

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 267

Complaint HA21-00236

Hamilton Health Sciences

November 25, 2024

Summary: The complainant asked for access to her child's patient records on her child's behalf. Hamilton Health Sciences granted access to some records, but withheld information in the records regarding its communications with a children's aid society. It claimed that granting access to the withheld information could reasonably be expected to result in a serious risk of harm to the child's treatment or recovery, within the meaning of the exemption in section 52(1)(e)(i) of *PHIPA*.

In this decision, the adjudicator accepts that the withheld information is exempt, and she dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3 Sch A, sections 4(1)(a) and (b), and 52(1)(e)(i).

OVERVIEW:

[1] The complainant¹ sought access, on her child's behalf, to her child's patient records from Hamilton Health Sciences (the custodian) under the *Personal Health Information Protection Act, 2004 (PHIPA)*. The custodian accepted the complainant's authority as a substitute decision-maker for her child under *PHIPA*² and granted her access to some of

¹ The access request was signed by both of the patient's parents, but only the complainant participated in the complaint.

² It is undisputed that the complainant is an authorized substitute decision-maker for her child under *PHIPA*. Although the parties do not address this issue in their representations, section 23(1)2 of *PHIPA*, authorizing

her child's records.

[2] The custodian withheld some nursing and physician notes in the records that detailed its communications with a children's aid society. To withhold those parts of the records, the custodian relied on two exemptions to the right of access: sections 52(1)(e)(i) (serious harm to the treatment or recovery of an individual) and 52(1)(e)(iii) (identification of a person who provided the information in confidence).

[3] The complainant was dissatisfied with the custodian's decision and filed a complaint about it with the Information and Privacy Commissioner of Ontario (IPC). The IPC attempted to mediate the complaint. At the end of mediation, the sole issue in the complaint was whether the complainant, exercising her child's right of access, should be granted access to the information that the custodian has withheld under sections 52(1)(e)(i) and (iii) of *PHIPA*.

[4] The complaint was then transferred to adjudication and an IPC adjudicator conducted a review. The parties provided written representations to the IPC adjudicator. The IPC adjudicator accepted that part of the custodian's representations – describing the withheld information – satisfied the IPC's confidentiality criteria for the sharing of representations, and she withheld that part as confidential. The IPC adjudicator shared the custodian's non-confidential representations with the complainant. The complaint was then assigned to me to continue the adjudication.

[5] In this decision, I uphold the custodian's claim of section 52(1)(e)(i) of *PHIPA* to the withheld information, and I dismiss the complaint.

RECORDS:

[6] The records at issue are nursing and physician chart notes that relate to the custodian's communications with a children's aid society.

DISCUSSION:

Issue A: Preliminary finding: the withheld information is personal health information, and the *Act* applies to it

[7] In its representations, the custodian asserts that the records at issue do not contain personal health information within the meaning of section 4 of the *Act* because they are not dedicated primarily to the provision of health care; rather, the withheld records were created to fulfill a legal obligation – the custodian's duty to report concerns about the patient's safety and well-being to the children's aid society under section 125(1)

a parent of a child who is less than 16 years of age to consent on the child's behalf, is the applicable provision.

of the *Child, Youth and Family Services Act, 2017*.³

[8] Having examined the withheld information, I disagree. The withheld information falls within sections 4(1)(a) and (b) of the definition of personal health information in *PHIPA*. It is identifying recorded information about the patient that relates to the patient's physical and mental health [section 4(1)(a)] and to the providing of health care to the patient, including the identification of those providing health care to the patient [section 4(1)(b)]. I find that the records at issue are all records of personal health information and that *PHIPA* applies to them.

Issue B: The exemption at section 52(1)(e)(i) of *PHIPA* applies to the withheld information

[9] The right of access is set out at section 52(1) of *PHIPA*. Sections 52(1)(a) through (f) list exemptions from the right of access. The custodian claims two of those exemptions apply in this complaint. The first one is section 52(1)(e)(i), which reads:

Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

(e) granting the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person[.]

[10] The purpose of section 52(1)(e)(i) is to protect the treatment, recovery and physical security of a patient and others. Past IPC decisions have confirmed that the standard of proof the custodian must meet to establish the application of this exemption is a demonstrable risk of harm that is well beyond the merely possible or speculative, although the evidence need not prove that granting access will in fact result in such harm.⁴

[11] The custodian provides confidential and non-confidential representations on its claim of this exemption. Although I have considered all the representations before me, including the confidential ones, I describe only the non-confidential representations in this decision.

[12] The custodian states that, before deciding to claim the section 52(1)(e)(i) exemption, it consulted members of the patient's health care team about granting access to the withheld information in the records. It explains that the professional opinion of the patient's health care team is that granting access could reasonably be expected to result

³ SO 2017, c 14, Sch 1. (the *CYFSA*)

⁴ See *PHIPA* Decisions 34, 90 and 100.

in a risk of serious harm to the patient's treatment or recovery. In its confidential representations, the custodian provides additional information to support its claim of section 52(1)(e)(i) to withhold the information at issue.

[13] Regarding its exercise of discretion to withhold the information under section 52(1)(e)(i), the custodian submits that it spent some time considering the records and consulting with the health care team to determine the level of harm that could reasonably be expected if it granted access to the withheld information. The custodian states that it also considered the backlash that its child abuse assessment program team has experienced from parents who disagree with a decision to report to a children's aid society.

[14] The complainant's representations do not directly address this issue or the custodian's non-confidential representations on it. Rather, they describe the complainant's reasons for wanting to know what is in the withheld information and her concerns with the custodian's decision to contact the children's aid society. The complainant's representations include copies of her communications with the custodian and others about her child's treatment history.

[15] Having examined the withheld information and considered the parties' complete representations, I agree with the custodian's claim of the section 52(1)(e)(i) exemption. I accept the health care team's assessment regarding its former patient, the complainant's child, that granting access could reasonably be expected to result in a risk of serious harm to the child's treatment or recovery. I am also satisfied that the custodian took relevant factors into consideration in exercising its discretion to withhold the information at issue, while granting access to the remaining information in the patient's records. Again, I note that there are confidential representations that I accept that I am not able to share in this decision. I find that the exemption in section 52(1)(e)(i) applies to the withheld information, and I uphold the custodian's exercise of discretion under this exemption as appropriate.

[16] Because I have found that section 52(1)(e)(i) applies to the withheld records and I have upheld the custodian's exercise of discretion in claiming it, I need not address section 52(1)(e)(iii).

ORDER:

I uphold the custodian's decision and dismiss this complaint.

Original Signed by: _____
Stella Ball
Adjudicator

November 25, 2024 _____