

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3751

Appeal PA15-41-2

University Health Network

July 25, 2017

**Summary:** The appellant, who had already received her late mother's personal health information from the University Health Network (UHN) by means of a request under the *Personal Health Information Protection Act (PHIPA)*, submitted a request to UHN under the *Freedom of Information and Protection of Privacy Act (FIPPA)*, which she later clarified was for documentation pertaining to persons who were involved with providing care to her mother. UHN conducted searches and located two additional emails, which were disclosed to the appellant. During mediation, and in response to the mediator's report, two additional searches were conducted, based on two specific lists of records the appellant believes should exist. No additional records were found. In the appellant's representations, she effectively presents a third list of items that she feels should exist. In this order, the adjudicator finds that the searches conducted by UHN were reasonable. The *FIPPA* appeal is dismissed. To the extent that the requested records might contain personal health information, no order is issued under *PHIPA*.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24; *Personal Health Information Protection Act*, S.O. 2003, c. 3, Schedule A, as amended, sections 4(1)(a) and (b), 8(1) and (2), and 54(1)(b).

### OVERVIEW:

[1] The appellant is the daughter and estate trustee of her mother, a deceased former patient of University Health Network (UHN). The appellant made a request to UHN for all records pertaining to her mother's file, including "emails, voice messages,

consult notes, sticky notes, meeting minutes, etc.” She indicated in her request that she is acting on behalf of her deceased mother. The form she used for the request indicates that it is made under the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

[2] UHN initially responded to the appellant by requesting confirmation of her entitlement to access her mother’s personal information.

[3] The appellant submitted proof of her authority to act as her deceased mother’s estate trustee. She also clarified that she was seeking:

... any and all documentation pertaining to any and all persons who participated in, and/or assisted in, and/or provided guidance and/or support in the care of [the appellant’s mother]. This includes doctors, nurses, students, residents, interns and fellows as well as administrative and supervisory personnel.

The time period for the request is June 1, 2013 to [December 10, 2014].

[4] In order to place this request in context, it is important to note that the appellant has already received access to her mother’s personal health information from UHN by means of a request under the *Personal Health Information Protection Act (PHIPA)*. This request was the subject of a separate complaint (HA15-39) that the appellant filed with this office, which is now closed. A previous time extension appeal file (PA15-41) is also closed.

[5] On February 13, 2015, the hospital issued a decision under *FIPPA* in response to the request outlined above. The decision stated, in part:

You have requested any and all documentation pertaining to any and all persons who participated in and/or assisted in and/or provided guidance and/or support in the care of [the appellant’s mother]. You indicated that you were not requesting personal health information.

Accordingly, the clinicians listed as [the appellant’s mother’s] caregivers in her medical file were asked to conduct a search of their files, electronic and otherwise, for any records not previously disclosed as part of [the appellant’s mother’s] medical record.

[6] UHN identified two emails that had been located as a result of this search, and granted full access to them.

[7] The appellant was not satisfied with UHN’s response and filed an appeal with this office.

[8] The appeal was assigned to a mediator. During mediation, the appellant described additional responsive records that she believes are in UHN’s custody and

control, and UHN conducted additional searches. The following sets out a description of the three record categories and UHN's responses to each, which were communicated to and responded to by UHN during mediation:

1. Email (unknown date) sent by an identified doctor (Doctor # 1) at Humber River Hospital<sup>1</sup> to an identified doctor at Princess Margaret Cancer Centre (PMCC) (Doctor # 2) and copied to a second identified doctor at PMCC (Doctor # 3) regarding the appellant's mother.

**UHN's response:** UHN's Freedom of Information and Privacy Co-ordinator (FOIC) contacted Doctor # 2 (at PMCC), who conducted a search of his files and all email folders. Doctor # 2 states he does not have any emails other than those which have been placed in the electronic health record, which the appellant has already reviewed. The FOIC also advised that he has checked with UHN's Health Records department as well as with staff at Humber River Hospital.

2. Fax of reports and accompanying fax cover from Doctor # 1 (at Humber River Hospital) sent to PMCC regarding the appellant's mother.

**UHN's response:** Any fax received relating to the patient's care would have been filed as part of the patient's overall health record. Doctor # 2 (at PMCC) has no records other than what is contained in the record previously reviewed by the appellant.

3. Communications regarding the destruction of disks containing images from tests of the appellant's mother by Humber River Hospital as given to PMCC by the appellant.

**UHN response:** Doctor # 2 (at PMHC) was not able to personally view the images on the CD he was given, so he gave the CD to UHN's Medical Imaging team for upload. Medical Imaging staff advised the FOIC that after uploading the images [which renders the images available through the electronic health record], the CD is placed in a secure bin for recycling/destruction unless there are instructions to the contrary. In this instance, the CD was disposed of.

[9] The appellant was dissatisfied with UHN's response and raised additional questions about the adequacy of its search for records, based in part on records she had obtained from Humber River Hospital.

[10] The mediator's report sets out a further list of records, somewhat different than the three-part list referred to above, that the appellant believes should exist. This list is as follows:

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<sup>1</sup> Sometimes also called Humber River Regional Hospital.

1. Response from Doctor # 2 (at PMCC) regarding reassessment of the appellant's mother as an outpatient and to discuss whether there is a role of palliative XRT.
2. The second message for the oncology nurse coordinator at PMCC for follow-up concerning Doctor # 2 (at PMCC)'s response as well any additional messages that may exist.
3. Identity of the oncology nurse coordinator who agreed to review the results to obtain an opinion and treatment.
4. The hospital at which the oncology nurse coordinator worked.
5. All relevant records of communications between UHN and Humber River Regional Hospital during the days prior to the appellant's mother's death.

[11] No further mediation was possible, and this file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator initially assigned to this appeal began the inquiry by inviting UHN to provide representations, which it did. The adjudicator then invited the appellant to provide representations, which she did. After being invited to provide reply representations, UHN indicated that "we have no additional statements to make."

[12] The file was then transferred to me to complete the adjudication.

[13] The appellant asserts that additional responsive records ought to exist.

## **DISCUSSION:**

### **Issue A. Which legislation is applicable in this case?**

[14] As a public hospital, UHN is both an institution under *FIPPA* and a health information custodian under *PHIPA*.<sup>2</sup>

[15] Although the appellant has indicated that she does not seek access to personal health information, it is quite clear that, at a minimum, some of the information the appellant believes ought to exist would qualify as personal health information as that term is defined in section 4 of *PHIPA*. Sections 4(1)(a) and (b) state:

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,

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<sup>2</sup> See the definitions of "institution" and "hospital" in section 2 of *FIPPA*, and also section 3(1)4i of *PHIPA*.

(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,

[16] Section 8(1) of *PHIPA* specifies that *FIPPA* does not apply to personal health information in the custody or under the control of a health information custodian, and section 8(2) provides a list of sections of *FIPPA* that apply where the custodian is also an institution under *FIPPA*.<sup>3</sup> These sections consist of the obligation to disclose various types of information, as well as a number of exemptions from the right to access records under *FIPPA*, and are not relevant.

[17] Under the circumstances, it would appear that some of the information the appellant believes ought to exist would be personal health information.<sup>4</sup> On the other hand, some might not be.<sup>5</sup>

[18] Fortunately, at this stage, this distinction is not of much importance. In assessing the reasonableness of the search undertaken by UHN, the following are the criteria to be applied under the two statutes.

### ***FIPPA***

[19] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.<sup>6</sup>

[20] *FIPPA* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>7</sup>

[21] 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.<sup>8</sup>

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<sup>3</sup> For more discussion of whether a request or part of a request falls under *FIPPA* or *PHIPA*, see also *PHIPA* Decision 17.

<sup>4</sup> For example, information responsive to items 1 and 2 of the appellant's final list of five specific items that the appellant believes should exist.

<sup>5</sup> For example, information responsive to item 4.

<sup>6</sup> Orders P-85, P-221 and PO-1954-I.

<sup>7</sup> Orders P-624 and PO-2559.

<sup>8</sup> Orders M-909, PO-2469 and PO-2592.

[22] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>9</sup>

[23] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>10</sup>

### ***PHIPA***

[24] Where a requester 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*.<sup>11</sup>

[25] As outlined above, this office has extensively canvassed the issue of reasonable search in orders issued under *FIPPA* and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. It has also addressed the issue of reasonable search under *PHIPA*. The principles outlined in orders of this office addressing reasonable search under *FIPPA* and *MFIPPA* are instructive to the review of this issue under *PHIPA*.<sup>12</sup>

[26] *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.<sup>13</sup>

[27] 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.<sup>14</sup>

[28] Although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>15</sup>

[29] Section 54(1)(b) specifically refers to the concept of a "reasonable search." It requires health information custodians to "give a written notice to the individual stating that, **after a reasonable search**, the custodian has concluded that record does not exist, cannot be found, or. . . ." [Emphasis added.]

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<sup>9</sup> Order MO-2185.

<sup>10</sup> Order MO-2246.

<sup>11</sup> PHIPA Decision 18.

<sup>12</sup> *Ibid.*

<sup>13</sup> Orders P-624; PO-2559. See also PHIPA Decision 18.

<sup>14</sup> Orders M-909; PO-2469; PO-2592. See also PHIPA Decision 18.

<sup>15</sup> Order MO-2246.

[30] Accordingly, in this appeal, the substantive issue to be decided is whether UHN conducted a reasonable search, regardless of which legislation applies.

## **Issue B: Did UHN conduct a reasonable search for records?**

### ***UHN's Representations and Affidavit***

[31] UHN has provided detailed representations, including an affidavit, to explain the steps it took to locate responsive records.

[32] It states that its initial search at the request stage, which produced the two emails mentioned above (that were disclosed to the requester), was conducted by taking the following steps:

- review the electronic patient record (EPR) to identify the clinicians that attended the appellant's mother at each visit; and
- contact the clinicians and ask them to search their email inboxes, voice mail boxes and paper records that had not been placed in or scanned to the EPR.

[33] The accompanying affidavit provided by UHN's acting Director of Privacy and Information Access (the acting director), identifies the four doctors who searched their records. The acting director states that he discussed the request with UHN's Health Records Department and requested that staff there also conduct a search. He also consulted with the Freedom of Information Co-ordinator and Supervisor of Health Records at Humber River Regional Hospital.

[34] As a result of these efforts, no records were located other than the two emails that have been disclosed.

[35] As already described in detail above, during the mediation stage, the appellant identified a list of three types of information she believes should exist, and this list was provided to UHN. To reiterate, this information may be briefly described as follows:

- Email (unknown date) sent by an identified doctor (Doctor # 1) at Humber River Hospital to an identified doctor at Princess Margaret Cancer Centre (PMCC) (Doctor # 2) and copied to a second identified doctor at PMCC (Doctor # 3) regarding the appellant's mother.
- Fax of reports and accompanying fax cover from Doctor # 1 (at Humber River Hospital) sent to PMCC regarding the appellant's mother.
- Communications regarding the destruction of disks containing images from tests of the appellant's mother by Humber River Hospital as given to PMCC by the appellant.

[36] UHN conducted further searches in an attempt to locate these records. One physician (referred to above as Doctor # 2 and identified as the primary caregiver) was again asked to search his files for information relating to Doctor # 1, and the Manager of Health Records was asked to check the central record. Doctor # 2 and the Medical Imaging Team were asked to provide information regarding the destruction of the CD-ROM referred to by the appellant. Staff at Humber River Regional Hospital were also contacted to determine whether responsive records exist at that institution. Nothing was found as a result of these searches, but the destruction of the CD-ROM was confirmed.

[37] UHN also states that the faxed report and its fax cover page, if received by UHN, would have been scanned into the EPR. A search of the EPR for these records did not locate them.

[38] As already noted, prior to the end of mediation, a different list of records that the appellant believes should exist was produced and it was included in the mediator's report. To reiterate, these records are:

- Response from Doctor # 2 (at PMCC) regarding reassessment of the appellant's mother as an outpatient and to discuss whether there is a role of palliative XRT.
- The second message for the oncology nurse coordinator at PMCC for follow-up concerning Doctor # 2 (at PMCC)'s response as well any additional messages that may exist.
- Identity of the oncology nurse coordinator who agreed to review the results to obtain an opinion and treatment.
- The hospital at which the oncology nurse coordinator worked.
- All relevant records of communications between UHN and Humber River Regional Hospital during the days prior to the appellant's mother's death.

[39] The acting director's affidavit states that after receiving this new list, he again consulted with the primary caregiver, Doctor # 2, and UHN Health Records Staff, and the Freedom of Information Co-ordinator at Humber River Regional Hospital. No records corresponding to these items were located.

[40] UHN also states that, with regard to the first bullet point, Doctor # 2 stated that there are no responsive records in his office, and none could be located in the Health Records Department or the EPR. Regarding the next three bullet points, this information would be maintained in the EPR if it existed, but Doctor # 2 could not locate these items, nor could Health Records staff. Regarding the final bullet point, Humber River Regional Hospital affirmed that it had previously provided copies of all records concerning the appellant's mother to the appellant and had no further records to disclose.



### ***The appellant's representations***

[41] The appellant's representations contain, in effect, a third list of yet more items she believes should exist, on top of the two lists produced during mediation. This new list is based, in part, on the contents of other records she has already received. She has attached copies of these other records to her representations. The appellant alleges that at least one of the other records provides evidence of the existence of documentation between Doctor # 1 and UHN.

[42] The appellant also refers to another doctor and the possibility that this doctor's name was incorrectly searched. I note, however, that the acting director names this doctor in his affidavit (using the name the appellant seems to feel would be best for searching) in his list of physicians who were asked to search their records. Moreover, as this doctor searched for her own records, I would expect that she did so using a suitable version of her own name, and in fact, she produced the two emails that were disclosed to the appellant at the request stage.

[43] Having reviewed this matter in detail, I conclude that UHN has conducted a reasonable search for records. The appellant submitted a broadly worded request, which she later clarified. The request was for records in addition to those she received from UHN under her *PHIPA* request. UHN responded to the appellant's request by reviewing her mother's medical records, identifying the physicians who were involved with her mother's care, and asking those physicians to conduct searches for responsive records, which they did. As noted, the two responsive emails were then disclosed.

[44] Subsequently, during the mediation stage of this appeal, two further lists emerged of items the appellant believes should exist: one that led to further searches conducted prior to the end of mediation, with results reported back to the mediator as outlined above; and a second list that appeared in the mediator's report and led to further searches after UHN received it. It is apparent that comprehensive searches and consultations were conducted by UHN with respect to both of these lists, including with Humber River Regional Hospital, which is not part of UHN, and nothing further was located.

[45] In her representations, the appellant provides what is, in effect, yet another list of items for which she believes additional searches are required. The question before me is whether to order UHN to conduct them.

[46] UHN has already done three searches, the second and third of which were for specific items the appellant feels should exist. In my view, it would not be reasonable to permit the appellant to impose yet a fourth search on UHN and require it to search for a third, and again different, iteration of the items the appellant feels should exist.

[47] Moreover, the request, as originally clarified, is for "documentation" pertaining to persons who were involved with providing care to the appellant's mother. Many of the

items in the two lists produced during mediation, for which searches have been conducted, go far beyond documentation pertaining to hospital staff members, and clearly refer to patient records, even though UHN affirmed in its decision that the appellant does not seek personal health information.<sup>16</sup> The same can also be said for the items the appellant identifies in her representations as records that should exist.

[48] As stated above, institutions and health care custodians are not required to prove with absolute certainty that additional records do not exist. Nor are they required, in my view, to respond with fresh searches to repeated and ever-changing reiterations of what is allegedly missing.

[49] UHN has expended considerable efforts to accommodate the appellant and search for the items she believes should exist. I find that its efforts constitute a reasonable search under both *FIPPA* and *PHIPA*.

**ORDER:**

The *FIPPA* appeal is dismissed. I make no order under *PHIPA*.

Original Signed by: \_\_\_\_\_  
John Higgins  
Adjudicator

July 25, 2017 \_\_\_\_\_

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<sup>16</sup> I note in passing that the identities of caregivers who provide health care are personal health information in any event – see section 4(1)(s) of *PHIPA*, reproduced earlier in this order.