

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 216

Complaint HA21-00182

Waypoint Centre for Mental Health Care

July 27, 2023

Summary: The issue in this complaint is whether information withheld under the *Personal Health Information Protection Act, 2004* (the *Act*) and the *Freedom of Information and Protection of Privacy Act (FIPPA)* by Waypoint Centre for Mental Health Care (Waypoint) in response to an access request is upheld. The access request was for a copy of the requester's health records, including any records relating to ethics reviews of the requester's time spent confined or in seclusion at Waypoint. Waypoint denied access to portions of these records, claiming the application of section 52(1)(f)(ii)(A) of the *Act*, allowing it to withhold information under the exemption in section 49(a) *FIPPA*, read with the discretionary solicitor-client privilege exemption in section 19 of *FIPPA*. In this decision, the adjudicator finds that the records are "dedicated primarily" to the complainant's personal health information within the meaning of section 52(3) of the *Act*. She also finds that the withheld portions of the records are exempt under section 49(a) of *FIPPA*, read with the solicitor-client exemption in section 19 of *FIPPA*. She upholds Waypoint's exercise of discretion under sections 49(a) and 19 of *FIPPA*, and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, sections 4, 52(1)(f)(ii)(A) and 52(3); *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 19(a), 19(c) and 49(a).

BACKGROUND:

[1] This decision resolves the issues raised as a result of a complaint of an access decision made under the *Personal Health Information Act, 2004* (the *Act*) by Waypoint

Centre for Mental Health Care (Waypoint). The access request was for a copy of the requester's health records, including any records relating to ethics reviews of the requester's time spent confined or in seclusion at Waypoint.

[2] In response to the access request, Waypoint released a copy of the requester's health records to him. Waypoint also advised the requester that it had identified five ethics review records. Waypoint denied access to these records, claiming the application of the section 52(1)(f)(ii)(A) of the *Act*, allowing it to withhold information under the exemption in section 49(a) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, read with the discretionary exemptions in sections 13 (advice or recommendations), 18(1)(j) (evaluation of the quality of health care), and 19 (solicitor-client privilege) of *FIPPA*.

[3] The requester, now the complainant, subsequently filed a complaint with the Information and Privacy Commissioner of Ontario (the IPC) regarding Waypoint's access decision.

[4] During the mediation of the complaint, Waypoint advised the mediator that it was narrowing its section 19 (of *FIPPA*) claim regarding the ethics review records to only portions of them, but it continued to claim the application of sections 13 and 18(1)(j) to the remaining portions of these records.

[5] The complaint then moved to the adjudication stage of the complaints process, where an adjudicator may conduct a review. I decided to conduct a review. I sought and received representations from both the complainant and Waypoint.

[6] During the review of the complaint, Waypoint issued a revised decision to the complainant, releasing three of the five ethics review records to him in their entirety. With respect to the remaining two ethics review records, Waypoint released them to the complainant, in part. Waypoint withheld portions of them, claiming the application of section 52(1)(f)(ii)(A) of the *Act*, which permits a custodian that is also an institution under *FIPPA* to claim the solicitor-client exemption under *FIPPA* (section 49(a), read with section 19). As a result of Waypoint's revised decision, the only information remaining at issue are the withheld portions of two ethics review records.

[7] There is no dispute between the complainant and the custodian that Waypoint is a "health information custodian" as defined in section 3(1) of the *Act* and that the ethics review records contain information that qualifies as the complainant's "personal health information" as defined in section 4(1) of the *Act*, and I agree. The ethics review records reveal information that relates to the complainant's health and the fact that he was a patient of Waypoint.¹

¹ "Personal health information" is defined in section 4(1) of the *Act*, which states in part:

(a) "personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information relates to the

[8] In its representations, Waypoint provided certain information relating to its section 19 of *FIPPA* claim that meets the IPC's confidentiality criteria because it contains the actual content of the withheld information. While I will not be referring to Waypoint's confidential representations in this decision, I have taken them into consideration in making my findings.

[9] In addition, Waypoint is an "institution" within the meaning of section 2(1) of *FIPPA*. As a result, Waypoint is able to claim certain exemptions in *FIPPA* through the operation of section 52(1)(f)(ii)(A) of the *Act*.²

[10] For the reasons that follow, I find that the records are "dedicated primarily" to the complainant's personal health information within the meaning of section 52(3) of the *Act*. I also find that the withheld information is exempt from disclosure under section 52(1)(f)(ii)(A) of the *Act*, allowing Waypoint to withhold it under section 49(a) of *FIPPA*, read with the solicitor-client exemption in section 19 of *FIPPA*. Lastly, I uphold Waypoint's exercise of discretion under sections 49(a) and 19 of *FIPPA*, and dismiss the complaint.

RECORDS:

[11] The information at issue consists of the withheld portions of two ethics review records.

ISSUES:

- A. Are the ethics review records "dedicated primarily" to personal health information within the meaning of section 52(3) of the *Act*?
- B. Does the solicitor-client privilege in section 19 of *FIPPA*, available through section 52(1)(f)(ii)(A) of the *Act* and section 49(a) of *FIPPA*, apply to the information at issue?
- C. Did Waypoint exercise its discretion under sections 49(a) and 19 of *FIPPA*, as claimed through section 52(1)(f) of the *Act*? If so, should the IPC uphold the exercise of discretion?

physical or mental health of the individual, including information that consists of the health history of the individual's family,

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

² The complainant's personal health information is also his "personal information" within the meaning of section 2 of *FIPPA*.

DISCUSSION:

Issue A: Are the ethics review records “dedicated primarily” to personal health information within the meaning of section 52(3) of the *Act*?

[12] The extent of an individual’s right of access under the *Act* depends on whether a record of his or her personal health information is “dedicated primarily” to that information.

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

Despite subsection (1) [setting out exemptions from the right of access in the *Act*], 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.

[14] PHIPA Decision 17 set out this office’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 utilizes a qualitative approach by taking into consideration various factors, including:

- the quantity of personal health information of the requester in the record,
- whether there is personal health information of individuals other than the requester in the record,
- the purpose of the personal health information in the record,
- the reason for creation of the record,
- whether the personal health information of the requester is central to the purpose for which the record exists, and
- whether the record would exist “but for” the personal health information of the requester in it.

[15] I provided both Waypoint and the complainant with the opportunity to provide representations on this issue. I did not receive representations from either party on this issue with respect to the ethics review records. However, I find that based on my

consideration of the records themselves, I find that the ethics review records are “dedicated primarily” to the complainant’s personal health information and that his access rights are, therefore, not limited by section 52(3) of the *Act*.

[16] The records reflect discussions that took place among professionals at Waypoint about the complainant’s healthcare. Applying the “qualitative approach” discussed above, in determining whether the records are “dedicated primarily” to the personal health information of the complainant, I find that they are.

[17] In particular, I find that the records contain only the complainant’s personal health information and that the purpose of and reason for the creation of the records was to discuss and plan the complainant’s healthcare. I further find that the complainant’s personal health information is central to the purpose for which the records exist, and that the records would not exist but for the personal health information of the complainant in them.

[18] Therefore, I find that the records are “primarily dedicated” to the complainant’s personal health information and that, as a result, his access rights are to the records as a whole, subject to the applicability of any exemptions found in section 52(1) to them. Waypoint is claiming the application of the solicitor-client privilege exemption in *FIPPA* through the operation of section 52(1)(f)(ii)(A) of the *Act*, which I address below.

Issue B: Does the solicitor-client privilege in section 19 of *FIPPA*, available through section 52(1)(f)(ii)(A) of the *Act* and section 49(a) of *FIPPA*, apply to the information at issue?

[19] As previously stated, if a record is dedicated primarily to the personal health information of the requester, such that he or she has a right of access under the *Act* to the whole record, section 52(1) provides that part(s) of the record may be exempt from the right of access.

[20] Waypoint is claiming the application of section 52(1)(f)(ii)(A) of the *Act*, which states:

Subject to this Part [Part V of the *Act*, 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,

(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, or

[21] Through the section 52(1)(f)(ii)(A) flow-through, Waypoint is claiming the discretionary exemption in section 49(a) of *FIPPA*, which allows an institution to refuse access to a requester's own personal information, read with the solicitor-client privilege exemptions in sections 19(a) and/or 19(c) of *FIPPA*.

[22] Section 49(a) of *FIPPA* states:

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

where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[23] Sections 19(a) and/or (c) of *FIPPA* state:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege,

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[24] Section 19(a) ("subject to solicitor-client privilege"), also referred to as the first branch of section 19, is based on common law. The second branch, found in section 19(c), ("prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by *FIPPA*. Waypoint must establish that at least one branch applies.

[25] At common law, solicitor-client privilege encompasses two types of privilege, namely solicitor-client communication privilege and litigation privilege. The branch two exemption is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

[26] In this complaint, Waypoint's position is that the withheld portions of the records are exempt from disclosure under either the common-law communication privilege or the statutory communication privilege in sections 19(a) and/or (c).

[27] 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.³ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.⁴ 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.⁵ Like the common law solicitor-client communication privilege, the statutory communication privilege covers records prepared for use in giving legal advice.

[28] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶

[29] A client may waive solicitor-client privilege, whether it be under the common-law privilege or the statutory privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.⁷

Representations

[30] Waypoint's position is that the withheld portions of the ethics review records are exempt under the common-law or statutory communication privilege in sections 19(a) and/or and (c).

[31] Waypoint submits that solicitor-client communication privilege attaches to records which include legal counsel's advice, position or comments, as well as specific requests by staff for legal advice, sometimes with background information attached.

[32] Waypoint submits that the records at issue explicitly make reference to legal advice and communications with legal counsel, as well as reveal discussions about legal counsel's advice. Waypoint further submits that these records form part of the continuum of communication between it and legal counsel regarding legal matters involving the complainant. Waypoint goes on to argue that the records were prepared with the expectation that the records would remain privileged and confidential.

[33] With respect to waiver, Waypoint submits that the records have not been provided to outside parties, and that it has not voluntarily evinced an intention to waive legal privilege in respect of them.

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁵ *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.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[34] The complainant's representations do not address whether the exemption in section 19 applies to the records.

Analysis and findings

[35] I find that the records are subject to the common-law solicitor-client communication privilege in section 19(a) of *FIPPA*. As previously stated, communication privilege protects direct communications of a confidential nature between lawyer and client or their agents or employees, made for the purpose of obtaining or giving legal advice,⁸ as well as information contained in records that would reveal the obtaining or giving of legal advice.

[36] In this case, based on Waypoint's representations, I agree with Waypoint that the release of these records would reveal the legal advice actually given by Waypoint's legal counsel to it, as well as discussions of that legal advice by Waypoint staff in relation to specific legal matters involving the complainant and Waypoint.

[37] Further, I find that I have been provided with evidence from Waypoint that it has explicitly not waived its privilege with regard to the communication privilege in section 19(a).

[38] Consequently, subject to my findings regarding Waypoint's exercise of discretion, I find that all of the ethics review records are subject to solicitor-client privilege and are exempt under section 49(a) read with 19 of *FIPPA*.

Issue C: Did Waypoint exercise its discretion under sections 49(a) and 19 of *FIPPA* (as claimed through section 52(1)(f) of the *Act*)? If so, should the IPC uphold the exercise of discretion?

[39] The sections 49(a) and 19 exemptions in *FIPPA* are discretionary, meaning that Waypoint can decide to release information even if the information qualifies for exemption. An institution under *FIPPA* must exercise its discretion. On review of an institution's reliance of the section 52(1)(f) flow through right, the IPC may determine whether the custodian failed to exercise its discretion.

[40] In addition, the IPC may find that the custodian erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In either case, the IPC may send the matter back to the custodian for an exercise of discretion based on proper considerations.⁹ The IPC cannot, however, substitute its own discretion for that of the custodian.¹⁰

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ Order MO-1573.

¹⁰ Section 54(2).

[41] In PHIPA Decisions 17, 30 and 33, the IPC found that considerations which may be relevant to an institution's exercise of discretion under *FIPPA* may also be applicable to an exercise of discretion under the *Act*. Some examples of considerations that may be relevant in this complaint are the purposes of *FIPPA*, including the principles that individuals should have a right of access to their own personal information, and that exemptions from the right of access should be limited and specific, and the wording of the exemption in section 19 and the interests it seeks to protect.

Representations

[42] Waypoint submits that it properly exercised its discretion in good faith in withholding the information at issue under section 19 of *FIPPA*, taking into account relevant considerations and not taking into account irrelevant considerations. In particular, Waypoint submits that it considered the purpose of *FIPPA*, the wording of the section 19 exemption, the interests that section 19 seeks to protect, the nature of the information at issue, the extent to which such information is sensitive to Waypoint, whether the release of the information will increase public confidence in Waypoint, and its historic practice with respect to similar information.

[43] Waypoint reiterates that the ethics review records are subject to legal privilege that can only be waived by Waypoint and that in the circumstances, waiver of legal privilege could have serious implications in terms of its ability to defend itself and its staff in relation to ongoing or contemplated litigation. Waypoint goes on to argue that the Supreme Court of Canada has upheld the inherent value of the solicitor-client privilege as fundamental to the proper functioning of the justice system and that the privilege has been found to be "all but absolute" due to "the high public interest in maintaining the confidentiality of the solicitor-client relationship."¹¹

[44] Lastly, Waypoint submits that it considered whether the release of the information would increase public confidence in it, and decided it would not. It argues that the complainant has been provided with full access to his records of personal health information and plan of care. Finally, Waypoint submits that the complainant has brought a number of legal proceedings against Waypoint which it must be able to address in a confidential manner, including the seeking and receiving of legal advice.

[45] The complainant submits that in exercising its discretion, Waypoint applied the exemption too broadly and failed to take into account that exemptions from the right of access should be limited and specific.

Analysis and findings

[46] Based on Waypoint's representations, I am satisfied that it properly exercised its discretion under section 19 of *FIPPA* because it took into account relevant considerations and did not take into account irrelevant considerations. I am satisfied

¹¹ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 53.

that Waypoint balanced the complainant's interests in the release of the records with the importance of the solicitor-client exemption, which I found applies to the information at issue. I also find that Waypoint took into consideration the purposes of *FIPPA* (and the *Act*), such as the principle that exemptions from the right of access should be limited and specific, because it released the majority of the information contained in the ethics review records to the complainant. Consequently, I uphold Waypoint's exercise of discretion under sections 49(a) and 19 of *FIPPA* to the information that I have found to be exempt from disclosure under those exemptions.

NO ORDER:

1. For the foregoing reasons, I uphold Waypoint's access decision and no order is issued.

Original signed by: _____

Cathy Hamilton
Adjudicator

July 27, 2023 _____