

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 130

Complaint HA18-00188

Hamilton Health Sciences

October 5, 2020

Summary: The adjudicator determines that a hospital is entitled to charge a fee of \$399, being reasonable cost recovery, for access to 1652 pages of electronic records.

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

Decision Considered: PHIPA Decision 111.

BACKGROUND:

[1] This decision is about a fee charged by a hospital for access to medical records, generated from the hospital's electronic medical records system and provided on a USB.

[2] On October 10, 2018, the requester (through a legal representative) made an access request under the *Personal Health Information Protection Act, 2004* (*PHIPA* or the *Act*) to Hamilton Health Sciences ("the hospital"), stating:

At this time, we are requesting all medical records in your possession for this patient from July 1, 2016 to current. This includes, but is not limited to, all test results, handwritten office notes, and consultations.

[3] The request included a \$30 cheque.

[4] On October 31, 2018, the hospital issued an invoice for an additional payment of \$443.00 to the requester's legal representative. The invoice also stated that, "Depending

on the size of the files requested, they will be sent to you on encrypted USB stick in PDF format.”

[5] The requester’s legal representative paid the fee to avoid further delay and subsequently received a copy of the records, which totalled 1652 pages, on a USB stick. However, the legal representative (who will be referred to throughout this decision as “the complainant”) filed a complaint with this office, disputing the fee.

[6] Mediation did not result in a resolution of the complaint and it was referred to adjudication. I am the assigned adjudicator and I decided to conduct a review of the complaint, during which I received written submissions from the complainant and the hospital. During my review, I also invited the parties to comment on the impact of PHIPA Decision 111, issued on February 19, 2020, on the issues in this complaint. Both sent comments in response.

[7] For the reasons below, I find that the hospital is entitled to charge a fee of \$399 for access to the records, and I order the hospital to refund the difference.

DISCUSSION:

The only issue before me is what fee the hospital is entitled to charge for access to the records.

Reasonable cost recovery for access as set out in *PHIPA*

[8] Sections 54(10) and (11) of *PHIPA* address fees that may be charged by a health information custodian, such as this hospital, for access to records of 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.

[9] As shown above, 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” if none is prescribed. 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*.

[10] 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*.¹ 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.² 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.³

[11] 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”),⁴ though never adopted, provides the best framework for determining the amount of “reasonable cost recovery” under *PHIPA*.⁵

[12] The 2006 framework applied 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 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.

¹ Orders HO-009 and HO-014.

² Orders HO-009, HO-014 and PHIPA Decision 17.

³ Orders HO-009, HO-014 and PHIPA Decision 17.

⁴ 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>

⁵ 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.

[13] 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.⁶ The following item set out in that table is of particular note in the circumstances of this review:

ITEM	COLUMN 1	COLUMN 2
12	For the review by a health information custodian or 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

[14] In PHIPA Decision 111, the IPC decided that the principle of "reasonable cost recovery", applied to the time required to review records in Item 12 above, does not permit a custodian to claim the same amount of review time for every type of record. The adjudicator observed that certain records with standard, predictable content (such as immunization records, vital signs records, weight records, medical imaging records and reports and laboratory reports) likely require no more than a brief, straightforward review

⁶ I have reproduced Table 1 in its entirety in the Appendix to this decision.

to establish whether they contain information to which an individual may not have a right of access.

[15] For such records, the adjudicator determined that a reasonable expectation of the time required for review 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 the *Act*.

[16] For other records, for which a more detailed review can reasonably be required, the adjudicator in PHIPA Decision 111 permitted a review time of two minutes per page.

[17] PHIPA Decision 111 was issued after I received initial representations from the hospital and the complainant, and I invited (and received) supplementary representations from them on the impact of this decision on the issues in this matter.

Representations of the parties

[18] The complainant does not disagree with the general principles set out in PHIPA Decision 111, and submits that the adjudicator there correctly concludes that the "appropriate level of review must be assessed based on each type of record, taking into consideration the specific information that it contains in the context of each custodian's record-holdings." The complainant also emphasizes the adjudicator's observation that her decision "is not intended to be a blueprint to be applied stringently in future circumstances."

[19] The complainant submits that, whereas in PHIPA Decision 111, the adjudicator's assessment of the time required for a review of the records was based on educated guesses, rather than a review of the records at issue, in the case before me, the records have already been produced and there is no reason to resort to "guesstimates."

[20] The complainant states that in this case, the vast majority of the records requires, at most, a straightforward review. Further, in contrast to the review of paper records at issue in PHIPA Decision 111, this case involves electronic records which, in the complainant's view, would require a review of no more than a second or two per page.

[21] The complainant's counsel submits that his firm has many years of experience in reviewing medical records in connection with litigation which, he states, would likely be a more detailed review than the one required by a custodian. Further, he submits that the review of medical records electronically from a computer screen has resulted in significantly shorter review times. In his submission, the review of all of the records in this case would rarely take longer than an hour and would on average take closer to ½ an hour because of the repetitive nature and format of the records.

[22] The hospital also agrees with the general principles put forward in PHIPA Decision 111, which it summarizes as follows:

- for a health information custodian to fulfill its obligations under the *Act* and to ensure it is granting access only to the personal health information to which the

requester is entitled under the *Act*, it is entitled to conduct a review of the requested records before granting access to them;

- although records are misfiled and mistakes sometimes occur, 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;
- a custodian may charge reasonable fees for its review of the records, based on the following scheme:
 - 5 seconds per page, for records requiring only "minimal time for a straightforward review", charged at \$45.00 per 15 minutes;
 - 2 minutes per page for records requiring more than a straightforward review (records that, by their nature, have the potential to contain information to which access may be refused), charged at \$45.00 per 15 minutes.

[23] The hospital states that, in this case, 1652 pages of records were requested. It is prepared to accept for the purposes of this review that all of them require no more than a straightforward review. Applying the guidelines in PHIPA Decision 111 and the 2006 framework, and based on 5 seconds per page for review, it calculates the amount of fees it is permitted to recover from the complainant as follows:

1652 pages – 20 pages = 1632 pages

1632 pages × 5 seconds = 8160 seconds (or 136 minutes)

136 minutes / 15 minutes = 9.067 15-minute intervals

9.067 intervals × \$45/interval = \$408

[24] The hospital also states that it is prepared to waive both the \$5 postage fee and the \$30 fee associated with the physical hardware (the USB stick) provided in this case, in recognition of the fact that it now offers production of electronic records by encrypted electronic mail at no additional cost to requesters. Applying these waivers, the remaining fees amount to a total of \$438, representing the \$30 initial fee and \$408 in fees associated with the production of the remaining 1632 pages of records.

Analysis and findings

[25] PHIPA Decision 111 established the principle that a health information custodian responding to a request for access to records of personal health information is entitled to review the records before granting access, and to charge fees for its review. The fees for review which it is permitted to charge a requester are to be assessed according to the principle of "reasonable cost recovery."

[26] In that decision, the adjudicator found that the health information custodian (in that case, the City of Toronto as the operator of a long-term care home) could charge fees

based on the amount of time reasonably necessary for a review of the records. For records requiring only a "straightforward review", five seconds per page was determined to be a reasonable length of time for such a review. For records requiring more detailed review, the adjudicator found that two minutes per page was a reasonable expectation of time required for review.

[27] I agree with the principles established in that decision, and with the manner in which they were applied to the facts before the adjudicator. Further, I do not agree with the complainant's characterization of the adjudicator's findings as a "guesstimate" of the time required to review the records. The adjudicator based her findings on the evidence before her, which included detailed descriptions of the types of records in the patient's file. The adjudicator's decision that five seconds a page was a reasonable length of time for review of straightforward records was based on a clear understanding of the types of records to which this type of review would be applied: immunization records, vital signs records, weight records, medical imaging records and reports such as X-rays, ECGs and ultrasounds, and the like.

[28] Although I recognize that this finding was not intended to be a "blueprint" for all future fee complaints under the *Act*, I see no reason not to follow it in the circumstances before me. Among other things, I reject the complainant's assertion that a review of records in electronic format will require less time than paper records, which was the format of the records discussed in PHIPA Decision 111. It is without doubt that the characteristics of electronic data reduce the time required for certain tasks, such as searching for or processing large amounts of information. However, I am not convinced that the medium in which the information is displayed (electronic v. paper) affects the time required by an individual to review those records in response to a request for access under the *Act*. In the circumstances of this case, in any event, I see no basis for drawing such a distinction.

[29] I cannot comment on the accuracy of the complainant counsel's description of his experience in preparing records for production during litigation but I am not persuaded that I should apply that experience, from a wholly different context, to the issues before me in this complaint.

[30] In the result, and taking into account the portion of the fees that the hospital has agreed to waive, I find that a fee of \$399 is justified and does not exceed reasonable cost recovery in the circumstances of this case. For greater clarity, I set out below my calculation of this fee:

Initial fee for all tasks described in section 25.1(1) of the 2006 framework, including 15 minutes of review time. ⁷		\$30
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⁷ The hospital applies the initial \$30 to include review time for only 20 pages of records, but I interpret the 2006 framework to set an initial fee of \$30 for all tasks described in section 25.1(1), including 15 minutes of review time which would otherwise be charged at the rate of \$45 per 15 minutes.

Calculation for remainder of time reviewing the contents of the records.	1652 @ 5 sec/pg = 138 minutes of review Less 15 minutes = 123 minutes (2.05 hours) of review	
Charge for review	2.05 hrs x \$180/hr	\$369
Total Cost of Processing Request	\$30 + \$369	\$399

[31] In conclusion, I do not uphold the fee charged by the hospital, and order it to provide a refund to the complainant of the difference between \$399 and the amount paid.

ORDER:

I do not uphold the hospital's fee of \$438 and order it to provide a refund to the complainant of the difference between \$399 and the amount already paid.

Original signed by: _____
Sherry Liang
Assistant Commissioner Tribunal Services

_____ October 5, 2020