

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 207

Complaint HA22-00076

Allevio Pain Management Clinic

April 26, 2023

Summary: In this decision the adjudicator finds that the complainant has established that the clinic has a duty to correct his records of personal health information and orders the clinic to do so by striking out the incorrect statements that the clinic had “saved images for future reference.” The complainant established under section 55(8) that the records are inaccurate for the purposes for which the clinic uses the information because the images were not saved, thereby undermining the very purpose for which the clinic included the statements in the records – to document the availability of the images for future reference.

Statutes Considered: *Personal Health Information Protection Act, 2004*, section 55; O. Reg. 329/04 (General) under *PHIPA*, section 3(7)

BACKGROUND:

[1] The complainant received health care¹ at the Allevio Pain Management Clinic (the clinic) on two occasions. The records describing the health care received indicated that ultrasound images were saved. Based, in part, on the findings in a related PHIPA Decision (PHIPA Decision 119, which I discuss below), the complainant learned that these images were not saved. The complaint at issue in this decision deals with the complainant’s request to have the records corrected to reflect the truth.

¹ A term defined in section 2(1) of the *Personal Health Information Protection Act, 2004* (the *Act* or *PHIPA*).

[2] The complainant attended the clinic on two occasions in 2018 – first in March and then in April. After each visit, the physician who treated the complainant at the clinic wrote a letter to another physician reporting on the treatment provided to the complainant. The records at issue in this complaint are these letters, which are dated March 20, 2018 and April 24, 2018 (the letters).

[3] Each letter describes the health care provided to the complainant, including specific details and measurements and contains the statement “Images were saved for future reference.”

[4] The complainant seeks to have these statements corrected in each of the letters because he believes that they are inaccurate.

[5] The reasons why the complainant thinks the statements are inaccurate include the findings in PHIPA Decision 119, which dealt with the same parties and records arising from the same health care visits.² PHIPA Decision 119 is about whether the clinic conducted a reasonable search for records – namely, the images referred to in the letters at issue in this review.

[6] In PHIPA Decision 119, the adjudicator upheld the clinic’s search as reasonable, and made the following findings of relevance to the present complaint (emphasis added):

[33] To justify why it is unable to locate and provide the complainant with the ultrasound images from his first visit [March 2018], the clinic explains that the ultrasound machine malfunctioned, such that it did not save images that were captured that day. The clinic further explains that although the machine has since been fixed, it is not possible to retrieve the images from the date of the complainant’s first visit. The clinic reached this conclusion after searches for these images were conducted by a number of the clinic’s employees, including its Patient Access Coordinator, a clinical assistant, and member of the clinic’s IT department. Based on the evidence of machine error and the search efforts of the clinic’s employees, who I accept were the relevant, knowledgeable staff to conduct searches, I conclude that it is not reasonable to expect that these specified records about the complainant’s first visit exist, but have not yet been located by the clinic.

[34] The clinic also explains that it is unable to locate and provide access to records that the complainant believes should exist as a result of his second visit [April 2018], because those records do not, nor did they ever, exist. According to the clinic, the complainant encountered a medical emergency prior to his scheduled procedure, which required him to be

² Reconsideration request denied in PHIPA Decision 121.

transferred to a nearby hospital. Based on the evidence before me, I accept that as result of the medical emergency, the scheduled procedure was not carried out.

[7] Faced with the knowledge that the ultrasound images were not saved – and not even taken at the April 2018 visit – the complainant now seeks to have this information (i.e., the statements that images were saved) corrected in the letters.

[8] The complainant says that he asked the clinic to make this correction. In a December 21, 2021 email to the clinic, he said:

I am filing a complaint against [the clinic] for failing to disclose to me that the images reported in [named doctor's] Medical Report to [the other doctor] on March 20 April 24 2018 did not exist (as indicated in my email to [a clinic employee] August 30, 2018). The PHIPA Decision 121 Complaint states that the Clinic found no 'images' mentioned in the reports. As CUSTODIANS of [specified doctor] medical records you failed to make the necessary corrections and the clinic failed to inform me as outlined in CPSO REGULATIONS and the Medicine Act of 1991. ...

[9] The clinic appears to have responded to this request as follows (on April 6, 2022):

After careful review of the application, and in discussion with the physician in question, it is clear that the physician will not amend their clinical notes and records. As custodians of the record itself, we are not in a position - nor are we able to qualified [sic] - to alter clinical note and records in any way.

We must decline this request as it is it not something we can accommodate.

[10] In response, in an April 11, 2022 email to the clinic, the complainant reiterated the reasons why he believes that the letters containing the statement are inaccurate. The clinic did not respond.

[11] On April 29, 2022, the complainant filed a complaint with the Information and Privacy Commissioner of Ontario (the IPC) about the clinic's failure to correct the letters in accordance with its obligations under the *Personal Health Information Protection Act, 2004 (PHIPA or the Act)*. The complaint was initially assigned to mediation. The mediator contacted the clinic and a staff member informed the mediator that the clinic was in bankruptcy and that inquiries should be made to the trustee in bankruptcy. The mediator contacted the trustee who confirmed that although the clinic was in bankruptcy, the clinic had maintained its health records.

[12] The mediator attempted to engage the clinic by email and phone. Although a

representative of the clinic initially responded to the mediator, the clinic did not engage in the mediation and the complaint remained unresolved.

[13] The complaint was transferred to the adjudication stage of the complaint process where an adjudicator may conduct a review under the *Act*. I decided to conduct a review.

[14] At my request, IPC staff contacted the clinic by phone and email and a representative of the clinic provided up-to-date contact information to the IPC. Using this contact information, I sent the clinic a Notice of Review outlining the issues in the complaint. The Notice of Review included the above excerpts from PHIPA Decision 119 and explained how these findings supported the complainant's request to correct the letters. The clinic did not respond, nor did it respond to several follow-up inquiries.

[15] As I explain below, although the clinic did not respond, I have sufficient information to adjudicate the issues before me in the complaint. The clinic has been provided the opportunity to state its position and it has declined to do so.

[16] For the reasons that follow, I find that the complainant has established that the letters are incomplete or inaccurate for the purposes for which the clinic uses the information and therefore the clinic is required under section 55(8) to make the corrections requested by striking out the sentences "Images were saved for future reference" in each of the letters.

RECORDS:

[17] The records at issue are:

- A letter dated March 20, 2018 from [a specified physician at the clinic] to another physician.
- A letter dated April 24, 2018 from [a specified physician at the clinic] to another physician.

ISSUES:

- A. Is the clinic a health information custodian and do the letters contain the complainant's personal health information?
- B. Does the clinic have a duty to make the requested correction under section 55(8) of *PHIPA*?

DISCUSSION:

Issue A: Is the clinic a health information custodian and do the letters contain the complainant's personal health information?

[18] In the Notice of Review, I stated my preliminary view that the clinic is a health information custodian under section 3(1) and that the specified physician was an agent of the clinic.³

[19] I was able to make these conclusions based on my review of the records and in consideration of the nature of the health care provided by the clinic to the complainant. As well, it was established in PHIPA Decision 119 that the clinic is a health information custodian and that the clinic has custody or control of the letters authored by the specified physician.

[20] As indicated, the clinic had a chance to make submissions about my preliminary view. It did not. In the absence of any arguments to the contrary, I confirm my preliminary views and find that the clinic is a health information custodian and the physician is an agent of the clinic, within the meaning of those terms in *PHIPA*.

[21] In the Notice of Review, I also stated my preliminary view that the letters contained the complainant's personal health information within the meaning of *PHIPA*. I formed this view on the basis of the content of the letters themselves, which describe health care provided to the complainant.⁴ I maintain this view; the letters contain the complainant's personal health information.

[22] I have also considered whether the clinic's bankruptcy has any bearing on the issues under review. Had another person obtained complete custody or control of the clinic's records of personal health information due to the clinic's bankruptcy, this person would become the health information custodian for these records.⁵ In the situation at hand, the clinic has maintained custody or control of these records of personal health information, including the records at issue in this review. Therefore, the duties and responsibilities under the *Act* with respect to the records remain with the clinic.

Issue B: Does the clinic have a duty to make the requested correction under section 55(8) of *PHIPA*? Do any of the exceptions to the duty to correct at section 55(9) of *PHIPA* apply?

[23] Having established that the clinic is a health information custodian and that the letters contain the complainant's personal health information, I will now consider

³ "Agent" is defined in section 2(1) of the *Act*.

⁴ Section 4(1)(b) defines "personal health information" to mean "identifying information about an individual in an oral or recorded form, if the information [...] relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family."

⁵ Section 3(7) of O. Reg. 329/04 under *PHIPA*.

whether the clinic has a duty to correct the letters.

[24] Section 55(1) of *PHIPA* sets out the right of an individual to request correction to records of his personal health information:

If a health information custodian has granted an individual access to a record of his or her personal health information and if the individual believes that the record is inaccurate or incomplete for the purposes for which the custodian has collected, uses or has used the information, the individual may request in writing that the custodian correct the record.

[25] Section 55(8) sets out a duty on the part of a health information custodian to grant a request for correction where certain conditions are met. It states:

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

[26] Section 55(9) provides exceptions to the duty to correct in some circumstances:

Despite subsection (8), a health information custodian is not required to correct a record of personal health information if,

(a) it consists of a record that was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise and authority to correct the record; or

(b) it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[27] Read together, sections 55(8) and 55(9) set out the criteria pursuant to which an individual is entitled to a correction of a record of their own personal health information. Section 55(10) of *PHIPA* states that upon granting a request for a correction, the health information custodian shall make the requested correction by recording the correct information in the record and striking out the incorrect information.

[28] Depending on the nature of the correction request, the information the individual seeks to have corrected, and the reasons for the custodian's refusal of the request, in a complaint about a refusal to correct, I may approach the analysis initially under section 55(8) or under section 55(9). I will begin with section 55(8).

[29] For the duty to correct in section 55(8) to apply, the individual seeking correction must establish that the "record is incomplete or inaccurate for the purposes for which the custodian uses the information." Section 55(8) also requires the individual to give

the custodian “the information necessary to enable the custodian to correct the record.” The duty to correct in section 55(8) will not arise unless both conditions have been met.

[30] Based on the wording of section 55(8), not all personal health information contained in records held by a health information custodian must be accurate in every respect. Where the custodian is not relying on the information at issue for a purpose requiring the accuracy of the information, the custodian is not required to correct the information.⁶

[31] In my view, the complainant has demonstrated that the letters are incomplete or inaccurate for the purposes for which the clinic uses the information.

[32] To begin, the reason that the statements were included in the letters (i.e., the purpose for which the clinic uses the information) is apparent from the statements themselves when viewed in the context of the letters. The statements were included in the letters to document that the images were saved and therefore available for reference in the future. As indicated above, the letters contain details and measurements about the health care provided to the complainant; the images are additional details that could inform treatment provided in future.

[33] The statements, however, could not serve the uses for which they were included in the letters because they are inaccurate. The images were not saved, an objective fact admitted by the clinic in the complaint leading to PHIPA Decision 119.

[34] The reasons that I accept the facts as determined by the adjudicator in PHIPA Decision 119 are: the clinic relied to its own benefit on the facts found by the adjudicator in PHIPA Decision 119; and the clinic was made aware in the Notice of Review of the relevance of these facts in the current complaint, and has not refuted them.

[35] It is possible that the clinic could have argued that it no longer uses the information due to its bankruptcy, or that it did not and does not rely on the statements for their accuracy. However, the evidence before me is that the clinic has maintained custody or control of the records of personal health information despite its bankruptcy. The clinic has chosen not to participate in the review and I therefore have no arguments before me nor any reasonable basis to find the clinic does not use or rely on the accuracy of the information at issue in this complaint. For example, as the health information custodian of the records, the clinic could be required to use this information to respond to queries from other custodians about the health care it provided to the complainant.

[36] The statements at issue in this complaint are objective and factual in nature. There can be no reasonable debate about whether the statements are incomplete or inaccurate. They are, as admitted by the clinic in the review leading to PHIPA Decision

⁶ PHIPA Decision 36, followed in PHIPA Decisions 39, 40, 59, 81, and many others.

119, inaccurate. When I consider the purpose of including the statement in the letters, I also find that they are inaccurate for the purpose for which the clinic uses the information.

[37] Because the complainant has established that the statements are inaccurate for the purpose for which the clinic uses the information, the clinic has the duty to correct the record unless an exception applies. The clinic's letter responding to the complainant's request touches on one of the exceptions [section 55(9)(a)]. In its letter, the clinic stated:

After careful review of the application, and in discussion with the physician in question, it is clear that the physician will not amend their clinical notes and records. As custodians of the record itself, we are not in a position - nor are we able to qualified [sic] - to alter clinical note and records in any way.

We must decline this request as it is it not something we can accommodate.

[38] Section 55(9)(a) provides that a health information custodian is not required to correct a record of personal health information if it consists of a record that was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise and authority to correct the record. When I consider the nature of the information at issue and the fact that the clinic was able to decisively and unequivocally explain in PHIPA Decision 119 that the images were not saved, I do not find it credible for the clinic to suggest or argue that it does not now have sufficient knowledge to correct it. I find that the exception at section 55(9)(a) does not apply.

[39] Lastly, there is no argument before me nor any reasonable basis to indicate that the section 55(9)(b) exception applies. Section 55(9)(b) provides that a health information custodian is not required to correct a record of personal health information if it consists of a professional opinion or observation that a custodian has made in good faith. This exception could apply if the change sought were a professional opinion or observation. As indicated, the situation before me is the rare case where the change sought is not in the realm of professional opinion or observation but rather is a mere objective fact about the record-keeping that occurred on a specified day.

[40] Having found that the complainant has established the duty to correct the letters, and because I am unpersuaded that either of the exceptions applies, I find that the clinic has a duty to correct the letters and I order it to do so.

ORDER:

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

1. I order the clinic, pursuant to sections 55(8) and (10)(a), to correct the letters by striking out the following sentence in each: "Images were saved for future reference."

Original signed by: _____

Valerie Jepson
Adjudicator

_____ April 26, 2023