

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 262

Complaint HA23-00050

Dr Jane A. Upfold

October 24, 2024

Summary: An individual asked the appointed guardian of her late doctor's medical records (the custodian) for access to her complete medical records. While the custodian originally claimed he found the individual's medical records, he later said he did not find any. In PHIPA Decision 256, the adjudicator found the custodian did not conduct a reasonable search for the complainant's medical records and orders him to conduct another search. The custodian conducted another search and did not find any additional records. In this final decision, the adjudicator finds the custodian did not conduct a reasonable search for records but finds no useful purpose in ordering another search. She dismisses the complaint.

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

Decisions Considered: PHIPA Decisions 18 and 256.

BACKGROUND:

[1] The complainant made a request under the *Personal Health Information Protection Act* (the *Act*) for access to her medical records with her deceased doctor, Dr. Jane A. Upfold. The request was made to the health information custodian (the custodian), who is the appointed guardian for Dr. Jane A. Upfold's medical records.

[2] The custodian responded to the complainant's request by email, stating, in part,

[Dr. Jane A. Upfold] appointed me the guardian of her medical records. Those records are highly confidential, and patients are entitled to have copies of them if they wish.

I looked for the file folder that contained your records before replying to your request. The file folder is quite large. It will take some time to copy the records while maintaining confidentiality. Medical authorities have stated that physicians and/or their designated record guardians should charge for the time it takes to provide a patient record duplicates. Estimating the time involved with your request, my fee would be \$250.

[3] Over the subsequent months, the complainant and the custodian had discussions, via email, about the initial fee provided by the custodian and fees for access that have been approved in prior decisions issued by the Information and Privacy Commissioner of Ontario (the IPC).

[4] The custodian issued a revised decision stating he could not locate any of the complainant's records in Dr. Upfold's files. He also advised the complainant he would not charge her for the time spent in responding to her request and searching for responsive records.

[5] The complainant filed a complaint with the IPC. The complainant explained she sought access to all her health records with her now deceased physician, who she identified by name and identification number given by the College of Physicians and Surgeons of Ontario (the CPSO). The complainant stated she wished to be provided with her records at the "permitted IPC rate of 25 cents per page." The complainant also stated she believes the custodian is withholding her personal health records because he previously confirmed they exist and subsequently advised that none exist.

[6] The IPC attempted to mediate the dispute between the parties.

[7] The custodian explained Dr. Upfold practiced from home and patient records were kept in her former office and an adjacent room used for storage. The custodian advised he saw a large file folder with the complainant's name on it, but when he opened it, it contained another individual's health information. The custodian stated he looked through the entire filing system but did not locate any records relating to the complainant. The custodian acknowledged his duty as the appointed guardian to provide personal health records to Dr. Upfold's former patients but confirmed he did not locate any records relating to the complainant.

[8] The custodian conducted another search, reviewing the file of the individual whose personal health information was in the complainant's file to see if there was a filing error. The custodian confirmed he did not locate the complainant's personal health records. He advised he spent numerous hours going through a filing cabinet used to store all patient files ten years or less. The custodian states he further spent an entire day moving

materials in a storage room to access a filing cabinet with older patient files but did not locate any responsive records. The custodian stated, "The records I examined seemed very thorough. Why there are no records for the complainant is a mystery to me."

[9] The complainant advised the mediator she was not satisfied with the custodian's search for responsive records, claiming her personal health records should exist.

[10] A mediated solution was not reached, and the complaint was moved to the adjudication stage. The adjudicator originally assigned to the complaint decided to conduct a review and invited the parties to submit representations on the searches conducted by the custodian. Both the custodian and complainant submitted representations.

[11] In PHIPA Decision 256, I found the complainant established that further records may exist. I also found the custodian did not provide sufficient evidence that the search for records was reasonable. I ordered the custodian to conduct a further search for records responsive to the complainant's request and provide a written explanation to the complainant regarding the results of the search.

[12] In response to PHIPA Decision 256, the custodian submitted representations explaining the additional searches he conducted. I shared the custodian's representations with the complainant, and she submitted further representations in response.

[13] In this decision, I find the custodian did not conduct a reasonable search for records but find no useful purpose in ordering a further search. I dismiss the complaint.

DISCUSSION:

[14] The sole issue to be determined in this complaint is whether the custodian conducted a reasonable search for the complainant's medical records under section 54 of the *Act*.

[15] Where a complainant claims additional records exist beyond those identified by the 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 the *Act*.¹ If the IPC is satisfied the search carried out was reasonable in the circumstances, the custodian's decision will be upheld. If the IPC is not satisfied, it may order further searches.

[16] The complainant submits the custodian should have located her personal health

¹ Section 53 of the *Act* states that an individual may exercise their right of access to their own personal health information by making a written request to the health information custodian who has custody or control of the information.

Section 54 of the *Act* sets out the steps a health information custodian must take in responding to a request for access to a record of personal health information.

records.

[17] The *Act* does not require a custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show he made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be “reasonably related” to the request.³

Representations

[18] In the Notice of Review, the adjudicator originally assigned to the complaint asked the custodian to provide a written summary of all steps taken in response to the request. In his representations, the custodian confirmed the summary, which is reproduced in the Overview above, provides an accurate explanation of the searches he conducted. Specifically, the custodian states “the Notice of Review statement of facts clearly identifies that I have conducted more than the required ‘reasonable search’ as defined by sections 53 and 54 of [the *Act*.]” The custodian did not respond to any of the questions posed in the Notice of Review.

[19] In PHIPA Decision 256, I ordered the custodian to submit an affidavit including the following information:

- A statement describing the custodian’s knowledge and understanding of the subject matter of the request;
- Details of any searches carried out including: by whom were they conducted, the date(s) the searches were conducted; what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches. I asked the custodian to please include details of any searches carried out to respond to the request.
- Whether it is possible that responsive records existed but no longer exist. I asked the custodian to provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
- Whether responsive records exist which are not in the custodian’s possession. Whether the custodian searched for those records.

[20] In the representations submitted in response to the interim decision, the custodian confirms he was the husband of Dr. Upfold, who is now deceased. He states he was not employed by Dr. Upfold, nor did he have any knowledge of her patients other than those involved in their personal lives. The custodian submits “it could be [argued] quite persuasively that [he is] under no legal obligation to address this matter at all” because

² Orders P-624 and PO-2559.

³ Order PO-2554.

he was not an employee of Dr. Upfold.

[21] The custodian acknowledges he made a "non-contractual and uncompensated commitment" to Dr. Upfold to be the custodian of her records after her death. The custodian submits he did not foresee he "would have to deal with this time-consuming case." In any case, the custodian submits Dr. Upfold showed him where all her records were kept and explained her obligations regarding providing copies of medical records if requested by a patient.

[22] The custodian submits that on July 26, 2024, after the issuance of PHIPA Decision 256, he "duplicated the extensive and exhaustive search for the records" as described in the Overview above. He submits he searched Dr. Upfold's office and behind the filing cabinets as before. The custodian submits he did not locate any records relating to the complainant.

[23] The custodian submits he does not know whether the complainant's records exist. However, if they do, the custodian submits he does not have access to them. The custodian submits he has records dating from the time Dr. Upfold began her practice and there is no evidence any records were destroyed, nor did Dr. Upfold advise him about any destruction of records. The custodian submits it is his understanding that it was Dr. Upfold's policy and practice to maintain her records indefinitely.

[24] The custodian submits the relationship between the complainant and Dr. Upfold deteriorated and Dr. Upfold may have referred the complainant to another physician. The custodian submits he is not aware if the complainant decided to go to another physician. However, the custodian submits the most probable reason no records relating to the complainant exist in Dr. Upfold's records is that they were transferred to another physician.

[25] In response, the complainant submits the custodian did not conduct a reasonable search for responsive records. The complainant submits the custodian demonstrated an "incomplete knowledge of the role of [health information custodian] and a disinterest in carrying out the related tasks." The complainant submits the custodian misrepresented her relationship with Dr. Upfold in his representations to discredit her and her version of events.

[26] The complainant asserts that as a health information custodian, the custodian has a legal obligation to safeguard Dr. Upfold's patient records and provide copies as request. The complainant submits the custodian is legally required to provide copies of her records to her because he accepted the role of health information custodian over Dr. Upfold's records. The complainant further states that she asked her family doctor to request a copy of her medical records from the custodian. However, the custodian did not respond to the complainant's family doctor's request for records.

[27] The complainant submits the custodian did not complete a thorough search of

records for the following reasons:

- When she submitted her initial request in December 2021, the custodian stated that her file was “quite large” and quoted a fee of \$250 for providing copies. The complainant found the fee to be too high and contacted the IPC for guidance. When the IPC notified the custodian of the fee schedule, the complainant submitted a second request. However, after receiving the second request, the custodian advised the complainant the file with her name contained the records of another patient. The complainant disputes the custodian’s claim, arguing that Dr. Upfold was highly organized with great attention to detail and was committed to her patients’ privacy.
- The complainant submits she was Dr. Upfold’s patient for nearly six years, and it is not possible that all her medical records could have gone missing.
- The complainant reiterates Dr. Upfold was a “consummate professional” and she saw Dr. Upfold take notes during and/or after every session. The complainant submits Dr. Upfold referred to her records when prescribing new medication or refilling old prescriptions. Therefore, the complainant submits her records certainly existed and the custodian has not provided a satisfactory explanation as to why none of her records were located.
- Contrary to the custodian’s claim, the complainant submits Dr. Upfold did not refer her patients to new physicians. The complainant submits there are “virtually no” doctors with Dr. Upfold’s specialty, and it would not have been possible for her treatment to be transferred to another physician. In any case, even if there was a referral to a new physician, the complainant submits the CPSO requires a physician to record referral information and retain original records.

[28] The complainant submits the custodian is withholding her records. She also submits this situation is “highly distressing” and she is extremely concerned that her medical records that relate to nearly six years of weekly psychotherapy sessions are in the sole custody of the custodian.

Analysis and finding

[29] The IPC considered the issue of responsible search for responsive records under the *Act* in PHIPA Decision 18. In that decision, the adjudicator reviewed and applied the principles regarding the issue of reasonable search under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator found the *Act* 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 it made a reasonable effort to identify and locate responsive records.⁴ To be responsive, a record must be “reasonably related” to the

⁴ Orders P-624 and PO-2559.

request.⁵

[30] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁶ A further search will be ordered if the custodian does not provide sufficient evidence to demonstrate it made a reasonable effort to identify and locate all the responsive records within its custody or control.⁷

[31] Although a complainant will rarely be able to indicate precisely which records the custodian has not identified, the complainant must still provide a reasonable basis for concluding that such records exist.⁸

[32] I find the search for records responsive to the complainant's request does not meet the threshold for being "reasonable." The custodian appears to have simply duplicated the searches he conducted in response to the original request. He does not appear to have expanded his search in response to PHIPA Decision 256. In addition, I find the complainant established a reasonable basis for concluding that responsive records should exist. Specifically, I find it improbable that the custodian has no records relating to the complainant's medical history after nearly six years of weekly treatment with Dr. Upfold. Second, I find the custodian did not provide sufficient evidence to demonstrate he made a reasonable effort to search for responsive records.

[33] I acknowledge that, in response to PHIPA Decision 256, the custodian provided information explaining the searches he conducted. I also accept the custodian conducted another search for responsive records but did not locate any. However, I reviewed the custodian's representations and find he does not provide sufficient information to demonstrate that he conducted a reasonable search for responsive records. It appears the custodian claims the medical records relating to the complainant for a nearly six-year period simply disappeared even though Dr. Upfold was a diligent physician, by all accounts.

[34] Furthermore, the custodian did not provide any evidence to demonstrate anything more than a cursory knowledge of Dr. Upfold's practice and the way she maintained her records. I note that in paragraph 40 of PHIPA Decision 256, I stated, "Should the custodian require further guidance regarding his responsibilities under the *Act*, it is suggested that he contact the College of Physicians and Surgeons of Ontario [the CPSO]." It does not appear the custodian made any effort to seek the assistance or guidance of the CPSO regarding his responsibilities under the *Act*.

[35] In fact, the custodian suggests he is under no legal obligation to search for or locate the complainant's medical records in response to her request. I note the custodian

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

⁸ Order MO-2246.

claims he made a “non-contractual and uncompensated” commitment to Dr. Upfold to manage her medical practice records. It is unclear what the custodian means by this. It would have been wise for the custodian to fully consider his obligations under the *Act* prior to making this commitment to Dr. Upfold. Specifically, I note that, as the health information custodian with custody or control of Dr. Upfold’s medical practice records, the custodian has a legal obligation to provide the complainant with access to records containing her personal health information.⁹ I also note under section 52(7) of the *Act*, a health information custodian has “a legal duty to provide, in a manner that is not inconsistent with this *Act*, personal health information as expeditiously as is necessary for the provision of health care to the individual.” In other words, because the custodian assumed the custody or control over Dr. Upfold’s medical records, he also assumed the legal responsibility to provide individuals such as the complainant with access to their own personal health information in accordance with the *Act*.

[36] It is highly implausible that Dr. Upfold maintained no records relating to over five years of treatment of the complainant. Given these circumstances and upon review of the custodian’s representations, I find there is insufficient evidence for me to conclude the custodian’s search for responsive records was reasonable.

[37] Furthermore, I find the complainant provided ample evidence to establish a reasonable basis for her belief that Dr. Upfold created and maintained records relating to the complainant’s medical history and treatment. Both parties agree Dr. Upfold was a diligent physician and followed best practices in creating and maintaining records in relation to her patients’ care. The complainant also confirmed Dr. Upfold did not refer or transfer her care to another physician and therefore would not have transferred either her original medical records or their copies another physician. It is also striking the custodian, in response to the complainant’s original request, advised her that her patient file was quite large but then found no records after the IPC required him to reduce the fee to be charged to produce the responsive records. Given these circumstances, I find the complainant provided a reasonable basis to conclude there should be records relating to the complainant’s care under Dr. Upfold in the custodian’s custody or control.

[38] However, given the tenor of the custodian’s representations and his claim that he has under no legal obligation to locate the complainant’s medical records and takes issue with having to deal with this complaint, I find no useful purpose would be served by ordering the custodian to conduct a further search.

[39] I appreciate how distressing it is for the complainant to be unable to access her personal and sensitive medical records relating to nearly six years of treatment with Dr. Upfold. Unfortunately, in these circumstances, I am limited to only requiring the custodian to conduct another search for records and it is my belief the custodian will not provide further information or assistance regarding the complainant’s medical records given the

⁹ Section 52(1).

representations he submitted in response to PHIPA Decision 256.

[40] Therefore, I find the custodian did not conduct a reasonable search for responsive records but will not order him to conduct a further search.

NO ORDER:

I make no order and dismiss the complaint.

Original Signed by: _____
Justine Wai
Adjudicator

_____ October 24, 2024