

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 272

Complaint HA22-00103

Dr. Kathy Kaye

February 13, 2025

Summary: The complainant made an access request to a doctor for records relating to his child's health care. The doctor located and granted access to records. The complainant filed a complaint based on his belief that additional records should exist.

In this interim decision, the adjudicator finds that there is insufficient evidence to conclude that the doctor conducted a reasonable search and orders the doctor to conduct another search.

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

OVERVIEW:

[1] The complainant made an access request to a doctor (the custodian) under the *Personal Health Information Protection Act, 2004* (PHIPA or the *Act*) for all records relating to his child's health care. In his request, the complainant alleged that the custodian had concealed records when responding to a previous access request, also for his child's records.

[2] In addition to his request for records relating to his child's health care, the complainant asked the custodian to clearly identify all alterations and entries made to the records after a specified date. The complainant also asked the custodian to transcribe any illegible portions of the records and to confirm in writing that she provided a copy of all of her records.

[3] The custodian responded by expressing her disagreement with the complainant's assertions. The custodian indicated that her response to the College of Physicians and Surgeons of Ontario (CPSO), which the complainant received, already included an explanation in response to the complainant's concerns. The custodian also confirmed that the Record of Investigation provided to the complainant by the Health Professions Appeal and Review Board (HPARB) contains a complete copy of the records. Nevertheless, the custodian provided another copy of the records to the complainant, along with a transcription of her handwritten notes.

[4] The complainant filed a complaint with the Information and Privacy Commissioner of Ontario (IPC) regarding the custodian's decision.

[5] As mediation did not resolve the complaint, the file was transferred to the adjudication stage of the complaint process where an adjudicator may conduct a review under *PHIPA*. The adjudicator originally assigned to the complaint sought and received representations from the custodian and the complainant.

[6] The complaint was subsequently transferred to me to continue the review. After reviewing the parties' representations, I sought and received additional representations from both parties.

[7] For the reasons that follow, I find that I have insufficient evidence to conclude that the custodian's search for records was reasonable. I order the custodian to conduct a further search for records and to provide me with a written explanation of her search efforts and the results of her search.

DISCUSSION:

[8] The sole issue to be determined in this complaint is whether the custodian conducted a reasonable search for records responsive to the complainant's request.

[9] Where a complainant 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*. If the IPC is satisfied that 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.

[10] Previous IPC decisions have found that the principles established in reasonable search orders issued under the *Freedom of Information and Protection of Privacy Act (FIPPA)* and its municipal equivalent, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* provide guidance in determining whether a custodian has conducted a reasonable search under *PHIPA*.¹

¹ PHIPA Decisions 17 and 18.

[11] These decisions establish that *PHIPA* 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 that she made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be “reasonably related” to the request.³

[12] 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.⁴

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

Representations

Background and previous request

[14] Both the custodian and the complainant’s representations make detailed reference to a previous access request to the custodian, also for the complainant’s child’s records. Although this previous access request is not the subject of this appeal, I will briefly summarize the parties’ representations regarding the previous request in order to provide context to the present access request and appeal.

[15] In 2020, the complainant’s child made the following request to the custodian:

I am requesting a copy of all files dealing with your evaluations of my health that are in your possession.⁶

[16] Following the request, the complainant confirmed receipt of what he considered to be a portion of the responsive records (i.e. only records authored by the custodian). The complainant advised the custodian of his belief that he should have also received records in the custodian’s possession which were authored by other physicians.

[17] The parties disagree on how the request ought to have been interpreted and characterize the events that followed differently. The custodian submits that the original consent from the complainant’s child did not encompass records authored by other physicians. The custodian states that she advised the complainant that his child would need to provide a further, broader consent before she could disclose additional records.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909; PO-2469; PO-2592.

⁵ Order MO-2246.

⁶ In the request, the complainant’s child consented to having the custodian release the responsive records to the complainant.

[18] The complainant submits that records authored by other physicians are clearly responsive to the request and should have been disclosed. The complainant disputes the need for an additional consent, citing similar requests that he made to other physicians, the majority of whom responded by providing complete copies of his child's records.

[19] The complainant submits that he was initially told that the custodian was not authorized to release the remainder of the records. The complainant states that he was then told that the custodian could release the remainder of the records, subject to an additional consent. The complainant believes that the custodian's decision to disclose the remainder of the records was not to remedy a misunderstanding or a gesture of goodwill, but because he had submitted a query to the IPC.

[20] Nevertheless, the complainant's child provided an additional consent, and the custodian disclosed records in her possession that were authored by other physicians. The custodian submits that through these two disclosures, she released all of the responsive records in her possession.

[21] After receiving the records, the complainant filed a complaint against the custodian with the CPSO. Subsequently, the complainant requested a review by HPARB. The complainant received a Record of Investigation from HPARB, which contained the custodian's response to the CPSO. The complainant alleges that the custodian's response to the CPSO contains records relating to his child's health care which were not disclosed to him in response to the initial request.

[22] The complainant then made another request to the custodian for records relating to his child's health care, which is the subject of this present appeal.

The custodian's representations

[23] The custodian submits that she conducted a reasonable search. By way of background, the custodian indicates that she retired in 2021 and last assessed the complainant's child in 2013.

[24] In her representations, the custodian provides information about the search that she conducted in response to the 2020 request. The custodian states that at the time of that request, files belonging to patients seen greater than 5 years ago were organized in banker's boxes, which were kept in a secure manner at her residence. The custodian submits that this was the only place where the complainant's child's records were stored.

[25] The custodian submits that she personally searched the boxes and retrieved all of the records in her possession. She then provided the records to an experienced staff member, who photocopied the relevant records and provided them to the complainant. The custodian states that while she initially disclosed only the records that she authored, she later disclosed the remainder of the records in her possession upon receiving a full consent.

[26] The custodian submits that her files are paper-based and that she does not maintain electronic medical records. The custodian submits that she has not destroyed or lost any records. The custodian states that she retains records for 15 years from the date that a patient was last assessed, and that fewer than 15 years have elapsed since she last assessed the complainant's child.

[27] The custodian submits that when it became clear that there was a discrepancy between the intended request and the consent, she and her staff worked with the complainant by explaining what he needed to do in order to receive a complete copy of the records. The custodian indicates that once the further consent was provided, there was no need for further clarification as she had provided all the records in her possession.

[28] The custodian submits that the complainant's claim that he received several different versions of records (with different page counts) is a mischaracterization of the records and the disclosures that have taken place. The custodian reiterates that she initially determined that records authored by other physicians were not responsive to or covered by the original consent. The custodian indicates that once she received a further consent, she disclosed all of the responsive records in her possession.

[29] The custodian explains that additional pages were disclosed in response to the complainant's present request (at issue in this appeal) because she included a newly created transcription of her written notes, which the custodian created and included at the complainant's request.

[30] With respect to the complainant's reference to records that he received from HPARB, the custodian submits that the IPC has previously found that documents in a Record of Investigation from HPARB are not admissible as evidence in a complaint. The custodian cites section 36(3) of the *Regulated Health Professions Act*, which states:

Evidence in civil proceedings

36 (3) No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

[31] Specifically, the custodian submits that in PHIPA Decision 100, the adjudicator found that because proceedings before the IPC are civil proceedings, therefore evidence contained in the Record of Investigation is not admissible in a complaint before the IPC.

[32] Nevertheless, the custodian explains that the records that she provided to the CPSO included communications between the complainant and the custodian regarding the requests, as well as communications between the custodian and the CPSO. The

custodian submits that in addition to providing the CPSO with the complainant's child's health records, she also submitted letters and emails regarding the events that followed the child's discharge from her practice, and that this accounts for any "discrepancy."

[33] The custodian concludes that the complainant has not provided any reasonable basis for believing that additional records exist.

The complainant's representations

[34] The complainant submits that the custodian has not been forthcoming and that he has received different records at different points in time. In particular, the complainant highlights the custodian's response to the initial request, which he argues was incomplete, and the records that he received from HPARB.

[35] The complainant submits that in reviewing the custodian's response to the CPSO, he identified 24 additional pages of records which were not previously disclosed to him following either the first or second request. Contrary to the custodian's claim as set out in her representations, the complainant submits that these include pages that are clearly not communications between him and the custodian or communications between the custodian and the CPSO.

[36] The complainant suggests that it is not reasonable to expect him to identify specific records or types of records that are missing and that by definition, he would not have knowledge of a missing record's contents. The complainant indicates that it is for this reason that he has requested clarification about the records with each disclosure.

[37] The complainant believes that the custodian has intentionally withheld records and questions whether the custodian created additional records to provide to the CPSO to bolster her case. The complainant indicates that when he asked the custodian to identify whether any alterations were made to the records, he did not receive a response.

Analysis and findings

[38] For the reasons that follow, I find that the custodian has not provided enough evidence for me to conclude that she has conducted a reasonable search.

[39] I acknowledge that the custodian has provided information about her search for records. However, based on my review of the representations, almost all of the information appears to relate to the search that the custodian conducted in response to the 2020 request, rather than the search that the custodian conducted in response to the complainant's subsequent request almost two years later, which is at issue in this appeal.

[40] Given my understanding that the 2020 request and the present request involve similar, if not identical records, I have considered whether there is sufficient evidence to support the inference that the custodian conducted the same search on both occasions. However, I am not convinced that all of the information that the custodian provided about

her initial search continues to be relevant.

[41] For instance, the custodian states that in response to the 2020 request, she personally searched for the records, then provided them to an experienced member of staff, who photocopied them and provided them to the complainant. The custodian also states that some time after the 2020 request, but before the present request, she retired and closed her office. While I do not have information about whether the custodian retained her staff after the closure of her office, there seems to be some possibility that this portion of her representations would no longer apply.

[42] I acknowledge that other aspects of the custodian's representations, such as her statements about keeping paper-based files or about her retention policy, may continue to be relevant. At the same time, as I have indicated above, it is conceivable that events taking place between the two requests may have resulted in some variation in the custodian's search. Without explicit indication from the parties, it is difficult to make defensible inferences about which portions of the custodian's representations remain relevant and which do not.

[43] For these reasons, I find that I do not have sufficient evidence to conclude that the custodian conducted a reasonable search. More specifically, I find that I do not have sufficient evidence about the custodian's efforts to identify and locate records that are responsive to the complainant's present request (i.e. the request at issue in this complaint). However, I also note that there is no evidence before me to suggest that the custodian has intentionally withheld records or created additional records to "bolster her case," as the complainant alleges.

[44] Given the above, I do not find it necessary at this time to consider the parties' submissions on the records from HPARB and their admissibility. However, the custodian may wish to consider whether it would be helpful to cross-reference those records in completing the further search and providing an explanation of her search efforts, which I order below.

[45] In conclusion, I find that the custodian has not provided enough evidence for me to conclude that she has conducted a reasonable search. Accordingly, I order the custodian to conduct a further search for responsive records and to provide an explanation of that search.

ORDER:

For the foregoing reasons, pursuant to section 61(1) of the *Act*,

1. I order the custodian to conduct a further search for records responsive to the complainant's access request within **30 days** of the date of this decision.

2. I order the custodian to provide me with a detailed explanation of her search efforts within **30 days** of the date of this decision. This explanation should be in the form of an affidavit sworn by the individual(s) who conducted the search and must include, at minimum:
 - The name and position of the individual(s) who conducted the search and a statement describing their knowledge and understanding of the subject matter of the request;
 - The steps taken in conducting the search, including the locations that were searched, the individuals contacted in the course of the search, the types of records that were searched, and the results of the search.
 - Whether it is possible that such records existed but no longer exist. The custodian is asked to provide details of when any such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules.

I will share the custodian's explanation with the complainant, subject to the IPC's confidentiality criteria set out in *Practice Direction 7*. The custodian should indicate her position on sharing.

3. I order the custodian to issue an access decision to the complainant with respect to any further records that are found as a result of the search ordered in Order Provision 1. The custodian must issue the decision in accordance with the provisions of the *Act* and within **30 days** of the date of this decision.
4. I reserve the right to require the custodian to provide me with a copy of the access decision referred to in Order Provision 3.
5. I remain seized of this complaint to deal with any other outstanding issues arising from this decision.

Original Signed by: _____
Anda Wang
Adjudicator

February 13, 2025 _____