

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3644

Appeal MA15-478

The Regional Municipality of Niagara

August 3, 2018

Summary: The appellant made a request to the municipality under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for specified records about him and about his deceased mother, including in connection with a long-term care home operated by the municipality. The appellant appealed the municipality's decision to grant only partial access to his own personal information under *MFIPPA*, and to deny access to any of his mother's personal health information on the ground he is not entitled to this information under the *Personal Health Information Protection Act, 2004 (PHIPA)*. The appellant also challenged the municipality's search for records. In this order, the adjudicator upholds the municipality's decision. She finds that the records at issue are records of personal health information of the appellant's mother, to which the appellant has no right of access under *PHIPA*. She also finds that, to the extent the records also contain personal information of the appellant that is subject to his right of access in *MFIPPA*, the municipality properly denied access under *MFIPPA*. She also upholds the municipality's search for records. She dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"); 14, 17, 36(1) and 38(b); *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, as amended, sections 3(1), 4, 8(1), 8(4), 23(1), 24, 25, 52, 53 and 54.

Orders and Decisions Considered: Order PO-3458, PHIPA Decision 17 and PHIPA Decision 27.

OVERVIEW:

[1] The appellant made a request to the Regional Municipality of Niagara (the

municipality) under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for records about him and about his deceased mother in connection with two named long-term care homes. The appellant specified a date range of March 2000 to 2012 for these records. He also requested any information relating to threats made in 1998 by a named individual from the municipality's "placement department."

[2] The municipality advised the appellant that it had searched its Senior Services Division and had located 68 pages of staff notes and emails, and 280 print-out pages of a website created by the appellant. The municipality's decision was to grant partial access to these records. It denied access to portions of the records on the basis of the personal privacy exemption at section 38(b) of *MFIPPA*.¹ The municipality also stated that it could not disclose the appellant's mother's medical file to him under *MFIPPA*. It explained that a request for access to that information falls under the *Personal Health Information Protection Act, 2004 (PHIPA)*, and that the appellant had not provided proof of his authority to request records relating to his deceased mother under *PHIPA*.

[3] The appellant appealed the municipality's decision to this office. During the mediation stage of the appeal process, the appellant reported that records about specific incidents relating to his mother's care were not among the records disclosed to him. He also asserted that there ought to exist additional records sent between various agencies, including the Ministry of Health and Long-Term Care, a Community Care Access Centre, the police and others.

[4] In response, the municipality stated that there are no records between the municipality and the agencies identified by the appellant that would be accessible through a request under *MFIPPA*. It noted that there may be responsive records within the mother's medical file, but that any such records would only be accessible to the named executor of the deceased's mother's estate, or with the consent of that individual. The municipality also confirmed that there do not exist any records relating to the individual named in the appellant's request, whom the appellant had identified as an employee of the municipality's placement department. The municipality stated that it has no knowledge of an employee by that name, and that there is no such department within the municipality.

[5] As mediation did not resolve the issues, the file was transferred to the adjudication stage of the appeal process for a written inquiry under *MFIPPA*. The municipality's representations on the issues were shared with the appellant in accordance with this office's *Code of Procedure* and *Practice Direction 7*. Although he was invited to provide representations in response, the appellant did not do so.

[6] The file was transferred to me to continue the adjudication of the appeal. In this order, I conclude that the records at issue are records of personal health information of the appellant's mother, to which the appellant does not have a right of access under

¹ In its original decision, the municipality erroneously referred to section 12 rather than to section 38(b) of *MFIPPA*. The municipality later corrected its error in a revised decision. This error had no bearing on the issues or my findings in this order.

PHIPA. The records also contain the personal information of the appellant and other individuals, to which the appellant seeks access under *MFIPPA*. I find, however, that the municipality properly withheld this information on the basis of section 38(b) of *MFIPPA*. In the result, I uphold the municipality's denial of access to all the information at issue. I also uphold the reasonableness of the municipality's search for records. I dismiss the appeal.

INFORMATION AT ISSUE:

[7] At issue in this appeal are the withheld portions of Records 3 and 7, which the municipality describes as Notes to File prepared by staff of its Community Services Department.

[8] The appellant also believes that there ought to exist additional records responsive to his request.

ISSUES:

- A. Does *PHIPA*, or *MFIPPA*, or both, apply in these circumstances?
- B. What is the extent of the appellant's right of access to the records under the applicable statute(s)?
- C. Did the municipality conduct a reasonable search for records?

DISCUSSION:

A. Does *PHIPA*, or *MFIPPA*, or both, apply in these circumstances?

The municipality is subject to both *PHIPA* and *MFIPPA*

The request is for the mother's personal health information within the meaning of *PHIPA*, as well as for the appellant's own personal information within the meaning of *MFIPPA*

The responsive records contain both types of information

Both *PHIPA* and *MFIPPA* apply in these circumstances

[9] *PHIPA* grants an individual a right of access to records of his or her own personal health information that are in the custody or under the control of a health information custodian, subject to limited exceptions (*PHIPA*, Part V).

[10] *MFIPPA* grants an individual a right of access to records of general information (*MFIPPA*, Part I) and to an individual's own personal information (*MFIPPA*, Part II) in

the custody or under the control of an institution, subject to certain limitations.

[11] Except in specified circumstances (none of which is relevant here), *MFIPPA* does not apply to personal health information in the custody or under the control of a health information custodian [*PHIPA*, section 8(1)].

[12] The municipality is both an institution within the meaning of *MFIPPA* [section 2(1)], and, in its role as the operator of a long-term care home, a health information custodian within the meaning of *PHIPA* [section 3(1)4.ii]. As a result, in certain circumstances, the municipality is subject to both *PHIPA* and *MFIPPA*. This means that when the municipality receives a request for access to information, it must decide whether *PHIPA*, or *MFIPPA*, or both, apply to the request.

[13] In this case, the request is for information about the appellant's mother, as well as for information about the appellant, in connection with a long-term care home operated by the municipality.²

[14] The requested information is contained in records prepared by staff of the municipality's Community Services Department (of which the Senior Services Department is a part) to document matters relating to the mother's stay as a resident of the home. Both records at issue contain identifying information about the appellant's mother relating to her physical or mental health, and about the providing of health care to her. This information constitutes the mother's "personal health information" within the meaning of section 4(1) of *PHIPA* [paragraphs (a) and (b)]. They also contain other identifying information about the mother that does not fall within the definition at section 4(1) of *PHIPA*, but that nonetheless qualifies as her personal health information under section 4(3). The right of access to these records of personal health information is governed by *PHIPA*.

[15] In addition, the records contain information about the appellant and other identifiable individuals. Among other things, the records contain details of the appellant's actions and conduct that would reveal something personal about him if disclosed. This qualifies as the appellant's "personal information" within the meaning of that term in section 2(1) of *MFIPPA* [paragraph (h)]. The records also contain information about individuals other than the appellant (or the appellant's mother). Remaining at issue in this appeal is the personal information of one individual, to whom I will refer in this order as the affected party. Specifically, the municipality withheld certain information in Record 3 that reveals something personal about the affected party; it also contains the affected party's opinion about the appellant. I consider this information to be the personal information of the affected party [paragraph (h)]; it is also the personal information of the appellant [paragraph (g)].³ Access to any of this

² The municipality operates one of the two long-term care homes named in the appellant's request. The other appears to be a privately-operated home; the municipality is not a health information custodian in relation to that home. I discuss this further under Issue C, below.

³ See Order PO-3458 for a similar treatment of information given by one individual about another individual.

personal information in the records is governed by *MFIPPA*.

[16] To summarize, the responsive records are records of personal health information of the appellant's mother that also contain the personal information of the appellant and one affected party. The appellant seeks access to both kinds of information in the records. Both *PHIPA* and *MFIPPA* apply in these circumstances.

B. What is the extent of the appellant's right of access to the records under the applicable statute(s)?

[17] When a record contains any personal health information, it is first necessary to consider the application of *PHIPA*. If the requester is the individual to whom the personal health information in the record belongs, or another person authorized under *PHIPA*, the requester may have a right of access to the record under *PHIPA*.

[18] If the requester is not a person authorized under *PHIPA*, then he has no right of access to the record under *PHIPA*. Moreover, there is no general right of access to personal health information in the record under *MFIPPA* or its provincial counterpart [*PHIPA*, section 8(1)].

[19] The requester may, however, have a residual right of access under *MFIPPA* to other information in the record that is not personal health information, provided all the personal health information in the record can reasonably be severed [*PHIPA*, section 8(4)].⁴

[20] In this case, the appellant seeks access both to the personal health information of his mother and to his own personal information in the records. I will consider his entitlement to the records first under *PHIPA*, and then under *MFIPPA*.⁵

The appellant is not entitled to make a request for access to the records under PHIPA

[21] In this case, the person to whom the personal health information in the records belongs is deceased.

[22] For a deceased individual, *PHIPA* provides that the deceased individual's estate trustee (or, where there is no estate trustee, the person who has assumed responsibility for the administration of the estate) may exercise powers in respect of the deceased individual's personal health information [*PHIPA*, section 23(1)4]. This includes the authority to request access to records of the deceased individual's personal health information [*PHIPA*, sections 25, 52, 53].

⁴ See *PHIPA* Decision 27 for a discussion of reasonable severability in the context of section 8(4) of *PHIPA*.

⁵ This office has applied this approach to requests for information covered by both *PHIPA* and *MFIPPA* (or its provincial counterpart, the *Freedom of Information and Protection of Privacy Act*) in previous decisions and orders. See, for example, *PHIPA* Decisions 17, 27, 30, 33 and 73, and Orders MO-3531 and PO-3861.

[23] The appellant has not provided any evidence of his authority to act on behalf of his deceased mother under *PHIPA*. Without such authority, the appellant has no right of access to records of his mother's personal health information. I uphold the municipality's decision in this regard.

The remaining information in the records is exempt under MFIPPA

[24] Section 36(1) of *MFIPPA* grants an individual a right of access to personal information about himself held by an institution such as the municipality.

[25] Through the operation of section 8(4) of *PHIPA* and section 36(1) of *MFIPPA*, the appellant may have a right of access to any of his personal information contained in the records of his mother's personal health information, if his mother's information can reasonably be severed from the records.⁶

[26] Some of the withheld information in Record 3 consists solely of the personal information of the appellant and the affected party.

[27] (Other withheld information in Record 3, and all the withheld information in Record 7, constitutes the mother's personal health information, to which the appellant has no right of access for the reasons described above.)

[28] I find that Record 3 is reasonably severable within the meaning of section 8(4) of *PHIPA*; as a result, the appellant has a right of access to his personal information in this record, subject to any applicable exemptions or exclusions. The municipality has withheld this information on the basis of section 38(b) of *MFIPPA*.

[29] Section 38(b) of *MFIPPA* permits an institution not to disclose a requester's personal information where doing so would constitute an unjustified invasion of another individual's personal privacy. Sections 14(1) to (4) of *MFIPPA* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. I am satisfied that none of the exceptions in paragraphs (a) to (e) of section 14(1), nor any of the presumptions in section 14(3), applies.

[30] I turn to the factors set out at section 14(2). In the circumstances, I find relevant the factor at section 14(2)(f), which weighs against disclosure of highly sensitive information. Given the nature of the allegations contained in the records, and my understanding from the records of the relationship between the appellant and the affected party, I find it reasonable to expect that disclosure of the withheld information could cause the affected party significant personal distress.⁷ The appellant has not directed me to any factors that would favour disclosure, and none is evident to me.

[31] I have considered the possible application of the absurd result principle in these circumstances. Under the absurd result principle, information that was originally supplied by the appellant, or of which he is otherwise already aware, may not be

⁶ This interpretation of section 8(4) of *PHIPA* was applied in *PHIPA* Decisions 17 and 27.

⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

exempt under section 38(b) because to withhold it would be absurd and inconsistent with the purpose of the exemption.⁸ The appellant was asked for submissions on this topic, but did not respond. There is no evidence to establish that the absurd result principle applies here.

[32] The appellant was also asked to address the potential application of section 14(4)(c) of *MFIPPA*. Under section 14(4)(c), an institution may decide that disclosure of personal information about a deceased individual to a close relative is desirable for compassionate reasons, and so is not an unjustified invasion of personal privacy.

[33] Section 14(4)(c) has no relevance in this appeal. It cannot apply to the information in the records about the appellant's deceased mother (which is personal health information governed by *PHIPA*), and the remaining information at issue (namely, the personal information of the appellant and the affected party) is not personal information about a deceased individual that could be the subject of a compassionate grounds disclosure.

[34] I uphold, therefore, the municipality's decision to withhold the appellant's personal information in Record 3 on the basis of section 38(b) of *MFIPPA*.

[35] (As described above, access to the remaining information in the records is not governed by *MFIPPA*.)

[36] I also uphold the municipality's exercise of discretion under this section. The municipality has disclosed a great deal of the appellant's own personal information in the records to him; it has only withheld limited portions of his own information that also contain an affected party's personal information, which I found to be properly exempt for reasons of personal privacy. I am satisfied that in exercising its discretion, the municipality considered relevant factors, including the appellant's right of access to his personal information and the privacy rights of the affected party, and did not consider irrelevant factors.

[37] Given all the above, I uphold the municipality's decision to withhold all the information at issue in the records on the basis of *PHIPA* and *MFIPPA*.

C. Did the municipality conduct a reasonable search for records?

[38] The appellant asserts that there ought to exist additional records about specific incidents relating to his mother's care, and records involving various named agencies. He also asked for records relating to a named individual about whom the municipality says it has no knowledge.

[39] Based on the appellant's description, some of these records, if they exist, would likely be records of his mother's personal health information. As set out above, access to these records would be governed by *PHIPA*. As the appellant has not established any

⁸ Orders M-444 and MO-1323.

entitlement to the records under that statute, I agree with the municipality that any additional responsive records of his mother's personal health information would not be accessible to him under *PHIPA*.

[40] However, given the appellant's request also covers information in the records that is governed by *MFIPPA*, I must consider the possibility that any additional records of personal health information could be reasonably severed within the meaning of section 8(4) of *PHIPA*. In addition, other records sought by the appellant may not contain any personal health information of his mother. In both cases, there may be a right of access under *MFIPPA*. For this reason, I cannot agree with the municipality that further searches are unnecessary because the appellant would have no entitlement to additional records that may exist.

[41] I am satisfied, for other reasons, that no further searches are necessary in these circumstances.

[42] When a requester claims that additional records exist beyond those identified, the issue to be decided is whether a reasonable search was conducted in accordance with statutory requirements.⁹ 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.¹⁰

[43] In this case, the search was conducted by an administrator and director of resident care for the home operated by the municipality. The search involved all records compiled for the appellant's mother, including clinical records, which had been prepared for inactive records storage after her death, in accordance with the municipality's records retention by-law. The home's staff were also asked to search for email and other records responsive to the request; no records were located through this search as relevant records had already been forwarded for inactive records storage before the municipality received the appellant's request. This result is consistent with the records retention practice described by the municipality. I find these search efforts to be reasonable in the circumstances.

[44] I am also satisfied that the municipality has provided a credible explanation, as described above, for its failure to locate records relating to a named individual. For other records sought by the appellant (those sent between various agencies, for example), the appellant has not described with any specificity what additional records he believes ought to exist, or the reason for his belief. I observe that the second long-term care home named in the appellant's request does not appear to be a home operated by the municipality; the municipality is not a health information custodian in relation to this home, and would not be expected to locate records related to this home through a search of records in its custody or control. The appellant has not explained to my satisfaction why the municipality's search efforts should have yielded more records.

⁹ *PHIPA*, sections 53 and 54; *MFIPPA*, section 17.

¹⁰ Orders M-909; PO-2469; PO-2592; see also *PHIPA* Decision 18.

[45] I conclude that the municipality has conducted a reasonable search for records, and that the appellant has not provided a reasonable basis for finding otherwise.

[46] I uphold the municipality's search for records.

ORDER:

I uphold the municipality's decision to withhold the information at issue, and its search for records. I dismiss the appeal.

Original Signed By _____
Jenny Ryu
Adjudicator

August 3, 2018 _____