

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 250

Complaint HA22-00031

A Psychologist

June 25, 2024

Summary: The complainant requested a copy of her entire file from the custodian. The complainant was dissatisfied with the completeness of the records she received and challenges the search for records. The adjudicator finds that the custodian has complied with her search obligations under *PHIPA* and dismisses the complaint.

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

Decisions Considered: PHIPA Decisions 17 and 18.

BACKGROUND:

[1] This order addresses the reasonableness of a psychologist's (the custodian's) search under the *Personal Health Information Protection Act, 2004* (*PHIPA* or the *Act*) in response to a request by the complainant, a former client, for a copy of her file. In her request, the complainant stated that her insurer was requesting copies of "all clinical notes, consultation reports, test results, and any applicable specialists' reports" and asked about the process for having the information required by the insurer released to her. By the time of the request, the parties' relationship had ended, and the complainant asked that the custodian not contact her directly.

[2] The custodian attempted to clarify, through an administrative assistant, whether the request was to disclose information to an insurer directly, or to the complainant, citing

confidentiality concerns associated with releasing records to a third party. After confirming that the file was to be released to the complainant directly, the custodian prepared a 535-page paper file and an electronic file for the complainant to pick up. The custodian charged an associated fee that the complainant paid.

[3] Approximately nine months after she picked up her file, the complainant contacted the custodian to say that the file released to her was incomplete. The custodian responded in an email the next day that the package provided to the complainant was her "complete file," arranged in chronological order and consisting of "all progress notes, emails and call exchanges, past reports etc."

[4] The complainant filed a complaint with the Information and Privacy Commissioner of Ontario (IPC) regarding access to her file and the fee charged to prepare it for release. The IPC attempted to mediate the complaint.

[5] The fee dispute was resolved in mediation and is not part of this review. The complainant maintained, however, that the custodian had additional records that she had not released to the complainant, namely, handwritten notes the complainant had observed her make during their sessions.

[6] The custodian conducted another search and located approximately 26 additional handwritten notes. Missed in the initial search, these appeared on the reverse side of some of the pages earlier released to the complainant. Releasing these additional notes to the complainant, the custodian explained that they were not the handwritten notes expected by the complainant because those contemporaneous session notes were shredded after they were used to prepare progress notes for the file.

[7] The complainant's concerns about the custodian's search were not resolved through mediation, and the file proceeded to the adjudication stage of the review process. I conducted a review under *PHIPA* of the reasonableness of the custodian's search for records, the sole issue identified for review by the parties.

[8] In this decision, I find that the custodian has conducted a reasonable search in satisfaction of her obligations under *PHIPA* and I dismiss the complaint.

DISCUSSION:

[9] 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*. Section 53 gives an individual the right to make a written request to the custodian for access to a record of personal health information, while section 54 describes the custodian's obligations in responding to the request. These sections require the custodian to make reasonable efforts to identify and to locate requested records.

[10] The IPC has found that the principles established in reasonable search orders made under provincial freedom of information statutes, namely the *Freedom of Information and Protection of Privacy Act (FIPPA)* and its municipal counterpart, *MFIPPA*,¹ are relevant and instructive to determining whether a health information custodian has conducted a reasonable search under *PHIPA*.² These orders establish that the custodian is not required to prove with absolute certainty that further records do not exist. Rather, the custodian must provide sufficient evidence to show that a reasonable effort was made to identify and locate responsive records in her custody or under her control.³ To be responsive, a record must be “reasonably related” to the request.⁴

[11] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the custodian’s decision. If I am not satisfied, I may order further searches.

[12] Although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁵

Representations

The complainant’s representations

[13] The complainant submits that, when she began to review the file, she “noticed numerous documents were not included, most obvious were the handwritten notes.” She also raises specific concerns about the contents of the records she received, stating that some documents are missing or incomplete.

[14] The complainant says that she observed the custodian taking what she describes as extensive handwritten notes during sessions. She says that these session notes sometimes exceeded four pages and went beyond key words, as the released progress notes contain full sentence quotes and the occasional diagram. She says that the fact that the custodian sometimes worked from the file and produced handwritten diagrams made during previous sessions suggests that she did not shred her handwritten notes after she completed the corresponding progress notes. She says that the relatively few handwritten notes released to her are not consistent with a “giant” file from which she says she often witnessed the custodian working during sessions and argues that this too suggests that the custodian did not shred her handwritten notes shortly or immediately after sessions. She disputes that these notes do not exist and says they have not been released to her.

[15] According to the complainant, other documents are also incomplete or missing.

¹ The *Municipal Freedom of Information and Protection of Privacy Act*.

² See PHIPA Decisions 17, 18, 43, 48, 55, 57, 61, 65, 73, 89, 126 and 217.

³ Orders P-624 and PO-2559.

⁴ Orders M-909, PO-2649 and PO-2592.

⁵ Order MO-2246; PHIPA Decisions 17 and 18.

She says that these include:

- incomplete or missing billing sheet information
- missing emails and attachments
- a privacy policy, information about a maternity leave and fee changes
- draft versions of reports exchanged with other health professionals
- a blank functional abilities form, and
- handouts provided during sessions.

[16] The complainant says that discussion of the custodian's privacy policy did not include mention of a policy involving the shredding of handwritten notes, and that, if such a policy was instituted during the time of her treatment, it was never articulated. She says that a practice by the custodian of keeping multiple sets of notes (i.e. handwritten notes taken during sessions, progress notes or notations on the backs of progress notes) would have raised concerns about errors in data transfer had it been discussed with her.

[17] The complainant states that practice standards published by the custodian's governing body that set out record-keeping and ethical standards with which the custodian must comply give her a reasonable basis to conclude that drafts of reports exist. She also says that, although the custodian provided a table in her representations indicating where some emails or information could be found in the file, the file she received did not contain page numbers, and that, by her count, information is not where the custodian says it should be.

[18] The complainant's representations also raise issues that relate to the custodian's professional standards, record-keeping practices and clinical judgment, and express a concern that the custodian maintained official records that do not accurately represent the complainant's narrative. I have not summarized those representations here because they do not relate to the issue of the custodian's search obligations under sections 53 and 54 of *PHIPA*.

The custodian's representations

[19] The custodian says that all extant documents relating to the complainant's request have been released to her and that some information requested no longer exists.

[20] In an affidavit submitted with her representations, the custodian states that she carried out all searches on her own as the sole custodian of the complainant's personal health information and the only one at her office with access to it. She says her search included all documents within a locked and secured physical file, all records contained in electronic charts after she switched to electronic charting, and her professional email

account. She says that she retrieved a total of 535 pages of documents that included intake documents, consent forms and other administrative documents; progress notes of each therapy session; reports and letters written on the complainant's behalf; phone, email and fax correspondence exchanged with the complainant, and any correspondence and reports she received from other health professionals concerning the complainant.

[21] She says that the paper documents were scanned and organized and that the only changes made were to combine the paper and electronic charts and to reorder the file into chronological order.

[22] The custodian states that her handwritten session notes are shredded after therapy sessions as they are limited, often illegible, and meaningful only to her. She says these notes serve as memory aids for preparing more detailed progress notes, which are filed before the handwritten notes are destroyed. She says she avoids writing progress notes during sessions to maintain eye contact and focus, and that the incomplete nature of session notes can lead to misinterpretation and potential harm if included in the file. She says that it is standard practice to keep progress notes and shred the handwritten session notes after use.

[23] The custodian also addresses what she describes as the complainant's expanded complaint about missing documents. She says that items like the office privacy policy and correspondence about a maternity leave or fee changes are administrative and are not kept in the clinical file because they do not contain personal health information. She says that she records in the file when such materials are provided to a client, but that storing the actual documents in the file would be unwieldy. As noted above, she provided a table with her representations identifying where in the file a number of documents the complainant says are missing can be found.

[24] Similarly, she says that suggested readings and handouts do not qualify as personal health information. She says she documents these materials in the progress notes but that they too are not kept in the client's file. She submits that she does not include drafts of letters or reports in a file to avoid confusion and inefficiency.

[25] The custodian states that the "giant" file the complainant saw in her office was not the complainant's file. Additionally, she says she is unaware of which specific functional abilities form is missing, stating that she would not have been part of the team that would have completed it.

[26] She submits that it is impossible to include everything discussed with a client in their file and that, given the size, numerous sources and complexity of the complainant's file, it is possible that some emails may have been missed. She says that psychologists make daily judgments about what is relevant to therapy goals and that these may not always align with what the client wishes to see recorded, especially when reviewed years later. She maintains, however, that the complainant's entire clinical file has been provided to her and that there are no further records beyond those already released.

Analysis and decision

[27] For the following reasons, I find that the custodian has conducted a reasonable search for records in response to the complainant's request and has therefore discharged her obligations under sections 53 and 54 of *PHIPA*.

[28] As noted above, IPC jurisprudence under *FIPPA* and *MFIPPA* has been used for guidance on what constitutes a reasonable search. These cases have described a reasonable search as one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to identify and locate records that are reasonably related to the request.⁶

[29] In this case, the custodian explained that she is the only person with access to the complainant's physical and electronic files. I accept that, as the complainant's treating psychologist, she was familiar and experienced with the records and the subject matter of the request and therefore able to carry out a search.

[30] Sections 53 and 54 require the custodian to undertake reasonable efforts when searching for records. This means that the standard placed on the custodian is one of reasonableness, not perfection. The custodian is not required to prove with certainty that further records do not exist. She must provide enough evidence to show that she has made a reasonable effort to identify and locate responsive records,⁷ that is, records that are reasonably related to the request.⁸ I find that she has done so.

[31] I also find that the custodian has provided a reasonable explanation for why the handwritten notes she took during sessions do not exist. I am not persuaded that the fact that the custodian located some notations on the backs of pages after a second search itself establishes a reasonable basis to conclude that more such notations or handwritten notes exist. I also accept the custodian's explanation for why materials such as handouts, policy documents or drafts would not be part of the clinical file, and that, where she distributes general materials that do not contain a client's personal health information, a note is made in the file, but that the materials themselves are not placed in the file.

[32] In the circumstances, I am satisfied that the custodian made reasonable efforts to locate and release the complainant's entire file. Although there is some debate between the parties about what should be included in the file, the issue before me is whether the search for records responsive to the request was reasonable, and not whether materials that might not be kept in a clinical file ought to be. I make no findings about whether their exclusion is a desirable practice or consistent with the custodian's practice standards. In the circumstances, I am satisfied that, although the file may not contain all of the documents that the complainant believes it should, there is no reasonable basis to

⁶ Orders M-909, PO-3649 and PO-2592.

⁷ Orders P-624 and PO-2559.

⁸ Order PO-2554.

conclude that another search would yield more handwritten notes or other materials. Concerns about the adequacy of the custodian's underlying record-keeping practices, or about matters relating to her clinical judgment are not for determination by the IPC, and I have not considered them here.

[33] For these reasons, I am satisfied that the custodian has met her obligations to conduct a reasonable search as required by *PHIPA*, and I dismiss this complaint.

ORDER:

I find that the custodian has conducted a reasonable search in satisfaction of her obligations under *PHIPA*. I dismiss this complaint.

Original Signed By: _____

Jessica Kowalski
Adjudicator

June 25, 2024 _____