

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 134

Complaint HA17-89

Service Coordination Support

October 29, 2020

Summary: Service Coordination for People with Developmental Disabilities (now called Service Coordination Support, or SCS) received a request for access to records under the *Personal Health Information Protection Act (PHIPA or the Act)* relating to the complainant's son. SCS located responsive records and granted partial access to them. The complainant filed a complaint with the IPC on the basis of her belief that additional records should exist.

In this decision, the adjudicator finds that SCS is not a health information custodian under the *Act*, and dismisses the complaint. Accordingly, there is no basis to review SCS' search for records.

Statutes Considered: *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A, sections 2(1) and 85(1)(b); *Personal Health Information Protection Act, 2004* SO 2004, c 3, Sched. A, as amended, sections 2, 3(1), 20(2); *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14, sections 1 and 35.

Decisions Considered: PHIPA Decisions 15 and 35.

BACKGROUND:

[1] Service Coordination for People with Developmental Disabilities (now called Service Coordination Support, or SCS) received a request for access to records concerning the complainant's son, under the *Personal Health Information Protection Act (PHIPA, or the Act)*.

[2] SCS issued a decision and provided partial access to the requested records to the

requester.¹

[3] The requester, now the complainant, filed a complaint with the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office) regarding SCS' decision.

[4] During mediation, the parties exchanged views about the reasonableness of SCS' search, in light of the complainant's belief that additional responsive records should exist, but could not resolve their dispute. The complainant asked that her complaint proceed to the review stage of the complaint process, where an adjudicator may conduct a review under *PHIPA*.

[5] At adjudication, it came to my attention that SCS may not be a "health information custodian" within the meaning of the *Act*. If that is the case, then the access provisions of the *Act* do not apply to SCS and the reasonableness of SCS' search for records cannot be decided under the *Act*. Given the importance of this issue, I asked SCS, and then the complainant, for representations on it. The parties provided representations in response, and consented to the sharing of their responses with one another.

[6] For the reasons that follow, I find that SCS is not a health information custodian within the meaning of the *Act*. Accordingly, I do not address the issue of whether SCS conducted a reasonable search for records, and I dismiss this complaint.

DISCUSSION:

[7] Although the complaint before me arises out of a request for access to records made under *PHIPA*, a preliminary issue is whether SCS is a health information custodian (HIC) within the meaning of *PHIPA*. Given my findings, below, that SCS is not a HIC under the *Act*, that is the only issue to be decided in this complaint.

Definition of "health information custodian" in *PHIPA*

[8] The term "health information custodian" is a term defined in *PHIPA* at section 3(1). The opening words of this definition are:

In [*PHIPA*],

"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

¹ SCS issued the requester a decision on the basis that the requester is her son's substitute decision-maker, as defined by section 71(3) of the *Act*.

connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any[.] [Emphasis added.]

[9] After the opening words of the definition of "health information custodian," there are eight paragraphs (and eight subparagraphs).² As the opening words of the definition of HIC state, to be a HIC a person or organization must be described in one of these eight paragraphs.

[10] Most of the eight paragraphs clearly do not apply to SCS.

[11] SCS' position is that it does not fit within any of the eight paragraphs, though it discussed paragraph 3(1)4(vii) in more detail. In my view, that is the only paragraph that might arguably apply to SCS, and I will discuss it below.

[12] The complainant did not specifically cite any paragraph as applying to SCS. Her

² Section 3(1) of *PHIPA* defines "health information custodian" as follows:

"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 or 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.
2. A service provider within the meaning of the *Home Care and Community Services Act, 1994* who provides a community service to which that Act applies.
3. [Repealed.]
4. A person who operates one of the following facilities, programs or services:
 - i. A hospital within the meaning of the *Public Hospitals Act*, a private hospital within the meaning of the *Private Hospitals Act*, a psychiatric facility within the meaning of the *Mental Health Act* or an independent health facility within the meaning of the *Independent Health Facilities Act*.
 - ii. A long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*, a placement co-ordinator described in subsection 40 (1) of that Act, or a care home within the meaning of the *Residential Tenancies Act, 2006*.
 - iii. A retirement home within the meaning of the *Retirement Homes Act, 2010*.
 - iv. A pharmacy within the meaning of Part VI of the *Drug and Pharmacies Regulation Act*.
 - v. A laboratory or a specimen collection centre as defined in section 5 of the *Laboratory and Specimen Collection Centre Licensing Act*.
 - vi. An ambulance service within the meaning of the *Ambulance Act*.
 - vii. A home for special care within the meaning of the *Homes for Special Care Act*.
 - viii. A centre, program or service for community health or mental health whose primary purpose is the provision of health care.
5. An evaluator within the meaning of the *Health Care Consent Act, 1996* or an assessor within the meaning of the *Substitute Decisions Act, 1992*.
6. A medical officer of health of a board of health within the meaning of the *Health Protection and Promotion Act*.
7. The Minister, together with the Ministry of the Minister if the context so requires.
8. Any other person prescribed as a health information custodian if the person has custody or control of personal health information as a result of or in connection with performing prescribed powers, duties or work or any prescribed class of such persons.

arguments can mainly be considered under section 3(1)4(vii), in response to SCS' representations.

Section 3(1)4(vii)

[13] Section 3(1)4(vii) says:

In [*PHIPA*],

"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 or the work described in the paragraph [3(1)4(vii)], if any

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

(vii) a centre or program or service for community health or mental health whose *primary purpose* is the provision of "health care" [emphasis added].

[14] The parties agree that SCS serves adults with developmental disabilities³ and children who have a confirmed diagnosis of a developmental disability or autism spectrum disorder in accordance with specified clinical criteria.

[15] Assuming without deciding that SCS could be a centre, program or service "for community health or mental health," its *primary purpose* must be the provision of health care in order for SCS to be a HIC under section 3(1)4(vii) of *PHIPA*. If it is not the primary purpose of SCS to provide health care, then it is not a HIC under section 3(1)4(vii).

[16] This leads to the question of what "health care" is. That is a term defined in section 2 of *PHIPA*. In this case, paragraphs (a) and (b) of the definition of "health care" may be relevant. These paragraphs say:

In [*PHIPA*],

"health care" means 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, [or]

³ As "developmental disabilities" is defined in the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*.

(b) is carried out or provided to prevent disease or injury or to promote health[.]

Is the primary purpose of SCS the provision of "health care"?

[17] In PHIPA Decisions 15 and 35, this office considered the impact of an overbroad reading of the term "health care." I agree with the approach taken in those decisions and adopt it to the circumstances before me. That approach recognizes the following:

- a "purposive reading of the *Act* . . . supports a narrower, rather than a broader, reading of 'health care';"⁴
- interpreting the term "health care" broadly can conflict with the policy behind section 20(2) of *PHIPA*,⁵ which facilitates the collection, use, or disclosure of personal health information within the health system that individuals generally expect to occur without the need for express consent;
- one of the purposes of the *Act* is to protect the confidentiality of individuals' personal health information and individuals' privacy, while facilitating the effective provision of health care at the same time – so interpreting "health care" broadly would "enlarge the scope of personal health information that could be collected, used or disclosed without express consent in other circumstances" and "such a reading could conflict with individuals' expectations and the policy behind section 20(2)."⁶

[18] Examining the nature of a service provided to determine whether health care was being delivered is also consistent the Federal Court's statement in *Wyndowe v. Rousseau*,⁷ that doctors performing independent medical examinations are not HICs under *PHIPA* because their primary purpose in carrying out those medical examinations is not the provision of health care.

[19] Turning to the evidence before me, I will explain why I find that it is not SCS' primary purpose to provide health care.

SCS' governing legislation

[20] The parties do not agree about the relevance, if any, of SCS' stated governing legislation to the question of whether it is a HIC under *PHIPA*. The representations on this point were not particularly clear or helpful, but in any event, I find that the evidence regarding SCS' services is clearer and directly relevant to the question that I

⁴ PHIPA Decision 35.

⁵ *Ibid*, citing PHIPA Decision 15.

⁶ *Ibid*.

⁷ 2008 FCA 39 (CanLII).

have to decide.

[21] SCS states that it operates as a "service agency," as defined in the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 (SIPDDA)*:

"service agency" means a corporation or other prescribed entity that provides services and supports to, or for the benefit of, persons with developmental disabilities and that has entered into a funding agreement with the Minister⁸ under section 10 with respect to those services and supports[.]

[22] One set of regulations under *SIPDDA* is the Quality Assurance Measures Regulations (QAMR).⁹ Part II of the QAMR is entitled "Quality Assurance Measures With Respect to Service Agencies, General." Section 2 of QAMR indicates that Part II applies to all service agencies. The provisions of QAMR upon which the parties rely (or appear to rely) are contained in Part II, namely sections 3(1), 3(2), and 7, and would apply to SCS if it is a "service agency" under *SIPDDA*.

[23] Section 3(1) of QAMR states that every service agency is required to address eleven quality assurance measures. One of those measures relates to "health promotion, health services and medication," which SCS referenced in its representations. The requirements related to a wide-ranging list of health-related services are set out in more detail at section 7 of the QAMR. SCS states on the one hand that none of the provisions of section 7 apply to it, but on the other, that it is subject to quality assurance measures regarding health-related issues under its governing legislation.

[24] This apparent discrepancy appears to be resolved by section 3(2) of QAMR, in light of SCS' brief representations regarding its relationship with third parties and its obligations under its governing legislation, and the more detailed evidence before me regarding the nature of its services.

[25] Section 3(2) says, in part:

(2) . . . where a service agency contracts with a third party to provide services and supports to persons with developmental disabilities, the service agency,

⁸ In *SIPDDA* at section 1, "Minister" means the Minister of Community and Social Services or any other member of the Executive Council to whom the administration of [*SIPDDA*] is assigned under the Executive Council Act.

⁹ *SIPDDA*, Quality Assurance Measures Regulations 299/10.

(a) shall ensure that the contract requires that the third party comply with the quality assurance measures **that would apply to the service agency if it were providing the services and supports;** and

(b) shall monitor the performance of the contract to ensure that the third party complies with the quality assurance measures[.] [Emphasis added.]

[26] The language bolded above means that section 3(2)(a) would not apply to a service agency that was providing services and supports directly. Based on the evidence before me of SCS' relationships with third parties, and the detailed evidence regarding the nature of SCS' own services, it appears that section 3(2) applies to SCS. This weighs against finding that SCS has a primary purpose of providing "health care," as that term is defined in *PHIPA*.

[27] In any event, the requirement to have policies and procedures regarding health-related matters is not determinative of whether the primary purpose of SCS is to deliver health care. Any number of organizations or institutions, such as schools, might reasonably be expected to have quality assurance measures regarding health-related issues, but are still not HICs.

The services offered by SCS

[28] The parties agree that SCS provides services to adults with a developmental disability and children with a confirmed diagnosis of a developmental disability or autism spectrum disorder in accordance with specified clinical criteria. In my Notice of Review inviting representations from the parties on the HIC issue, I invited representations on the nature of SCS' services and the apparent contradiction between SCS' online description of itself as a HIC and its position in this complaint. The complainant provided detailed representations about SCS' services (which are also described on SCS' website), to which SCS declined to reply.

[29] According to its website, SCS offers six services. Its descriptions of these services are summarized below.¹⁰

- Children's Case Management - SCS helps parents plan for the needs of their child and family. SCS works with parents to explore opportunities, services and supports available for children in Ottawa. Once a child's eligibility is confirmed, a case manager can assist in linking a family to community resources, completing a person-centered plan and providing support, as required. Applicants can contact community resources directly to register and SCS can assist them in completing

¹⁰ <https://scsonline.ca/services/>

applications as needed. Children's Case Management does not offer residential services or day programs.

- Development Services Ontario Eastern Region (DSOER) - Applicants must apply through DSOER to see if they are eligible to receive adult supports available in their community, funded by the Ministry of Children, Community and Social Services (MCCSS). DSOER will help applicants to: understand and complete the application process, determine the kind of services and supports they need, get access to funded services and supports that they need when a spot is available, and find information in their community. The delivery of adult developmental services and supports that are funded by MCCSS are not included in this DSOER service.
- Adult Case Management - SCS supports individuals and their families in developing a plan to meet their needs and to find available opportunities, resources and services within the community. Adult Case Management does not offer residential services or day programs.
- Respiteservices.com/Ottawa – This is a secure website hosted by SCS with tools that match applicants with direct support providers who can provide respite. This service is available to children and adults with developmental disabilities and/or autism in Ottawa. Each direct service provider is independent from respiteservices.com and SCS. They are engaged by and paid by the family.
- Coordinated Service Planning for Children and Youth – This service was created to support families with children/youth who have multiple and/or complex special needs. It aims to ensure that the services involved with their child/youth are working as a team, towards the family's goal, and that they are kept informed through the process. This service is not meant to duplicate services currently being used, but rather, ease communication between families and their team members. It provides the family with the chance to meet together with all of the professionals from different agencies and work towards creating a single plan of care for the child/youth.
- Residential and Community Services – This service is for youth in extended care with the Children Aid Society transitioning to adult services and receiving residential services with private supports. A SCS resource coordinator can work with the youth to monitor the quality of their current services and develop a plan to meet their goals. Residential and day programs are not offered as part of this service.

SCS' online statements about the application of PHIPA

[30] SCS takes the position that it is not a HIC. It explains that its website contains references to *PHIPA* because it decided to follow *PHIPA* as a best practice to protect client information regardless of whether it is personal health information. SCS states that it accordingly "enhanced its website and policies to comply with *PHIPA* in an

attempt to align its information safeguarding methods with the recommended best practices while not fully understanding the implications of being a HIC.”

[31] I accept this as a reasonable explanation for the apparent discrepancy between SCS’ position in this case (that it does not provide health care and is not HIC, as those terms are defined by *PHIPA*), and its online statements about its status as a HIC. Although the online statements reflect a practice that led to access to records being granted to the complainant, neither the statements nor the past access to records bind me to find that SCS is a HIC.

The role and status of the funding ministry

[32] SCS is funded by the Ministry of Children, Community and Social Services (MCCSS). I understand some of the complainant’s arguments to mean that because SCS is funded by MCCSS, SCS is a HIC. However, the source of SCS’ funding is not relevant to an analysis of whether it is a HIC under section 3(1)4(vii). It is worth noting in any event that under *PHIPA*, the Minister of Health and Long-Term Care (MOH) is a HIC,¹¹ while the Minister of Children, Community and Social Services is not.

[33] The complainant also made other arguments regarding the MCCSS’ use of personal health information, and its status as an institution under the *Freedom of Information and Protection of Personal Privacy Act (FIPPA)*.¹² However, the question to be decided is whether SCS is a HIC, not whether MCCSS is or should be. Evidence about MCCSS’ use of personal health information or its status under *FIPPA* does not establish that SCS qualifies as a HIC as defined in section 3(1)4(vii) of *PHIPA*, or under any other paragraph of section 3(1) of *PHIPA*.¹³

Analysis and findings

[34] In my view, what is common to each of the six services offered by SCS is SCS’ role as a coordinator for, or link to, a wide range of services offered by third parties to individuals with developmental disabilities and/or autism. It is a role of coordination between these individuals (or their family members) and third-party services, which may include assessing each individual’s needs and/or preferences, and matching them to various types of programs in the community. The effect of the individuals’ participation in those third-party programs may well be that it enhances their health, but that does not transform SCS’ role into one that can be described as having a primary purpose of providing health care. In my view, it would be too broad a reading of “health care” to find that SCS’ primary purpose is the provision of health care.

¹¹ Under section 3(1)(7) of *PHIPA*.

¹² R.S.O. 1990, c. F.31.

¹³ It was not argued that SCS is an institution as defined in *the Freedom of Information and Protection of Privacy Act (FIPPA)*. It is not listed in the schedule of institutions covered by *FIPPA*.

[35] It is true that SCS serves members of the community who have health challenges. The complainant states that these individuals “have other health issues including mental and neurological diagnoses, speech-language impairments and complex health needs often requiring 24 hours supervision.” However, the fact SCS’ client base has health challenges does not mean that SCS’ primary purpose is the delivery of health care. With respect to the status of third party entities to whom SCS refers for services, I am not satisfied that their status is relevant to the question of whether SCS itself is a HIC. Assuming, without deciding, that at least some of those third party entities are HICs under *PHIPA*, that does not mean that SCS itself, as a coordinating agency, is a HIC.

[36] The complainant’s representations highlight the role of employees of the DSOER, one of the six areas of SCS’ services. She provided a 2019 job posting for DSOER assessors in support of her position that these individuals conduct “assessments of personal care needs and health issues . . . with goals to facilitate . . . access to numerous services including to community participation programs, to residential services and to health services.” I understand DSOER’s function is to assist with applications and determinations of eligibility for services or support for persons with developmental disabilities or their family members. The complainant appears to argue that this amounts to “health care”. However, this function is only a part of what SCS offers, and on the whole, it is clear that SCS’ primary purpose is not the provision of health care, but rather the coordination of various services for its client base.

[37] Considering the evidence before me about SCS’ six services, I find that SCS’ administrative role in each of these services, and overall, weighs strongly against finding that the primary purpose of SCS is the provision of “health care.”

[38] Finally, the complainant argues, and SCS agrees, that SCS has personal health information in its possession. However, this is irrelevant to whether SCS is a HIC. In order for *PHIPA* to apply to a request for access to information, the entity in question must be a HIC, and the information must be personal health information. If the entity is not a HIC, then the fact that the information at issue is personal health information is irrelevant.

Section 3(1)5

[39] The complainant asserts that SCS’ DSOER assessors are evaluators within the meaning of the *Health Care Consent Act, 1996 (HCCA)*. It appears by this assertion that the complainant is raising the relevance of another paragraph listed under the opening words of the definition of HIC, specifically, section 3(1)5 of *PHIPA*.

[40] Section 3(1)5 says:

In [*PHIPA*],

“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 or the work described in the paragraph, if any

5. An evaluator within the meaning of the *Health Care Consent Act, 1996* or an assessor within the meaning of the *Substitute Decisions Act, 1992*.

[41] There is insufficient evidence before me to conclude that DSOER assessors are "evaluators" under the *HCCA*. Evaluators under the *HCCA* evaluate an individual's capacity. The evidence before me is that the DSOER assessor evaluates needs, not capacity. As a result, section 3(1)5 is not applicable here.

Conclusion

[42] Since SCS is not a health information custodian, then the access provisions in *PHIPA* do not apply, and there is no basis for a complaint about SCS' search under *PHIPA*.

NO REVIEW:

For the reasons set out above, there is no basis to review SCS' search for records, and I dismiss this complaint.

Original Signed by: _____
Marian Sami
Adjudicator

_____ October 29, 2020