

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 193

Complaint HA20-00182

London Health Sciences Centre

December 8, 2022

Summary: Under the *Personal Health Information Protection Act, 2004 (PHIPA)*, the complainant requested that corrections be made to a consultation note documenting her visit to the London Health Sciences Centre (the hospital). Among other reasons, the complainant asserts that statements in the note about certain behaviours and health issues are inaccurate, and are inconsistent with information she later provided to the hospital about her health and her capacity to live a successful life. The complainant filed a complaint with the IPC about the hospital's refusal to make her requested corrections. In this decision, the adjudicator upholds the hospital's refusal to correct based on an exception to the duty in section 55(8) of *PHIPA* that otherwise requires the hospital to correct personal health information in certain circumstances. In this case, the adjudicator finds that the exception at section 55(9)(b) of *PHIPA* for professional opinions or observations (accurate or otherwise) made in good faith applies to the personal health information at issue in the consultation note. She dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, sections 55(1), (8) and (9)(b); 55(10)(c); and 55(11).

OVERVIEW:

[1] This decision concerns a complainant's request under the *Personal Health Information Protection Act, 2004 (PHIPA)* to the London Health Sciences Centre (the hospital) for the correction of a consultation note documenting a hospital visit. It is the complainant's assertion that the note, authored by a physician who was then a resident

at the hospital, contains inaccurate statements about the complainant's behaviours and about her mental health more generally. The hospital refused the complainant's correction request under *PHIPA*. One of the grounds for the hospital's refusal is the exception, found at section 55(9)(b) of *PHIPA*, to the duty at section 55(8) to grant a correction request in certain circumstances. The exception at section 55(9)(b) applies to professional opinions or observations made in good faith. In this decision, I uphold the hospital's refusal to correct based on the section 55(9)(b) exception. As a result, I dismiss the complaint about the hospital's refusal to correct the consultation note.

BACKGROUND:

[2] The complainant visited the hospital and was seen by a physician who was, at the time of their encounter, a resident under the supervision of a hospital psychiatrist. The complainant later viewed a consultation note authored by the resident to document this visit. The complainant has concerns with some of the information contained in the consultation note. Among other things, she objects to statements in the note referring to alcoholism, major depression, and anxiety.

[3] Several years after the visit documented in the consultation note, the complainant raised her concerns in a telephone conversation with a different hospital doctor. While the doctor refused to amend the resident's consultation note, she agreed to prepare a psychiatric assessment note based on her telephone conversation with the complainant. The psychiatric note contains the doctor's account of the complainant's concerns with the consultation note authored by the resident. The psychiatric note is filed in the complainant's electronic health record as an addendum to the consultation note.

[4] The complainant was not satisfied that the psychiatric note addressed all her concerns with the consultation note. She thus made a formal request under *PHIPA* for correction of the consultation note. She set out the details of her correction request in a two-page letter to the hospital, with attachments in support of her request.

[5] The hospital refused to make the complainant's requested corrections, but advised her of her right to prepare and to have attached to the psychiatric note (which is itself an addendum to the consultation note) a statement of disagreement. The complainant prepared a statement of disagreement. The hospital has confirmed that the statement of disagreement is attached to the consultation note in the complainant's health record (along with the addendum consisting of the psychiatric note prepared by the doctor).

[6] The complainant remained dissatisfied with the hospital's refusal to make her requested corrections to the consultation note prepared by the resident, and she filed a complaint with the Information and Privacy Commissioner of Ontario (IPC) in respect of the refusal.

[7] During the mediation stage of the complaint process, the complainant prepared a document identifying statements in the consultation note that she asserts are false, inconsistent, or otherwise mistaken. The hospital maintained its decision to refuse the requested corrections, on two grounds. The hospital asserts that the complainant has not demonstrated to its satisfaction that the consultation note is incomplete or inaccurate for the purposes for which the hospital uses the information, referring to the requirements of section 55(8) of *PHIPA*. The hospital also asserts that the consultation note contains professional opinions made in good faith, referring to an exception to the duty to correct found at section 55(9)(b) of *PHIPA*. (I discuss the relevant sections of *PHIPA* in more detail, below.)

[8] However, in an attempt to address the complainant's concerns, the hospital made a further addendum to the consultation note. This further addendum states that the complainant "disputes the correctness aspects of this record," and refers readers to the first addendum to the consultation note (being the psychiatric note prepared by the doctor) for details.

[9] The hospital later agreed to add another addendum to the consultation note. This third addendum to the consultation note states:

As permitted under [*PHIPA*], this patient has challenged the accuracy of the information in this [consultation note]. The hospital has reviewed the patient's request to correct the information and has subsequently refused the request on the basis that 1) it was a professional opinion and 2) the patient had not demonstrated to the hospital's satisfaction that the note was inaccurate. As a result of the hospital's refusal to grant the correction request, the patient has submitted a Statement of Disagreement that is stored in hard copy in the patient's [hospital] record. This Statement is part of the patient's legal hospital record and must be disclosed whenever this Note is disclosed.

[10] The complainant remained dissatisfied with the hospital's response to her correction request, and this file moved to the adjudication stage of the IPC's complaint process.

[11] At the adjudication stage, I conducted a review during which the parties exchanged representations in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*.

[12] For the reasons that follow, I uphold the hospital's refusal to correct based on the exception at section 55(9)(b) of *PHIPA*. I dismiss the complaint.

DISCUSSION:

Does the section 55(9)(b) exception (professional opinion or observation made in good faith) to the duty to correct apply in the circumstances?

[13] In this complaint, there is no dispute that the hospital is a “health information custodian,” and that the consultation note at issue is a record of the complainant’s “personal health information” within the meaning of those terms in *PHIPA*.¹ There is no dispute that the complainant has a right to request correction of the consultation note under section 55(1) of *PHIPA*.

[14] In some circumstances, the hospital has a duty under *PHIPA* to grant a correction request. This duty is found at section 55(8) of *PHIPA*, which states:

The health information custodian shall grant a request for a correction under [section 55(1)] if the individual demonstrates, to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information and gives the custodian the information necessary to enable the custodian to correct the record.

[15] However, section 55(9) provides exceptions to the duty to correct in some cases. In this complaint, the relevant exception is section 55(9)(b), which states:

Despite [the duty to correct at section 55(8)], a health information custodian is not required to correct a record of personal health information if [...] it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[16] Read together, sections 55(8) and 55(9) set out the criteria pursuant to which an individual is entitled to a correction of a record of her own personal health information.

[17] In this case, the hospital refused the complainant’s correction request both on the ground the complainant has failed to satisfy the requirements of section 55(8) (i.e., to demonstrate that the record is incomplete or inaccurate for the purposes for which the hospital uses the information...), and that the exception at section 55(9)(b) applies (i.e., that the record consists of a good faith professional opinion or observation).

[18] Depending on the nature of the correction request, the information the individual seeks to have corrected, and the reasons for the custodian’s refusal of the request, the IPC may approach the analysis in a correction complaint initially under section 55(8) or

¹ Specifically, the person who operates the hospital is a health information custodian within the meaning of paragraph 4.i of section 3(1) of *PHIPA*. The consultation note contains identifying information about the complainant that qualifies as her personal health information within the meaning of section 4 of *PHIPA*

under section 55(9).²

[19] For the reasons that follow, I find that the exception at section 55(9)(b) applies in the circumstances. It is therefore unnecessary for me to consider the hospital's alternate claim that the complainant has not satisfied the requirements of section 55(8). The wording of section 55(9) makes clear that whether or not the requester meets the onus in section 55(8), a finding that an exception in section 55(9) applies will result in a finding that the hospital has no duty to correct.

[20] The purpose of the section 55(9)(b) exception is to preserve "professional opinions or observations," *accurate or otherwise*, that have been made in good faith. This purpose is based on sound policy considerations, including the need for documentation that may explain treatments provided or events that followed a particular observation or diagnosis. This approach is consistent with the approach taken to similar provisions in other jurisdictions.³

[21] Where a "professional opinion or observation" is involved, section 55(8) does not give an individual the right to request a correction that effectively amounts to a substitution or change to the custodian's "professional opinion or observation," *unless* it can be established that the professional opinions or observations were not made in good faith. Moreover, a request for correction or amendment should not be used to attempt to appeal decisions or professional opinions or observations with which a complainant disagrees; it cannot be a substitution of opinion, such as the complainant's view of a medical condition or diagnosis.⁴

[22] Where a custodian claims that section 55(9)(b) applies, the custodian bears the burden of proving that the personal health information at issue consists of a "professional opinion or observation" about the individual. However, once the custodian has established that the information qualifies as a "professional opinion or observation," the onus is on the individual seeking a correction to establish that the "professional opinion or observation" was not made in good faith.

[23] Thus, section 55(9)(b) involves a two-part analysis. The first question is whether the personal health information at issue is a "professional opinion or observation." The second question is whether the "professional opinion or observation" was made "in good faith." I find that both parts of the test are met in this case, as I explain below.

The personal health information at issue qualifies as a "professional opinion or observation"

[24] In order for section 55(9)(b) to apply, the personal health information must

² PHIPA Decision 36.

³ See for example Orders H2004-004, H2005-006 and H2005-007 of the Information and Privacy Commissioner of Alberta, cited in PHIPA Decision 36.

⁴ PHIPA Decision 36.

qualify as either a “professional opinion” or a “professional observation.” Only those observations and opinions that require a health information custodian or an agent to exercise or apply special knowledge, skills, qualifications, judgment or experience relevant to their profession qualify as “professional observations” or “professional opinions” within the meaning of section 55(9)(b).⁵

[25] The consultation note at issue in this complaint is a record prepared by a physician, who was then a resident, documenting the complainant’s hospital visit. The hospital explains that the consultation note was dictated on the same date as the visit, and is supported by the resident’s handwritten notes made contemporaneously with their meeting. Based on this context, and on the contents of the consultation note itself (a copy of which the IPC received from the hospital with the consent of the complainant), I am satisfied that the personal health information at issue in the note constitutes “professional opinions” or “professional observations” within the meaning of section 55(9)(b).

[26] I have no difficulty making this finding for certain statements in the consultation note that clearly arise from the application of the resident’s professional judgment and experience. Examples include diagnoses made by the resident, and the resident’s findings following a mental status examination of the complainant.

[27] In addition to the above type of statements, a second type of statement appears in the consultation note. These are statements about the complainant’s career, professional activities and interests, and the complainant’s health history. I recognize that this second type of statement could, in some circumstances, be characterized as statements of fact as opposed to professional opinions or observations.

[28] The complainant challenges the accuracy of these statements, and, in some cases, provides evidence to show that they are inaccurate. For example, the complainant provided proof of income to demonstrate her hours of work, and testimonials about her leadership and volunteer experience to demonstrate her capacity to lead a successful life. She also points to several statements in the consultation note that she describes as contradictory. As one example, the complainant contrasts the note’s reference to her “suspected sensitivity to wine” with statements later in the note describing episodes of frequent binge-drinking by the complainant. As another example, the complainant points to statements in the note that refer, variously, to the complainant’s having some history and no history of self-harming behaviours. I understand the complainant to be saying that the existence of contradictory statements in the consultation note supports her claim about its overall inaccuracy.

[29] As noted above, however, the application of the section 55(9)(b) exception does not turn on whether the personal health information at issue is objectively true or accurate. The section 55(9)(b) exception may apply to personal health information,

⁵ PHIPA Decision 37.

even if that information is inaccurate, where that information qualifies as a “professional opinion or observation,” made in good faith. I find that the second type of statement described above qualifies as a professional opinion or observation within the meaning of section 55(9)(b), for the following reasons.

[30] This second type of statement appears in the consultation note as part of the resident’s account of what the complainant told her and the resident’s perceptions of the complainant’s presentation during the hospital visit. In this context, these statements inform the resident’s clinical findings documented in the consultation note. In this way, this second type of statement is connected to the more obvious applications of professional judgment and experience that are evident in the first type of statement. Even in cases where the second type of statement is demonstrably inaccurate (for example, where the complainant says the resident inaccurately documented the complainant’s medication history, or incorrectly identified the name of a previous doctor), I am satisfied that the resident’s account of their interaction represents the exercise of her professional knowledge and skills in the course of information-gathering to arrive at a clinical judgment. The fact that these statements may contain inaccuracies does not affect their classification as professional opinions or observations within the meaning of section 55(9)(b).⁶

[31] I will next consider whether these professional opinions or observations (contained in both the first and second type of statement in the consultation note) were made in good faith.

The professional opinions or observations at issue were made “in good faith”

[32] The question under this heading is whether there are reasonable grounds to conclude that the professional opinions or observations at issue were not made “in good faith” within the meaning of section 55(9)(b). If the professional opinions or observations were not made in good faith, then the section 55(9)(b) exception to the duty to correct cannot apply.

[33] The courts have stated that a finding that a person has not acted in good faith can be based on evidence of malice or intent to harm another individual, as well as serious carelessness or recklessness. The courts have also stated persons are assumed to act in good faith unless proven otherwise. There is thus a presumption of good faith, and the burden of proof to rebut the presumption of good faith rests on the individual seeking to establish that a person has acted in the absence of good faith.⁷ In the context of section 55(9)(b) of *PHIPA*, the burden rests on the individual seeking the correction to establish that the custodian did not make the professional opinion or observation in good faith.

[34] The complainant notes that she does not ascribe any ill will on the part of the

⁶ PHIPA Decisions 36 and 37.

⁷ *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII).

resident who prepared the consultation note. It is instead the complainant's submission that the resident's inexperience led her to make inaccurate and biased assumptions about the reasons for the complainant's visit to the hospital, and that these assumptions led the resident to make inaccurate, and sometimes contradictory, statements in the note about the complainant's mental health. More generally, the complainant submits that her ability to provide the necessary proof of bad faith is limited due to the hospital's failure to give her all the records and information she needs. She reports that "the records available have not recorded why [she] refused the physician's recommended treatments," and she proposes that the "lack of recording demonstrates absence of good faith."

[35] The complainant's evidence does not establish reasonable grounds to rebut the presumption of good faith. To address the complainant's more general argument first, she has not demonstrated how the contents of other hospital records establish bad faith in connection with the personal health information at issue in this complaint. For example, she has not explained how the other records she describes relate to the professional opinions and observations made by the resident that are at issue in this complaint.

[36] Next, I have considered the complainant's more specific allegations with respect to the resident who authored the consultation note. The claims are that the resident lacked experience and was biased because of the nature of her profession (which I take to be a reference to her residency in psychiatry). The complainant appears to be suggesting that the resident was inclined to make inaccurate or unfair observations and opinions about the complainant as a result. I note again that the section 55(9)(b) exception can apply to professional opinions and observations even if they are inaccurate. Thus, even if the resident's opinions and observations in the consultation note were untrue, and the errors could be attributed to the resident's lack of experience or to systemic biases in the profession, this would not, in my view, be sufficient to establish intentional fault or malice, or serious carelessness or recklessness amounting to bad faith on the part of the resident in arriving at her professional opinions and observations. As a result, the presumption of good faith stands.

[37] Because I have found, above, that the personal health information the complainant seeks to have corrected consists of professional opinions and observations made in good faith, the section 55(9)(b) exception applies. Therefore, the hospital has no duty to make the corrections requested by the complainant, and I uphold the hospital's refusal to correct on this basis.

[38] Lastly, I acknowledge the complainant's submission that her correction request is motivated by her concern that inaccurate information in the consultation note could be used by third parties in making decisions about insurance, adoption, job opportunities, and other significant areas of her life. I make two brief comments on this point raised by the complainant.

[39] First, I note that *PHIPA* contains rules governing the disclosure of an individual's personal health information by health information custodians like the hospital. Among other things, these rules require that any consent to disclose personal health information to third parties who are not health information custodians be given expressly, and meet the other requirements of a valid consent.⁸ *PHIPA* also sets out limited circumstances in which custodians can disclose an individual's personal health information without consent.⁹

[40] Second, I note that sections 55(11) and (12) of *PHIPA* give an individual whose correction request has been refused the right to prepare and to have attached to the record a statement of disagreement that sets out her requested corrections to the record. It is my understanding that the complainant has exercised her right in this regard. Subject to certain conditions, the complainant is now entitled to require that the custodian make all reasonable efforts to disclose the statement of disagreement to any person to whom the custodian has already disclosed the record at issue.¹⁰ She may wish to exercise this right, if she has not done so already.

NO ORDER:

For the foregoing reasons, I dismiss the complaint.

Original Signed By: _____

Jenny Ryu
Adjudicator

December 8, 2022 _____

⁸ *PHIPA*, section 18, particularly section 18(3)(a).

⁹ *PHIPA*, sections 38-50.

¹⁰ *PHIPA*, sections 55(10)(c), 55(11)(c), and 55(12).