

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 231

Complaint HA23-00003

A Hospital

December 5, 2023

Summary: The complainant sought a review of the hospital's decision to deny her request for access to her deceased son's hospital records, under the *Personal Health Information Protection Act, 2004*, because she was not authorized to exercise a right of access on the deceased's behalf. The hospital exercised its discretion to disclose some of the deceased's personal health information to the complainant – the circumstances of his death – as permitted by section 38(4)(b) of the *Act*.

The adjudicator determines that no review is warranted under sections 57(3) and 57(4)(a) of the *Act* because there are no reasonable grounds to review the complaint and the hospital has responded adequately to the complaint. The complainant has no right of access to her deceased son's personal health information under the *Act* and she has received from the hospital the limited personal health information that may be disclosed without consent under section 38(4)(b) of the *Act*.

Statutes Considered: *Personal Health Information Protection Act, 2004*, sections 38(4)(b)(i) and (ii), 57(3) and 57(4)(a).

BACKGROUND:

[1] This decision addresses a complainant's request for access to her deceased son's records of personal health information from a hospital under the *Personal Health Information Protection Act, 2004* (the *Act*). It determines that no review is warranted because there are no reasonable grounds to review the subject-matter of the complaint

under section 57(3), and because the hospital has responded adequately to the complaint under section 57(4)(a) of the *Act*.

[2] The complainant submitted a request to the hospital for access to the records of the last six months of her son's life during which he was hospitalized and received palliative care. In response to the complainant's request, the hospital advised the complainant that she required the consent of her son's wife, who is the estate trustee and is authorized under the *Act* to exercise a right of access to his records. The complainant did not obtain that consent.

[3] The hospital then issued a decision letter denying the complainant's access request on the grounds that she is not authorized under the *Act* to exercise a right of access on behalf of her son. The hospital stated that the deceased's wife had not provided consent for the hospital to disclose records to the complainant, and there is no provision of the *Act* that permits disclosure of the requested records to the complainant.

[4] In its letter, the hospital disclosed some information about the circumstances of the complainant's son's death in accordance with section 38(4)(b) of the *Act*: the immediate cause of death and the underlying cause, and the date of death.

[5] The complainant was dissatisfied with the hospital's decision and filed a complaint about it with the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the complaint. During mediation, the complainant provided submissions explaining why she seeks access to her son's hospital records, how she learned about her son's death, and that she did not have an opportunity to visit or grieve her son at the end of his life. The complaint could not be resolved at mediation and it was moved to the adjudication stage of the complaint process.

[6] As the adjudicator, I examined the complaint file. My preliminary assessment was that no review of the complaint was warranted because the complainant does not have a right of access to her deceased son's records and the hospital had disclosed to her the limited personal health information that it was permitted to disclose without the consent of the estate trustee.

[7] I sent the complainant a letter advising her of my preliminary assessment to not conduct a review. I advised her that I had read her submissions and I understood her compassionate grounds for seeking access to her son's records; however, based on the circumstances of the complaint and the applicable legislation it appeared that:

- she does not have a right of access to her son's records under the *Act*
- her son's wife, who is the estate trustee, has not consented to the disclosure of the requested records, and

- the hospital has exercised its discretion appropriately and has disclosed to her the limited personal health information that it is permitted to disclose without consent under section 38(4)(b) of the *Act*.

[8] I invited the complainant to provide representations in response to my preliminary assessment letter, if she disagreed. The complainant provided a response, which I summarize below.

[9] For the reasons that follow, I find that no review of this complaint is warranted.

DISCUSSION:

[10] The complainant's representations describe the agonizing circumstances behind this complaint: the way that she learned of her son's death, her inability to travel to Canada to see her son or attend his funeral, and her strained relationship with her son's wife. Although I do not set out the personal details in the complainant's representations, I have considered her complete representations.

[11] Because the complainant is not the estate trustee and does not have the consent of the estate trustee, the complainant has no right of access to her deceased son's personal health information under the *Act*.¹

[12] The discretionary disclosure provision at section 38(4) of the *Act* is the only provision that applies to permit disclosure to the complainant of her deceased son's personal health information in this complaint. Section 38(4) of the *Act* sets out specific circumstances in which health information custodians, like the hospital, may disclose personal health information of a deceased individual without consent. The circumstances set out in section 38(b) are relevant to this complaint. Section 38(4)(b) states:

38(4) A health information custodian may disclose personal health information about an individual who is deceased, or is reasonably suspected to be deceased,

(b) for the purpose of informing any person whom it is reasonable to inform in the circumstances of,

(i) the fact that the individual is deceased or reasonably suspected to be deceased, and

(ii) the circumstances of death, where appropriate[.]

¹ Section 23(1)4 of the *Act* sets out the authority of a deceased person's estate trustee to exercise powers with respect to a deceased person's personal health information. These powers include the authority to make a request for access to the personal health information of the deceased person (sections 25, 52 and 53 of the *Act*).

[13] Disclosure under section 38(4) is discretionary. This means that if the conditions under section 38(4) are met, a health information custodian may disclose personal health information about a deceased individual without consent. When a person seeks disclosure of a deceased individual's personal health information under section 38(4), the health information custodian must consider whether that person meets the conditions for disclosure under that section. The health information custodian must also decide whether and how much information to disclose.

[14] Under section 38(4)(b)(i), a health information custodian is given discretion to decide whether to disclose the fact of an individual's death in order to inform any person whom it is reasonable to inform.

[15] Under section 38(4)(b)(ii), a health information custodian is given discretion to decide whether it is appropriate to disclose personal health information about the circumstances of a death to a person. Disclosure under section 38(4)(b)(ii) is not limited to family members, but it is reasonable to expect family members to be included amongst those to whom disclosure under section 38(4)(b)(ii) may be appropriate. A health information custodian is entitled to consider a compassionate need for information in deciding whether and how much disclosure is appropriate.

[16] Applying sections 38(4)(b)(i) and (iii) to this complaint, the hospital was permitted to disclose to the complainant personal health information about her son to inform her of the fact that he is deceased and of the circumstances of his death. The hospital exercised its discretion under sections 38(4)(b)(i) and (ii) and determined that it was reasonable to disclose to the complainant the fact and date of her son's death, and that it was appropriate to disclose her son's immediate and underlying causes of death. The hospital explained that, in exercising its discretion to disclose this information to the complainant, it considered her relationship with her son and her compassionate reasons for wanting to know about the circumstances of her son's death.

[17] I am satisfied that the hospital considered the relevant factors of the complainant's relationship with her son and her compassionate reasons for seeking information about his death in exercising its discretion to disclose the deceased's personal health information under sections 38(4)(b)(i) and (ii) of the *Act*. There is no suggestion that the hospital considered irrelevant factors or that it did not exercise its discretion in good faith, as it is required to do. There is also no suggestion that any other provision of the *Act* applies to permit the hospital to disclose any additional personal health information to the complainant without the consent of the estate trustee. Accordingly, I find that the hospital exercised its discretion under sections 38(4)(b)(i) and (ii) appropriately, and I uphold its exercise of discretion and its decision.

[18] Sections 57(3) and (4) of the *Act* set out the IPC's authority to review or not to review a complaint. Sections 57(3) and 4(a) apply in this complaint and state:

(3) If the Commissioner does not take an action described in clause (1)(b) or (c) or if the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified, the Commissioner may review the subject-matter of a complaint made under this Act if satisfied that there are reasonable grounds to do so.

(4) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,

(a) the person about which the complaint is made has responded adequately to the complaint[.]

[19] I find that there are no reasonable grounds to review the subject-matter of the complaint under section 57(3) and (4)(a) of the *Act* because the hospital has responded adequately to the complaint and no purpose would be served by conducting a review.

NO REVIEW:

For the foregoing reasons, no review of this matter will be conducted under Part VI of the *Act*.

Original Signed By: _____
Stella Ball
Adjudicator

_____ December 5, 2023