

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 286

Complaint HA22-00102

Dr. Jatinder Takhar

June 24, 2025

Summary: The complainant is the father of a patient of Dr. Takhar. Under the *Personal Health Information Protection Act, 2004 (PHIPA)*, the father, on behalf of the patient, asked the doctor for a copy of all records in the doctor's possession relating to her provision of care to the patient. The father filed a complaint under *PHIPA* about the doctor's decision to withhold discrete portions of the records on legal privilege grounds (section 52(1)(a) of *PHIPA*). He also believes there must exist records of interviews conducted with and about the patient, including interview notes, scripts, and recordings, which the doctor has not identified or located.

In this decision, the adjudicator upholds the doctor's access decision. She finds that legal privilege applies to the withheld portions of two pages of records, and that the doctor conducted a reasonable search for responsive records in the doctor's custody or control. She dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, sections 2 (definitions), 3(1), 4, 5(1), 23(1), 25, 52(1)(a), 53, and 54; *Regulated Health Professions Act, 1991*, SO 1991, c 18, section 36(3).

Decisions Considered: PHIPA Decision 232.

OVERVIEW:

[1] The complainant in this matter is the father of a patient of Dr. Jatinder Takhar (the doctor). In this complaint, the parties agree that the father is a lawfully authorized substitute decision-maker for the patient for the purposes of the *Personal Health*

Information Protection Act, 2004 (PHIPA), and in this capacity may make an access request under *PHIPA*, on the patient's behalf, for records of the patient's personal health information.¹

[2] On the patient's behalf, the father asked the doctor for a copy of all records in the doctor's possession relating to her provision of care to the patient. The request read as follows (emphasis father's):

I am requesting that:

(i) You provide a copy of ALL YOUR RECORDS dealing with [the patient's] health care including your notes, referrals, lab tests, audio recording[s] and their transcriptions and so on, regardless of who created these records.

(ii) I request that all alterations and entries made in the records after [a specified date] be clearly identified.

(iii) I request that you provide a transcription of your records which are illegible.

(iv) I request that you confirm in writing that you have provided a copy of ALL YOUR RECORDS.

[3] In response, legal counsel for the doctor noted that the father had received a copy of records in the doctor's possession in the context of a proceeding before the Health Professions Appeal and Review Board (HPARB).² The HPARB proceeding arose from the father's complaint to the College of Physicians and Surgeons of Ontario (the College) about the doctor.

[4] Separately, in response to the father's access request under *PHIPA*, counsel for the doctor provided the father with "another copy of the records in [the doctor's] possession along with a transcription of the handwritten notes made by [the doctor]." This release consists of 58 pages of records.

[5] The father was dissatisfied with this response and filed a complaint with the Office of the Information and Privacy Commissioner of Ontario (IPC).

[6] The father takes issue with the doctor's decision to withhold portions of two pages of records under section 52(1)(a) of *PHIPA*, which is an exemption from the right of access in *PHIPA* that applies to information subject to a legal privilege.

[7] The father also alleges that the copy of records he received from the doctor in

¹ Sections 5(1), 23(1)1, 25, 52, and 53 of *PHIPA*.

² HPARB is an independent adjudicative agency that, among other duties, reviews decisions made by the Inquiries, Complaints and Reports Committees of the self-regulating health professions colleges in Ontario.

response to his *PHIPA* request is incomplete, because it does not include additional records that he believes ought to exist. Specifically, he believes there are notes, scripted questions, audio and/or video recordings, and other records relating to interviews conducted with and about the patient.

[8] As these issues could not be resolved through mediation, the file was moved to the adjudication stage of the complaint process. I conducted a review of the matter, during which I sought and received the parties' representations, and shared them in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*.

[9] In this decision, I explain why I uphold the doctor's access decision and dismiss the complaint.

RECORDS:

[10] At issue in this complaint are the doctor's severances to pages 37 and 38 of the 58-page file to which the doctor otherwise granted full access under *PHIPA*.

[11] Also at issue are the additional records that the father believes are responsive to his access request and that the doctor has not identified or released to him. These include written notes, interview scripts and questions, and audio and/or video recordings of two interviews concerning the patient.

ISSUES:

- A. Does the exemption at section 52(1)(a) of *PHIPA* for records subject to legal privilege apply to the withheld portions of pages 37 and 38?
- B. Did the doctor conduct a reasonable search for responsive records in her custody or control?

DISCUSSION:

Preliminary Issues

[12] Section 52 of *PHIPA* grants an individual a right of access, subject to limited exceptions, to records of an individual's "personal health information" that are in the custody or under the control of a "health information custodian." The right of access may be exercised by a lawfully authorized substitute decision-maker for the individual. As noted, the parties agree that the father is a lawfully authorized substitute-decision maker for the patient for the purposes of *PHIPA*.

[13] “Personal health information” is defined in section 4 of *PHIPA* to include identifying information about an individual that relates to the individual’s physical or mental health (paragraph (a) of the definition at section 4(1) of *PHIPA*); and to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual [paragraph (b)]. It also includes other identifying information about the individual contained in a record that contains personal health information of the type enumerated in section 4(1) of *PHIPA* [section 4(3)]. The parties do not dispute that the records at issue in this complaint are or would be records of “personal health information” of the patient, within the meaning of that term in *PHIPA*.

[14] Finally, based on the information before me, I shared with the parties my understanding that the doctor has in her possession records of the patient’s personal health information that are distinct from records of the patient’s personal health information in the custody or control of the hospital at which the doctor practises, where the patient also received health care. It is my understanding that the father made an access request under *PHIPA* to the hospital for those latter records, and that the hospital’s decision on that request is not at issue in this complaint.

[15] During the review, the parties confirmed my understanding of the facts.

[16] This complaint therefore concerns issues arising from the doctor’s decision on the father’s request (made on the patient’s behalf) for access to records of the patient’s personal health information in the doctor’s custody or control in her capacity as a “health information custodian.”³ The father’s separate request to the hospital for access to records in the hospital’s custody or control, in respect of which the doctor may be an agent within the meaning of *PHIPA*,⁴ is not at issue in this complaint.

[17] The issues in this complaint are the following:

- the doctor’s application of the section 52(1)(a) exemption to withhold access to portions of records in the doctor’s custody or control; and
- the reasonableness of the doctor’s search for responsive records in her custody or control.

A. Does the exemption at section 52(1)(a) of *PHIPA* for records subject to legal privilege apply to the withheld portions of pages 37 and 38?

[18] The doctor withheld portions of two pages of the patient’s records, citing the

³ The term is defined in section 3(1) of *PHIPA* to include “a health care practitioner” (at paragraph 1 of the definition). The terms “health care” and “health care practitioner” are further defined in section 2 of *PHIPA*. This definition is subject to some exceptions, including one discussed in the next footnote.

⁴ *PHIPA* sets out an exception to the definition of health information custodian for a health care practitioner who is an “agent” of another health information custodian: section 3(3)1 of *PHIPA*. (I discuss the definition of “agent” at footnote 20.) This distinction is relevant because, among other things, the custodian remains responsible for personal health information handled by its agents [sections 17(1) and 17(3)(b)].

exemption at section 52(1)(a) of *PHIPA*. This section states:

Subject to this Part [Part V of *PHIPA*, which sets out the rights of access and correction], 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 [...] the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual[.]

[19] The term “legal privilege” is expansive, covering a number of legally recognized privileges, such as solicitor-client privilege, litigation privilege, and settlement privilege.⁵

[20] Through counsel, the doctor describes the information withheld on pages 37 and 38 as her notes on legal advice she received about her interactions with the father. I understand the doctor to be claiming solicitor-client communication privilege for these withheld portions.

[21] Common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.⁶ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.⁷ The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.⁸

[22] The father makes no substantive representations on this issue, and relies on my assessment of the doctor’s legal privilege claim.

[23] I have examined the withheld information on these pages, and I agree with the doctor’s description of it. The withheld information reveals communications of a confidential nature between the doctor and her legal counsel, made for the purpose of seeking or giving legal advice. This type of information is protected by solicitor-client communication privilege, and there has been no waiver of privilege by the doctor, who is the privilege-holder.

[24] I thus uphold the doctor’s section 52(1)(a) exemption claim to withhold these portions of the records.

⁵ Perun, Halyna et al., *Guide to the Ontario Personal Health Information Protection Act* (Toronto: Irwin Law, 2005) at pages 523-524.

⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

⁸ Orders PO-2441, MO-2166, and MO-1925.

B. Did the doctor conduct a reasonable search for responsive records in her custody or control?

[25] Under this heading, I will consider the father's claim that there must exist additional responsive records in the doctor's custody or control that she has not identified or located in response to his access request. Specifically, the father believes there ought to exist written notes, scripted questions, audio and/or video recordings, and other records of two interviews involving the patient.

[26] I summarize the father's evidence for his belief as follows:

[27] With respect to the first interview (an in-person interview of the patient conducted on a specified date by the doctor; a resident; and a medical student) the father makes the following assertions:

- That the patient recalls the resident read scripted questions to the patient and recorded the patient's answers by hand;
- That the patient recalls the doctor also recorded the patient's answers by hand, and at times posed additional questions to the patient; and
- That some form of electronic recording of the interview was done. This is based on the father's observation that the doctor's assessment (prepared after the interview) "makes reference to recordings/dictations."

[28] With respect to the second interview (a telephone interview of his spouse conducted on a specified date by a medical student), the father makes the following assertions:

- That a medical student read scripted questions to his spouse; and
- That the medical student recorded in some fashion (either in writing or through a mechanical/electronic device) the answers given by his spouse, without seeking the spouse's permission to make such a recording.

[29] Because the father asserts that the records he seeks are (or reasonably ought to be) in the doctor's custody or control, the issue to be decided is whether the doctor conducted a reasonable search for responsive records, as required by sections 53 and 54 of *PHIPA*. These sections address the written request that an individual may make to a custodian to exercise a right of access to records, and the obligations on the custodian in responding to the access request.

[30] Sections 53 and 54 require the custodian to make reasonable efforts to identify and to locate requested records. 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.

[31] In PHIPA Decisions 17, 18, and later decisions,⁹ the IPC found applicable to *PHIPA* the principles outlined in IPC orders that address the issue of reasonable search under the *Freedom of Information and Protection of Privacy Act (FIPPA)* and its municipal counterpart. These decisions establish that *PHIPA* 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 that it has made a reasonable effort to identify and locate responsive records.¹⁰

[32] 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.¹¹ A further search will be ordered if the custodian does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all the responsive records within its custody or control.¹²

[33] 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.¹³

[34] During the review, I asked the doctor to explain whether it is her position that the additional records identified by the father do not exist and/or should not reasonably be expected to exist in her custody or control, and, if not, why not. In addition, to determine whether the doctor conducted a reasonable search as required by *PHIPA*, I asked her to provide a written summary of all the steps she took in response to the request.

[35] Through counsel, the doctor explains that the responsive records are physical records securely stored in a filing cabinet in her office at the hospital. She says this is the only location in which she maintains records in respect of which she is the custodian.¹⁴ She explains that in response to the father's access request, she searched the filing cabinet and located responsive records covered by the request. The doctor's position is that (with the exception of the two pages of records discussed at Issue A) she has provided the father with complete copies of all responsive records in her possession relating to her provision of care to the patient.

[36] In response to the father's claim about the existence of additional interview records, the doctor says she does not use scripts for clinical interviewing, and as such does not have a script of questions for the first interview (at which the doctor was present). The doctor also says she does not have in her possession any handwritten

⁹ Among them, PHIPA Decisions 43, 48, 52 and 57.

¹⁰ Orders P-624 and PO-2559; PHIPA Decisions 17 and 18.

¹¹ Orders M-909, PO-2469 and PO-2592.

¹² Order MO-2185.

¹³ Order MO-2246.

¹⁴ These records are distinct from the patient's records in respect of which the hospital is the custodian, which are stored in the hospital's electronic medical records system and are not at issue in this complaint. See the discussion at paragraphs 14-16 of this decision.

notes, scripted questions, or recordings of the second interview (conducted by a medical student, at which the doctor was not present).

[37] In addition, the doctor says that she does not have audio recordings of any kind (including of any clinical interview or dictation) relating to the patient, and does not have video recordings of the interviews. She observes that the hospital's electronic medical records system includes a system for dictation of patient consultation notes, and refers any questions about this system to the hospital (which would have custody or control of any resulting audio recordings). The doctor notes that records pertaining to both interviews exist in the form of contemporaneous consultation notes, which is the standard documentation arising out of these types of interviews. She observes that consultation notes for both interviews were already provided to the father in response to his access request.

[38] Finally, the doctor says she is not aware of any responsive records that once existed but no longer exist.

[39] The father challenges the doctor's assertion that there are no additional interview records. His evidence includes affidavits from the patient and the spouse describing their recollections of the interviews, including their accounts that the interviewer(s) appeared to be consulting notes or papers.

[40] More generally, the father questions how the doctor was able to form opinions or make diagnoses of the patient without "records of investigations" on which to base those diagnoses. In addition, with respect to the second interview (which was conducted by a medical student), the father questions how the student would have been able to conduct the interview without specific instructions from the doctor, including about the questions to pose.

[41] The father analogizes the records he believes must exist to medical tests without which a medical professional would be unable to form opinions or make diagnoses. He proposes that if the records he seeks do not exist, then the doctor may have committed medical malpractice by making an unsupported diagnosis. He suggests this raises questions about whether the doctor engaged in fraudulent billing practices.

[42] The father makes other assertions about the doctor's lack of credibility, including based on what he identifies as inconsistencies in the doctor's explanations to the College, HPARB, and the IPC about the existence, purpose, and completeness of the patient's records in her possession. In support of these assertions, and his broader allegations about the doctor's conduct and her motivations in this complaint, the father provided excerpts of documents from the College proceeding involving the parties.

[43] As I noted to the parties during the review, section 36(3) of the *Regulated Health*

*Professions Act, 1991 (RHPA)*¹⁵ makes inadmissible in IPC proceedings certain materials from proceedings under the *RHPA*, such as proceedings of some regulatory colleges.¹⁶ Given this prohibition, I have not relied on the documents submitted by the father. I have, however, considered as a whole all the evidence he provided in support of a broader claim that the doctor's actions contravened *PHIPA*.

[44] The issue before me is whether the doctor conducted a reasonable search for responsive records in her custody or control, in accordance with her obligations under *PHIPA*. After considering both parties' representations on this issue, I asked the doctor to provide more details about her search for any responsive records outside her possession that may nonetheless be in her custody or control. Specifically, I asked the parties to address whether the doctor conducted a reasonable search in respect of responsive records that may be in the possession of third parties, such as the medical resident and the medical student involved in the interviews.

[45] In asking for representations on this topic, I explained that while "custody" and "control" are not defined terms in *PHIPA*, the IPC has interpreted these terms in *PHIPA* in a manner consistent with the broad and liberal approach it takes to interpreting these same terms in *FIPPA* and its municipal counterpart, and in the *Child, Youth and Family Services Act, 2017*.¹⁷ Specifically, in *PHIPA* Decision 232, the IPC observed that factors applicable in determining whether or not a record is in the custody or control of an organization under those statutes can be relevant in assessing the analogous question under *PHIPA*.¹⁸

[46] In the circumstances of that decision, the IPC found the following factors (among others) to be relevant in deciding whether records at issue were in the custody or control of a health information custodian:

- Whether the record was created by the custodian (or an agent of the custodian);
- The use the creator intended to make of the record;
- Whether the custodian had a statutory power or duty to carry out the activity that resulted in the creation of the record, and whether that activity was a "core," "central" or "basic" function of the custodian;

¹⁵ SO 1991, c 18. Section 36(3) of the *RHPA* states: "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."

¹⁶ *PHIPA* Decision 80, followed in *PHIPA* Decisions 100, 172, and many others.

¹⁷ See *PHIPA* Decisions 232, 253, 254, and 255, among others.

¹⁸ *PHIPA* Decision 232, paras 58-62.

- Whether the content of the record related to the custodian's mandate and functions;
- Whether the custodian has a right to possession of the record;
- The extent to which the custodian had the authority to regulate the record's content, use, and disposal; and
- The extent to which the custodian had relied on the record.

[47] In determining whether records are in the "custody" or under the "control" of a custodian, the decision-maker must consider relevant factors contextually in light of the purpose of the legislation.¹⁹

[48] The doctor made a primary argument that any responsive records created by and/or in the possession of third parties (i.e., the medical resident and the medical student involved in the interviews) are not in her custody or control. Among her reasons are that these third parties are not her employees and do not have an obligation to act in her best interest, and that any such records would have been created without her knowledge.

[49] It is unnecessary to canvass these arguments in detail, because I agree with the father that any responsive records in the possession of a third party like the medical resident or the medical student would be records in the custody or control of the doctor. This is because I conclude that whether or not the doctor specifically knew of or directed the creation of any such records, they would have arisen in the context of the third party's role as an agent of the doctor within the meaning of *PHIPA*.²⁰

[50] In this role, any collection, use, or disclosure of the patient's personal health information by the third party would have been done on behalf of the doctor, in support of the doctor's providing of health care to the patient, and not for the third party's own purposes. In these circumstances, any responsive records created by and/or in the possession of the third party would be records in the doctor's custody or control, and thus records in respect of which the doctor would have obligations under *PHIPA*.

[51] In this case, however, I am satisfied by the doctor's evidence that she conducted a reasonable search for responsive records, including any such records outside her possession. The doctor's evidence (offered in the alternative to her primary argument) is

¹⁹ PHIPA Decision 232, noting that the court adopted this approach to the question of custody or control under the *Municipal Freedom of Information and Protection of Privacy Act* in *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div Ct), leave to appeal refused (March 30, 2011), Doc. M39605 (CA).

²⁰ The term "agent" is defined at section 2 of *PHIPA* to mean, in relation to a health information custodian, "a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent's own purposes, whether or not the agent has the authority to bind the custodian, whether or not the agent is employed by the custodian and whether or not the agent is being remunerated."

that she asked the medical resident to provide any responsive records relating to the patient in the medical resident's possession, care, or control, and that the medical resident reported having no such records. With respect to the medical student, the doctor says she has no contact information for the student, who may have moved to the United States.

[52] More broadly, the doctor maintains that she has no knowledge of any additional responsive records, including any interview records created and/or held by third parties, that she has not already produced in response to the father's access request.

[53] In the circumstances, I am satisfied that the doctor has demonstrated reasonable efforts to identify and locate responsive records in her custody or control, including any such records that exist or could reasonably be expected to exist in the possession of a third party. While I have considered the detailed evidence the father provided, including the affidavit evidence giving different accounts of the interviews, I am not persuaded that further searches would yield additional records.

[54] I understand the father continues to believe in the existence of additional records, including because he takes issue with the doctor's diagnosis of the patient, and has significant concerns (outside those that can be addressed under *PHIPA*) about the doctor's conduct. This complaint addresses only those matters covered by *PHIPA*. On the issue of reasonable search, the doctor has provided sufficient evidence to demonstrate her compliance with *PHIPA*. While the father has raised a number of concerns about the doctor's actions and conduct, he has not provided a reasonable basis for me to conclude that the records he seeks must exist.

[55] For these reasons, I uphold the doctor's search for responsive records in her custody or control.

NO ORDER:

For the foregoing reasons, I dismiss the complaint without issuing an order.

Original Signed by: _____

Jenny Ryu
Adjudicator

June 24, 2025