

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 194

Complaint HA20-00127

Peel Regional Paramedic Services

December 21, 2022

Summary: An individual submitted a request under the *Personal Health Information Protection Act* (*PHIPA* or the *Act*) to the Region of Peel (the custodian) for access to an investigation report (the report) resulting from his complaint to the Professional Standards Department of Peel Regional Paramedic Services, a division of the Region of Peel. The custodian denied access to the report on the basis that it is exempt from disclosure under sections 52(1)(c) (for use in a proceeding) and 52(1)(d) (for an investigation authorized by law) of *PHIPA*. The custodian also claimed that the report was excluded from the scope of *MFIPPA* as a result of the application of the exclusion at section 52(3) (records related to labour relations and employment-related matters) of that act. In this decision, the adjudicator finds that access to the report is governed by *PHIPA*, not *MFIPPA* and that neither of the exemptions at sections 52(1)(c) and (d) of *PHIPA* apply. She orders the custodian to provide the report to the complainant.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sch. A (as amended), sections 2, 3(1), 4(1), 4(2), 4(3), 8(1), 8(4), 52(1)(c), 52(1)(d)(i)(ii), 52(2) and 52(3); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1), 4(1), 36(1) and 52(3); *Ambulance Act*, R.S.O 1990, c. A. 19.

Decisions Considered: PHIPA Decisions 17, 53 and 73.

BACKGROUND:

[1] The complainant before me was tasered while in police custody. Police requested an ambulance to attend to remove the taser probe. Following the incident, the complainant made a request to the Region of Peel for, and received, a copy of the

Ambulance Call Report (ACR). That request was made under the *Personal Health Information Protection Act (PHIPA or the Act)*.

[2] The complainant then submitted a complaint to the Professional Standards Department of Peel Regional Paramedic Services, which is a division of the Region of Peel (the custodian); the complaint related to the care that was provided to him by paramedic services. An internal investigation was initiated to review the allegations. The results of the investigation were compiled into an investigation report.

[3] Following the completion of the investigation, the complainant made another request to the custodian under *PHIPA*, requesting access to the investigation report. The requester explained that he was aware that the custodian had opened an investigation into his complaint regarding the care provided to him by paramedics, but that once the investigation was complete, he was not provided with a copy of the report or any information about the resolution of the complaint.

[4] The custodian denied access to the report on the following basis:

[The report] relate[s] to information that was collected or created in the course of an investigation and would fall outside the scope of the *Act* pursuant to Section 52(1)(c) and 52(1)(d)(i)(ii) which states that the *Act* does not apply to such records.¹

[5] The complainant, together with his mother acting as his representative, made a complaint to the Information and Privacy Commissioner of Ontario (the IPC) about the custodian's decision to deny access to the investigation report. A mediator was assigned to attempt to assist the parties in reaching a mediated resolution.

[6] During mediation, the custodian clarified that it was denying access to the investigation report on the basis of the application of the exemptions at sections 52(1)(c) (for use in a proceeding) and 52(1)(d) (for an investigation authorized by law) of *PHIPA*.²

[7] The complainant advised that he continues to seek access to the investigation report. As a mediated resolution could not be reached, the file was moved to the adjudication stage of the complaint process, where an adjudicator may conduct a review.

[8] As the adjudicator assigned to the complaint, I decided to conduct a review. I

¹ Despite the custodian's decision letter, as will be explained below, sections 52(1)(c) and (d)(i) and (ii) are exemptions, rather than exclusions. If any exemptions apply, the *Act* applies to those records but the custodian can withhold access to them. However, if any exclusions apply, the records fall outside of the scope of the *Act*.

² The custodian also advised that it was denying access to the investigation report on the basis of the application of the exclusion at section 51(1)(a) (quality of care information) of *PHIPA*. However, it abandoned this claim at the adjudication stage.

sought and received representations from the parties, which were shared between them in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*.

[9] During the review, the custodian advised that it was also claiming that the exclusion for employment related information at section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* applies to exclude the report from the scope of that act.³

[10] For the reasons that follow, in this decision:

- I find that *PHIPA* applies to the report, but that it is not exempt from disclosure under that act,
- I find that *MFIPPA* does not apply to the report, and
- I order the custodian to grant the complainant access to the report, in its entirety.

RECORD:

The record at issue in this appeal is a 10-page investigation report (the report).

ISSUES:

Preliminary issue: Does *PHIPA* or *MFIPPA*, or both, apply in to the report?

A. Does the complainant has a right of access to the report under *PHIPA*?

A.1 Is the report a record of "personal health information" as that term is defined in section 4 of *PHIPA*?

A.2 Is the report "dedicated primarily to personal health information about" the complainant within the meaning of section 52(3) of *PHIPA*?

A.3 Does the exemption at section 52(1)(c) of *PHIPA* for information collected for use in a proceeding apply to report?

Does the exemption at section 52(1)(d)(i) and (ii) for information collected in the course of an investigation authorized by law apply to the report?

³ The complainant was provided with the opportunity to respond to the custodian's representations, including its claim that section 52(3) of *MFIPPA* applies to exclude the report from the scope of *MFIPPA*.

If either or both of these exemptions apply, can the exempt information be severed under section 52(2)?

- B. Is MFIPPA relevant in the circumstances and if so, is the report excluded from the scope of *MFIPPA* as a result of the application of the exclusion for labour relations and employment-related information at section 52(3)?

DISCUSSION:

Preliminary Issue: Does *PHIPA* or *MFIPPA*, or both, apply to the report?

[11] The custodian takes the position that it is governed by both *PHIPA* and *MFIPPA*. I agree. There is no dispute that, as a provider of ambulance services, the custodian is a "health information custodian" within the meaning of that term at section 3(1) 4. v. of *PHIPA*. There is also no dispute that, as a municipality, it is an institution within the meaning of that term at section 2(1) of *MFIPPA*. *PHIPA* and *MFIPPA* each have their own rules governing access to information. In any given case, one or the other statute, or both, may apply. Here, for the following reasons, I find that only *PHIPA* applies.

[12] *PHIPA* (Part V) grants an individual a right of access to records of their own personal health information that are in the custody or under the control of a health information custodian, subject to certain limited exceptions. Section 52(1) of *PHIPA* reads:

52(1) 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,

[Subsections (a) through (f) identify limited exceptions to an individual's right of access to a record of their own personal health information. The custodian relies on two of them, as further explained below].

[13] Part 1 of *MFIPPA* grants an individual a general right of access to records. Section 4 (1) of *MFIPPA* reads:

4 (1) Every person has a right of access to a record or part of a record in the custody or under the control of an institution unless,

(a) the record or part of the record falls within one of the exemptions under sections 6 to 15; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[14] Part II of *MFIPPA* also grants an individual a right of access to their own personal information, subject to certain limited exceptions. Section 36(1) reads:

36 (1) Every individual has a right of access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual contained in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

[15] As the custodian is subject to both *PHIPA* and *MFIPPA*, I must consider whether complainant's right of access to the report is to be determined under *PHIPA* or *MFIPPA* or both.

[16] In order to determine which statute governs a requester's right of access, it is necessary to first determine whether the record contains any "personal health information," as that term is defined in section 4(1) of *PHIPA*.⁴ If it contains the requester's own personal health information, the right of access will initially be determined under *PHIPA*.

[17] Under *PHIPA*, the right of access to personal health information belongs to the individual to whom the information relates, or to a person authorized to make a request for access on the individual's behalf.⁵ *PHIPA* does not otherwise provide a general right of access to records of personal health information. Therefore, if the records do not contain the requester's personal health information, but only the personal health information of other individuals, the requester does not have a right of access under *PHIPA*. In that case, if the health information custodian is also an institution under *MFIPPA*, and if the personal health information can be reasonably severed from the record, the appellant's right of access to the remainder of the record will be determined under *MFIPPA*.⁶

[18] If the record is not a record of personal health information (in other words, if it does not contain anyone's personal health information), *PHIPA* does not apply at all. In cases where the health information custodian is also an institution under *MFIPPA*, access to the records is considered only under *MFIPPA*.

[19] In this case, the complainant made the request under *PHIPA*. The custodian

⁴ The definition of "personal health information" at section 4(1) of *PHIPA* will be set out in greater detail below.

⁵ See section 52(1) of *PHIPA*.

⁶ See *PHIPA*, section 8(4).

denied access to the requested report based on two exemptions under *PHIPA*: section 52(1)(c) (information for use in a proceeding) and section 52(1)(d)(i) and (ii) (information for an investigation). The custodian also claims that the complainant does not have a right of access to the report under *MFIPPA* because section 52(3) of *MFIPPA* excludes records related to labour relations and employment related matters from the scope of *MFIPPA*.

[20] Where a body, such as the custodian, that is both an institution under *MFIPPA* and a health information custodian under *PHIPA* receives an access request for a record that contains personal health information, sections 8(1) to (4) of *PHIPA* provide guidance in considering the interaction between the two statutes.⁷ Sections 8(1) and 8(4) are particularly relevant in this complaint. Those sections read:

8 (1) Subject to subsection (2) [containing certain exceptions that are not relevant to this complaint], the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise....⁸

8 (4) This Act does not limit a person's right of access under section 10 of the *Freedom of Information and Protection of Privacy Act* or section 4 of the *Municipal Freedom of Information and Protection of Privacy Act* to a record of personal health information if all the types of information referred to in subsection 4(1) are reasonably severed from the record.

[21] Read together, these provisions have the effect of preserving an individual's right of access under *MFIPPA* to portions of records for which no determination has been made under *PHIPA*.

[22] Having regard to the above, where a body (such at the city here) is governed by both statutes, the IPC's approach is to first consider a requester's right of access under *PHIPA*, and then consider any right of access under *MFIPPA* for any portions of the record for which no determination has been made under *PHIPA*.

[23] Therefore, prior to considering whether the report is excluded from the complainant's right of access under *MFIPPA*, I must decide whether *MFIPPA* is relevant at all here. And to do that, I must first consider the extent of the complainant's right of access to the report under *PHIPA*.

⁷ *PHIPA* Decision 30.

⁸ Sections 8(2) and 8(3) of *PHIPA* set out circumstances in which *MFIPPA* or its provincial equivalent, the *Freedom of Information and Protection of Privacy Act (FIPPA)* may apply to records of personal health information. Those circumstances are not relevant in this appeal.

Issue A: Does the complainant have a right of access to the report under PHIPA?

Issue A.1: Is the report a record of "personal health information" as that term is defined in section 4 of PHIPA?

[24] A requester's right of access to records under *PHIPA* is limited to records of the requester's own personal health information.⁹ Section 4(1) defines the term "personal health information":

4 (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,

(a) relates to the physical or mental health of the individual, including information that consist of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual, ...

(g) identifies an individual's substitute decision-maker.¹⁰

[25] Section 4(2) defines "identifying information" referred to in section 4(1):

4 (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.

[26] Section 4(3) addresses identifying information that is not considered personal health information, but which is contained in a record of personal health information:

4 (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.

[27] In PHIPA Decision 17, the IPC adopted a broad interpretation of the phrase

⁹ Or the personal health information of the individual on whose behalf the requester acts as a substitute decision maker.

¹⁰ Paragraphs (c) through (f) of section 4(1) have no relevance in this appeal.

"personal health information."¹¹ The IPC has applied this broad interpretation in subsequent decisions and orders.¹²

Representations on whether the report contains the complainant's "personal health information"

The custodian's representations

[28] The custodian states that the report contains "personal health information" within the meaning of section 4 of *PHIPA*. It submits that the information includes information about the physical health and medical condition of the complainant, including healthcare the paramedics provided to him.

[29] The custodian submits that because it previously disclosed other records to the complainant, specifically, an ambulance call report, the complainant has already been provided with his own personal health information. The custodian submits that the report is not personal health information but is general information pertaining to the paramedics' responsibilities in attending to the ambulance call.

The complainant's representations

[30] The complainant disputes the custodian's position that the report does not contain his personal information. He also disputes the custodian's statement that the report "now pertains to an internal employment matter," specifically, disciplinary measures.

[31] The complainant states that the only information that was disclosed to him was the original Ambulance Call Report (ACR) and it is this disclosure of the ACR that prompted him to seek access to the investigation report. He submits that the investigation report contains his personal health information as it relates to his complaint into the accuracy of the ACR.

Analysis and finding on whether the report contains the complainant's "personal health information"

[32] I must first determine whether the report qualifies as a record of personal health information of the complainant. As previously stated, the IPC has broadly interpreted the meaning of what qualifies as "personal health information."

[33] In considering the complainant's right of access to the report, I apply the "record-by-record" method of analysis adopted by the IPC. Under this method, the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record. As noted in *PHIPA* Decision 17, the presence of any personal

¹¹ See paragraphs 65 to 68 of *PHIPA* Decision 17.

¹² *PHIPA* Decisions 52 and 82, and Order MO-3531.

health information in a record makes a record of personal health information under *PHIPA*.

[34] Applying the record-by-record method of analysis to the report, I find that it contains the personal health information of the complainant. The report relates to an investigation into a complaint regarding the provision of emergency care services provided to an individual, the complainant. The report contains information about the physical health of the complainant (section 4(1)(a)) and about the provision of health care to him, including the identification of a person as a provider of health care to him (section 4(1)(b)).

[35] I find, therefore, that the report is a record of personal health information under section 4(1) of *PHIPA*.

Issue A.2 Is the report "dedicated primarily to personal health information about" the complainant within the meaning of section 52(3) of PHIPA?

[36] Under *PHIPA*, the extent of an individual's right of access to a record of their personal health information under *PHIPA* depends on whether the record is "dedicated primarily" to that information.

[37] This is because, subject to any applicable exemptions, the right of access in *PHIPA* applies either to the whole record, or only to certain portions of it. Specifically, while section 52(1) of *PHIPA* grants a right of access to the entire record, 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:

52 (3) 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.

[38] *PHIPA* Decision 17 set out the IPC's approach to the interpretation of section 52(3) (see paragraphs 85-115). 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.

[39] This list is not exhaustive.

Representations on whether the report is “dedicated primarily” to the personal health information of the complainant

Custodian

[40] The custodian submits that the report is not dedicated primarily to the personal health information about the complainant within the meaning of section 52(3) of *PHIPA*.

[41] The custodian submits that the report was prepared and maintained primarily for a purpose other than the provision of healthcare. It submits that the report was prepared by a Professional Standards Investigator in documenting an internal investigation for employment purposes in response to a complaint submitted by the complainant about the quality of care provided to him by the paramedics. It submits that the report would not exist absent receipt of the complaint.

[42] The custodian further explains that the creation of the records arises from the complainant’s allegations of misconduct and is not related to the complainant’s personal health information in any meaningful way. It submits that the “main purpose” for which the report was created was “to address employment-related and regulatory matters between [the custodian] and its employees.”

[43] The custodian submits that the report contains only a “limited quantity of personal health information” and that information is only incidental to the purpose of the report. The custodian submits that the report is neither quantitatively nor qualitatively dedicated to the complainant’s personal health information. The custodian submits that the report is not dedicated primarily to personal health information and the complainant does not have a right of access to it under *PHIPA*.

[44] The custodian reiterates that it has disclosed the personal health information in the report to the complainant (by way of its release of the ACR to him) and submits that any personal health information that might remain is not only the same information as that which was already provided to the complainant but that, in the context of the report, it is not reasonably severable within the meaning of section 52(3) of *PHIPA*.

Complainant

[45] The complainant submits that the report would not exist “but for” his own personal health information.

Analysis and findings

[46] As former Assistant Commissioner Sherry Liang explained in PHIPA Decision 17, the distinction between records that are and are not dedicated primarily to personal health information is an important first step in defining an individual’s right of access. She explained the importance of the distinction as follows:

The distinction is important because if a record is dedicated primarily to the personal health information of the individual, the individual has a right of access to the entire record, even it incidentally contains information about other matters or other parties. If a record is not dedicated primarily to the personal health information of the individual, the right of access only applies to the information about the individual that can reasonably be severed from the record.¹³ [emphasis added]

[47] In this case, I find that the report is dedicated primarily to the personal health information of the complainant.

[48] Considering some of the factors listed above, from a quantitative perspective, I find that the majority of the report’s content consists of the personal health information about the complainant, the state of his physical health when he was attended to by emergency services personnel and the health care services that were provided to him. The report does not contain the personal health information of any other individual.

[49] However, PHIPA Decision 17 and other IPC decisions expressly establish that the section 52(3) analysis is a qualitative, rather than quantitative effort.¹⁴ Therefore, the sheer quantity of personal health information in a record is a factor to consider and is not, on its own, determinative of the issue of whether a record is dedicated primarily to the personal health information of the requester. Accordingly, I will also consider other relevant factors, of a qualitative nature, including the reason for the report’s creation or its function, whether the personal health information is central to the purpose for which the report exists and whether the report would exist “but for” the personal health information.

[50] Having reviewed the report, in my view, the reason for its creation or its function was to consider the totality of the circumstances surrounding the provision of health care to the complainant and to assess the complaint regarding the care that was provided. The report contains a factual description of accounts provided by the

¹³ PHIPA Decision 17, para. 86.

¹⁴ PHIPA Decision 158.

complainant and the paramedics and then conveys the investigator's professional views or assessment of whether the facts demonstrate that the complaint made regarding the provision of health care provided to the complainant were substantiated or unfounded.

[51] Given the reason for the creation of the report, and its function, I accept that the inclusion of the complainant's personal health information was both necessary and central to the report's purpose. Additionally, I accept that the report would not exist "but for" the complainant's personal health information. The reason for which the investigation report was created was to address complaints regarding the health care services that were provided to the complainant. Without the complainant's personal health information, there would be no report.

[52] My consideration of the relevant factors above, from both a qualitative and quantitative perspective, leads me to find that the report is dedicated primarily to the complainant's personal health information.

[53] My finding in this respect is informed by previous IPC decisions, most particularly, PHIPA Decision 73 and PHIPA Decision 53.

[54] In PHIPA Decision 73, the adjudicator considered records about internal reviews and actions taken by a hospital in response to complaints made by the requester, whose deceased relative had been a patient at the hospital. Included in the records considered by the adjudicator in that complaint were records whose purpose, as stated by the custodian, was to seek and provide advice regarding risk management. Although the custodian argued that these records were not created in the usual course of clinical interaction, the adjudicator nevertheless found that they were dedicated primarily to the personal health information of the requester's relative, stating:

Most of the content of these records relate to the relative's personal health information, and it is clear from the records that the personal health information is central to the purpose of the records. Although these records would not typically be found within a patient's medical file, they are qualitatively about the clinical experience of the appellant's relative at the hospital. These records contain communications about the review conducted in respect of the relative's care at the hospital, and information about the care provided to the relative during his time at the hospital.

[55] In PHIPA Decision 53, the adjudicator considered a record comprised of emails exchanged between an Ontario Health Insurance Plan (OHIP) medical advisor and staff of the Ministry of Health and Long-Term Care (MOHLTC)¹⁵ that review or describe the complainant's matter before the Health Services Appeal and Review Board (HSARB). Although the adjudicator described the record as being "generally concerned with the HSARB hearing and its process" she ultimately found the record to be dedicated

¹⁵ The MOHLTC was the custodian in that complainant.

primarily to the personal health information of the complainant based on a consideration of relevant factors:

From a quantitative perspective, however, I find that the majority of the content consists of personal health information about the complainant, whether by reason of the discussion of his eligibility for coverage for health care or because it describes specific health care provided to him. The qualitative factors of purpose and function are also relevant to my consideration of the issue. Specifically, on my review of record 22, I conclude that the function of the email communications was to convey the medical advisor's professional views and his assessment of the complainant's case before the HSARB to ministry staff. In my view, the inclusion of the complainant's personal health information was both necessary and central to the record's purpose. Accordingly, I find that record 22 is dedicated primarily to the complainant's personal health information.

[56] I agree with the reasoning expressed in PHIPA Decisions 53 and 73 and find that they are consistent with my reasoning in this appeal, as set out above.

[57] Having found that the report at issue in this appeal is dedicated primarily to the complainant's personal health information under section 52(3), the complainant has a right of access to the entire report, even if it incidentally contains information about other matters or other parties, provided that no exemptions from that right of access apply. Therefore, I will now consider whether either of the exemptions claimed by the custodian apply to any of the information in the report or whether the complainant is entitled to full access to it.

Issue A.3: Does the exemption at section 52(1)(c) of PHIPA for information collected for use in a proceeding apply to the report?

Does the exemption at section 52(1)(d) for information collected in the course of an investigation authorized by law apply to the report?

If either or both of these exemptions apply, can the exempt information be severed under section 52(2)?

[58] As mentioned above, where a record is found to be dedicated primarily to the personal health information of the requester, the requester has a right of access to the whole record subject to a number of exemptions from the right of access set out in section 52(1). In this complaint, the custodian relies on sections 52(1)(c) and (d) to refuse access to the report. Those sections state:

52 (1) Subject to this Part [Part V of *PHIPA*, setting out the rights of access and correction], 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,

(c) the information in the record was collected or created primarily in anticipation of or for use in a proceeding,¹⁶ and the proceeding, together with all appeals or processes resulting from it, have not been concluded;

(d) the following conditions are met:

(i) the information was collected or created in the course of an inspection, investigation or similar procedure authorized by law, or undertaken for the purpose of the detection, monitoring or prevention of a person's receiving or attempting to receive a service or benefit, to which the person is not entitled under an Act or a program operated by the Minister, or a payment for such a service or benefit, and

(ii) the inspection, investigation, or similar procedure, together with all proceedings, appeals or processes resulting from them, have not been concluded[.]

Does the exemption at section 52(1)(c) of PHIPA for information created or collected for use in a proceeding apply to the report?

Representations on the application of section 52(1)(c)

[59] The custodian submits that the report was prepared in relation to proceedings arising out of the allegations of paramedic misconduct that were reasonably anticipated. It submits that because the matter had the potential of involving disciplinary proceedings, it prepared and collected the report to assist in defending the allegations of misconduct. The custodian further submits that, although its own internal investigation into the complaint has concluded, the report was prepared and maintained in contemplation of potential civil litigation.

[60] The complainant does not address this exemption in his representations.

Analysis and finding on the application of section 52(1)(c)

[61] To date, there has been limited interpretation by the IPC of the exemption at section 52(1)(c). In PHIPA Decision 73, the adjudicator stated:

¹⁶ The term "proceeding" is term that is defined in section 2 of *PHIPA*.

... [The exemption at section 52(1)(c)] appears to be consistent with the premise underlying litigation privilege – that it allows for a “zone of privacy” in which to investigate and prepare for a proceeding. The basis for the exemption is broader than that required for the litigation privilege in *FIPPA*, as it does not require the records to be prepared by or for counsel for the hospital. Rather, it merely requires that the records were collected or created primarily in anticipation of or for use in a proceeding, which is broadly defined in section 2 of [*PHIPA*] as:

a proceeding held in, before or under the rules of a court, tribunal, a commission, a justice of the peace, a coroner, a committee of a College within the meaning of the *Regulated Health Professions Act, 1991*, a committee of the Board of Regents continued under the *Drugless Practitioners Act*, a committee of the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Service Work Act, 1998*, an arbitrator or a mediator.

[62] On my consideration of the custodian’s representations together with my review of the report, I do not accept that I have sufficient evidence to find that the exemption at section 52(1)(c) has been established.

[63] First, I do not have sufficient evidence to conclude that the report was created (or collected) primarily for use in a proceeding as the term proceeding is defined in section 2 of *PHIPA*. In my view, based on the sum total of the custodian’s representations and on the report’s layout and content, the primary purpose for its creation was to investigate the complaint made regarding the standard of health care services provided to the complainant and any other collection or use that might have been anticipated or made of it is ancillary to that primary purpose. Additionally, although the custodian submits that the report was created during its internal investigation and makes a general reference to its use in potentially anticipated disciplinary proceedings, it does not provide evidence to support a conclusion that either its internal investigation or the suggested disciplinary proceedings qualify as a proceeding as described in section 2 of *PHIPA*.

[64] I acknowledge the custodian’s argument that the report was prepared in anticipation of the potential of civil litigation.” Not only has the custodian not demonstrated that there is an existing or anticipated civil litigation matter related to the incident that gave rise to the creation of the report, it has also not provided evidence that that the report was prepared primarily for in anticipation of such civil proceeding. Put differently, the report was created “in the course of” or “for the purpose of” the custodian’s investigation into the complaint, not in the course of, or for the purpose of, any court proceeding.

[65] Second, even if it could be said that the report was prepared primarily for a proceeding as required in section 2 of *PHIPA*, for section 52(1)(c) to apply, that

proceeding, together with all appeals or processes resulting from it, must not have been concluded. In its representations, the custodian clearly submits that its internal investigation into the complaint has concluded. It does not provide evidence to support a conclusion that any other types of proceedings arising from the creation of the report are ongoing or "have not been concluded." Additionally, in my view, any civil litigation matter brought before the courts in relation to this incident cannot be seen as an appeal or process arising from the custodian's internal investigation or any other type of proceeding for which the report may have been created; instead, it would be a separate and distinct proceeding.

[66] In my view, I have insufficient evidence to find that the report was created primarily in anticipation of or for use in a proceeding of the type set out in the definition of that term in section 2 of *PHIPA*, and even if it were, I have insufficient evidence to conclude that such proceeding has not been concluded. Accordingly, I find that the report is not exempt under section 52(1)(c).

Does the exemption at section 52(1)(d) for information created or collected in the course of an investigation authorized by law apply to the report?

Representations on the application of section 52(1)(d)

[67] The custodian claims that the exemption at section 52(1)(d) applies because the report was created for an internal investigation authorized under the *Ambulance Act*.¹⁷ It further submits that, although the internal investigation has concluded, the report was prepared and maintained in contemplation of an investigation by the MOHTLC. It submits that the MOHLTC opened an investigation into the incident and, to the custodian's knowledge, that investigation it has not concluded.

[68] The complainant does not address this exemption, or the custodian's claims with respect to this exemption, in her representations.

Analysis and finding on the application of section 52(1)(d)

[69] Although the exemption at section 52(1)(d) has not yet been interpreted by the IPC, there are some similarities between it and the exemption at section 52(1)(c), discussed above. As with section 52(1)(c), section 52(1)(d) requires that the record was collected or created for a specific purpose (for section 52(1)(d) an inspection, investigation or other similar procedure), and that the purpose for which the record was collected or created must not have been concluded. However, section 52(1)(d) also requires that the inspection, investigation or other similar procedure must have been authorized by law.

[70] Having considered the evidence before me, which includes the representations of the custodian and the content of the report itself, I do not accept that it establishes that

¹⁷ *Ambulance Act*, R.S.O. 1990, c. A. 19 (*Ambulance Act*).

the requirements of the section 52(1)(d) exemption are met.

[71] The custodian's representations on the application of this exemption are brief. The custodian submits that the investigation that gave rise to the report was an "internal investigation" that was conducted under the authority of the *Ambulance Act*. The custodian does not, however, point to any provisions of the *Ambulance Act*, the regulations made under that act, or the provisions of any other act and its regulations, to support its position that the investigation for which the report was created was authorized by law as required by section 52(1)(d). Additionally, although not determinative of the issue, on its face the report itself does not indicate that the investigation as conducted under the authority of the *Ambulance Act* or any other act.

[72] As a result of my finding below, however, it is not necessary for me to make a finding with respect to whether the investigation conducted by the custodian that resulted in the report at issue was "authorized by law" as required by the first part of the exemption at section 52(1)(d). Accordingly, I do not do so here.

[73] Even if the report could be said to have been created for an investigation conducted by the custodian that was authorized by law under either the *Ambulance Act* or another act, the second part of the exemption, at paragraph (ii) of section 52(1)(d), requires that the investigation, together with all proceedings, appeals or processes resulting from them, have not been concluded. I do not accept the circumstances in this complaint demonstrate that the second part of section 52(1)(d) has been established.

[74] As noted above, in its representations, the custodian clearly submits that its internal investigation into the complaint has concluded. It also submits that following its own investigation, the MOHLTC opened its own investigation into the incident, which, to the custodian's knowledge, has not concluded. Although not explicitly stated by the custodian, I understand its submission in this respect to set out its position that all proceedings, appeals or processes resulting from the investigation in the complaint have not been concluded.

[75] I do not accept the fact that the MOHLTC opened an investigation into the incident establishes that paragraph (ii) of the exemption at section 52(1)(d) has been met. As previously mentioned, the report was created "in the course" of the custodian's investigation into the complaint. It was not created "in the course" of any MOHLTC investigation. In my view, any subsequent (or even concurrent) investigation into the matter conducted by the MOHLTC is separate and distinct from the custodian's internal investigation; there is no evidence to support a conclusion that such investigation can be characterized as an appeal or process arising from the custodian's own internal investigation.

[76] Accordingly, I find that the exemption at section 52(1)(d) does not apply to the report.

Issue B: Is *MFIPPA* relevant in the circumstances? If so, is the report excluded from the scope of *MFIPPA* as a result of the application of the exclusion for labour relations and employment-related information at section 52(3)?

[77] Section 8(1) of *PHIPA* provides that, subject to limited exceptions set out in section 8(2) (none of which are relevant here), *MFIPPA* does not apply to personal health information under the custody or under the control of a health information custodian.

[78] Above, I have found that the report is a record of personal health information in the custody or under the control of a health information custodian and that it is dedicated primarily to the personal health information of the custodian to which he has a right of access. There are no portions of the report in respect of which I have not made a determination under *PHIPA*. Therefore, *MFIPPA* is simply not relevant to the issue of the complainant's access right in the circumstances.

[79] Because *MFIPPA* is not relevant in the circumstances, I will not consider the custodian's claim that the report is excluded from the scope of that act by virtue of section 52(3) of *MFIPPA*.

ORDER:

1. For the foregoing reasons, pursuant to section 61(1) of the *Act*, I order that the custodian provide the report to the complainant by January 23, 2023.
2. In order to verify compliance with order provision 1, I reserve the right to require the custodian to provide me with a copy of the report, and any related correspondence, disclosed to the complainant in compliance with this decision.

Original signed by: _____

Catherine Corban
Adjudicator

December 21, 2022