

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-3816-F

Appeal PA16-146

Ministry of Health and Long-Term Care

February 23, 2018

**Summary:** In this decision, the IPC determines that information about the number of persons who received funding from the ministry for out-of-country treatment of a specified condition at a specified medical facility, within a given time, is not personal health information. During the adjudication of the appeal, the appellant narrowed his request to exclude himself and one other individual. As a result of its finding, the IPC determines that the provisions of the *Personal Health Information Protection Act* do not apply and the appellant has a right of access to this information under 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; *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched. A, section 4(1).

### INTRODUCTION:

[1] The Ministry of Health and Long-Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for information about funding for out-of-country treatment of a specified condition at a particular medical facility in the United States. The ministry denied access to much of the information sought by the requester.

[2] The requester appealed the ministry's decision to this office, becoming the appellant in this appeal. The ministry subsequently issued a revised decision, taking the position that the information sought by the appellant is covered by the *Personal Health Information Protection Act (PHIPA)* and cannot be the subject of an access request under *FIPPA*. Though the request was narrowed significantly during the processing of

the appeal, the ministry continued to deny access to the requested information.

[3] In this order, I find that the information responsive to the appellant's revised request does not constitute personal information under *FIPPA* or personal health information under *PHIPA*. I find that it is information of a general nature and I order the ministry to disclose that information to the appellant under *FIPPA*.<sup>1</sup>

## **BACKGROUND:**

[4] In responding to the appellant's original access request, the ministry provided the appellant with a copy of a previous Health Services Appeal and Review Board (HSARB) decision, which allowed an appeal by another individual (the HSARB appellant) from a denial of funding for the treatment at the out-of-country facility. The decision explains the conditions that must be met in order for this particular treatment to be approved for OHIP funding. The appellant was already aware of this decision, and is acquainted with the individual who is the subject of that decision. The appellant states that the reason he wishes to pursue this appeal is to determine the number of individuals who have received this funding.

[5] During mediation, the appellant narrowed the scope of his request to simply the number of people who received funding from the ministry for the treatment at the named medical facility, in the 36 months before the request. The appellant wished to pursue this part of his request because he believed the ministry gave him conflicting information. According to the appellant, before he made his request, he understood that only one individual had received such funding but the ministry's responses to his request were ambiguous, suggesting to him there may be more, and he therefore wishes to confirm the number.

[6] As no mediated resolution was possible, the file was transferred to adjudication, where I initiated an inquiry. During my inquiry, I invited the ministry and appellant to provide representations in response to a Notice of Inquiry. The non-confidential portions of their representations were shared with each other in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*.

[7] Also during my inquiry, I issued Order PO-3718-I, requiring the ministry to provide me with the contact information of the HSARB appellant (an affected party), so that I could notify her of this appeal and invite her to make submissions on the issues. Upon being notified of the appeal, the affected party indicated that she did not wish to participate in the appeal by providing submissions or consent to disclosure.

[8] Upon reviewing the parties' representations, it appeared to me that there may be common ground between the appellant and the ministry. The appeal returned to the

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<sup>1</sup> Although the right of access under *FIPPA* applies to "records", the ministry did not object to treating the information sought as a "record", in effect, agreeing to create a record for the purposes of this appeal.

mediation stage to explore a mediated settlement. The second attempt at mediation was unsuccessful, but the appellant's request was further narrowed to exclude any information relating to himself or to the HSARB appellant. As a result, the appellant's request is now for the number of people, without taking into consideration himself or the HSARB appellant, who have received funding from the ministry for the specified treatment at the named medical facility in the 36 months prior to the request.

[9] The file was transferred back to the adjudication stage for an inquiry into the appellant's narrowed request. I invited the ministry to provide supplementary representations addressing the issues in light of the revised request. The ministry advised that all issues raised in the appeal were addressed in its original representations, and it would not be providing supplementary representations.

## **DISCUSSION:**

### **Application of the *Personal Health Information Protection Act, 2004***

[10] In this appeal, the parties disagree about whether a right of access to the information is governed by *PHIPA* or *FIPPA*, and whether the appellant has a right of access to that information under the applicable statute(s).

[11] *PHIPA* sets out rules governing access to records of personal health information that are in the custody or under the control of a health information custodian, and the entitlement of a person to make a request for access to such records. Under *PHIPA*, the right of access to personal health information belongs to the individual to whom the information relates, or to his or her "substitute decision-maker"—a person authorized to make a request for access on the individual's behalf. *PHIPA* does not otherwise provide any right of access to records of personal health information.

[12] *FIPPA* grants an individual a right of access to records of general information and to an individual's own personal information in the custody or under the control of an institution, subject to certain exceptions.

[13] Section 8(1) of *PHIPA* provides (with specified exceptions) that *FIPPA* does not apply to personal health information in the custody or under the control of a health information custodian. However, rights of access under *FIPPA* are preserved if all the personal health information can be reasonably severed from the record.

[14] The appellant purports to be exercising a right of access under *FIPPA*, not *PHIPA*; he takes the position that the information he seeks is not personal health information of any identifiable individual. The ministry, however, takes the position that *PHIPA* applies to oust his right of access under *FIPPA*.

[15] There is no dispute that the ministry is both an institution within the meaning of *FIPPA* (section 2(1)) and a health information custodian within the meaning of *PHIPA* (section 3(1)). Therefore, in order to determine whether *PHIPA* applies to the

information at issue, I must establish whether the information constitutes "personal health information". If the information constitutes personal health information in the custody or control of a health information custodian, then I must apply sections 8(1) and 8(4) of *PHIPA*, which address the interaction between *PHIPA* and access rights under *FIPPA*.

**Does the record contain "personal health information" within the meaning of *PHIPA*?**

[16] The information the appellant seeks is the **number** of people who have received funding from the ministry for a specific treatment performed by a named doctor from a named medical facility in the 36 months before the appellant's request. Pursuant to the revised request, the responsive information is to exclude any information about the appellant, or about the HSARB appellant.

[17] The ministry did not submit any additional representations after the appellant narrowed his request, and I therefore have before me only its original representations in this appeal. In the ministry's decision letter and representations, the ministry submits that because of the small cell count (see below) and the nature of the information, there is a reasonable expectation that individual(s) could be identified by disclosure of the responsive information. On this basis, the ministry has denied access to the responsive information.

[18] "Personal health information" is defined in section 4 of *PHIPA* as follows:

(1) "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.

(2) "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.

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

(4) Personal health information does not include identifying information contained in a record that is in the custody or under the control of a health information custodian if,

(a) the identifying information contained in the record relates primarily to one or more employees or other agents of the custodian; and

(b) the record is maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employees or other agents.

[19] The appellant maintains that the number alone could not reasonably be used to identify any individuals, and therefore does not constitute "personal health information" for the purposes of *PHIPA*. Instead, the appellant maintains that the responsive information is information of a general nature held by an institution to which he has a right of access under *FIPPA*.

[20] The ministry submits that it is reasonably foreseeable that the information at issue could be used, either alone or together with the HSARB decision and other information easily available on the internet, to disclose the personal health information of an affected party/parties. In particular, the ministry submits that the information at issue could reveal and/or confirm information that relates to the physical health of an affected party/parties, the provision of health care to an affected party/parties, and an affected party/parties' eligibility for OHIP coverage during the specified time frame.

[21] In support of this position, the ministry submits that the HSARB decision does not completely anonymize the HSARB appellant, as it reveals her sex and initials. The ministry quotes from portions of the HSARB decision, and assumes that the HSARB appellant and the appellant in this matter likely know each other. In particular, the ministry notes that the affected party is the president of a not-for-profit organization that advocates for people suffering from the specific medical condition, and states:

"Given the Foundation's role, the Ministry submits that the appellant was probably also in contact with the organization, and likely knows [the

affected party's] identity as a result of their common attempt to obtain out of country funding from OHIP in particular. As they are both Ontario residents, it is likely that they may even have communicated directly with one another about their medical issues and the processing of their out of country funding applications."

[22] The ministry also submits that the responsive information constitutes a "small cell", which, citing Order PO-2811, "refers to a situation where the pool of possible choices to identify a particular individual is so small that it becomes possible to guess who the individual might be, and the number that would qualify as a small cell count varies depending on the situation." On the basis that the small cell test is met in this case, the ministry submits that there is a reasonable expectation that the disclosure of the information at issue could be used by the appellant to confirm the identity of an affected party/parties (and reveal personal health information).

[23] On the basis that the information at issue consists of personal health information of an identifiable affected party, the ministry submits that it has no authority to disclose it to the appellant. Part V of *PHIPA* does not authorize a health information custodian to disclose personal health information to anyone other than to whom the information relates. A health information custodian has no authority to consider whether the disclosure of another individual's personal health information would not constitute an unjustified invasion of privacy, or would promote a compelling public interest, as institutions are permitted to do under *FIPPA*.

### **Analysis**

[24] As is evident from the above, the ministry's submissions focus largely on the prospect that disclosure of the information sought would reveal personal health information of the HSARB appellant. However, the appellant's narrowed request specifically excludes any information about this individual. Having regard to the narrowed scope of the appellant's request and the representations submitted by both parties, I find that the information responsive to the appellant's request does not constitute "personal health information", of an identifiable individual, for the purposes of *PHIPA*.

[25] I acknowledge the ministry's position regarding "small cell counts" and accept that there may be circumstances where revealing non-identifying information relating to a small number of individuals may allow the identification of a specific individual. The ministry did not, however, show how the information responsive to the narrowed request could reveal personal health information of any individual, including the HSARB appellant. In the circumstances, and given that the appellant has specifically excluded any information relating to the HSARB appellant from the request, the response to the request would not reveal anything about that individual.

[26] In sum, I conclude that disclosure of the number sought by the appellant, without taking into consideration the appellant or the HSARB appellant, would not disclose the personal health information of an identifiable individual. Accordingly, the

information responsive to the request does not constitute "personal health information", as defined in section 4(1) of *PHIPA*.

[27] Given my finding that the information at issue is not personal health information, I am not required to consider the parties' submissions on the issue of access to information under *PHIPA*; I will now consider the appellant's right of access to the information under *FIPPA*.

### **Access under the Freedom of Information and Protection of Privacy Act**

[28] The ministry submits that in the event that I find that the information at issue is not "personal health information" for the purposes of *PHIPA*, then the appellant would have a right of access under *FIPPA*. The ministry submits that if the information is not "personal health information" for the purposes of *PHIPA*, then it follows that the information is also not "personal information" for the purposes of *FIPPA*, and therefore the mandatory personal privacy exemption in section 21(1) would not apply.

[29] As the ministry does not contest the appellant's right of access to this information if it is found to be of a general nature, I am satisfied that the appellant has a right of access under *FIPPA* to the information at issue in this appeal. To reiterate, he has a right of access to information about the number of individuals (without taking into consideration either the appellant or the HSARB appellant) who received funding from the ministry, for the specified treatment, at the named medical facility, in the 36 months before the request

### **ORDER:**

1. I order the ministry to disclose to the appellant the information at issue.
2. I order disclosure to be made by **April 4, 2018** but not before **March 26, 2018**.

Original Signed by: \_\_\_\_\_  
Sherry Liang  
Assistant Commissioner

February 23, 2018 \_\_\_\_\_