

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 214

Complaint HA21-00223

PhysioMed Leaside

June 30, 2023

Summary: The complainant made an access request to a health information custodian under the *Personal Health Information Protection Act* (the *Act*) for his entire patient file. After reviewing the records provided by the custodian, he made a complaint to the IPC on the basis that further responsive records exist, raising the issue of reasonable search. In this decision, the adjudicator finds that the complainant has established that further records may exist and that the custodian did not provide sufficient evidence that the search for records was reasonable. She orders the custodian to conduct a further search for responsive records and to provide a written explanation to the complainant regarding the results of the search.

Statutes Considered: *Personal Health Information Protection Act, 2004, S.O. 2004, c. 3*
Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, sections 53 and 54.

BACKGROUND:

[1] The requester made a request under the *Personal Health Information Protection Act* (the *Act*) to PhysioMed Leaside (the custodian) for his entire patient file related to his care, where he sought treatment for injuries.¹

¹ Specific types of records requested include estimates, referral/requisition forms, private health insurance forms, assignment of benefits forms, assessment reports, diagnostic evaluations, invoices, memorandums, documents sent to the Workplace Safety and Insurance Board (the WSIB), records related to replacement of medical devices, treatment plans, motor vehicle reports, hospital reports, report of WSIB payments, letters from medical professionals.

[2] In response to the request, the custodian sent the requester records by email. After receiving records from the custodian, the complainant advised the custodian that records were missing. The custodian advised the complainant that his complete file had been sent to him by email.

[3] The requester, now the complainant, made a complaint about the custodian's response to the Information and Privacy Commissioner of Ontario (the IPC), claiming that he had not received all responsive records and the custodian has destroyed records submitted to private health insurance companies and the to the Workplace Safety and Insurance Board (the WSIB).

[4] During mediation, the complainant advised that he believes more responsive records exist and he outlined these in a letter dated August 8, 2022 to the mediator (the letter). The mediator shared this letter with the custodian. In response, the custodian advised the mediator that the "complainant received his file copy in its entirety." The mediator advised the complainant of the custodian's position.

[5] As the complainant remained dissatisfied with the custodian's response to the complaint and no further mediation was possible, this complaint was transferred to the adjudication stage of the complaints process, in which an adjudicator may conduct a review under the *Act*.

[6] As the adjudicator assigned to this complaint, I decided to conduct a review into this matter. I began by inviting representations from the custodian on the issues set out in a Notice of Review. I received representations from the custodian and shared a copy of them with the complainant, when inviting the complainant to respond to the issues and questions set out in the notice, as well as to respond to the custodian's representations. I received representations from the complainant.² I decided it was unnecessary for me to seek reply representations from the custodian.

[7] In this order, I find that the complainant has established that further records may exist and that the custodian did not provide sufficient evidence that the search for records was reasonable. Accordingly, I order the custodian to conduct a further search for responsive records and to provide a written explanation to the complainant regarding the results of the search.

DISCUSSION:

[8] The sole issue in this complaint is whether the custodian conducted a reasonable search for responsive records.

[9] Where a complainant claims that additional records exist beyond those identified

² The complainant's representations refer to matters that are not at issue in this complaint. In this order, I only summarize the relevant portions related to this complaint and the issue of reasonable search.

by a custodian, the issue to be decided is whether the custodian has conducted a reasonable search for records as required by sections 53 and 54 of the *Act*. If the IPC is satisfied that the search carried out was reasonable in the circumstances, the custodian's decision will be upheld. If the IPC is not satisfied, I may order further searches.

[10] The *Act* does not require the custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³ To be responsive, a record must be "reasonably related" to the request.⁴

Representations

[11] At the end of mediation, the complainant indicated that he believes additional records should exist, including, but not limited to, records outlined in the letter, which the mediator shared with the custodian. I asked the custodian to directly address this in its representations.

[12] However, in its representations, the custodian submits:

...when requested for the notes and records for the complainant, I gathered all the materials from his file and sent them to him. [The complainant's] file consists of hundreds of pages as he attended the clinic for many months. During that course, he had many different payers (ie. WSIB, [Motor Vehicle Accident (MVA)] insurance, extended health insurance). All come with many pages of papers work and therefore it took some time to make sure his file copy was complete. I can say with certainty a reasonable search was conducted on our electronic medical records system as well as his paper file.

[13] The complainant submits that additional responsive records exist that the custodian has not provided to him, including:

- While the custodian claims to have provided services to the complainant on certain dates, the custodian has not provided any records that demonstrate this.
- The custodian has not provided the complainant with records submitted to his private health insurance providers and the Office of the Worker Adviser on certain dates, even though the complainant was able to retrieve copies from these organizations directly.

³ See, for example, Orders P-624 and PO-2559. While these orders were made under the *Freedom of Information and Protection of Privacy Act*, the findings regarding search are equally applicable in this case.

⁴ Order PO-2554.

- There is a discrepancy in the amount paid by the complainant, as documented by each party, including instances where the custodian was reimbursed by the WSIB but sought payment from the complainant.
- There are no documents about block fees and a financial arrangement made between the complainant and the custodian.

Analysis and findings

[14] I find that the search for responsive records does not meet the threshold for being "reasonable" for the reasons outlined below.

[15] The IPC has extensively canvassed the issue of reasonable search in orders issued under the *Freedom of Information and Protection of Privacy Act* (and its municipal counterpart the *Municipal Freedom of Information and Protection of Privacy Act*). It has also addressed the issue of reasonable search under the *Act*.⁵ In addition to what is set out in PHIPA Decision 18, principles outlined in orders of the IPC addressing reasonable search under *FIPPA* and *MFIPPA* are instructive to the review of this issue under the *Act*.

[16] The *Act* does not require the custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁶ To be responsive, a record must be "reasonably related" to the request.⁷

[17] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁸ A further search will be ordered if the custodian does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁹

[18] Although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹⁰

[19] First, I find that the complainant has established a reasonable basis that further records may exist. The extent to which the complainant alleges there are missing records, together with the custodian's failure to address the letter, allows me to conclude that it would be reasonable that further records related to the complainant may exist.

⁵ PHIPA Decision 18.

⁶ Orders P-624 and PO-2559.

⁷ Order PO-2554.

⁸ Orders M-909; PO-2469; PO-2592.

⁹ Order MO-2185.

¹⁰ Order MO-2246.

[20] Second, I find that the custodian has not provided sufficient evidence to show that it has made a reasonable effort to search for responsive records. I required the custodian to provide a written explanation of all steps taken in response to the request, including whether it clarified the request with the complainant, details of any searches carried out, including by whom, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches, whether records existed but no longer exist and why, and whether responsive records exist, which are not in the custodian's possession.

[21] The custodian's representations are brief and provide minimal details about the search conducted by the custodian. While I understand that the custodian searched for electronic and paper records, its representations do not address the complainant's belief that additional responsive records exist as outlined in the letter, nor do they provide the written explanation I requested of all of the steps taken in response to the request.

[22] Accordingly, I find that the custodian has not provided sufficient evidence to demonstrate that its search for responsive records was reasonable. As a result, I will order it to conduct a further search for responsive records and to provide an explanation of its search efforts. While I am mindful that further searches may not reveal additional records, the custodian is required to address my finding that it has not provided sufficient evidence to demonstrate the reasonableness of its search, including answering the questions contained in the Notice of Review dated January 18, 2023, addressing the complainant's belief that additional records exist as outlined in his letter of August 8, 2022 and explaining that if records no longer exist, why they no longer exist.¹¹

ORDER:

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

1. I order the custodian to conduct a further search for records responsive to the complainant's access request within **45 days** of the date of this decision.
2. I order the custodian to issue a decision to the complainant that provides him with a written explanation of the search and the results of the search, as outlined in this order. This decision is to be issued within **45 days** of the date of this decision.
3. Should further records be found as a result of the search ordered above, I order the custodian to include a decision on access to the records in its decision referred to in order provision 2.

Original Signed by: _____

June 30, 2023

¹¹ A copy of these will be again provided to the custodian separately after the issuance of this order.

Valerie Silva
Adjudicator