

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 199

Complaint HA19-00302

Queensway Carleton Hospital

January 24, 2023

Summary: This decision addresses a request under the *Personal Health Information and Protection of Privacy Act (PHIPA)* made to the Queensway Carleton Hospital (the hospital) for the personal health information of a patient, the complainant's son. The request was for the complainant's son's entire file while on a particular ward and correspondence about him exchanged between any and all employees at the hospital. The hospital granted partial access to the information, denying access to portions of the records under both *PHIPA* and the *Freedom of Information and Protection of Privacy Act (FIPPA)*. The hospital claimed the exemptions at section 52(1)(a) of *PHIPA* (legal privilege) and sections 13(1) (advice and recommendations) and 21(1) (personal privacy) of *FIPPA*. In addition to objecting to the denial of access to portions of the records, the complainant took issue with the reasonableness of the hospital's search for responsive records.

In this decision, the adjudicator partially upholds the hospital's decision. She finds that section 52(1)(a) of *PHIPA* applies to the information for which it was claimed. She also finds that some of the information is exempt from disclosure under section 52(1)(f) of *PHIPA* (flow-through to *FIPPA*), because section 49(a) of *FIPPA* (discretion to refuse a requester's own personal information), read with section 13(1) of *FIPPA*, applies to some of the information at issue. The adjudicator orders the hospital to provide the non-exempt information to the complainant. She also finds the hospital's search for records deficient and orders it to conduct an additional search for records.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, sections 3(1), 4(1), 4(2), 4(3), 8(1), 8(4), 52(1)(a), 52(1)(f), 52(3). *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definitions of "institution" and "personal information"), 13(1), 21(1) and 49(a).

Decisions Considered: PHIPA Decisions 17, 30 and 33.

BACKGROUND:

[1] This decision resolves a complaint filed in response to the Queensway Carleton Hospital's (QCH or the hospital) decision to withhold information contained in records relating to a patient at the hospital. It also addresses the reasonableness of the hospital's search for the requested records.

[2] The complainant submitted a request to the hospital, on behalf of her son,¹ for access under the *Personal Health Information Protection Act* (PHIPA or the *Act*) to the following information:

[Her son's] entire information from all the departments of Queensway Carleton Hospital. [Her son's] entire file from ALC/C-3 unit. Correspondence (i.e. emails) related to [her son] from all employees of QCH.

[3] The hospital did not issue a formal decision letter but sent the complainant an email advising that it was sending her a USB containing records responsive to the request by mail to the complainant's home address.

[4] After receiving the records, the complainant filed a complaint with the Information and Privacy Commissioner of Ontario (the IPC) regarding the hospital's decision. She took issue with the information that the hospital withheld from the records that were provided to her and also took the position that the hospital did not conduct a reasonable search for the requested records stating that additional records should exist.

[5] During the early resolution stage of the IPC's complaint process, the complainant set out several points to explain why she believes that additional records should exist:

- Regarding email correspondence between employees, discussing her son's care, there are eight hospital employees, identified by name and by position, who should have email correspondence responsive to her request because they were involved in her son's care.

¹ The complainant provided the Queensway Carleton Hospital and the Information and Privacy Commissioner of Ontario with a copy of a document titled "Power of Attorney for Personal Care." Section 23(1) 3 of PHIPA sets out the authority of a person who is authorized under section 26 of PHIPA to exercise powers with respect to the personal health information of an individual who is incapable. These powers include the authority to make a request for access to the personal health information of an incapable person (PHIPA, sections 25, 52, 53). See PHIPA Decision 33. Paragraph 2 of section 26(1) states that an individual's attorney for personal care may consent in the place of an individual incapable of providing consent under PHIPA.

- There should be notes from the speech-language pathologist and social workers who visited her son while in hospital and who discussed his case with her.
- Another health care facility sent records related to her son to the hospital which were not provided to her. The complainant states that more than 200 pages of these types of records were shown to her during a meeting with two named individuals on an identified date. As an example of the types of these records she referenced a letter, sent to the hospital on an identified date, from two named physicians from the other health care facility, which sets out the physicians' recommendations. She explained that she was provided with a copy of this letter by the other health care facility but that the hospital did not provide her with a copy of this letter in responsive to her request.

[6] Following the clarification provided by the complainant during the early resolution stage of the complaint process, a mediator was assigned to attempt to facilitate a mediated resolution between the parties.

[7] During mediation, the hospital wrote to the complainant, describing its understanding of the access request and explaining how it maintains records that are provided to it by other entities, such as the other health care facility referred to by the complainant. The hospital stated, in part:

This complaint involves a request for access to records of personal health information of [the complainant's son] including emails from hospital employees. In response to the request, the hospital's health records department provided [complainant's son's] substitute decision maker with a complete copy of medical records related to [complainant's son]. In response to the complaint, the hospital submits that it conducted a reasonable search which did not identify any other responsive records in its custody or control.

...Agents who are care providers are required to record personal health information to comply with the requirements of the *Public Hospitals Act* and their professional colleges. Agents providing care to patients, such as [the complainant's son], will record personal health information relevant to providing care and are not required to include any and all information in the record. Additionally, agents are not permitted to use email to discuss or communicate about patients.

The hospital, on occasion, receives physical copies of records from external health information custodians and other times is able to access this information electronically. The hospital, however, does not keep copies of these external records. Rather, care providers are expected to exercise their professional judgement and record information relevant to the care that they are providing.

[8] The hospital also responded directly to the points raised by the complainant, set out above.

[9] It advised that its Information Technology (IT) team conducted an audit of emails on the hospital's servers, but that the audit did not identify any emails that referenced the personal health information of the complainant's son.

[10] It advised that speech-language pathologists and social workers record their notes and observations in the electronic medical record (EMR) and do not maintain separate records. The hospital stated that a complete copy of the EMR was provided to the complainant and that, if notes regarding a visit are not recorded in the EMR, there are no other records in the custody or under the control of the hospital that would relate to such visit.

[11] It also reiterated that it does not include external clinical records in its medical record, nor are those external records kept separately by the hospital. It explains that, pursuant to this practice, copies of the specified records that she identified were not retained.

[12] Subsequently, the hospital sent the mediator an email providing further clarification regarding its retention practices in relation to external information requested or provided by other health care providers.² The hospital reiterated that it does not keep copies of such external records and the hospital's physicians and other care providers are expected to exercise their professional judgment to record the information from those records that might be relevant to the care that they are providing. The hospital states that the physical copies of the external records are destroyed. The hospital explains that the practice of only keeping relevant information in its EMR is referred to as a "thinning of the chart" and is often performed by the Health Records department. The hospital stated:

If information such as this external documentation is sent to us and it is not directly reference or part of the care provided at [the hospital], it is destroyed and is not included in our electronic chart. This is the case for the external information reference in this request. [emphasis in original]

[13] The hospital confirmed that the process explained above is a practice rather than a formal retention policy. The hospital confirmed that, going forward, it asked its Health Records department to include this explanation in the hospital's formal retention policy.

[14] The complainant advised that she was not satisfied with the custodian's explanation and explained that she was present at a meeting with social workers and speech language pathologists where they provided recommendations with respect to her son's care. She submits that she noticed the social workers taking notes during this meeting and advised that she was not provided with these notes. The complainant also

² With the hospital's consent, this email was shared with the complainant.

stated that she believes that additional email communication should exist and provided a copy of an email sent to her on a particular date, which included information about her son's care. She also stated that the hospital did not disclose the outcome of an investigation into her son's care conducted by the hospital's patient ombudsman.

[15] In response, the hospital advised that the patient document from the social workers and speech language pathologists would have been destroyed upon patient discharge. With respect to the patient ombudsman's records, as well as the email communication referred by the appellant, the hospital provided an additional decision letter advising that it had conducted another search for these records and located additional email communications and records related to the investigation conducted by the patient ombudsman. It advised that it was prepared to disclose those records, in part, noting that it was withholding some of that information under sections 13(1) and 21(1) of *FIPPA*.

[16] The complainant disagreed with the redactions made by the hospital and the hospital responded with a detailed explanation of why the exemptions claimed applied to each redaction. The complainant indicated that she was not satisfied with the hospital's response.

[17] As a mediated resolution could not be reached, the complaint was moved to the adjudication stage of the complaint process where an adjudicator may conduct a review.

[18] As the adjudicator assigned to the complaint, I decided to conduct a review. During my review, I sought and received representations from both 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*.

[19] For the reasons that follow, I partially uphold the hospital's decision to withhold portions of the records. Specifically, I find:

- the information for which section 52(1)(a) of *PHIPA* was claimed is exempt from the right of access under that section because it is subject to legal privilege;
- some of the information is exempt under section 52(1)(f) of *PHIPA*, read with sections 49(a) and 13(1) of *FIPPA* because it consists of advice and recommendations.

[20] As a result, I order the hospital to provide the non-exempt information to the complainant. Also, in this decision, I do not uphold the hospital's search for responsive records and order it to conduct an additional search for records.

RECORDS:

[21] The records at issue consist of email correspondence. They are email chains with multiple emails and there is significant duplication with respect to both the records and the portions that the hospital has withheld as a result of exemption claims under *PHIPA* or under *FIPPA*.

Record Numbers	Exemption claimed	Reason cited by hospital
59 to 67, 82 and 149	Section 52(1)(a) of <i>PHIPA</i>	Withheld portions are subject to legal privilege
121 to 129	Section 52(3) of <i>PHIPA</i> ³	Not dedicated primarily to the complainant's son's personal health information
8, 9, 17 to 21, 40, 46, 58, 89 to 93, 96 to 99, 103 to 105 and 153 to 160	Section 13(1) of <i>FIPPA</i>	Withheld portions consist of advice or recommendations
28 to 31 and 31 to 36	Section 21(1) of <i>IPPA</i>	Withheld portions contain the personal information of individuals other than the complainant's son

[22] As will be explained further below, I will first consider whether the withheld portions of these records (and, as mentioned above, records 121 to 129, portions of which have been withheld without identified exemption claims) are exempt under section 52(1)(f) of *PHIPA*, which permits the hospital to withhold certain information that would be exempt from disclosure under *FIPPA*.

ISSUES:

Preliminary issue: Does *PHIPA* or *FIPPA*, or both, apply to the right of access to the records?

A. Does the complainant have a right of access to the records under *PHIPA*?

A.1 Are the records at issue records of "personal health information" as that term is defined in section 4(1) of *PHIPA*?

A.2 Are the records "dedicated primarily to personal health information" about the complainant's son within the meaning of section 52(3) of *PHIPA*?

³ Despite having been claimed by the hospital as an exemption, section 52(3) is not an exemption claim. As will be discussed in more detail below, section 52(3) considers whether a record is dedicated primarily to the personal health information of the individual requesting access. This determination is relevant to the extent of the requester's right of access to a record of personal health information.

- A.3 Do any of the exemptions at section 52(1) of *PHIPA* apply to the records?
- A.3 (i) Does the exemption at section 52(1)(a) of *PHIPA* for records subject to legal privilege apply to the portions of the records for which it was claimed?
- A.3. (ii) Does the “flow through” exemption at section 52(1)(f) of *PHIPA* apply to allow the hospital to withhold information exempt under section 49(a) of *FIPPA*, read with the exemption for advice and recommendations at section 13(1) of *FIPPA*?
- B. Does the complainant have a right of access to any of the records under *FIPPA*?
- B.1 Does the exemption for advice and recommendations at section 13(1) of *FIPPA* apply to the portions of records 153 to 160, for which it was claimed?
- C. Did the hospital conduct a reasonable search for responsive records?

DISCUSSION:

Preliminary Issue: Does *PHIPA* or *FIPPA*, or both, apply to the complainant’s right of access to the records?

[23] By claiming exemptions under both acts, the hospital takes the position that it is governed by both *PHIPA* and *FIPPA* and that as a result, both of those acts apply.

[24] There is no dispute that, as a provider of health care services, the hospital is a “health information custodian” within the meaning of that term at section 3(1) of *PHIPA* (paragraph 4.1)]. There is also no dispute that the hospital is an institution within the meaning of that term at paragraph a.2 of section 2(1) of *FIPPA*.

[25] *PHIPA* and *FIPPA* each have their own rules governing access to information.

[26] *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. *FIPPA* grants an individual a right of access to records of general information (Part II) and to an individual’s own personal information (Part III) in the custody or under the control of an institution, subject to certain exceptions.

[27] As the custodian is subject to both *PHIPA* and *FIPPA*, I must consider whether complainant’s right of access to the records is to be determined under *PHIPA* or *FIPPA* or both.

[28] 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*.

[29] Under *PHIPA*, the right of access to personal health information belongs to the individual to whom the information relates, or to their "substitute decision maker," 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.

[30] The request that gives rise to this complaint is a request for records relating to the complainant's son. Here, there is no dispute that the complainant acts as her son's substitute decision maker within the meaning of *PHIPA*.⁶

[31] As I explain further under Issue A, most of the records at issue are records of the complainant's personal health information, records 153 to 160 however, are not because they do not contain his personal health information.

[32] As *PHIPA* does not provide a general right of access to records of personal health information, if the records contain the personal health information of another individual or individuals but do not contain the complainant's son's personal health information, the complainant, as her son's substitute decision maker, does not have a right of access under *PHIPA*. In that case, since the hospital is also an institution under *FIPPA*, and if the personal health information of the individuals can reasonably be severed from the record, the complainant's right of access to the remainder of the record will be determined under *FIPPA*.⁷

[33] 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. Since the hospital is also an institution under *FIPPA*, access to the records is then considered only under *FIPPA*.

[34] Finally, where *PHIPA* applies to a record, and a determination of the requester's access rights is made under *PHIPA*, access under *FIPPA* is considered for any portion of the record for which a determination has not been made under *PHIPA*.

[35] The above guidance about the interaction between the two statutes is derived

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

⁵ See sections 5(1), 23 and 25 of *PHIPA*.

⁶ See footnote 1.

⁷ See *PHIPA*, section 8(4).

from sections 8(1) to (4) of *PHIPA*.⁸ Of particular relevance in this appeal, paragraphs (1) and (4) of section read, in part:

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....⁹

...

(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. 2004, c. 3, Sched. A, s. 8 (4).

[36] Having regard to the above, I will first consider the extent of the complainant's right of access under *PHIPA* and then her right of access under *FIPPA*.

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

Issue A.1: Are the records at issue records of personal health information" as that term is defined in section 4 of PHIPA?

[37] A requester's right of access to records under *PHIPA* is limited to records of the requester's own personal health information.¹⁰ 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,

⁸ PHIPA Decision 30.

⁹ 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.

¹⁰ Or the personal health information of the individual on whose behalf the requester acts as a substitute decision maker.

(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,

...¹¹

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

[38] 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.

[39] Section 4(3) addresses identifying information that is not considered 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.

[40] Information is personal health information only if it is "identifying information" about an individual – that is, the information must in itself identify the individual (for example, by consisting of the individual's name), or else it must be reasonably foreseeable in the circumstances that the information could be used, either alone or with other information, to identify the individual.

[41] In PHIPA Decision 17, the IPC adopted a broad interpretation of the phrase "personal health information."¹² The IPC has applied this broad interpretation in subsequent decisions and orders.¹³

Analysis and finding on whether the records contain the complainant's son's "personal health information"

[42] Although the custodian takes the position that some portions of the records have been withheld under *PHIPA* and other portions have been withheld under *FIPPA*, I must first consider all of the records at issue to determine whether any of them qualify as records of personal health information of the complainant's son. As previously stated, the IPC has broadly interpreted the definition of "personal health information."

¹¹ Paragraphs (c) through (f) of section 4(1) have no relevance in this appeal.

¹² See paragraphs 65 to 68 of PHIPA Decision 17.

¹³ PHIPA Decisions 52 and 82, and Order MO-3531.

[43] In considering the records at issue, I apply the “record-by-record” method of analysis adopted by the IPC.¹⁴ 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 health information in a record makes that record a record of personal health information under *PHIPA*.

[44] Neither the custodian nor the complainant made specific representations on whether the records at issue in this review are records of personal health information of the complainant’s son.

[45] I have reviewed all of the records at issue in this complaint. Applying the record-by-record method of analysis, I find that the great majority of them contain the personal health information of the complainant’s son and are, therefore, records of his personal health information.

[46] The majority of the records at issue are emails relating to health care services provided to the complainant’s son. Specifically, they contain information that relates to the physical or mental health of the complainant’s son (section 4(1)(a)) and information that relates to the provision of health care to the complainant’s son, including the identification of a person as a provider of health care of the complainant’s son (section 4(1)(b)). Therefore, I find that the majority of the records qualify as records of personal health information of the complainant’s son under section 4(1) of *PHIPA*.

[47] The exception to my finding is records 153 to 160. Records 153 to 160 do not contain the personal health information of the complainant’s son. They are internal emails between staff regarding the complainant’s request for access to their personal health information records, specifically, how to process and respond to the complainant’s request. None of these records mention the complainant or her son by name or refer to health care services provided to him. As these records do not contain the complainant’s son’s personal health information, the complainant’s right of access to them is governed by *FIPPA*, not *PHIPA*. I will address this at Issue B, below.

Issue A.2: Are the records “dedicated primarily to personal health information about” the complainant’s son within the meaning of section 52(3) of PHIPA?

[48] Above, I found that all records, with the exception of records 153 to 160, contain the personal health information of the complainant’s son. I will call these records the “PHIPA records” for the remainder of this order. 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.

[49] This is because, subject to any applicable exemptions, the right of access in

¹⁴ The “record-by-record” approach for dealing with requests for records of personal information is set out in Order M-352.

PHIPA can apply 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.

[50] 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 under *PHIPA*. *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), the IPC 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 the 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.

[51] This list is not exhaustive.

Analysis and findings on whether the records are “dedicated primarily” to the personal health information of the complainant’s son

[52] In its representations, the custodian submits that the severed (withheld) portions of the records are not dedicated primarily to the complainant’s son’s personal health information.¹⁵

[53] However, whether a record is dedicated primarily to a requester’s personal

¹⁵ The complainant does not make any representations that address whether the records are dedicated primarily to her son’s personal health information.

health information is a determination to be made with respect to the whole record. As explained in PHIPA Decision 17, this approach recognized that records that are dedicated primarily to the personal health information of a requester may still incidentally contain other kinds of information:

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.¹⁶ [emphasis added]

[54] The custodian argues that the portions of the records that it has withheld from the complainant are not dedicated primarily to the complainant's son's personal health information. However, similar to the IPC's approach about whether the records contain the personal health information of an individual, a record-by-record method of analysis is applied by the IPC when considering whether a record is dedicated primarily to a complainant's personal health information as set out in section 52(3).¹⁷

[55] In this case, I find that the *PHIPA* records are dedicated primarily to the personal health information of the complainant's son.

[56] Considering some of the factors listed above, from a quantitative perspective, I find that the majority of the content in the records consists of the personal health information about the complainant's son, the state of his physical health while he was an in-patient at the hospital and the health care services that were provided to him. Some of the records contain information about another individual, however, from my review of these records, their content primarily addresses the personal health information of the complainant's son and the other individual's information is incidental to the records in which it is contained.

[57] Despite the fact that, from a quantitative perspective the records largely consist of the personal health information of the complainant's son, PHIPA Decision 17 and other IPC decisions expressly establish that the section 52(3) analysis is a qualitative, rather than quantitative effort.¹⁸ Therefore, the sheer quantity of the requester's 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 records' creation or function, whether the personal health information is central to the purpose for which those records exist and whether the records would exist "but for" the personal health

¹⁶ PHIPA Decision 17, para. 86.

¹⁷ PHIPA Decision 123.

¹⁸ PHIPA Decision 158.

information.

[58] Having reviewed the *PHIPA* records, in my view, the reason for their creation or function was to consider the totality of the circumstances surrounding the provision of health care to the complainant's son and assess how best to provide the health care required by the complainant's son, going forward.

[59] Given the reason for the creation of the records, and their function, I accept that the inclusion of the complainant's son's personal health information was both necessary and central to their purpose. Additionally, I find that none of the records would exist "but for" the complainant's son's personal health information. The reason for which the records were created was to discuss and establish health care services that were, and were to be, provided to the complainant's son. Without the complainant's son's personal health information, none of the records at issue in this complaint would exist.

[60] My consideration of the relevant factors above, both quantitative and qualitative, leads me to find that the *PHIPA* records are dedicated primarily to the complainant's son's personal health information.

[61] Having found that all of the records at issue in this appeal that are to be considered under *PHIPA* are dedicated primarily to the complainant's son's personal health information under section 52(3), the complainant has a right of access to them, in their entirety, even if any of them incidentally contain information about other matters or other parties, provided that no exemptions from that right of access apply. Therefore, I will now consider whether any exemptions under *PHIPA* apply to any of the information in the records or whether the complainant is entitled to full access to them.

Issue A.3: Do any of the exemptions at section 51(1) of PHIPA apply to the records?

[62] 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)(a) to refuse access to portions of the records. Additionally, based on the custodian's claim that two *FIPPA* exemptions – sections 13(1) and 21(1) – apply to some of the records, the exemption at section 52(1)(f) may also apply. Since *FIPPA* is not the operative statute for these *PHIPA* records, the *FIPPA* exemptions are not relevant. However, section 52(1)(f) of *PHIPA* is a "flow-through" exemption for custodians, like the hospital, that are also institutions under *FIPPA*.

[63] Sections 52(1)(a) and (f) read:

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,

(a) the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual;

...¹⁹

(f) the following conditions are met:

(i) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or is acting as part of such an institution, and

(ii) the custodian would refuse to grant access to the part of the record,

(A) under clause 49(a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record[.]²⁰

Issue A.3. (i) Does the exemption at section 52(1)(a) of PHIPA for records subject to legal privilege apply to the portions of the records that were withheld from the complainant under that exemption?

[64] The hospital submits generally that the withheld portions of records 59 to 67, 82 and 149 are exempt from disclosure on the basis of legal privilege. The hospital does not elaborate further on how legal privilege applies to the withheld portions of those records.

[65] The complainant does not make any submissions that address whether or not any of the withheld information is subject to legal privilege and therefore exempt from disclosure under section 52(1)(a) of *PHIPA*.

[66] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of

¹⁹ Paragraphs (b) to (e) of section 52(1) contain other exemptions from the right of access that are not relevant in the circumstances of this complaint.

²⁰ Part (B) of section 52(1)(f)(ii) references the parallel provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, the provincial counterpart to *FIPPA*.

obtaining or giving legal advice.²¹ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.²² The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.²³ In this case, there is no evidence to suggest that litigation privilege is relevant.

[67] Having considered the evidence before me, specifically, the content of the records, I find that all of the information that the hospital has withheld pursuant to the exemption at section 52(1)(a) of *PHIPA*, is exempt from disclosure as it is subject to legal privilege, specifically, common law solicitor-client communication privilege.

[68] Records 59 to 62, 63 to 67, 82 and 149 are all email chains related to legal advice sought by the hospital from their external legal counsel. Records 60 to 62 are communications between hospital staff that were provided to legal counsel, seeking advice on the matters discussed in those communications. Record 59 is the email sent to the hospital's legal counsel requesting legal advice on the matters discussed in the communications set out in records 60 to 62. Record 63 sets out the advice provided by the hospital's external legal counsel regarding the matters set out in records 60 to 62. Record 67 is a hospital staff member's response to the advice provided by legal counsel. Records 64 to 66 and 149 forward the legal advice provided by legal counsel in record 63 to various hospital staff. Record 82 is a separate email chain from those discussed above, where, from my review, disclosure of the severed portions would reveal the nature of the legal advice provided by legal counsel and set out in record 63.

[69] From my review of these records, it is clear they either relate directly to the seeking and providing of legal advice, or form part of the continuum of communications between the solicitor and the client, necessary for the seeking or providing of legal advice. I accept that all of this information is subject to legal privilege and exempt from disclosure under section 52(1)(a) of *PHIPA*.

[70] I note that some of the information that I have found to be subject to legal privilege above is duplicated in other records; specifically, in records 28 to 30 and 31 to 34. As I have found that this duplicate information forms part of the continuum of communications between the hospital and its legal counsel, necessary for the provision of legal advice, I find that it is also exempt where it appears in records 28 to 30 and 31 to 34.

[71] As discussed above in the "Records" section of this decision, the hospital has also claimed that the withheld portions of records 121 to 129 are exempt from disclosure, however, it does not identify the particular exemption under which it is withholding this

²¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²² *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

²³ Orders PO-2441, MO-2166 and MO-1925.

information. I have reviewed these records with a view to determining whether the severed information is subject to legal privilege under section 52(1)(a).

[72] From my review of record 129, an email chain, I accept that the withheld portions are exempt from disclosure as they would either reveal advice provided by external legal counsel as set out in record 63, discussed above, or form part of the continuum of communications between the hospital and its lawyer necessary for the provision of legal advice, and therefore, subject to legal privilege. The same information is duplicated in some parts of records 96 to 99. Accordingly, I also find that this duplicate information is subject to legal privilege.

[73] Based on my review of the withheld information in records 121 to 128 however, I find that it does not qualify for exemption under section 52(1)(a). This information neither requests nor contains legal advice. It also cannot be seen as part of the continuum of communications necessary for the provision of legal advice. Therefore, it is not information that is subject to legal privilege. I will consider this severed information in these records in my discussion below on the possible application section 52(1)(f) of *PHIPA*. None of the other exemptions in section 52(1) of *PHIPA* have been claimed and none appear to be relevant in the circumstances.

[74] In sum, as I have found that the withheld portions of records 59 to 67, 82, 129 and 149 are subject to legal privilege, I find that they are exempt from disclosure under section 52(1)(a) of *PHIPA*. Additionally, I find that where some of this information is duplicated in records 28 to 34 and 96 to 99, it is also exempt under section 52(1)(a) and I uphold the hospital's decision to withhold it.

Issue A.3. (ii) Does the "flow through" exemption at section 52(1)(f) of PHIPA apply to allow the hospital to withhold information subject to exemption under section 49(a) of FIPPA, read with the exemption for advice and recommendations at section 13(1) of FIPPA?

[75] As explained above, in this case the complainant's right of access to most of the records at issue is to be considered under *PHIPA* and not under *FIPPA*. However, because the hospital is a health information custodian under *PHIPA* and also an institution under *FIPPA*, the "flow-through" exemption at section 52(1)(f) permits the hospital to claim the application of certain *FIPPA* exemptions to deny access to personal health information in the records. Section 13(1) of *FIPPA* is one such *FIPPA* exemption, and I address it below.

[76] However, the personal privacy exemptions at section 21 of *FIPPA* (and its discretionary counterpart at section 49(b)), are not exemptions that are available to a health information custodian using the flow-through exemption at section 52(1)(f) of *PHIPA*. Additionally, *PHIPA* does not contain an exemption for the personal information of others that may be contained in the record of the requester's personal health information.

52(1)(f): considering section 49(a) of FIPPA, read with section 13(1) of FIPPA

[77] The hospital claims that some of the withheld portions of records 8, 9, 17 to 21, 40, 46, 58, 89 to 93, 96 to 99, and 103 to 105 are exempt from disclosure as a result of the application of the exemption for advice and recommendations at section 13(1) of *FIPPA*. Although the hospital did not originally claim section 13(1) for any of the withheld portions of records 28 to 31, 34 to 36,²⁴ in its representations it submits that the withheld portions of these records contain information that consists of advice and recommendations. As a result, in my discussion on advice or recommendations below, I will also consider whether the withheld portions of records 28 to 31 and 34 to 36, that I have not found exempt from disclosure under section 52(1)(a) of *PHIPA*, consist of advice and recommendations.

[78] In this case, for the records for which the hospital claimed the section 13(1) *FIPPA* exemption, I will consider whether the hospital can rely on the exemption at section 49(a) of *FIPPA*, read with section 13(1) of that act, due to the application of the “flow-through” exemption at section 52(1)(f) of *PHIPA*.²⁵ As previously discussed, I will also consider whether the withheld portions of records 121 to 128 are exempt from disclosure under section 52(1)(f) of *PHIPA*, since I found above that they are not exempt under the legal privilege exemption.

Section 49(a) of FIPPA, read with section 13(1) of FIPPA

[79] Section 49(a) applies where a record contains the personal information of a requester, and gives an institution discretion to withhold the information if other exemptions apply, or grant the information despite the exemption. Section 49(a) of *FIPPA* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, **13**, 14, 14.1, 14.2, 15, 15.1, 16, 18, 19, 20 or 22 would apply to the disclosure of that personal information.
[emphasis added]

[80] Section 13(1) of *FIPPA* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²⁶ The section states:

²⁴ It also claims section 21(1) of *FIPPA* applies to exempt portions of these records from disclosure.

²⁵ An explanation as to why I am considering section 49(a), read with section 13(1), despite the custodian’s claim that section 13(1) alone applies, follows in the section directly below.

²⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[81] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[82] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁷

[83] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[84] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁸

[85] The application of section 13(1) is assessed at the time the advice or recommendations were prepared. The institution does not have to prove that the advice or recommendations were actually communicated. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.²⁹

[86] Sections 13(2) and (3) set out a list of mandatory exceptions to the section 13(1) exemption, none of which appears to be applicable in the circumstances of this complaint.

[87] I will now consider whether the remaining withheld portions of records 8, 9, 17 to 21, 28 to 31, 34 to 36, 40, 46, 58, 89 to 93, 96 to 99, 103 to 105 and 121 to 128 are subject to the exemption for advice and recommendations at section 13(1) of *FIPPA*.

²⁷ See above at paras. 26 and 47.

²⁸ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

²⁹ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

Representations of the parties on section 49(a) of FIPPA, read with section 13(1) of FIPPA

[88] The hospital submits that the records for which it has claimed section 13(1) of *FIPPA* contain advice and recommendations made to hospital management by internal and external parties, including suggested courses of actions regarding a number of matters, specifically:

- advice regarding proposing a transfer to a vacancy at a group home (records 8 and 9)
- advice regarding scheduling a meeting between stakeholders and the complainant (records 17 to 21)
- advice and recommendations following an incident between the complainant's son and a clinician (records 28 to 31 and 34 to 36)
- advice regarding the course of action to be taken following receipt of communication from the complainant (records 40 and 46)
- advice and recommendations from stakeholders related to hospital policies and procedures surrounding patient transportation requirements to another facility for procedures not available at the hospital (records 89 to 91 and 103 to 105)
- advice and recommendations regarding a response to an email from the complainant (records 92, 93, 96 to 99)

[89] The hospital submits that these records describe advice on next steps given by senior management regarding matters including the complainant's communications with the patient care team about the health care services provided to her son. The hospital submits that "where complete advice is not provided, the severed portions would permit the drawing of inference on the nature of the actual advice." The hospital provided a table outlining more detail about how the withheld information from each record qualifies as advice or recommendations.

[90] The complainant disputes the hospital's claims that the records contain advice and recommendations stating that it is their belief that most of the severed portions contain impressions and perceptions by hospital employees regarding the complainant's requests about care, treatment, accommodations and possible transitions to other care settings. She submits that she should be privy to the hospital's decisions to accommodate or not to accommodate her son's disability-related needs.

Analysis and finding on section 52(1)(f) of PHIPA – whether section 49(a) of FIPPA, read with section 13(1) of FIPPA applies to the information for which it was claimed.

[91] As indicated above, for the hospital to rely on the exemption at section 52(1)(f)

of *PHIPA* it must demonstrate that it would have withheld the complainant's own personal information (in this case, the complainant's son's personal information) under section 49(a) of *FIPPA*. In this case, section 49(a) would be read with the exemption for advice or recommendations at section 13(1) of *FIPPA*. Above I have found that all of the records at issue here contain the personal health information of the complainant's son. Accordingly, I find that all of the records at issue in this appeal contain the personal information of the complainant's son.

[92] In the discussion below, I find that some of the information at issue qualifies as advice or recommendations within the meaning of those terms, set out above, while some of it does not.

[93] For ease of reference, I reiterate that the information that I will consider in my discussion and analysis below is the withheld portions of records 8, 9, 17 to 21, 28 to 31, 34 to 36, 40, 46, 58, 89 to 93, 96 to 99, 103 to 105, and 121 to 128 and the portion of record 129 that I have not found to be exempt under section 52(1)(a). These records are all various iterations of a number of email chains; there is significant duplication within the records with respect to the information that has been withheld.

Information found to be advice or recommendations within the meaning of section 13(1) of *FIPPA*

[94] Having reviewed the withheld portions of the records at issue, I find that some of the information that has been withheld from the records consists of advice or recommendations within the meaning of section 13(1) of *FIPPA*. Specifically, I find that:

- The disclosure of the withheld portions of records 8 and 9 would reveal advice provided by hospital staff and would also permit the drawing of accurate inferences as to recommendations given by that staff member regarding a particular course of action.
- The disclosure of one particular sentence, duplicated in records 28 to 31 and 34 to 36, would permit the drawing of accurate inferences as to the nature of a recommendation that was provided and was ultimately accepted by a decision-maker.
- The withheld portions of records 89 to 91 set out a recommendation, the disclosure of which would reveal a suggested course of action in response to a particular situation to be ultimately accepted or rejected by the individual(s) to whom the email is being sent.
- The disclosure the withheld portions of records 96 to 99 that I did not find to be exempt under section 52(1)(a), would, if disclosed, permit the drawing of accurate inferences about the advice or recommendations provided to and ultimately accepted by a decision-maker.

- The disclosure of the withheld portions of records 103 to 105, which relate to a similar subject matter as that addressed in records 89 to 91, would reveal the advice or recommendation of a staff member with respect to how a particular situation should be addressed

[95] I find that this information is exempt from disclosure as a result of the application of the “flow-through” exemption at section 52(1)(f) of *PHIPA* which permits the hospital to withhold certain information on the basis of section 49(a), read with section 13(1) of *FIPPA*.

[96] As I have found that this information is subject to the exemption at section 52(1)(f), I uphold the hospital’s decision not to provide it to the complainant.

Information found NOT to be advice of recommendations within the meaning of section 13(1) of *FIPPA*

[97] I find that some of the information that has been withheld from the records does not constitute advice or recommendations within the meaning of section 13(1) of *FIPPA*. Specifically, I find that:

- The withheld portions of records 17 to 21 is not information that consists of advice or recommendations. The portions of these records that have been withheld contain factual information regarding a meeting.
- The withheld portions of records 26, 27 and 58, which is duplicated in each record, is not information that consists of advice or recommendations. It is factual information, together with an opinion, none of which, if disclosed would reveal a suggested course of action or policy options to be considered by a decision maker.
- Considering the remaining withheld portions of 28 to 31 and 34 to 36,³⁰ I do not accept that any of them qualify as either advice or recommendations because they consist of factual information the disclosure of which would not permit accurate inferences to be drawn as to the nature of any advice or recommendation that might have been provided.
- The withheld information in records 40 and 46, as well as that found in records 92 and 93, is also factual information. From my review, none of the information that has been withheld from these records provides a suggested course of action that can ultimately be accepted or rejected by a decision-maker or amounts to policy options to be considered. It does not consist of advice of recommendations.

³⁰ Above I found that some of the information in these records to be subject to legal privilege and other information to be advice.

- The withheld portions of 121 to 128 consist of a factual statement that is neither advice nor a recommendation and its disclosure would not reveal or permit accurate inferences to be drawn regarding any advice or recommendation that might have been given.

[98] As I have found that this information does not qualify as advice or recommendations under section 13(1) of *FIPPA*, I find that the “flow-through” exemption at section 52(1)(f) of *PHIPA* does not apply to this information. None of the other exemptions in *PHIPA* apply to it and I will order the hospital to release it.

Information claimed to be exempt under section 21(1) of FIPPA

[99] Although I have found that both section 52(1)(a) and section 52(1)(f) of *PHIPA* apply to some of the withheld portions of records 28 to 31 and 34 to 36 there are remaining portions to which neither of these exemptions apply. The hospital has claimed that the mandatory personal privacy exemption at section 21(1) of *FIPPA* applies to some of these remaining portions because they contain information relating to other individuals. However, as I note above, section 21(1) of *FIPPA* cannot apply.

[100] Given that records 28 to 31 and 34 to 36 contain and are dedicated primarily to the complainant’s son’s personal health information under section 52(3), the complainant has a right of access to these records under *PHIPA* in their entirety, even if they incidentally contain information about other matters or other parties, provided that no exemptions from that right of access apply.

[101] In sum, because they contain and are dedicated primarily to the complainant’s personal health information, records 28 to 31 and 34 to 36 are not subject to *FIPPA*. Additionally, the flow-through exemption at section 52(1)(f) of *PHIPA* cannot apply to the portions of these records which the hospital has withheld pursuant to section 21(1) of *FIPPA* because section 21(1) of *FIPPA* (and section 49(b) of *FIPPA*) is not available via the flow-through exemption at section 52(1)(f) of *PHIPA*. As no other exemptions under *PHIPA* have been claimed for the information that has been withheld from these records, nor do any of them appear to apply, the withheld portions of records 28 to 32 and 34 to 36 that the hospital claims are the information of another identifiable individual are not exempt under *PHIPA*.

Issue B. Does the complainant have a right of access to any of the records under *FIPPA*?

Issue B.1 Does the exemption for advice and recommendations at section 13(1) of FIPPA apply to the portions of records 153 to 160, for which it was claimed?

[102] As found above, records 153 to 160 do not contain the complainant’s (or any other individual’s) personal health information. As a result, the complainant’s right of access to this information is to be considered under *FIPPA*. The hospital claims that

portions of these email chains that have been withheld consist of advice and recommendations that are exempt from disclosure under section 13(1) of *FIPPA*.

[103] Section 13(1) of *FIPPA*, as well as the definition of the terms "advice" or "recommendations" that are generally applied by the IPC when considering the application of this exemption, are discussed above.

[104] The hospital submits that the portions of these records that it has withheld consist of advice or recommendations under section 13(1) of *FIPPA*. From my review, I find that they do.

[105] These records relate to the processing of the access request submitted by the complainant. They are email exchanges between two staff members about the hospital's response to the request. I accept that the withheld portions related consist of either of advice or recommendations about the processing of the request and the hospital's interpretation of how the relevant legislation, *PHIPA* or *FIPPA* applies to the requested information or contain information, the disclosure of which would reveal advice or recommendations provided by a staff member about the processing of the request and the interpretation of the legislation that can ultimately be accepted or rejected by a decision-maker. Accordingly, I find that section 13(1) of *FIPPA* applies to the withheld portions of records 153 and 160.

[106] As section 13(1) of *FIPPA* is a discretionary exemption, the hospital has the discretion to grant access to the information despite the fact that it could withhold it. As part of my review, I must determine whether the hospital exercised its discretion under *FIPPA*, and whether its exercise of discretion was proper.

[107] Having considered the parties representations, and the information contained in the records that I have found subject to exemption under section 13(1) of *FIPPA*, I am satisfied that in exercising its discretion not to disclose this information, the hospital took into consideration relevant factors, including the hospital's interests in withholding information that would reveal advice and recommendations regarding internal matters. I am also satisfied that the hospital did not base its access decision on irrelevant factors, that it did not exercise its discretion in bad faith or for an improper purpose, or that it made an error when doing so. I uphold its exercise of discretion to withhold records 153 to 160 under section 13(1) of *FIPPA*.

Issue C: Did the hospital conduct a reasonable search for responsive records?

[108] The complainant maintains that additional records, beyond those identified by the hospital, exist. As a result, I must decide whether the hospital conducted a reasonable search for the requested records as required by sections 53 and 54 of *PHIPA*. These sections address the written request that an individual may make to a custodian to exercise a right of access to records, and the obligations on the custodian to make reasonable efforts to identify and locate requested records in response to the

access request. If I am satisfied that the hospital's search was reasonable in the circumstances, I will uphold the hospital's decision. If I am not satisfied, I may order the hospital to conduct further searches.

[109] Previous IPC decisions³¹ have found that the principles outlined in IPC orders that address the issue of reasonable search under *FIPPA* and its municipal counterpart also apply to *PHIPA*. These decisions establish that *PHIPA* does not require the hospital to prove with absolute certainty that further responsive records do not exist; however, the hospital must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records.³² To be responsive, a record must be "reasonably related" to the request.³³

[110] Although a complainant will rarely be in a position to indicate precisely which records the custodian has not identified, the complainant must still provide a reasonable basis for concluding that additional records might exist.³⁴

The parties' representations

[111] In her representations, the complainant confirmed that despite the written explanation provided by the hospital, at mediation, regarding its retention practices and its treatment of external information it receives from other hospitals or healthcare providers, she continues to be of the view that additional records responsive to the request should exist.³⁵

[112] The complainant submits that the hospital received external information from another named health care provider. She submits that this information was a part of her son's health care at the hospital and should have been identified in response to her request. The complainant identified five different types of records that she believes should have been located and provided to her by the hospital in response to her request; together with her representation she provided copies of these records already in her possession. Specifically, she submits that the following records should have been located:

- a behavioural management plan that was prepared by an external health care provider, that was provided to and was to be used by the hospital when caring for her son;
- a document of a specified date prepared by hospital nursing management staff in regards to her son's health care that indicates that the hospital sought

³¹ Including PHIPA Decisions 17, 18, 43, 48, 57 and 61.

³² Orders P-624 and PO-2559; PHIPA Decision 18.

³³ Order PO-2554; PHIPA Decision 18.

³⁴ Order MO-2246.

³⁵ The hospital's explanation provided at mediation is set out above, in the Background section of this order.

assistance from the external health care provider with respect to the care to be provided;

- an email of a specified date from the Manager Social Work and Discharge Services;
- an email of a specified date containing attachments of care and health documentation that was copied to three named hospital staff; and
- emails of a specified date between herself and a named physician.

[113] The complainant also submits that the hospital's nursing manager prepared care strategies for her son and documented them for all staff to follow. She submits that these records "most likely" were dated between two specified dates spanning almost two months.

[114] The complainant submits that the hospital either intentionally withheld these documents from her or unjustifiably destroyed them, contrary to its own formal retention policy and practice. She submits that the hospital's failure to disclose these records demonstrates that additional responsive records should exist.

[115] The hospital was asked to respond to the complainant's representations on this issue as well as to provide more detail regarding its search for responsive records. In reply, the hospital provided a summary of all steps taken in response to the request, including the search that was conducted for responsive records. The hospital's representations describe a multiple-hour search by experienced staff, in collaboration with the hospital's Technical Services department who assisted with a search of email servers, databases and cloud-based servers using specialized software. The hospital submits that several query scripts were developed and refinements were made to the search criteria in order to more efficiently identify responsive records.

[116] The hospital submits that the complainant's submission that responsive records were either withheld or destroyed is a mischaracterization. It submits that reasonable efforts were taken to conduct a search to locate the responsive records and information was not unduly withheld from the complainant or destroyed.

Analysis and findings

[117] Having reviewed the complete representations provided by the parties and all of the materials in the complaint file, I am not satisfied that the hospital conducted a reasonable search for responsive records.

[118] The complainant has identified very specific records that she believes should have been located by the hospital and identified as responsive to her request. She provided copies of these records together with her representations. I find that this establishes a reasonable basis for concluding that further records may exist.

[119] The hospital's response to the complainant's concerns regarding the search it conducted is quite general in nature. While I accept that experienced hospital staff searched for responsive records, the hospital did not directly address or respond to the complainant's assertion that additional records should have been located. In particular, it does not explain why none of the specific records identified by the complainant identified in her representations that she submits are already in her possession were not located during its search.

[120] I acknowledge that the hospital submits that its practice is not to include records it receives from external health care providers in a patient's file and that any that may have been included are destroyed on discharge. However, with one exception, the records identified by the complainant appear to be internal hospital records prepared by its own staff. The exception being a behavioural management plan which, based on the complainant's explanation was to be used by the hospital when caring for her son.

[121] In my view, the complainant has established a reasonable basis for believing that additional records should have been found. In the absence of an explanation as to why these specific records identified by the complainant in her representations were not located, in my view, the hospital has not provided sufficient evidence for me to make a finding that its search for responsive records was reasonable.

[122] As a result, I find that the hospital has not established that it has met its requirements under either *PHIPA* or *FIPPA* to conduct a reasonable search to locate records responsive to the request. Accordingly, I will order the hospital to conduct a further search for responsive records, and to provide an explanation of that search. If none of the records specifically identified by the complainant in her representations are located during that search, the hospital is also required to provide a reasonable explanation as to why none of those records were located during that search.

ORDER:

For the foregoing reasons, pursuant to section 61(1) of *PHIPA*:

1. I order the hospital to provide the information that I have found is not exempt under either *PHIPA* or *FIPPA* to the complainant by **30 days of the date of this decision**.

For the sake of clarity, with the hospital's copy of this decision, I am providing a copy of the records or pages of records that contain information that is to be withheld from the complainant. The information to be withheld is redacted.

These records I am providing to the hospital are not a complete copy of the records at issue, it includes only those records that contain information that should not be disclosed.

2. I order the hospital to conduct a further search for records responsive to the complainant's access request. In particular the hospital is to search for the five specific documents referenced in paragraph 112 of this decision.
3. I order the hospital to issue a new access decision to the complainant that provides a written description of the search, the results of the search and a confirmation of whether any of the records specifically identified by the complainant in her representations are not located during the search. The hospital is also to provide the complainant with a reasonable explanation as to why any or all of those specific records were not located during the search, if that is the case.
4. For the purposes of the procedural requirements of *PHIPA*, the date below should be treated as the day the complainant made the access request.

Original signed by: _____
Catherine Corban
Adjudicator

_____ January 24, 2023