaneous ²³		152	4.81
	Records of Clothing	86	2.72
	Private Hired Worker (Sitter/Companion) sign in sheet	66	2.09
10: X-Ray and ECG Reports ²⁴		5	0.16
	X-Ray, ECG, Ultrasound	5	0.16
11: Laboratory Reports		66	2.09
	Laboratory Reports	66	2.09

Table 1, as referenced in section 25.1(2) of the 2006 framework (Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol. 139-10 (11 March 2006)).

TABLE 1

ITEM	COLUMN 1	COLUMN 2
1.	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages
2.	For making and providing a paper copy of a record from microfilm or microfiche	50 cents per page

²³ Under Category 9: Miscellaneous, the custodian also listed: Records of Clothing and Personal Effects – Admission, Records of Clothing and Personal Effects, Resident Incident Report, Authorization to Purchase, Family Acknowledgement for sitters/companions and Sitter/Companion Acknowledgment.

²⁴ Under Category 10: X-Ray and ECG Reports, the custodian listed: X-Ray Reports and ECG Reports, MRI, CT Scan, etc.

3.	For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form	\$10
4.	For making and providing a microfiche copy of a record stored on microfiche	50 cents per sheet
5.	For making and providing a copy of a microfilm of a record stored on microfilm that is,	
	i. 16 mm	\$25 per reel
	ii. 35 mm	\$32 per reel
6.	For printing a photograph from a negative or from a photograph stored in electronic form, per print,	
	i. measuring 4" × 5"	\$ 10
	ii. measuring 5" × 7"	\$ 13
	iii. measuring 8" × 10"	\$ 19
	iv. measuring 11" × 14"	\$ 26
	v. measuring 18" × 20"	\$ 32
7.	For making and providing a copy of a 35 mm slide	\$ 2
8.	For making and providing a copy of an audio cassette	\$ 5
9.	For making and providing a copy of a ¼", ½" or 8 mm video cassette,	
	i. that is one hour or less in length	\$ 20
	ii. that is more than one hour but not more than two hours in length	\$ 25
10.	For making and providing a copy of a ¾" video cassette,	

	i. that is not more than 30 minutes in length	\$ 18
	ii. that is more than 30 minutes but not more than one hour in length	\$ 23
11.	For producing a record stored on medical film, including x-ray, CT and MRI films	\$5 per film
12.	For the review by a health information custodian or an agent of the custodian of the contents of a record to determine if the record contains personal health information to which access or disclosure may or shall be refused	\$45 for every 15 minutes after the first 15 minutes
13.	For supervising examination of original records	\$6.75 for every 15 minutes