

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 226

Complaint HA21-00175

Jeffrey Mark Kelland

September 22, 2023

**Summary:** The complainant sought access, under the *Personal Health Information Protection Act, 2004 (PHIPA)*, to a complete copy of her own medical records from her former physician (the custodian). The custodian located the requested records and granted her complete access to them. The complainant filed a complaint on the basis that additional records responsive to her request should exist. In this decision, the adjudicator upholds the custodian's search as reasonable and dismisses the complaint.

**Statutes Considered:** *Personal Health Information Protection Act, 2004* c 3 Sched A, as amended, sections 53 and 54.

**Decisions Considered:** PHIPA Decision 18.

### BACKGROUND:

[1] This decision addresses the reasonableness of the search conducted by a custodian in response to an individual's request for access to her own records of personal health information.

[2] The complainant made a request under the *Personal Health Information Protection Act, 2004* (the *Act* or *PHIPA*) to her family physician (the custodian) for access to "all medical documentation." Several days later, the complainant made a second request to the custodian, seeking access to her "complete medical records" indicating that following inquiries made to the College of Physicians and Surgeons of

Ontario, she understands that she "is entitled to obtain all documentation in my file from other physicians, specialist and reports from hospitals and blood labs."

[3] The custodian located paper and digital records in his office, retrieved older paper records from storage and retrieved records from a specified urgent care clinic, where the custodian also saw the complainant as a patient. These records were provided to the complainant.

[4] After the complainant received the records there were a number of communications between the complainant and the custodian. During this time, at the request of the complainant, a copy of her records was provided to the complainant's new physician's office; a copy was provided to her as part of a complaint review proceeding before the Health Professions Appeal and Review Board; and, a copy was provided to her lawyer.

[5] Although the custodian's decision was to disclose all responsive records that were located, the complaint believes that additional responsive records should exist. On this basis, she filed a complaint with the Information and Privacy Commissioner of Ontario (the IPC) regarding the custodian's decision. A mediator was assigned to attempt to assist the parties in reaching a mediated resolution.

[6] During mediation, the complainant advised that her appeal arises from her view that additional records responsive to her request should have been located for a particular time period and on a number of identified dates. As a result, at issue in the complaint is the reasonableness of the custodian's search.

[7] During mediation, the custodian conducted another search for records between or on the dates provided by the complainant and advised that no additional records were located. The custodian provided the complainant with additional information regarding the records that were disclosed and the searches that were conducted.

[8] The complainant considered the information provided by the custodian and advised that she had received Ontario Health Insurance Plan (OHIP) data that indicates that records should exist for ten additional dates.

[9] The custodian reviewed the information provided and advised that records had previously been located and provided to the complainant for every date identified by the complainant, with the exception of two. The custodian advised that based on the OHIP data available to him, he did not bill for services to the complainant on one of those dates and that a search for records related to the other date located no records. The custodian sent the complainant a copy of the records that correspond to the list of dates that she provided with the exception of the two dates for which records were not located.

[10] The complainant advised that she continues to believe that additional records should exist, including records from 2016 and also from 2019 onwards, for the dates

she provided during mediation. She also stated that psychotherapy notes should exist, despite none having been located.

[11] As a mediated resolution between the parties was not reached, the complaint was moved to the adjudication stage of the complaint process where an adjudicator may conduct a review. I decided to conduct a review of the complaint and sought and received representations which were shared amongst both parties.

[12] For the reasons that follow, I uphold the custodian's search as reasonable and dismiss the complaint.

## **DISCUSSION:**

[13] The sole issue to be determined in this complaint is whether the custodian conducted a reasonable search for the complainant's medical records. The complainant takes the position that the custodian's search should have located additional records beyond those that were provided to her.

[14] Where a requester claims that additional records exist beyond those identified 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 *PHIPA*. If I am satisfied that the search carried out was reasonable in the circumstances, the custodian's decision will be upheld. If I am not satisfied, I may order further searches.

[15] The IPC has extensively canvassed the issue of reasonable search in orders issued under the *Freedom of Information and Protection of Privacy Act (FIPPA)* and its municipal counterpart the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. It has also addressed the issue of reasonable search under *PHIPA*.<sup>1</sup> In *PHIPA* Decision 18, I found that the principles established in reasonable search orders under *FIPPA* and *MFIPPA* are relevant to determining whether a custodian has conducted a reasonable search under *PHIPA* and are instructive to the review of this issue under *PHIPA*. I find that this approach should be applied to the circumstances of this complaint.

[16] The IPC decisions establish that *PHIPA* 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.<sup>2</sup> To be responsive, a record must be "reasonably related" to the request.<sup>3</sup> If sufficient evidence or reasonable effort is not provided, a further search

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<sup>1</sup> See, for example, *PHIPA* Decisions 18, 43, 48, 52, 57, 61 and 89.

<sup>2</sup> See, for example, Orders P-624, PO-2559 and *PHIPA* Decisions 18, 43, 52, 57, 61 and 89.

<sup>3</sup> Order PO-2554.

will be ordered.<sup>4</sup>

[17] Although 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.<sup>5</sup>

### **The parties' representations**

[18] The custodian provided representations, as well as an affidavit, describing the search he conducted for records responsive to the complainant's request. These were provided to the complainant.

[19] In his representations and affidavit, the custodian states that he himself, together with an experienced staff member, "completed multiple searches of every location where [the complainant's] medical records in his possession and control could be located." He submits that he was guided in the additional searches by information provided to the custodian during the complaint process, including specific dates that the complainant identified as dates for which records should exist. The custodian also submits that he reviewed his OHIP records to confirm whether any additional records should exist based on billings submitted. The custodian submits that all responsive records located in the course of the searches were provided to the complainant.

[20] The custodian also provides more specific details about the searches conducted for the complainant's medical records. He submits that it was established that the complainant's records would be located in four locations within the building in which his medical practice is located: a paper chart in the office, a secure storage facility in the basement, the Electronic Medical Record (EMR), and a paper chart in the specified urgent care clinic, which is located in the same building as his practice. The custodian submits that these are the only four locations that the complainant's medical records would have been stored and each location was thoroughly searched by him and/or the experienced member of his staff.

[21] The custodian submits that the staff member who assisted him with the searches has worked in his practice for many years and is therefore, experienced and is knowledgeable about the record storage and filing systems used in his practice, as well as those used by the specified urgent care clinic. He also submits that as he communicated all information that he received about the requests and subsequent clarification to this staff member, so that they understood the scope and nature of each search that was to be completed.

[22] The custodian submits that his staff retrieved the paper medical records from prior to 2019 from his office, the paper medical records from the complainant's past physicians from the storage facility and the paper medical records from the specified

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<sup>4</sup> Order MO-2185.

<sup>5</sup> See, for example, Order MO-2246 and PHIPA Decisions 17, 18, 57, 61 and 89.

urgent care clinic, while he located and reviewed the digital records from 2019 to the present on the EMR and had them printed. The custodian submits that as a result of the information provided by the complainant during the complaint process, these locations were searched multiple times, including against OHIP billing data to confirm that records had been provided to the complainant, with respect to the dates that he provided care to her.

[23] Addressing the complainant's concern, raised at mediation, that psychotherapy records should have been located, the custodian states that he did not provide psychotherapy to the complainant but he did provide her with counselling. He submits that all records relating to the counselling that he provided to the complainant were disclosed to her.

[24] The custodian submits that there are no additional records related to the request that are in his custody or control. He submits that he has conducted a reasonable search for records.

[25] The appellant made brief representations via email in response to the custodian's representations. She submits that the records that were disclosed to her were "a mess," "not in any logical order", and had "pages missing." She submits that "[t]here were whole blocks of time missing" and that "[t]here were pages that were photocopied up to 3 times." She further submits that the records were not in chronological order and that she "did not have time to go through and try to organize the records into a logical order." The complainant also submits that the records that were sent to her new physician were also incomplete and very disorganized.

[26] The appellant submits that she obtained her OHIP billing records and tried to compare them to the records provided to her by the custodian. She submits that there remain records that have never been sent to herself, her new physician or her lawyer.

### **Analysis and decision**

[27] I am satisfied that the custodian provided sufficient evidence to demonstrate that he conducted a reasonable search. I am not persuaded that the complainant has raised a reasonable basis to believe that additional records exist.

[28] From the evidence provided, it is clear that the custodian tasked an experienced staff member to assist him with searching for responsive records in appropriate locations. I accept that both of these individuals, as the physician maintaining the records sought and a long-term employee of that physician's practice, have knowledge of and familiarity with the types of records maintained by the custodian and the various locations in which those sought by the complainant would be held.

[29] Throughout the complaint process, the complainant identified specific records that had not been located or provided to her that she believes should exist. For some of those records, the complainant provided some background support for her belief,

including stating that her belief that additional records exist for some of the specific dates comes from OHIP billing data. In my view, the evidence demonstrates that the custodian considered the information provided by the complainant about the existence of additional responsive records and conducted additional searches in an attempt to locate those records, including searches based on OHIP billing data with respect to services provided to the complainant. Despite conducting additional searches, the custodian did not locate any additional records beyond those already provided to the complainant.

[30] Additionally, in conducting his additional searches, the custodian noted that some of the records identified by the complainant as not having been located in earlier searches had already been provided to her. To ensure that the complainant had copies of those records at hand, the custodian provided those records to her again.

[31] As noted above, to establish that a reasonable search has been conducted, a custodian must provide enough evidence to show that he has made a reasonable effort to identify and locate responsive records, that is, records that are reasonably related to the request. In my view, the evidence supports a conclusion that the custodian has conducted a reasonable search.

[32] Although the complainant continues to assert that all responsive records have not been located, I am not persuaded that there is a reasonable basis to conclude that additional searches would yield further records.

[33] I find that the custodian has met his obligations under the *Act* and has conducted a reasonable search for records as required by *PHIPA*.

**ORDER:**

For the foregoing reasons, the complaint is dismissed and no order is issued.

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

September 22, 2023 \_\_\_\_\_