

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 257

Complaint HA23-00057

Mirus Medical

July 15, 2024

Summary: The complainant made a request under *the Act* for access to her and her child's charts. The custodian charged the complainant \$30 for each chart. The complainant's request to the custodian to waive the fees was denied. As a result, the complainant filed a complaint under the *Act* with respect to the amount of the fees and the custodian's decision not to waive the fees.

In this decision, the adjudicator finds that \$30 constitutes "reasonable cost recovery" for each chart. The adjudicator upholds the custodian's exercise of discretion not to waive the fees.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, sections 54(10) to (12).

BACKGROUND:

[1] The complainant and her child were patients of a family physician at the Mirus Medical clinic (the custodian). The complainant made a verbal request for her and her child's "charts" pursuant to the *Personal Health Information Protection Act, 2004 (the Act)* because the custodian was closing her family practice.

[2] The custodian charged the complainant a fee of \$30 for each chart. The email from the clinic notifying the complainant that the charts were available for pick up did not indicate if the charts were to be provided in paper or on a DVD/CD. The complainant asked that the fees be waived on account of her low-income, disabilities and because she had a dependent. The custodian denied the request to waive the fees. (At some point

the complainant sought access to her child's immunization history and the custodian provided this information without charge.)

[3] The complainant was not satisfied with the amount of the fees charged by the custodian and the custodian's decision not to waive them and made a complaint to the Information and Privacy Commissioner of Ontario (IPC).

[4] A mediator was appointed to explore resolution. However, a mediated resolution was not achieved, and the file was transferred to the adjudication stage of the complaint process, where an adjudicator decided to conduct a review. The adjudicator sought and received representations from the custodian and the complainant in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*. The appeal was then transferred to me to continue the review. Having reviewed the appeal, I decided to seek reply representations from the custodian.

[5] For the reasons set out below, I find that the fees charged by the custodian do not exceed "reasonable cost recovery" and uphold them. I also uphold the custodian's exercise of discretion not to waive the fees.

ISSUES:

- A. Does the custodian's fee of \$30 for each chart exceed "reasonable cost recovery" as that term is used in the *Act*?
- B. Should the custodian's denial of fee waiver be upheld?

DISCUSSION:

[6] There is no dispute between the parties that the custodian is a "health information custodian" as that term is defined in section 3(1) of the *Act*, or that the charts at issue are records of "personal health information" as that term is defined in section 4(1) of the *Act*.

Issue A: Does the custodian's fee of \$30 for each chart exceed "reasonable cost recovery" as that term is used in the Act?

[7] Sections 54(10) and (11) of the *Act* provide health information custodians with the discretion to charge a fee for providing an individual with access to their own personal health information. These sections read:

54 (10) A health information custodian that makes a record of personal health information or a part of it available to an individual under [Part V of the *Act*] or provides a copy of it to an individual under clause (1)(a) may

charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.

(11) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed.

[8] As of the date of this decision, there is no regulation that prescribes fees for access under the *Act*. However, the IPC has the authority under the *Act* to conduct a review to determine whether the fee charged exceeds “the amount of reasonable cost recovery.”

[9] The expression “amount of reasonable cost recovery” is not defined in the *Act*. Applying the modern rule of statutory interpretation, the IPC has previously concluded that the phrase “reasonable cost recovery” does not mean “actual cost recovery” or full recovery of all the costs borne by a health information custodian in fulfilling a request for access to an individual’s own personal health information.¹ Further, the IPC has concluded that the use of the word “reasonable” to describe cost recovery suggests that costs should not be excessive, and that, as a whole, section 54(11) must be interpreted in a manner that avoids creating a financial barrier to the important purpose of the *Act*, which is to grant a right of access to one’s own personal health information.²

[10] Past orders have held that the fee scheme set out in a proposed regulation to the *Act*, published by the Minister of Health and Long-Term Care in 2006 (the “2006 framework”),³ though never adopted, provides the best framework for determining “the amount of reasonable cost recovery” under the *Act*.⁴ I agree with this reasoning and will apply the 2006 framework in this decision.

[11] The 2006 framework establishes a set fee that custodians may charge to complete specifically defined work required to respond to a request. It also prescribes the fees that custodians may charge over and above that set fee. The 2006 framework reads, in part, as follows:

Fees for access to records

25.1(1) For the purposes of subsection 54(11) of the Act, the amount of the fee that may be charged to an individual shall not exceed \$30 for any or all of the following:

1. Receipt and clarification, if necessary, of a request for a record.
2. [...]

¹ Order HO-009.

² Order HO-009.

³ Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol 139-10 (11 March 2006). Available online here: <https://files.ontario.ca/books/139-10.pdf>.

⁴ Order HO-009.

3. Locating and retrieving the record.
4. Review of the contents of the record for not more than 15 minutes by the health information custodian or an agent of the custodian to determine if the record contains personal health information to which access or disclosure may be refused.
5. Preparation of a response letter to the individual.
6. Preparation of the record for photocopying, printing or electronic transmission.
7. [...]
8. [...]
9. [...]
10. [...]
11. [...]

[12] Section 25.1(2) of the 2006 framework indicates that a custodian may charge fees over and above the set \$30 fee as set out in Table 1. The following excerpt from Table 1 is relevant to this review:

Item	Column 1	Column 2
3.	For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form	\$10

Parties' representations

[13] The custodian submits that a fee of \$30 per chart is a fair amount.

[14] The custodian's representations describe the general process of how requests to access personal health information were dealt with. The custodian says that when a patient requested their personal health information, a receptionist explained the cost of preparing a chart, the format in which the chart could be provided and associated costs of each format. If a patient chose to receive the chart in paper format, the custodian charged \$30 for the first 20 pages and \$0.25 for each subsequent page. If a patient chose to receive the chart in PDF format, a flat fee of \$30 was charged and the patient was asked to bring their own USB on which the chart would be saved. To keep the fee at \$30, patients were advised to choose to receive their personal health information in PDF format. For those patients who have low income, the custodian saved the chart on a DVD

and did not charge extra fee for the DVD.

[15] The custodian says that the fee of \$30 includes the following tasks: her review of a chart, the preparation of the chart by administrative staff (printing or creating a PDF document), and the cost of supplies required to prepare the chart. The custodian says that it took her between 5 to 15 minutes to review a chart.

[16] The custodian further notes that the fee of \$30 for each chart is consistent with the 2006 framework, which also permits a health information custodian to charge a fee of \$10 to save a chart on a compact disk – a fee that the custodian did not charge the complainant.

[17] In response, the complainant submits that the fees are not fair because the custodian chose to charge a maximum amount recommended and did not provide an explanation about how the amount charged reflected the time and supplies that were spent specifically preparing her and her child's charts.

[18] The complainant also says that the custodian's staff failed to follow the process described by the custodian on how staff should respond to an access request. When the complainant requested her and her child's charts, a receptionist did not inform her of options with respect to format in which the charts could be provided and did not provide a fee estimate. The complainant was informed of the fees only when she received an email confirming that the charts were available for pick up.

[19] Finally, the complainant says that the custodian's letter notifying patients of the closure of the custodian's family practice led her to believe that a fee was only charged if a chart was transferred to another family physician.

[20] In reply, the custodian provides more general details about the procedure to respond to requests for copies of a chart.

[21] In the case of the complainant, the custodian submits that the time and material that she and her staff spent on preparing the complainant's and her child's charts significantly exceed \$30 per chart. The custodian says that the complainant's chart contains 219 pages and her child's chart contains 79 pages. It took her 22 minutes to review the complainant's chart and 10 minutes to review the child's. Considering the general explanation provided by the custodian, I understand that this review consisted of confirming that the charts were complete. The custodian further says that for each chart her staff spent another 10-15 minutes to prepare a PDF version of the chart and save it on a CD/DVD.⁵

[22] The custodian says that she and her staff offered to the complainant to provide

⁵ The custodian referred to a device on which the charts were saved as DVD in her original representations and CD in her reply representations. Given similarity of these devices and the purpose of their use, I find that it is not relevant whether the charts were saved on a CD or DVD.

the charts to her in PDF format, which is the most cost-effective. The custodian reiterates that she charged a flat fee of \$30 if an individual requested their personal health information in PDF format because no printing was required. If the chart was to be provided in paper format, the custodian charged 25 cents for printing each additional page after 20 pages to account for the cost of ink and paper. Therefore, had the charts been printed, the custodian would have charged \$79.75 for the complainant's chart alone.

Analysis and finding

[23] I find that the fee of \$30 charged by the custodian for each chart does not exceed "reasonable cost recovery" and I uphold it.

[24] I have decided to follow the approach taken by other IPC adjudicators to use the 2006 framework to assess whether the fees charged constitute "reasonable cost recovery." The 2006 framework stipulates that a custodian may charge \$30 for locating and retrieving each chart, preparing the chart and preparing a response letter to a complainant. I accept the custodian's representations that her staff retrieved the charts and, after the custodian's review, consolidated relevant personal health information of the complainant and her child into PDF documents to be saved on a DVD/CD. The staff also sent an email to the complainant advising that the charts were ready to be picked up. These tasks fall within the types of tasks for which the custodian is permitted to charge \$30. Section 25.1(1) of the 2006 framework permits a health information custodian to charge \$30 for "any or all" tasks listed in it. This means that \$30 could be charged for completing one, several or all tasks from the list.

[25] The custodian explained other steps that she took to prepare the charts, such as confirming that her notes were complete. In my view, these kinds of tasks are part of a custodian's general responsibilities under the *Act* and are not the types of activities for which a discrete fee may be charged.⁶

[26] However, the custodian says that in addition to consolidating relevant personal health information in a PDF document, her staff also prepared a CD/DVD containing the charts. I find that the tasks that the custodian's staff performed to prepare a CD/DVD are tasks for which the custodian is entitled to charge over and above \$30 because they are related to "making" or providing the personal health information on a compact disk.⁷

[27] The complainant challenges the custodian's decision to charge her \$30 for each chart on the basis that she understands that fee to be the "maximum." These arguments will be addressed under the next issue.

[28] I agree with the complainant that the letter sent by the custodian to patients advising of the closure of the family practice appears to state that a fee would be charged only if a record is transferred to another family physician. However, the *Act* provides

⁶ PHIPA Decision 111 at para 57.

⁷ PHIPA Decision 143 at para 23 and 31, regarding a similar digital format, a USB.

health information custodians with discretion to charge a fee and I do not find that the language in this letter limits that discretion.

[29] I will next address the complainant's representations that the custodian did not provide her with a fee estimate and a choice of format in which she would like to receive the charts. I find that the custodian failed to comply with her obligations under section 54(10) of the *Act* because she failed to provide the complainant with a fee estimate. The custodian also did not provide the complainant with a choice of format in which she would like to receive the charts. While these failures do not impact my finding that the fee of \$30 per chart is a reasonable cost recovery, in my view, these failures provide justification to cap the fee to be charged at \$30 per chart regardless of the format in which the complainant chooses to receive the charts.

[30] Pursuant to section 54(10) of the *Act*, the custodian ought to have provided the complainant with a fee estimate because she was charging a fee for the charts. The custodian appears to believe that the letter that she sent to her patients advising of the closure of her practice constitutes a fee estimate. However, I find that it is not. A fee estimate is a detailed statement of the charges to prepare a specific record for disclosure.⁸ The custodian's letter only provided a general overview of the fees that she charged to every individual who sought access to their personal health information.

Issue B: Should the custodian's denial of fee waiver be upheld?

[31] Section 54(12) of the *Act* gives a health information custodian discretion to waive payment of all or any part of the fee. The section states:

A health information custodian mentioned in [section 54(10)] may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so.

[32] When deciding whether to waive payment of all or part of a fee, a custodian must exercise its discretion. Given the language of section 54(12) of the *Act*, the IPC has held that its review of a custodian's decision to deny a fee waiver request is limited to a review of its exercise of discretion under that section.⁹

[33] The *Act* does not prescribe factors for determining whether a waiver is fair and equitable. The IPC has held that the factors listed in the fee waiver provisions of *Freedom of Information and Protection of Privacy Act (FIPPA)* may be equally applicable to the

⁸ IPC's Guideline on "Fees, Fee Estimates and Fee Waiver". While the guideline provides guidance to provincial and municipal institutions on fees, fee estimates and fee waivers under the *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act*, respectively, it provides useful information about fees, fee estimates and fee waivers that is equally applicable to section 54(10) of the *Act*.

⁹ PHIPA Decision 17.

determination of whether a fee waiver is "fair and equitable" under the *Act*.¹⁰ Relevant factors listed in section 57(4) of *FIPPA* are:

- a. the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- b. whether the payment will cause a financial hardship for the person requesting the record.

Parties' representations

[34] The complainant submits that any amount charged by the custodian will cause her financial hardship. The complainant explains that she is a sole parent of a young child. She describes her source of income at the time when she made the request and provides evidence about her current source of income, which, she says, places her and her child below a poverty line. The complainant has a significant debt and no assets. The complainant provides documents confirming when her debt becomes payable.

[35] Related to this point, the complainant also asserts that the custodian should simply not have charged the maximum fee allowable.

[36] The custodian submits that she considered the complainant's circumstances in reaching her decision not to waive the fees. The custodian did not charge the complainant for accessing her child's immunization history. The custodian also did not charge the complainant a fee for a DVD/CD on which the charts were saved. The custodian says that when the complainant requested a fee waiver, she did not provide documentation about her financial circumstances. The custodian adds that she charged the same fee to her other patients in similar situations.

Analysis and finding

[37] I find that the custodian exercised her discretion in accordance with the *Act* and I uphold the decision not to waive all or any portion of the fees. I must uphold the decision if I am satisfied that the custodian turned her mind to considering whether it would be fair and equitable to waive the fee.

[38] The custodian considered the extent to which the actual cost of preparing charts is different from the amount that she charged to the complainant and the amount that she could charge pursuant to the 2006 framework. The custodian charged the complainant \$30 for each chart. As outlined above, pursuant to the 2006 framework, the custodian was entitled to charge the complainant \$30 for each chart and \$10 for providing the charts on a CD/DVD. The custodian also provided the child's immunization records without a charge.

¹⁰ PHIPA Decision 17.

[39] The complainant's main argument is that because of her financial situation a fee waiver should have been granted. All that is required is that the custodian consider the complainant's financial situation. While there was initially some dispute about whether the complainant had provided enough information to substantiate her financial circumstances, I am satisfied that the custodian considered her financial circumstances but weighed these considerations against the other considerations outlined above. I uphold the custodian's decision not to further waive the fee of \$30 per chart.

ORDER:

I uphold the fee of \$30 per chart regardless of the format in which the complainant chooses to receive the charts. I also uphold the custodian's decision not to waive the fees.

Original signed by: _____
Anna Kalinichenko
Adjudicator

July 15, 2024 _____