

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3718-I

Appeal PA16-146

Ministry of Health and Long-Term Care

April 6, 2017

Summary: In this Interim Order, the ministry is ordered to provide the contact information for any affected party(ies), for the purpose of facilitating notification pursuant to section 50(3) of the *Freedom of Information and Protection of Privacy Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 50(3), 52(4); *Personal Health Information Protection Act, 2004*, SO 2004, c 3, sections 8(1), 8(4), 60(13), 60(18).

Orders and Investigation Reports Considered: HO-014.

Cases Considered: *Re Rizzo & Rizzo Shoes Limited*, [1998] 1 S.C.R. 27.

INTRODUCTION:

[1] An individual who has sought funding for out-of-province treatment at a named facility wishes to know **how many** Ontario residents have received funding for this treatment. He is not seeking any other information about the person(s) receiving this treatment. In this appeal of his access request under the *Freedom of Information and Protection of Privacy Act (FIPPA)*, he wishes only to know the **number** of people who have been given funding for the treatment, in the 36 months before his request.

[2] The Ministry of Health and Long-Term Care (the ministry) refuses to disclose this number. It takes the position that disclosing the **number** of resident(s) who have

received this funding would in itself reveal personal health information.

[3] The requester states that he was present at a public hearing before the Health Services Appeal and Review Board of Ontario. He states that a representative of the ministry informed him, as well as others present, that **one (1)** Ontario resident received funding for this out-of-province treatment at the named facility in the 36 months previous. He states that this information is on the public record. The requester states that the reason he is continuing with his appeal is that, during the course of this appeal, he has received information suggesting that more than one person received funding (thus contradicting what was stated at the hearing).

THE ISSUE

[4] The purpose of this interim order is to direct the ministry to provide me with the contact information for any individual(s) whose personal health information, in its view, would be disclosed by the number sought by the requester. I have decided to contact any such individual(s) so that they may have the opportunity to make submissions on disclosure of this number to the requester. I have requested this contact information from the ministry, and it has declined to provide it, submitting that this issue should be first considered under the *Personal Health Information Protection Act (PHIPA)*, rather than *FIPPA*.

Relevant provisions in *FIPPA*

[5] *FIPPA* provides a right of access to records in the custody or under the control of an institution, subject to exemptions and exclusions.¹ There is no dispute that the ministry is such an institution and that the individual has made such a request under *FIPPA*.

[6] Where a person has made an access request, decisions of the heads of institutions may be appealed to the Information and Privacy Commissioner of Ontario (the IPC or this office), and this office may commence an inquiry and issue orders disposing of the issues raised in the appeal.²

[7] After receiving notice of an appeal, section 50(3) of *FIPPA* provides that this office may give notice of an appeal to any "person with an interest in the appeal". This provision allows persons who may be affected by a decision of this office to be notified so that they can participate in our proceedings and their interests can be properly considered. Indeed, in some cases, this office will be required to give notice in order to

¹ *FIPPA*, s. 10

² *FIPPA*, Part IV

ensure procedural fairness.³

[8] Section 52(4) provides me with the authority, during an inquiry, to require production of any record in the custody or control of an institution, despite “any other Act or privilege”.

Relevant provisions in *PHIPA*

[9] *PHIPA*, with some exceptions, applies to personal health information in the custody or control of health information custodians. There is no dispute that the ministry is a health information custodian,⁴ nor that the information requested is in the custody or control of the ministry. At issue, however, is whether the number of people who have been given funding is “personal health information” within the meaning of *PHIPA*. Section 4 of that *Act* defines personal health information, in part, as follows:

4. (1) In this Act,

“personal health information”, subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual’s family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

(c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual’s health number, or

(g) identifies an individual’s substitute decision-maker

³ *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, 2014 ONSC 3295

⁴ *PHIPA*, s. 3(1)7

(2) In this section,

“identifying information” means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

[10] Section 8 of *PHIPA* addresses the interaction between *FIPPA* (and its municipal equivalent) and *PHIPA* and provides:

8. (1) Subject to subsection (2), the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise.

...

(4) This Act does not limit a person’s right of access under section 10 of the *Freedom of Information and Protection of Privacy Act* or section 4 of the *Municipal Freedom of Information and Protection of Privacy Act* to a record of personal health information if all the types of information referred to in subsection 4 (1) are reasonably severed from the record.

[11] Individuals who have reasonable grounds to believe that another person has contravened or is about to contravene a provision of *PHIPA* or its regulations may make a complaint to the IPC.⁵ In response to a complaint, and where there are reasonable grounds to do so, the IPC may commence a review.⁶ Further, *PHIPA* grants the IPC the authority to commence a review on its own initiative where this office has reasonable grounds to believe that a person has contravened or is about to contravene a provision of *PHIPA* or its regulations.⁷

[12] In conducting a review, the Commissioner or Assistant Commissioner may compel production of records of personal health information without consent, provided the criteria in section 60(13) of *PHIPA* are met:

Despite subsections (2) and (12), the Commissioner shall not inspect a record of, require evidence of, or inquire into, personal health information without the consent of the individual to whom it relates, unless,

⁵ *PHIPA*, s. 56

⁶ *PHIPA*, s. 57(3)

⁷ *PHIPA*, s. 58

(a) the Commissioner first determines that it is reasonably necessary to do so, subject to any conditions or restrictions that the Commissioner specifies, which shall include a time limitation, in order to carry out the review and that the public interest in carrying out the review justifies dispensing with obtaining the individual's consent in the circumstances; and

(b) the Commissioner provides a statement to the person who has custody or control of the record to be inspected, or the evidence or information to be inquired into, setting out the Commissioner's determination under clause (a) together with brief written reasons and any restrictions and conditions that the Commissioner has specified.

[13] In this case, the ministry has conceded that section 60(13) of *PHIPA* only applies in the context of a review, and that no such review can be initiated unless a person has or is about to contravene *PHIPA*. The ministry has further stated that it is not its position that there are reasonable grounds to believe that the ministry has contravened, or is about to contravene, *PHIPA*. The ministry does not allege that the IPC has received a complaint pursuant to *PHIPA*.

[14] Like *FIPPA*, *PHIPA* contains a provision addressing representations from affected persons. Section 60(18) of *PHIPA* requires that the IPC give "any other affected person an opportunity to make representations to the Commissioner" in a review.

[15] Unlike *FIPPA*, *PHIPA* only grants individuals a right of access to records of personal health information about themselves, and does not contain a broader public right of access.⁸

Procedural Background

[16] There is no dispute that the appellant filed a request for access pursuant to section 10 of *FIPPA*. The ministry originally processed and denied this request on the basis of section 21 of *FIPPA* (the personal privacy exemption).

[17] I began this inquiry under *FIPPA* by seeking representations from the ministry. The ministry submitted representations with the caveat that it was not conceding that *FIPPA* applies to the issues under this appeal. It submitted that the only information at issue is personal health information that cannot reasonably be severed and therefore that the "appellant's right to the information and the Ministry's obligation to deny his access to it, should be considered under *PHIPA*, not *FIPPA*."

[18] After obtaining responding representations from the appellant, I sought reply

⁸ *PHIPA*, s. 52(1)

representations from the ministry and informed the ministry that I had decided to give the individual(s) reflected in the number an opportunity to provide their views and requested their contact information. In response, the ministry expressed concerns with providing the IPC with this contact information. Instead, the ministry proposed that the IPC provide the ministry with letter(s) inviting representations from the individual(s), which the ministry would then forward to the individual(s). The IPC prepared and provided the letter(s) to the ministry.

[19] The ministry subsequently decided that it would not forward letter(s) to the individual(s) reflected in the number requested by the appellant. I requested that the ministry explain its position in writing. In correspondence dated January 30, 2017, the ministry advised that:

As you know, the ministry's position on this appeal is that it must be processed under the *Personal Health Information Act* (PHIPA) and not the *Freedom of Information and Protection of Privacy Act* (FIPPA). In this regard, there is no third party notice procedure under PHIPA that is comparable to section 28 of FIPPA. Consequently, there is no PHIPA mechanism or process that the Ministry could use to give the ...[individual(s)] notice of the request.

Similarly, there is no PHIPA provision comparable to section 50(3) of FIPPA giving the Commissioner discretion to provide notice about the appeal to a person "with an interest in the appeal".

...

PHIPA does not contemplate the possibility of an "affected third party" in a review of an access request because only individuals requesting their own records of personal health information have a right of access under PHIPA. No third parties could have an interest in such records.

Given this statutory scheme, the ministry has concluded that the only way the ministry can assist the IPC is ... pursuant to section 60(13) of PHIPA....

[20] In correspondence dated February 3, 2017, I directed the ministry to section 60(18) of *PHIPA*, as a comparable *PHIPA* provision addressing notice to third parties. As such, even if the ministry was correct that this file must be processed under *PHIPA*, I could still seek representations from affected persons. I further noted that, in order to rely upon section 60(13) of *PHIPA*, I would first need to find that a review is warranted pursuant to sections 57 or 58 of *PHIPA*. I would also need to determine, as required by section 60(13), that this production is reasonably necessary in order to carry out the review and that the public interest in carrying out the review justifies dispensing with obtaining consent. I requested that the ministry either provide the individual(s) address(es), or agree to forward a letter to the individual(s).

[21] In a response dated February 13, 2017, the ministry advised that it had contacted the individual(s) reflected in the number requested by the appellant and sought their consent to share their contact information for the purpose of this appeal. The ministry advised that this consent was declined. The ministry also quoted from a response received from the individual(s). However, it is unclear what information the ministry provided these individual(s) about the request, and the subsequent appeal of this request to the IPC. Specifically, it is unclear if these individual(s) were informed that the only potential personal health information at issue in this appeal is a **number**, and that they have an opportunity to provide representations on whether this number constitutes their personal health information.

[22] On February 14, 2017, I asked the ministry to respond to the issues raised in my February 3, 2017 letter, and noted that I may decide to issue a production order pursuant to section 52(4) of *FIPPA*.

[23] In its most recent correspondence dated February 17, 2017, the ministry has clarified its position on this issue.

The ministry's position

[24] The ministry submits that the information responsive to the request in this case constitutes personal health information that cannot be "reasonably severed" from the record: "the [personal health information] and the record are one and the same".

[25] The ministry acknowledges that section 8(4) of *PHIPA* preserves a right of access under *FIPPA*, but submits that the right of access is limited, and does not extend to records that consist purely of personal health information, as in the case at hand. The ministry submits that this office must determine whether the appellant's right of access is preserved under section 8(4) of *PHIPA*, before determining which *FIPPA* provisions the requester may rely upon. If I determine that the appellant's right of access is preserved by section 8(4), then the appellant has the right under *FIPPA* to appeal the ministry's denial of access and Part IV of *FIPPA* will apply to that appeal. If I determine that the appellant's right of access is not preserved by section 8(4), then the requester has no right of access under *FIPPA*, nor does he have a right to appeal the Ministry's decision to the IPC under *FIPPA*.

[26] Moreover, the Ministry submits that if the un-severable record of personal health information cannot be requested under *FIPPA*, then the appeal cannot be processed under *FIPPA* and therefore I cannot rely on sections 50(3) or 52(4). The ministry also takes the position that there are no grounds to initiate a review under *PHIPA* and this office could not therefore rely on its powers under section 60(13) of *PHIPA* to inquire into the individual(s) personal health information.

[27] In short, the ministry's position in this case amounts to the contention that I cannot proceed with this appeal under *FIPPA* and neither can I initiate a review under

PHIPA.

[28] As the ministry advised that the individual(s) reflected in the number requested by the appellant refused to provide their consent to share their contact information, the ministry maintains that it has no discretionary authority under *PHIPA* to disclose the affected person's contact information to this office, as it would contradict the individual(s)' objection to disclosure.

[29] I did not seek the requester's views on the issues addressed in this interim order, but he has indicated that he does not object to his identity being disclosed to any affected party who is notified of his request and appeal.

DISCUSSION

[30] For the following reasons, I find that I have authority under section 52(4) of *FIPPA* to require the ministry to provide me with the contact information of persons whose interests may be affected by this appeal, and I exercise that authority in this appeal.

[31] Section 10(1) of *FIPPA* grants individuals a right of access to records in the custody or control of an institution, subject to exemptions and exclusions. The requester in this case is not seeking his own personal information or personal health information, either under *FIPPA* or *PHIPA*. There is no dispute that he has submitted a request, and is attempting to exercise the public right of access, under section 10(1) of *FIPPA*.

[32] Since the ministry is also a "health information custodian" under *PHIPA*, section 8 of that Act (and more particularly, sections 8(1) and (4), quoted above), addresses the interaction between these two statutes. *PHIPA* preserves the right of access under *FIPPA*, but excludes from that right any personal health information that cannot reasonably be severed.

[33] Where a request is made under *FIPPA* for access to records, and the response of the institution is that section 8(4) limits or excludes access, this office must consider and determine the application of section 8(4) to the records. In doing so, the IPC may have to review the records of personal health information at issue.⁹ The IPC may further seek representations from affected persons in order to have the benefit of their views, and also to ensure that this office's processes are procedurally fair. This exercise is similar to decisions this office makes when an institution claims that records are excluded from *FIPPA* by provisions in *FIPPA*. Examples of such exclusions are: records relating to an ongoing prosecution (s. 65(5.2)), to labour relations and employment-

⁹ Indeed, in this case the ministry provided the IPC with the number requested, and that it submits personal health information, in response to an Order for Production issued by the IPC.

related matters (s. 65(6)), to hospital privileges (same), certain adoption-related records (s. 65(8)), and records relating to academic research (s. 65(8.1)). In such cases, this office may conduct an inquiry in order to determine whether the exclusion applies. The potential conclusion that *FIPPA* does not apply to records does not prevent this office from conducting such an inquiry, and exercising its powers in support of the inquiry. However, in this case, the exclusion at issue is not contained in *FIPPA*, but in *PHIPA*.

[34] The ministry has submitted that, until I decide whether this request is preserved by section 8 of *PHIPA*, I must consider this matter under *PHIPA* and not *FIPPA*. If I find that section 8(4) of *PHIPA* does exclude access under *FIPPA*, then the matter would be at an end. However, if I find that section 8(4) of *PHIPA* does not exclude a right of access under *FIPPA*, then the IPC can proceed to adjudicate this matter under *FIPPA*, if necessary. If the matter proceeds under *FIPPA*, the complaint would then be processed as an appeal under Part IV of *FIPPA*, presumably ending with a separate decision addressing any *FIPPA* exemptions or exclusions claimed.

[35] I reject the ministry's submission that I must first decide under *PHIPA* whether the requester's right of access is preserved by section 8(4) before exercising the powers of an inquiry under *FIPPA*.

[36] I am guided by the modern rule of statutory interpretation, as described in *Sullivan on the Construction of Statutes*,¹⁰ and adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Limited*, [1998] 1 S.C.R. 27 at para. 21:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] The plain purpose of section 8 of *PHIPA* is to address the interaction of *FIPPA* and *PHIPA*.¹¹ Section 8(1) states that, unless *PHIPA* "specifies otherwise", *FIPPA* does not apply to personal health information in the custody or under the control of a health information custodian. However, in section 8(4), *PHIPA* "specifies otherwise" and preserves the right of access under section 10 of *FIPPA*, provided that all personal health information is reasonably severed.

[38] The ministry's position rests on a technical reading of section 8(4) under which the *FIPPA* right of access is only preserved once personal health information has been

¹⁰ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014), p. 7

¹¹ I note that there are other statutory provisions addressing the interaction between *PHIPA* and other statutes (see, for example, sections 7 and 9 of *PHIPA*). However, it is section 8 of *PHIPA* that addresses the issue in this appeal.

reasonably severed. From this, the ministry argues that no *FIPPA* issue exists to be adjudicated until the issue of reasonable severance of personal health information has been dealt with under *PHIPA*. The ministry's submission, if accepted, would amount to a victory of form over substance.

[39] Practically, section 8(4) of *FIPPA* will only be invoked by *FIPPA* institutions responding to *FIPPA* access requests and issuing decisions under *FIPPA*. As a matter of statutory interpretation, I cannot accept that the legislature intended section 8(4) to exclude specific *FIPPA* access requests from *FIPPA*'s appeal provisions. In the context of the broader statutory scheme in *PHIPA* and *FIPPA*, it is clear the legislature intended to create an exclusion to the *FIPPA* right of access, to be adjudicated under the broader statutory scheme under Part IV of *FIPPA*.

[40] This is supported by a broader reading of the provisions in Part VI of *PHIPA* addressing administration and enforcement of that Act. As noted above, the IPC's powers to commence reviews and issue orders is premised upon contraventions, or potential contraventions, of *PHIPA*. While *FIPPA* contains a broader public right of access, there is no comparable right of access under *PHIPA* addressing individual's access to personal health information about other individuals.¹² Indeed, the regulation under *PHIPA* specifically excludes a right of access to information that is contained in a record that is dedicated primarily to the personal health information of another person.¹³ The ministry has not detailed how, on its reading of the legislation, a decision to refuse a *FIPPA* access request on the basis of section 8(4) of *PHIPA* could be adjudicated by the IPC under Part VI of *PHIPA*. In my view, Part VI of *PHIPA* cannot be read to include disputed responses to access requests under *FIPPA* as contraventions or potential contraventions of *PHIPA*.

[41] Moreover, the interpretation suggested by the ministry would needlessly complicate and delay the adjudication of *FIPPA* access requests where an institution asserts section 8(4) of *PHIPA* to refuse the request. Effectively, the ministry's position is that all such disputes would have to be bifurcated: first addressing section 8(4) of *PHIPA* and then, if necessary, any other *FIPPA* exceptions and exclusions claimed by the institution. Where a matter is not fully resolved under section 8(4), this would mean that the IPC would have to issue two decisions and, if representations from affected persons are necessary, to seek such representations in two tranches. As stated by Commissioner Beamish in HO-014, in the context of a different issue of statutory interpretation, this would add "a layer of complexity that is neither necessary nor desirable in the broader context of the Act."¹⁴

[42] In this case, I have determined that the individual(s) reflected in the number requested by the requester should be notified and given an opportunity to make

¹² *PHIPA*, s. 52(1)

¹³ O. Reg. 329/04, s. 24(3)

¹⁴ *PHIPA* Order HO-014, para. 35

submissions. Under section 50(3) of *FIPPA*, I have the discretion to inform such individual(s). The individual(s) may provide helpful submissions on whether disclosure of the number would reveal any personal health information. When fully apprised of the nature of this request, the individual(s) may decide to consent to disclosure of this number. While the ministry has asked the individual(s) whether they consent to share their contact information with the IPC, it is unclear specifically what information the ministry conveyed to these individuals. It is unclear if the ministry conveyed that these individual(s) have the opportunity to submit representations to the IPC explaining whether the number sought by the appellant is their "personal health information". Moreover, the quote provided by the ministry in its correspondence dated February 13, 2017 suggests that the individual(s) may have been under the impression that the requester is seeking access to clinical records, rather than a number.

[43] For these reasons, I have decided to exercise my authority under section 52(4) and direct the ministry to provide me with the contact information of the individual(s) whose personal health information the ministry believes would be revealed through disclosure of the number.

ORDER:

I order the Ministry to provide this office with the contact information of all individual(s) who have received funding for the treatment named in the appellant's request, in the 36 months before his request. Such information must be provided on or before **April 25, 2017**.

Original Signed by: _____
Sherry Liang
Assistant Commissioner

_____ April 6, 2017