

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 115

Complaint HA18-68

Paul Wolfe, Registered Massage Therapist

March 16, 2020

Summary: The complainant sought access to her records of personal health information from Paul Wolfe, Registered Massage Therapist (RMT). This decision determines that Paul Wolfe, RMT is deemed to have refused the complainant's request for access. Mr. Wolfe is ordered to provide a response to the complainant regarding her request for access to records of her personal health information in accordance with the *Personal Health Information Protection Act, 2004* and without recourse to a time extension.

Statutes Considered: *Personal Health Information Protection Act, 2004*, ss. 2, 3, 4, 53 and 54.

BACKGROUND:

[1] This is a complaint under the *Personal Health Information Protection Act, 2004* (the *Act*).

[2] On October 26, 2017, the complainant sent a written request via email to Paul Wolfe, RMT (the custodian) for access to her records of personal health information. The written request stated:

"Thank you for providing my entire file in January 2017. However the entire file was illegible.

On March 23, 2017 I sent a further email to you requesting a legible copy of my entire file. You have not provided this file within 30 days as required by the Personal Health Information Protection Act.

1. Please provide the legible entire file at this time.

The information relative to the "Fee" and "Session" (1/2 hour or 1 hour) relative to my treatments is also illegible. Furthermore the "Fee" and "Session" (1/2 hour or 1 hour) is only indicated on page 2 but not on other pages.

2. As such please also email or mail a separate records indicating the "Fee" and "Session" duration (i.e. 1/2 hour or 1 hour) for all treatments that I received."

[3] On October 23, 2017, the Information and Privacy Commissioner/Ontario (IPC or this office) received a deemed refusal complaint from the complainant indicating that it had been more than 30 days since she had submitted a request for access to records to the custodian and she had not received a response. As a result, file HA17-115 was opened.

[4] On March 28, 2018, the complainant advised this office that she did not receive a response to the second part of her request as stated above.

[5] On May 17, 2018, this office decided to open a subsequent file to address the second part of the request as the issues in file HA17-115 did not appear to address the second part of the request. As a result, HA18-68 was opened. HA17-115 has concluded.

[6] The issues for this complaint are limited to the second part of the request for access to a separate record indicating the "Fee" and "Session" duration i.e. ½ hour or 1 hour for all treatments (in bold above).

[7] Between June 22, 2018 and May 26, 2019, the analyst formerly assigned to this file sought to clarify the issues of the complaint. During this time, the analyst formerly assigned to this file also attempted to contact the custodian without success.

[8] On May 29, 2019, the complainant confirmed with the analyst formerly assigned to this file that she had made two separate requests and that her request (in bold above) was not being handled in file HA17-115.

[9] Once the issues had been determined, a Notice of Review was sent to the complainant and to the custodian. The Notice of Review stated that the complainant filed a complaint alleging that the custodian was deemed to have refused the complainant's request for access to a separate record indicating the "fee" and "session" duration (i.e. ½ hour or 1 hour) by not providing a response within the time period set out in section 54 of the *Act*. The Notice of Review indicated that the custodian was

directed to immediately respond to the complainant's request for access and to forward a copy to me, the analyst assigned to this complaint. The Notice of Review indicated that if the custodian failed to do so and settlement was not reached by August 27, 2019, an order requiring the custodian to provide a response to the complainant may be issued.

[10] The custodian did not issue a response. The custodian was contacted by phone on September 17, October 15 and October 22 2019, without success.

[11] Given the difficulty I faced when attempting to contact the custodian, I contacted the College of Massage Therapy of Ontario (CMTO), the regulator established by the provincial government to regulate the practice of Massage Therapy and to govern the conduct of Registered Massage Therapists (RMTs) through the provisions of the *Regulated Health Professions Act, 1991* and the *Massage Therapy Act, 1991*. I asked the CMTO to contact the custodian to impart a message that he contact this office as soon as possible. On September 30, 2019, the CMTO advised that it had informed the custodian that our office had been attempting to contact him. The CMTO advised that they encouraged the custodian to contact me urgently.

[12] Unfortunately, the custodian did not contact me immediately, and I was uncertain how to contact him further.

[13] On November 6, 2019, the custodian sent me an email advising he had received my letters, emails and voicemails, but had not read or listened to them. He also advised that he would contact me soon in order to resolve this matter.

[14] On November 15, 2019, I spoke to the custodian. The custodian advised that preparing a decision would take some time as it encompassed twenty-five (25) years of health records of the complainant. The custodian also asked for guidance on how to issue a decision with respect to this matter, which was provided the same day.

[15] Despite the custodian's promises to resolve this matter and the guidance provided to him, the custodian did not issue a decision.

DISCUSSION:

Issue A: Are the records at issue "records" of "personal health information" as defined in sections 2 and 4 of the *Act*?

[16] Section 2 of the *Act* defines a "record" as:

...a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record.

[17] Section 4(1) of the *Act* states, in part:

In this *Act*,

“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,

(c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual’s health number, or

(g) identifies an individual’s substitute decision-maker.

[18] “Identifying information” is defined in section 4(2) of the *Act* as information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

[19] Based on the information before me, I am satisfied that the information contained in the records relates to the provision of health care to the complainant by Mr. Wolfe. I am satisfied that the requested records contain identifying information about the complainant and that the information relates to payments for the provision of health care to the complainant.

[20] As a result, I find that the records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*.

Issue B: Is Paul Wolfe, RMT a “health information custodian” as defined in section 3(1) of the *Act*?

[21] The *Act* provides an individual with the right of access to records of personal

health information about the individual that are in the custody or under the control of a "health information custodian". The term "health information custodian" is defined in section 3 of the *Act*, which reads, in part:

In this *Act*,

"health information custodian", subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties of the work described in the paragraph, if any:

1. A health care practitioner or a person who operates a group practice of health care practitioners.

...

[22] A "health care practitioner" is a term defined in section 2 of the *Act*, which reads in part as follows:

"health care practitioner" means,

(a) A person who is a member of a regulated profession within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care,

...

[23] "Health care" is also defined in section 2 of the *Act*, in part, to mean:

any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,

(a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,

(b) is carried out or provided to prevent disease or injury or to promote health, or

...

[24] Section 1(1) of the *Regulated Health Professions Act, 1991* includes the following definitions of "member" and "college":

In this *Act*,

“College” means the College of a health profession or group of health professionals established or continued under a health profession *Act*;

...

“member” means a member of a College;

[25] The custodian is a sole health care practitioner and a member of the College of Massage Therapists of Ontario. The custodian provided health care to the complainant and has custody or control of the records of personal health information as a result of or in connection with the provision of health care to the complainant. Applying the definitions, I find that Mr. Wolfe is a “health care practitioner” and therefore a health information custodian within the meaning of the *Act*.

Issue C: Did Paul Wolfe, RMT respond to the request for access in accordance with section 54 of the *Act*? Is Paul Wolfe, RMT in a deemed refusal situation pursuant to section 54(7) of the *Act*?

[26] Section 53(1) of the *Act* states that an individual may exercise a right of access to a record of personal health information by making a written request for access to the health information custodian that has the custody or control of the personal health information.

[27] Under section 54(2) of the *Act*, a health information custodian must respond to a request for access to a record of personal health information as soon as possible in the circumstances, but not later than 30 days after receiving the request. As previously mentioned, this is subject to an extension of time for a further period not to exceed 30 days if, within 30 days after receiving the request for access, the health information custodian gives the individual written notice of the extension setting out the length of the extension and the reasons for the extension.

[28] Sections 54(3) and 54(4) of the *Act* provide as follows:

(3) Within 30 days after receiving the request for access, the health information custodian may extend the time limit set out in subsection (2) for a further period of time of not more than 30 days if,

(a) meeting the time limit would unreasonably interfere with the operations of the custodian because the information consists of numerous pieces of information or locating the information would necessitate a lengthy search; or

(b) the time required to undertake the consultations necessary to reply to the request within 30 days after receiving it would make it not reasonably practical to reply within that time.

(4) Upon extending the time limit under subsection (3), the health information custodian shall give the individual written notice of the extension setting out the length of the extension and the reason for the extension.

[29] On October 26, 2017, the complainant made a written request for access to the custodian via email. The complainant indicated, and I have concluded, that the custodian has not responded to the complainant's request for access in compliance with section 54 of the *Act*.

[30] There is no evidence to suggest that, within the 30 days of receiving the request for access, the custodian provided the complainant with written notice extending the time for a response for a further period of time not exceeding 30 days. In any event, this additional 30-day period would have expired long ago.

[31] Our office has encouraged the custodian to meet his statutory obligations under the *Act* by providing the complainant with a response to her request for access to records of personal health information. The lack of response from the custodian to the written request for access of the complainant which was made over two years ago, on October 26, 2017, is unacceptable. This has been further exacerbated by the lack of response from the custodian to attempts made by this office to contact him.

[32] In light of the custodian's continued failure to respond to the complainant's request for access in compliance with the *Act* and to adequately respond to the attempts made by this office to resolve this matter without recourse to a formal order, I find that the custodian is deemed to have refused the complainant's request for access pursuant to section 54(7) of the *Act*. Accordingly, I will order the custodian to issue a response to the complainant within ten days of this decision, and to provide a copy to my attention to verify compliance.

ORDER:

For the foregoing reasons, pursuant to section 61(1) of the *Act*, I order that:

1. The custodian shall provide a written response to the complainant regarding her request for access to the records of her personal health information in accordance with the *Act* and without recourse to a time extension no later than **March 30, 2020**.
2. In order to verify compliance, the custodian shall provide me with a copy of the response referred to in Provision 1 by **March 30, 2020**. This should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original signed by _____

March 16, 2020 _____

Soha Khan
Analyst