

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 119

Complaint HA19-00009

Allevio Pain Management Clinic

May 11, 2020

Summary: A patient of a pain management clinic sought a copy of his complete medical records from the clinic. The clinic issued a decision providing access to the records that it identified as belonging to him. As he was not satisfied with the completeness of the records identified, he filed a complaint with this office challenging the reasonableness of the clinic's search for records. In this decision, the adjudicator upholds the clinic's search as reasonable and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, c 3 Sched A, as amended, sections 53 and 54.

Decisions Considered: PHIPA Decision 18.

BACKGROUND:

[1] Allevio Pain Management Clinic (the clinic) received a request under the *Personal Health Information Protection Act* (the *Act*) for access to the following:

Please mail me a copy of my medical report along with the paramedic report.

[2] Following some additional correspondence between the clinic and the requester, the requester again requested medical records by stating, in part, the following:

I have spoken to [an individual] at [College of Physicians and Surgeons of Ontario (CPSO)] regarding my medical records and she instructed me to

contact [a named clinic doctor] and have him send my records to me along with my follow up treatment.

[3] The clinic responded by asking the requester to complete, sign, and send back a consent form before it would release his records to him.

[4] Shortly thereafter, the requester filed a complaint with this office indicating that it had been more than 30 days since his access request had been made and he had not yet received a response from the clinic. Complaint HA18-111 was opened to deal with the deemed refusal matter, following which the clinic provided the requester access to his "complete medical records." The requester acknowledged receipt of the records and expressed a number of concerns with what he had received.

[5] The requester then filed another complaint with this office alleging that additional records should exist. This complaint file, HA19-0009, was opened as a result.

[6] During the mediation stage of the complaint process, the complainant explained that he visited the clinic's facility on two specified dates. He expressed his belief that additional records should exist for those two visits. The complainant further explained that he was scheduled to have a procedure completed during his second visit, but that he went into medical distress which resulted in the procedure being aborted.

[7] The clinic maintained that it provided the complainant with a complete copy of his medical records. The clinic told the mediator that the records provided to the complainant included those relating to the two visits specified by him, as well as three letters that were written by the doctor named in the complainant's request.

[8] The clinic also conducted an additional search for records, but did not locate any additional records beyond those already provided to the complainant.

[9] In support of his position that further records exist, the complainant told the mediator that two of the letters that he received from the clinic stated that a particular procedure "was used" and that "images were saved for future reference." However, the complainant says that the records he received from the clinic did not include these images or any discharge papers.

[10] In response, the clinic reiterated its position that it had provided the complainant with all of the records responsive to his request. The clinic explained that the medical images from the complainant's first visit were not saved due to a machine malfunction. The clinic also explained that when the doctor prepared his report for the second visit, he assumed that imaging would be conducted and saved, but that imaging never occurred because the complainant had to be rushed to the hospital.

[11] The complainant was not satisfied with the clinic's response. He questioned how the doctor was able to read images at his second visit if the machine was broken during his first visit. The complainant also asked about images from an epidural procedure that

he had during his second visit. The complainant continues to maintain that he should be provided with access to the images and the discharge papers relating to the two visits.

[12] As a mediated resolution was not achieved, the file was transferred to the adjudication stage of the complaint process. I decided to conduct a review under the *Act*. In doing so, I sought and received representations from the parties. The parties' submissions were shared in accordance with section 18 of the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*.

[13] For the reasons that follow, I uphold the clinic's search as reasonable and dismiss the complaint.

DISCUSSION:

[14] There is no dispute that the clinic is a "health information custodian" or that the records sought by the complainant are records of his "personal health information" as those terms are defined in sections 3 and 4 of the *Act*, respectively.

Did the clinic conduct a reasonable search for the complainant's personal health information records under section 54(1) of the *Act*?

[15] The sole issue that I must decide in this complaint is whether the clinic conducted a reasonable search for records responsive to the complainant's request, as required by sections 53 and 54 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the clinic's decision. If I am not satisfied, I may order further searches.

[16] This office has extensively canvassed the issue of reasonable search in orders issued under the *Freedom of Information and Protection of Privacy Act (FIPPA)* and its municipal counterpart, *MFIPPA*. It has also addressed the issue of reasonable search under *PHIPA*.¹ In addition to what is set out in PHIPA Decision 18, 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*.

[17] The principles established in these past decisions confirm 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.² To be responsive, a record

¹ PHIPA Decision 18.

² Orders P-624 and PO-2559.

must be "reasonably related" to the request.³

[18] 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.⁴ 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 of the responsive records within its custody or control.⁵

[19] 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.⁶

Representations

The clinic's representations

[20] The clinic provided representations in an affidavit sworn by its Patient Access Coordinator (the coordinator). The coordinator's evidence is that the clinic has provided the complainant with a complete copy of the medical records relating to him that the clinic has in its possession.

[21] The coordinator advises that when the complainant asked about access to the medical imaging from his two visits to the clinic, a clinical assistant and an employee of the clinic's IT department conducted a search for the requested images. The coordinator explains that the employees learned that the images from the complainant's first visit had not been recorded or saved because the ultrasound machine had malfunctioned. The coordinator advises that although the ultrasound machine had been repaired, no patient records could be retrieved for the period of time during which the machine was malfunctioning. As a result, the coordinator attests that the clinic is unable to produce any images from the date of the complainant's first visit.

[22] With respect to the complainant's second visit, the coordinator attests that no medical imaging was done, because a medical emergency arose which required the scheduled procedure to be aborted in order to transfer the complainant to a hospital. The coordinator also says that because the scheduled procedure was not carried out, a discharge report was not prepared.

[23] The coordinator addressed the references in the doctor's report to a medical imaging procedure being used and the images being saved for future reference. In

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

doing so, she refers to an email that had previously been sent to the complainant by the clinic's Patient Access Team Lead. In that email, the team lead explained that when the doctor prepared his report on the date of the complainant's second visit, he "assumed that imaging was going to be saved for future reference; however, [the complainant's] imaging had to be aborted" as a result of the medical emergency.

[24] The coordinator also confirms that she completed a second search during the mediation stage of the complaint process, but did not locate any additional responsive records.

The complainant's representations

[25] The complainant's representations raise a number of questions in response to the clinic's submissions. He asks when the doctor noticed that no images were saved from his first visit; why it took the clinic a year to discover that there were no images; and when the two clinic employees conducted a search for his images. He also asks whether there is any documentation relating to the repair of the ultrasound machine.

[26] The complainant maintains that the named doctor "performed approximately 20 epidural injections before he aborted." He questions how the doctor was able to do so if no images were saved from his first visit.

[27] The complainant also maintains that the records kept by the clinic do not meet the standards required by the CPSO, and "are not of the standard that [he] can accept." For example, the complainant refers to a record in which boxes for "discharge instructions provided" and "discharged with driver" are checked off, despite the clinic's claim that no discharge report was prepared. He says that this is an example of the clinic's poor record keeping.

The clinic's reply⁷

[28] In response, the clinic explained that it became aware that images were missing when the complainant submitted his request for a complete copy of his medical records. The clinic reiterates that when the complainant requested his images, a clinical assistant and a member of the clinic's IT department reviewed the machine that was used at the complainant's first visit and discovered that the images had not been saved due to machine error. According to the clinic, the named doctor was notified that the ultrasound images could not be retrieved.

[29] The clinic advises that it placed an ultrasound machine service request

⁷ Upon review of the clinic's reply representations, I determined that they did not raise new facts or issues to which the complainant should be invited to respond. Therefore, I did not invite the complainant to provide sur-reply representations on the issue of reasonable search.

approximately one and a half weeks after the complainant's first visit, which was before they had discovered that the complainant's images were unavailable. The clinic says that the repair took place approximately a month after the complainant's first visit.

[30] The clinic continues to maintain that it has provided the complainant with complete records relating to his care.

Analysis and findings

[31] As mentioned above, in a reasonable search complaint, the complainant must establish a reasonable basis for concluding that additional responsive records exist that have not yet been identified and located by a custodian.⁸ Considering the evidence before me, I am not satisfied that the complainant has provided sufficient evidence to establish a reasonable basis for his belief that additional responsive records exist.

[32] The complainant's primary concerns relate to the clinic not having provided him with medical images from his two visits to the clinic, or the discharge report from his second visit. In my view, however, the clinic has offered a sufficient explanation for why it is unable to locate and provide the complainant with these particular records. Notably, the *Act* does not require the clinic to prove with absolute certainty that the sought-after records do not exist; rather, it requires the clinic to provide sufficient evidence to demonstrate that it has made a reasonable effort to locate responsive records.⁹

[33] To justify why it is unable to locate and provide the complainant with the ultrasound images from his first visit, the clinic explains that the ultrasound machine malfunctioned, such that it did not save images that were captured that day. The clinic further explains that although the machine has since been fixed, it is not possible to retrieve the images from the date of the complainant's first visit. The clinic reached this conclusion after searches for these images were conducted by a number of the clinic's employees, including its Patient Access Coordinator, a clinical assistant, and member of the clinic's IT department. Based on the evidence of machine error and the search efforts of the clinic's employees, who I accept were the relevant, knowledgeable staff to conduct searches, I conclude that it is not reasonable to expect that these specified records about the complainant's first visit exist, but have not yet been located by the clinic.

[34] The clinic also explains that it is unable to locate and provide access to records that the complainant believes should exist as a result of his second visit, because those records do not, nor did they ever, exist. According to the clinic, the complainant

⁸ Order MO-2246.

⁹ Orders P-624 and PO-2559; PHIPA Decisions 17, 18, 79, and 86.

encountered a medical emergency prior to his scheduled procedure, which required him to be transferred to a nearby hospital. Based on the evidence before me, I accept that as result of the medical emergency, the scheduled procedure was not carried out. Further, since the complainant left the facility on an emergency basis, in an ambulance, I also accept that a discharge summary may not have been prepared in this situation. Based on the clinic's evidence of these circumstances, I find that there is no reasonable basis upon which to conclude that these particular records related to the complainant's second visit exist, but have not yet been located by the clinic.

[35] The complainant has not suggested that any additional responsive records should exist beyond those addressed above. Therefore, I am not persuaded, based on the evidence before me, that there is a reasonable basis for concluding that additional responsive records exist, which have not yet been identified and located by the clinic. While I acknowledge the complainant's concerns regarding the quality of the clinic's record keeping, and the clinic's delay in realizing that the images from his first appointment had not been saved, the issue before me under *PHIPA* is limited to whether the clinic has conducted a reasonable search in response to the complainant's access request.

[36] Based on the evidence provided by the parties, I am satisfied that the clinic used experienced employees who were knowledgeable in the subject matter of the complainant's request to conduct its searches for responsive records. In my view, the request was sufficiently clear, and I accept that the clinic understood its responsibility to search for, and provide the complainant with access to, his medical records. When the complainant explained which specific records he believes had not yet been located and provided to him, a clinic employee conducted a subsequent search, but did not locate any additional records beyond those already provided to the complainant. I am satisfied that the clinic expended a reasonable effort in order to locate records that are reasonably related to the complainant's request. Accordingly, I find that the clinic has met its obligations to conduct a reasonable search as required by the *Act*.

[37] Therefore, for the reasons outlined above, I uphold the clinic's search and dismiss the complaint.

ORDER:

I uphold the clinic's search as reasonable and dismiss the complaint.

Original signed by _____

Jaime Cardy
Adjudicator

_____ May 11, 2020