

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 112

Appeal HA19-00141

A Hospital

February 26, 2020

Summary: The complainant submitted a correction request under section 55(1) of the *Personal Health Information Protection Act* to a hospital regarding reports created as a result of her admission to the hospital. The hospital denied the correction request citing section 55(9)(b) of the *Personal Health Information Protection Act*. The adjudicator finds that no review is warranted in accordance with sections 57(3) and 57(4)(a) and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, sections 3(1), 4(1), 55(8), 55(9), 57(3) and 57(4)(a).

BACKGROUND:

[1] This decision addresses the hospital's denial of the complainant's request under section 55(1) of the *Personal Health Information Protection Act (PHIPA)* for correction of two hospital reports containing her personal health information (PHI).

[2] The complainant submitted a correction request to the hospital after receiving access to an Emergency Department Note completed by an emergency room doctor and a Consultation Note/ Discharge Summary completed by a psychiatrist. In her correction request, the complainant states that the reports "indicate a delusional disorder, which is inaccurate." The complainant goes on to request that "the diagnosis of delusional disorder be removed from the record."

[3] The hospital issued a decision to the complainant denying her correction request, citing section 55(9)(b). In its decision, the hospital states:

[The] Request to Correct Personal Health Information has been denied by [names of two doctors] for the following reason:

Consists of a professional opinion or observation that a custodian has made in good faith about the individual – PHIPA 55(9)(b)

[4] The hospital also advised the complainant that it would attach a Statement of Disagreement and provided her a blank form on which to write that statement.

[5] The complainant filed a complaint with this office and a mediator was assigned. However, the parties were unable to reach a settlement and the matter was transferred to the adjudication stage of the complaint process.

[6] After reading the complaint file,¹ I sent a letter to the complainant advising her that my preliminary view was that there were no reasonable grounds for a review under section 57(3) and (4) of *PHIPA* and gave her an opportunity to provide written representations.

[7] In response, the complainant submitted additional documentation in support of her position that the hospital should make the requested corrections. In addition, the complainant sent in several reference letters from members of her community. A considerable amount of the documentation submitted by the complainant addressed her concerns about the quantity of prescription drugs that had been prescribed to her over the years, along with her explanation as to why this had occurred.

[8] My jurisdiction is limited to matters relating to the complainant's correction request under *PHIPA*. I do not have the jurisdiction to, nor will I, comment on the complainant's concerns about prescribing, or the conduct of the pharmacists or doctors referred to in her submissions.

[9] After reviewing the complaint file along with the complainant's supplemental submissions, I find that there are no reasonable grounds for a review under section 57(3) and 57(4)(a) because the complainant has not met the initial onus of establishing a right of correction under section 55(8) and because the hospital adequately responded to the complaint. In any event, even if the complainant had satisfied the onus under section 55(8), I would find that the "professional opinion or observation" exception at section 55(9)(b) applies.

¹ The complaint letter was accompanied by an Appendix prepared by the complainant in which she advised that she has filed complaints with the College of Physician and Surgeons (CPSO), College of Pharmacists and the Premier's office. The complainant also provided photographs and letters from other physicians in support of her complaint.

DISCUSSION:

Should the complainant's correction complaint proceed to a review under *PHIPA*?

[10] I have the authority under sections 57(3) and (4) of *PHIPA* to decide whether this office should conduct a review of a complaint. These provisions state, in part:

(3) If the Commissioner does not take an action described in clause (1)(b) or (c) or if the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified, the Commissioner may review the subject-matter of a complaint made under this Act if satisfied that there are reasonable grounds to do so.

(4) The Commissioner may decide not to review the subject matter of the complaint for whatever reason the Commissioner considers proper...

[11] There is no dispute that the information the complainant seeks to correct constitutes her personal health information (PHI). PHI is defined in section 4(1) of *PHIPA*, in part as follows:

"personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

- a. relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
- b. relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

[12] There is also no dispute that the hospital is a "health information custodian" as defined in section 3(1) of *PHIPA*,² and that the complainant was given access to her health records before making her correction request.

[13] The sole issue in this complaint is whether the hospital has a duty to correct the complainant's PHI in the records. Section 55(8) of *PHIPA* provides for a right of correction to records of PHI in some circumstances. It states:

² Under section 3(1)4.i. of *PHIPA*.

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.

[14] Section 55(9)(b) of *PHIPA* sets out the relevant exception to the obligation to correct records of PHI in this complaint, as follows:

Despite subsection (8), a health information custodian is not required to correct a record of personal health information if, it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[15] Read together, these provisions set out the criteria pursuant to which an individual is entitled to a correction of his or her records of PHI. The purpose of section 55 of *PHIPA* is to impose a duty on health information custodians to correct records of PHI that are inaccurate or incomplete for the purposes for which they use the information, subject to the exceptions set out in section 55(9) of the *PHIPA*.

Analysis and Decision

The complainant has not discharged the onus in section 55(8)

[16] 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" pursuant to section 55(8).

[17] Section 55(8) requires the individual asking for correction to:

- a. demonstrate to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information, and
- b. give the custodian the information necessary to enable the custodian to correct the record.

[18] If the above is established, the question becomes whether or not any of the exceptions that are set out in section 55(9) apply.

[19] Previous decisions from this office have found that not all PHI contained in records held by health information custodians needs to be accurate in every respect. If

a request is made to correct inconsequential bits of information that have no impact on the purposes for which the custodian uses the information, and the custodian is not relying on the information for a purpose relevant to the accuracy of the information, the custodian is not required to correct the information.³

[20] In addition, this office has found that the custodian is not required to grant the correction request if the individual seeking the correction does not provide the custodian with the information necessary to enable it to correct the record.⁴

[21] Based on my review of the materials, it appears that the complainant takes the position that any reference in the records describing her as delusional or paranoid should be removed from the records. The complainant submits that the doctors preparing the reports she seeks to have corrected should not have described her as "delusional" or "paranoid" given her medical history which she argues they were aware of. In support of her position, the complainant submitted several medical reports and correspondence from other doctors.

[22] I have reviewed the complaint file, the additional documentation provided by the complainant along with the records themselves and find that the requested corrections need not be made as the complainant has not established that those portions of the records are "incomplete or inaccurate for the purposes for which the hospital uses the information" as required by section 55(8).

[23] The complainant has the onus of establishing whether or not the "record is incomplete or inaccurate for the purposes for which the custodian uses the information" pursuant to section 55(8) and her submissions do not address this issue. I also note that the complainant's submissions do not dispute that her admission to the hospital was the result of the emergency room doctor placing her under a psychiatric hold to allow time for her to undergo a psychiatric assessment. The psychiatrist examined the complainant the next day and discharged her.

[24] Having regard to the above, I find that the hospital is not obliged to grant the correction request on the basis that the complainant has failed to establish that the record is incomplete or inaccurate for the purpose for which the hospital uses the information. Given my finding, it is not necessary that I also determine whether the complainant provided the hospital with the information necessary to correct the record.

In any event, the "professional opinions or observations" exception in section 55(9)(b) applies

[25] As set out above, section 55(9)(b) states that a health information custodian is

³ PHIPA Decisions 36, 39 and 40.

⁴ PHIPA Decisions 36 and 39.

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.

[26] Thus, 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.

[27] The determination of whether the exception at section 59(9)(b) applies involves a two-part analysis. The first question is whether the PHI is a "professional opinion or observation." The second question is whether the "professional opinion or observation" was made "in good faith."

The complainant's PHI qualifies as a "professional opinion or observation."

[28] PHIPA Decisions 36 and 37, which have been adopted in other correction decisions of this office, including PHIPA Decisions 43, 47 and 71, applied established principles of statutory interpretation to the wording used in section 55(9)(b). In PHIPA Decisions 36 and 37, I concluded that for PHI to fit within the exception in section 55(9)(b), it must consist of a "professional opinion" or "professional observation." Accordingly, 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). In addition, 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."⁵

[29] Accordingly, the question here is whether the PHI the complainant seeks to correct accurately represents the professional opinion or professional observation of the doctors at the time at which those observations and opinions were recorded. In this case, the records were prepared by an emergency room doctor and psychiatrist working at the hospital. I am satisfied that the doctors in question possessed special

⁵ PHIPA Decision 71.

qualifications, knowledge, judgment and experience in medicine. In addition, I am satisfied that they applied their professional knowledge in documenting their examination of the complainant. Accordingly, I find that the doctor's observations describing the complainant as delusional and/or paranoid were derived from the exercise of their professional knowledge and judgment and that they constitute "professional opinions and observations" for the purpose of section 55(9)(b). In my opinion, the complainant's request to correct this information seeks to substitute or rewrite the doctors' opinions or observations about her in the records.

The "professional opinion or observation" was made "in good faith."

[30] Court decisions have stated that 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 also stated that persons 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 not acted in good faith to rebut the presumption of good faith.⁶

[31] In her submissions, the complainant raised long-standing concerns she has had with the medical and pharmaceutical community regarding the over-prescribing of prescription drugs. She also advised that she filed complaints with the relevant regulatory bodies and the Premier's office. However, the submissions presented by the complainant do not address the question of whether the doctors who authored the reports acted in bad faith. Instead, the complainant takes the position that they should have come to a different diagnosis regarding the symptoms she presented given her medical history.

[32] Having regard to the complainant's submissions, the circumstances of the complaint and the records themselves, I conclude that there is not sufficient evidence before me to support a finding that the emergency room doctor or psychiatrist acted in bad faith. As there is no evidence of malice, intent to harm, serious carelessness or recklessness on the part of these doctors, I find that the exception to the duty to correct at section 55(9)(b) applies in the circumstances of this complaint and that the hospital was not required to correct the complainant's records of PHI.

Decision

[33] As set out above, sections 57(3) and 57(4) set out my authority to decline to review a complaint. For the reasons stated above, I have decided not to review this complaint on the basis that there are no reasonable grounds to do so as the complainant has not met the initial onus under section 55(8). In any event, even if the

⁶ *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII)

complainant had satisfied the onus under section 55(8), I am satisfied that the exception at section 55(9)(b) applies and that there are therefore no reasonable grounds to conduct a review under section 57(3).

[34] I issue this decision in satisfaction of the notice requirement in section 57(5).

NO REVIEW:

For the foregoing reasons, no review of this matter will be conducted under Part VI of the *Act*.

Original signed by _____
Jennifer James
Adjudicator

February 26, 2020 _____