

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 117

Complaint/Appeal PA18-402

Humber River Hospital

April 17, 2020

**Summary:** The complainant submitted a request to the hospital for access to video surveillance footage depicting his exit from the hospital. He stipulated that he seeks only his own image in the footage, and not the images of any other individuals. The hospital denied access to the severed footage on the basis that the complainant might attempt to reverse the obscuring technology applied to it. In this decision, the adjudicator orders the hospital to grant the complainant access to the footage he seeks. She notes that the hospital may charge a fee, representing reasonable cost recovery, for a third party service provider to perform the necessary editing of the footage.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, sections 3(1), 4(1), 4(2), 4(3), 52(3), 54(10), 54(11), 54(12), and 72; *Freedom of Information and Protection of Privacy Act*, section 2(1) (definition of "institution").

**Decisions and Orders Considered:** PHIPA Decision 17, PHIPA Decision 52, PHIPA Decision 82, Order MO-3531, Health Order HO-009, Health Order HO-014, Order MO-3796 and Order PO- 3671.

### BACKGROUND:

[1] The complainant submitted an access request to the Humber River Hospital (the hospital) for access to the following:

Hospital medical records pertaining to hospital visit on [date]. Requesting to access video surveillance of [the complainant's] exit from the hospital. Due to privacy issues please dub out all other people in the video.

[2] The hospital issued a decision granting the complainant full access to his medical records and released these records to him.

[3] The hospital blurred the facial images of some of the individuals captured in the surveillance video but still denied the requester access to the video, in its entirety, under section 21(1) of *FIPPA*. The hospital's decision stated in part:

Your request for the video to be released to you is denied as per Section 21(1) Personal Privacy of *FIPPA*. Although the video has been blurred to obscure the faces of other patients, we know that technology and software programs are available, as well as YouTube instructions that can reverse the blurring process. Therefore, there is a real likelihood that the privacy of other patients seeking care at the hospital would be compromised. Hospitals have the highest of requirements to protect the privacy of patients and as such the hospital cannot take the risk of violating privacy laws by releasing the video to you.

[4] The complainant appealed the hospital's decision to this office and a mediator was assigned. During mediation, the mediator canvassed whether the hospital had considered processing the request for the video surveillance record under the *Personal Health Information Protection Act, 2004 (PHIPA)*. The hospital informed the mediator it had done so, but maintained its position that the video surveillance record would fall under *FIPPA*, and not *PHIPA*. The mediator shared the hospital's position with the complainant.

[5] The complainant informed the mediator that he wished to pursue access to the video surveillance at adjudication. The file was then moved to the adjudication stage. I decided to conduct a review under *PHIPA* and started my review by inviting and receiving representations from the hospital.

[6] I then contacted the complainant to confirm whose images in the video footage he seeks access to. He clarified that he seeks access to his own image as well as that of the nurse who escorted him out of the hospital. I then notified the nurse as an affected party and invited her to make representations. The nurse provided brief representations, and did not consent to sharing them. As discussed below, the complainant later stated that he seeks access only to his own image, so the images of other individuals, including the nurse, are no longer at issue.

[7] I then sought representations from the complainant.<sup>1</sup> In his representations, the complainant stated that he would be satisfied with receiving a copy of the video footage

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<sup>1</sup> The hospital's representations were shared with the complainant, except for a small portion that was withheld from the complainant as it met the confidentiality criteria set out in the *Code of Procedure for Matters under the Personal Health Information Protection Act*.

with only his own image, and not that of the nurse. Accordingly, the nurse's image is no longer at issue.

[8] In my Notices of Review, I set out my preliminary view that based on my examination of the materials before me, including the video footage, the complainant's request is a request covered by both *PHIPA* and *FIPPA*. I asked the parties to address the application of both statutes to the request.

[9] In this decision, I find that *PHIPA* applies to the complainant's request. I find that the complainant has a right of access under *PHIPA* to the information he seeks, which is his own image on the video footage, with the images of the other individuals obscured. Because I find that *PHIPA* entitles the complainant to all the information he seeks, I find it unnecessary to address any residual right of access under *FIPPA*.

## **RECORDS:**

[10] The records at issue consist of three pieces of consecutive video footage of the complainant at the hospital, from the time of his fall in a hallway until shortly after he exits the hospital. In this decision, I also refer to the records collectively as the video, or the video footage, and I refer in some instances to a record as a "clip".

## **ISSUES:**

1. Does *PHIPA*, or *FIPPA*, or both, apply in these circumstances?
2. Access under *PHIPA*
  - A. Do the records contain "personal health information" as defined in section 4 of *PHIPA*?
  - B. Is each record "dedicated primarily" to the complainant's personal health information within the meaning of section 52(3) of *PHIPA*?
  - C. Can the complainant's personal health information to which he seeks access reasonably be severed from the information to which he does not seek access?

## **DISCUSSION:**

### **Issue 1: Does *PHIPA*, or *FIPPA*, or both, apply in these circumstances?**

[11] There is no dispute that the hospital is a body subject to *PHIPA* pursuant to section 3(1) of *PHIPA*, and an institution subject to *FIPPA* within the meaning of section 2(1) of *FIPPA*.

[12] As a result, in certain circumstances, the hospital is subject to both *PHIPA* and *FIPPA*. This means that when the hospital receives a request for access to information, it must decide whether *PHIPA*, or *FIPPA*, or both, apply to the request.

[13] In making this decision, the hospital must consider the nature of the request (i.e., whether the request is for personal health information, or for information that is not personal health information); the contents of the record(s) responsive to the request (i.e., whether the responsive record(s) contain personal health information, or information that is not personal health information); and, in the case of a request for personal health information, whether the requester is a person authorized under *PHIPA* to exercise a right of access to that information.<sup>2</sup>

[14] In this case, as noted above, there is no dispute that the complainant's request was for access to video records in which he appears. In these circumstances, the complainant may have a right of access to this record under *PHIPA* or *FIPPA*, or both. In particular, if the record contains the complainant's personal health information, the complainant has a right of access under *PHIPA*. Furthermore, whether or not the complainant has a right of access under *PHIPA*, he may have a right of access under *FIPPA* to other information in the record that is not personal health information.<sup>3</sup>

[15] In situations where both *PHIPA* and *FIPPA* could apply, the approach of this office is to first consider the extent of any right of access under *PHIPA*, and then consider the extent of any right of access under *FIPPA* to any records or portions of records for which a determination under *PHIPA* has not been made.<sup>4</sup>

## **Issue 2: Access under *PHIPA***

### **A. Do the records contain "personal health information" as defined in section 4 of *PHIPA*?**

[16] It is not in dispute that each record contains images of the complainant. The complainant is depicted in a hallway of the hospital, and then near and just outside the hospital's exit.

[17] In order to determine whether the complainant has a right of access to each record (or any portion of each record) under *PHIPA*, it is first necessary to determine whether the complainant's information in the record constitutes his "personal health

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<sup>2</sup> See *PHIPA* Decision 17, *PHIPA* Decision 27, *PHIPA* Decision 73, *PHIPA* Decision 96, *PHIPA* Decision 107, and Order MO-3644.

<sup>3</sup> *PHIPA*, section 8(4); *FIPPA*, sections 10 and 47(1). For orders and decision addressing access under both statutes, see *PHIPA* Decision 17, *PHIPA* Decision 27, *PHIPA* Decision 30, *PHIPA* Decision 33, *PHIPA* Decision 73, *PHIPA* Decision 101, and Order MO-3531.

<sup>4</sup> *PHIPA* Decision 17, *PHIPA* Decision 30, *PHIPA* Decision 33, *PHIPA* Decision 73.

information” within the meaning of *PHIPA*.

[18] “Personal health information” is defined in section 4 of *PHIPA*, in part, as follows:

(1) In [*PHIPA*],

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

(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,

(2) In this section,

“identifying information” means 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.

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[19] In *PHIPA* Decision 17, this office adopted a broad interpretation of the phrase “personal health information”. This office has applied this broad interpretation in subsequent orders and decisions.<sup>5</sup>

### ***Representations***

[20] The hospital acknowledges that the footage contains the complainant’s personal health information, but submits that it would be arbitrary and unrealistic to attempt to distinguish among the images or sections of the footage that contain his personal information, his personal health information, or both. The hospital submits that the video contains limited personal health information of the complainant, depicting that he was a patient at the hospital, and that he was there on a particular date.

[21] The hospital also notes that the video contains the images of other patients and visitors, and submits that their images are their personal health information or their

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<sup>5</sup> See *PHIPA* Decision 52, *PHIPA* Decision 82, and Order MO-3531.

personal information.

[22] The complainant's representations do not address whether the records contain his personal health information.<sup>6</sup> He submits, however, that the personal privacy of the other individuals depicted in the records can be protected by blurring their images.

### ***Analysis and findings***

[23] I find that each of the three records is a record of personal health information of the complainant within the meaning of section 4(1) of *PHIPA*. Among other things, each record reveals that the complainant was a patient of the hospital, which, in my view, qualifies as identifying information about the complainant that relates to the providing of health care to him, within the meaning of paragraph (b) of section 4(1) of *PHIPA*.

[24] Section 4(3) is also relevant to what constitutes the complainant's personal health information. That section states:

Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[25] Section 4(3) is an answer to the hospital's submission that it is unrealistic to attempt to distinguish among the images of the complainant that contain his personal information as opposed to his personal health information. By virtue of the fact that each record contains the complainant's personal health information, all of the complainant's identifying information in each record is his personal health information.

[26] I find, therefore, that the complainant's personal health information includes all footage containing his image. Either all of the footage containing the complainant's image identifies him as a person seeking health care, such that his image throughout the footage is his personal health information under section 4(1)(b), or alternatively, even those images that do not identify him as a person seeking health care are his personal information by virtue of section 4(3).

[27] At the end of the third clip, the complainant's image no longer appears, but the car he has just entered is visible. Given the context in which this portion of footage appears, I consider it to be identifying information about the complainant, and therefore part of his personal health information in accordance with section 4(3).

[28] Also, for clarity, I find that the background in all the footage (hospital hallway,

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<sup>6</sup> Despite being asked to do so, the complainant did not address his access rights under *PHIPA*, instead arguing that he has a right to the video under *FIPPA*.

furniture, exit area, and so on) is included in the complainant's personal health information. I make explicit mention of this because I note that the hospital's consultant, quoted in more detail below, stated that as part of its blurring of the video, it will "blur everything around" the complainant. However, in my view, the background images of the hospital setting are part of what makes the record the complainant's personal health information under section 4(1)(b).

[29] As noted above, the complainant does not seek access to anyone's image other than his own. Therefore, I do not need to consider whether the images of others, the nurse for example, are included in the complainant's personal health information.

[30] The hospital argued in its representations that the images of the other individuals in the footage are exempt from the complainant's right of access under section 52(1)(e)(iii).<sup>7</sup> However, given that the complainant does not seek those images, it is not necessary to make a finding on the hospital's submission that the exemption at section 52(1)(e)(iii) applies to the images of the other individuals in the footage.<sup>8</sup> The hospital does not argue that any exemptions apply to other portions of the video.

[31] Because each record contains the complainant's personal health information, *PHIPA* applies to his access request. I will now consider the extent of his access right under *PHIPA*.

**B. Is each record "dedicated primarily" to the complainant's personal health information within the meaning of section 52(3) of *PHIPA*?**

[32] The extent of the complainant's right of access under *PHIPA* depends on whether each record of his personal health information (i.e., each piece of video footage) is "dedicated primarily" to that information. While section 52(1) of *PHIPA* confers a right of access to a record of personal health information, section 52(3) limits access where the record is not dedicated primarily to the individual's personal health information. Section 52(3) of *PHIPA* states:

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<sup>7</sup> Section 52(1)(e)(iii) provides:

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,

(iii) lead to the identification of a person who provide information in the record to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the identify of the person be kept confidential;

<sup>8</sup> The hospital also argues that section 52(1)(e)(iii) applies to the blurred images of these individuals, because of the possibility of their being identified through reversal of the blurring applied to the video. I address this concern in my discussion of the severance issue below.

Despite subsection (1) [setting out exemptions from the right of access in *PHIPA*], if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

[33] PHIPA Decision 17 sets out this office's approach to the interpretation of section 52(3). In order to determine whether a record is "dedicated primarily" to the personal health information of the individual within the meaning of section 52(3), this office takes into consideration various factors, including:

- the quantity of personal health information of the requester in the record;
- whether there is personal health information of individuals other than the requester in the record;
- the purpose of the personal health information in the record;
- the reason for creation of the record;
- whether the personal health information of the requester is central to the purpose for which the record exists; and
- whether the record would exist "but for" the personal health information of the requester in it.

This list is not exhaustive.

### ***Representations***

[34] The hospital submits that the records are not dedicated primarily to the complainant's personal health information. It submits that the video footage was created to maintain safety for patients and staff, and that to the extent that it captures individuals' personal health information, this is incidental to its security objective. The hospital observes that the video would have been recorded even if the complainant had not attended the hospital during the time frame depicted on the video. The hospital also notes that the video depicts a wide range of information over and above the complainant's personal health information, such as the personal health information of numerous patients, and the personal information of visitors.

[35] The complainant's representations do not address this issue.

### ***Analysis and findings***

[36] I agree with the hospital that none of the records is dedicated primarily to the complainant's personal health information. I accept its submission that the purpose of



the records' creation was the security objective of maintaining safety for patients and staff. While the complainant's personal health information appears throughout the records, I agree that it is incidental to the security purpose of the footage. Moreover, the video would have existed regardless of the requester's attendance at the hospital on the day in question.

[37] Given my finding that none of the records is dedicated primarily to the complainant's personal health information, he has a right of access only to his reasonably severable personal health information in each of the records. Because the complainant does not seek access to the images of individuals other than himself, I do not need to make a determination on whether any of those images are the complainant's personal health information. I have found that his personal health information includes everything else depicted in the video.

**C. Can the complainant's personal health information to which he seeks access reasonably be severed from the information to which he does not seek access?**

[38] The main point of contention between the parties is whether the complainant's personal health information to which he seeks access can reasonably be severed from the remainder of the information.

[39] The concept of reasonable severability appears in several instances in *PHIPA*. It is used to grant a right of access to information that is reasonably severable from information to which the requester does not have a right of access under *PHIPA*.<sup>9</sup> The concept of reasonable severability applies equally here, where the complainant does not seek access to the entirety of the information in each record.

***Representations***

[40] The hospital submits that in the circumstances of this case, the information to which the complainant does not have a right of access cannot be reasonably severed from his personal health information.

[41] The hospital submits that blurring or blacking out images has traditionally been considered an appropriate method of severing video footage. It submits, however, that in this case, blurring out the images of the individuals other than the complainant is not sufficient to properly sever them out of the video. It submits that instructions on how to reverse or remove facial blurring or blacking out are readily available online.

[42] The hospital further explains that in its initial response to the access request, it asked its lawyers to assist with the blurring of the video. The blurred video was then

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<sup>9</sup> See sections 51(2), 52(2) and 52(3).

viewed by the complainant's family, at no charge. The hospital submits that the complainant refused to see the video and refused to provide a confidentiality undertaking in exchange for a copy of the severed video. In the hospital's submission, there is a real risk that he intends to re-identify the patients and other individuals in the video, and/or further disseminate the video to others who may do so.

[43] The hospital further explains that it has now retained the services of a cybersecurity expert to provide an opinion on appropriate methods of blurring of the video that would protect the identities of the other faces captured on it. It submits that even expert blurring is not guaranteed against attempts at unblurring. It submits that, in the circumstances of this review, if a copy of the video is ordered to be provided to the complainant, it should only be ordered with blurring carried out to the standard described by the hospital's expert, at the complainant's expense, and in conjunction with an IPC order requiring that the complainant not attempt to unblur the video.

[44] Although the complainant continues to argue his access rights under *FIPPA*, rather than *PHIPA*, his arguments on severance are relevant because the concept of reasonable severability also applies in *FIPPA*. The complainant submits that his only motivation is to obtain a contemporaneous record of his condition at the time he was inappropriately discharged from the emergency department and that the video depicts him crawling on his hands and knees as he was escorted out of the emergency department. He submits that the hospital's argument as to why it cannot release the video to him is based on an incorrect inference that he intends to unblur the video to identify the other individuals depicted in it. He states that the undertaking that the hospital initially proposed that he sign was overbroad, and thus he did not agree to sign it. The complainant states that he has no intention of attempting to unblur the video to identify the other individuals who may be depicted in it, and will undertake and provide written confirmation that no steps will be taken to try to re-identify any patients who may appear in the video.

[45] Next, the complainant submits that the hospital has now proposed to release the video to him only after it has been further blurred by a cybersecurity expert for ten hours at his expense. He submits that the hospital's proposal will serve to make the cost of obtaining the video prohibitively expensive for him.

[46] In reply, the hospital stresses its obligation to protect the privacy rights of all patients. It explains that the initial undertaking that it asked the complainant to sign had two components: (1) not to further disclose the images in the video without the consent of the other individuals in the video and of the hospital, and (2) not attempt to re-identify the blurred individuals in the video. It submits that this is the first time the complainant has stated that he has no intention of attempting to unblur the video. It also submits that the complainant has only agreed to sign an undertaking not to attempt to unblur the images of other patients, and it points out that it has confidentiality obligations to the numerous individuals other than patients who may be seen on the video, such as visitors, volunteers, paramedics, security guards, and so on.

[47] The hospital also notes that the complainant has not agreed not to further disseminate the video. It raises a concern that others to whom the complainant provides the video may attempt to unblur the faces depicted on it. It submits that the only way to safeguard against this is through an undertaking not to further disseminate the video.

[48] The hospital concludes by stating that it is not prepared to provide the video in redacted form to the complainant except in response to an order of this office that requires it to do so, and that sets out specific language of an undertaking to be signed by the complainant confirming that he will not disseminate the video or attempt to re-identify any of the individuals in it.

### ***Analysis and finding***

[49] For the following reasons, I will order the hospital to provide access to the severed video, with all of the footage released with the exception of the images of all the individuals other than the complainant, which are to be obscured. I will not order the complainant to sign any undertaking, nor will I order him to refrain from disseminating the footage or attempting to reverse the severing applied to it. I also observe that if the hospital decides to charge a fee for access, its fee must be limited to reasonable cost recovery, and it must first provide the complainant with an estimate of its fee.

[50] I begin by turning to the opinion of the cybersecurity expert (the consultant) upon whom the hospital relies for the proposition that there is a real risk of the complainant's attempting to reverse the blurring technology applied to the video. The consultant states, in part:

Blurred videos can be unblurred if the original algorithm and file resolution is known, our approach will be to mask the algorithm by rescaling and reformatting the video thus masking the algorithm used.

We have analyzed the video to have a run time of 58 mins and 18 seconds long involving 2 camera angles and we estimate it will take approximately 10 hours to complete the blurring objective where one individual is not to be blurred and 203 passerby's [sic] are to be blurred.

All videos will be blurred where the individual who is not to be blurred is not present and in sections where the individual who is not to be blurred is present, we will blur everything around him.

The video will be flattened in order to achieve final blurring .... In order for the video to not be unblurred, the following will be executed:

- The video will be rescaled to block anti-blur software from identifying original algorithm use to blur the faces.

- The video will then be reformatted to different format to block anti-blur software from identifying the original file.

Please note: Undergoing the above process will make it very difficult and resource intensive, but not impossible, for an individual to successfully unblur it. We cannot provide a guarantee as to the ability to maintain the privacy of individuals within the blurred video.

[51] First, I note that the consultant repeatedly refers to using blurring technology to sever the images of the individuals other than the appellant. However, there are other types of obscuring technologies, such as blacking out, that are less susceptible to attempts at reversing.<sup>10</sup>

[52] Second, even assuming that the technology used is blurring technology, the consultant states that unblurring the edited video would be very difficult and resource intensive. In my view, it is highly unlikely that the complainant would attempt this, given his statement that the blurring the hospital proposes to do is already prohibitively expensive for him. It also seems highly unlikely that the complainant or any other individual would succeed even if they were to attempt it.

[53] Finally, I note the complainant's statement, through his counsel, that he does not intend to attempt to unblur the video in order to identify any individuals in it.

[54] I understand the hospital's concern for confidentiality and its desire to ensure that the privacy of its patients is not compromised. In my view, however, the risk that the obscuring technology the hospital chooses to apply to the video will be reversed is far too remote to justify withholding the entirety of the footage from the complainant. As the hospital itself acknowledges, this office routinely makes orders for the release of severed video footage. This has been ordered in cases where the information to be withheld is highly sensitive.<sup>11</sup> The standard for severing cannot be perfection. In my view, it would be too high of a bar to require that severing be 100% foolproof.

[55] I find, therefore, that the video footage can be reasonably severed within the meaning of section 52(3) of the *Act*. This can be achieved by obscuring the images of all individuals other than the complainant, and releasing the edited footage to him.

[56] I will not order the complainant not to attempt to reverse any obscuring technology that the hospital applies to the footage, nor to sign an undertaking to that effect. The hospital has not satisfied me that its concern is more than speculative. Moreover, the complainant has stated to me that he does not intend to attempt to

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<sup>10</sup> Blacking out is a conventional method of obscuring video that is known to be more secure than blurring.

<sup>11</sup> See, for examples, Orders MO-3796 and PO-3671.

reverse the severing applied to the video. This is enough to satisfy me that he will not do so.<sup>12</sup>

[57] I also will not order the complainant not to show or distribute the footage he receives to others. There is not any evidence before me that the complainant intends to share the video with others who in turn intend to attempt to reverse the severing. The hospital's submission in this regard is again speculation. In my view, this is not an appropriate circumstance in which to place restrictions on the complainant's handling of the footage he receives as a result of this decision.

[58] As a result of my findings, I will order the hospital to provide the complainant with access to each of the video clips, with the images of the other individuals obscured.

[59] In accordance with section 54(10), if the hospital decides to charge the complainant a fee for access, it must first give him an estimate of the fee.

[60] Although the hospital's fee is not directly before me, I offer the hospital the following as guidance in determining what fee may be allowed under *PHIPA*. Sections 54(10) and (11) of the *Act* provide as follows:

(10) A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part 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.

[61] 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." Where there is no regulation prescribing the amount of the fee that may be charged for a particular activity, 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*.

[62] 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*.<sup>13</sup> Applying the modern rule of

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<sup>12</sup> I note that it is an offence to willfully make a false statement to mislead or attempt to mislead the Commissioner: see *PHIPA*, section 72(1)(h).

<sup>13</sup> Orders HO-009 and HO-014.

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.<sup>14</sup> 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.<sup>15</sup>

[63] These past decisions 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"),<sup>16</sup> though never adopted, provides the best framework for determining the amount of "reasonable cost recovery" under *PHIPA*.<sup>17</sup>

[64] The 2006 framework adopted in those decisions 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 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.

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<sup>14</sup> Orders HO-009, HO-014 and PHIPA Decision 17.

<sup>15</sup> Orders HO-009, HO-014 and PHIPA Decision 17.

<sup>16</sup> 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>

<sup>17</sup> Orders HO-009, HO-014 and PHIPA Decision 17.

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.

[65] 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. Fees for severing video footage prior to granting access to it are not included in that table. However, in my view, it is reasonable to allow a health information custodian to claim costs, representing reasonable cost recovery, of the services of a third party for severing a record of personal health information for the purpose of granting access to the remainder.

[66] I agree, however, with this office's finding that "reasonable cost recovery" does not mean actual recovery of all the costs borne by a health information custodian. In the circumstances of this complaint, therefore, should the hospital choose to engage a third party to manipulate the video footage beyond what is reasonably necessary to protect the privacy of the individuals whose images are obscured, or if the third party's costs are otherwise excessive, the hospital may not be permitted under *PHIPA* to recover the full cost of the fee charged to it by the third party. As noted above, the fee charged by the custodian (including any component of the fee based on third party charges to the custodian) may be the subject of a complaint to, and reviewed by, this office.

[67] I also draw the parties' attention to section 54(12) of *PHIPA*, which permits the hospital to waive the payment of all or any part of the fee if, in its opinion, it is fair and equitable to do so. It is open to the complainant to request a waiver of the hospital's fee.

**ORDER:**

1. I order the hospital to provide the complainant with access to the three video clips at issue. A copy of each record in its entirety is to be provided to him, except images of all individuals other than the complainant are to be obscured.
2. If the hospital decides to charge a fee for access, it is to give the complainant an estimate of the fee in accordance with section 54(10).
3. For the purposes of order provisions 1 and 2, the date of this decision should be treated as the date of the access request.
4. The timelines referred to in order provision 3 may be extended if the hospital is unable to comply in light of the current COVID-19 situation. I remain seized of the complaint to address any such request.

Original signed by \_\_\_\_\_  
Gillian Shaw  
Senior Adjudicator

\_\_\_\_\_  
April 17, 2020