

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4198

Appeal PA20-00715

Trillium Health Partners

October 15, 2021

Summary: This appeal deals with an access request received by Trillium Health Partners (Trillium) for emails between specified staff members related to the appellant's son, who had been a patient. Trillium granted partial access to the responsive records located. The appellant appealed Trillium's decision, claiming that additional responsive records exist. In this order, the adjudicator dismisses the appeal and finds that Trillium conducted a reasonable search for responsive records using the principles under section 24 of *Freedom of Information and Protection of Privacy Act (FIPPA)*. Noting that *PHIPA* may have applied given the nature of the request, she decides it is not necessary to determine specifically whether the operative statute is *FIPPA* or the *Personal Health Information Protection Act (PHIPA)* because the analysis and result would be the same in the circumstances.

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, 2004*, S.O. 2004, c.3, as amended, sections 53 and 54.

OVERVIEW:

[1] This appeal arises from a request made to Trillium Health Partners (Trillium) by the appellant for access to the following records:

Records from the emails sent between [specified staff] relating to [the appellant's deceased son] between May 30, 2019 and August 31, 2019.

[2] Trillium issued a final decision granting the appellant access, in part, to the responsive records and withholding some information under section 21(1) of the *Freedom of Information and Protection of Personal Privacy Act (FIPPA)* (personal privacy).

[3] The appellant appealed Trillium's decision to the Office of the Information and Privacy Commissioner (the IPC).

[4] A mediator was assigned to explore the possibility of resolving the appeal. During mediation, the appellant advised that he was no longer seeking access to the withheld information but believes that more records exist. He asserted that Trillium is covering up negligence in connection with his son's death and that there must be more records generated between the individuals specified in his request.

[5] The mediator informed Trillium of this. In response to the appellant's concern, Trillium sent an email to the mediator containing the information about the searches that it performed for the responsive records and its final position on the matter, which was that no additional records exist.

[6] The mediator forwarded this email to appellant, who advised that he remains dissatisfied with Trillium's response and still believes that more records exist. Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[7] The adjudicator originally assigned to this appeal decided to conduct an inquiry. The parties were asked to address the application of *FIPPA* and the *Personal Health Information and Protection of Privacy Act (PHIPA)* to the remaining issue of whether Trillium conducted a reasonable search for responsive records. While representations were sought from both parties, only Trillium submitted representations and these were shared with the appellant, in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[8] The appeal was then transferred to me to continue with the adjudication of the matter.¹

[9] In this decision, I uphold Trillium's search as reasonable using the principles under section 24 of *FIPPA* and dismiss this appeal. While *PHIPA* may apply to the request given the nature of the request, I decide that it is not necessary to determine specifically whether the operative statute is *FIPPA* or *PHIPA*, because the analysis and result would be the same in the circumstances.

¹ I have reviewed all the file material and representations and have determined that I do not require further information before making my decision.

ISSUES:

- A. Should this appeal proceed pursuant to *FIPPA* or *PHIPA*?
- B. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Should this appeal proceed pursuant to *FIPPA* or *PHIPA*?

[10] Trillium's access decision was issued and this appeal has proceeded under *FIPPA*, not *PHIPA*. As the request appeared to relate to information that could include the personal health information of the appellant's son, the views of the parties were sought on whether *FIPPA* or *PHIPA* applies to the remaining issue of the reasonable search.

Representations

[11] Trillium submits that this appeal should proceed pursuant to *FIPPA*. It submits that while the records contain personal health information, section 52(1)(f)(ii)(A) of *PHIPA* permits it to claim the application of certain *FIPPA* exemptions (as "flow-through") to deny access to personal health information in the records, because it is subject to both *PHIPA* and *FIPPA*. As such, some parts of the record were redacted under *FIPPA* at the request stage, which are no longer at issue in this appeal.²

[12] As noted above, the appellant did not submit any representations.

Analysis and finding

[13] For the reasons outlined below, I find that it is unnecessary to determine in the circumstances whether the operative statute is *FIPPA* or *PHIPA* and I will use the principles in section 24 of *FIPPA* to consider the issue of reasonable search.

[14] There is no dispute that Trillium is a health information custodian subject to *PHIPA* pursuant to section 3(1) of *PHIPA* and an institution subject to *FIPPA* within the meaning of section 2(1) of *FIPPA*. As a result, in certain circumstances, Trillium is subject to both *PHIPA* and *FIPPA*. This means that when Trillium receives a request for access to information, it must decide whether *PHIPA* or *FIPPA*, or both, apply to the request.

[15] While I note that the appellant's request was for records that could contain his son's personal health information, I also note that this appeal deals only with the issue of reasonable search. IPC adjudicators have consistently found that the principles

² Section 21/49(b) of *FIPPA* is not one of the exemptions that is available to a health information custodian/institution using the flow-through exemption. As the issue of severances is not before me, I make no comment on whether Trillium's approach to severances was the correct one.

outlined in IPC orders addressing reasonable search under *FIPPA* (and its municipal counterpart) are instructive to the review of reasonable search under *PHIPA*.³

[16] In this appeal, Trillium has made representations on the issue of reasonable search under *FIPPA*, and conducting the reasonable search analysis under *PHIPA* would have no impact on the analysis or outcome of this appeal. In these circumstances, I have decided it is not necessary to make a determination about which is the operative statute here.

SEARCH FOR RESPONSIVE RECORDS

Issue B: Did the institution conduct a reasonable search for records?

[17] 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 24.⁴ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[18] An institution is not required 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.⁵ To be responsive, a record must be "reasonably related" to the request.⁶

[19] 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.⁷

[20] 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.⁸

[21] 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.⁹

³ PHIPA Decision 101 and PHIPA Decision 18.

⁴ Orders P-85, P-221 and PO-1954-I and MO-3644.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

⁹ Order MO-2246.

Representations

[22] Trillium submits that the appellant has been granted access, in part, to all of the responsive records and that no additional records exist because it conducted a reasonable search for records responsive to the request.

[23] Trillium explains that the request was received verbally from the appellant. It also explains that the appellant subsequently clarified that he did not want any correspondence between himself and Trillium, and added the name of another Trillium staff member to the scope of the request. To address his concerns about deleted items, Trillium also explains that it provided the appellant with details of how it would search for the responsive records, specifically advising that all email folders, including deleted folders, would be searched.

[24] Trillium submits that employees with the following titles performed searches in their Microsoft Outlook emails accounts, including email files and their attachments, in all of email folders, including deleted items, for responsive records:

- Director, Administration
- Director, Patient Relations
- Clinical Manager, Emergency and Urgent Care
- Chief of Emergency Medicine
- Clinical Program Director, Emergency

[25] It also submits that each of these employees are experienced and knowledgeable in the subject matter of the request as they had each had, in some capacity, direct contact with the appellant about his son.

[26] It further submits that the above employees were provided with instructions on how to conduct the email search, including guidance on how to search all email folders and how to use the search terms. It explains that its staff were instructed to search for “[*first name*]” and “[*last name*]” individually, as well as “[*first name last name*]”¹⁰. It also provided me with a copy of the search guidance document provided to staff, which outlines that each email folder (“All Outlook Items”) must be searched in Microsoft Outlook, and includes instructions on doing so. It also explains that some of these employees reached out to the privacy office, seeking clarification on how to conduct the searches and they were provided with guidance on how to perform the searches.

[27] Finally, Trillium submits that the searches conducted by these employees yielded email records and attachments, which were deemed responsive by its privacy office,

¹⁰ First and last name of the appellant’s son.

which then applied redactions under section 21 of the *FIPPA* to them where they made reference to other patients.¹¹ It also submits that it does not have any additional responsive records not provided to the appellant.

[28] Trillium also submits that it is unlikely that responsive records no longer existed at the time of the searches (middle of 2020) because the timeframe of the requested records (middle of 2019) fell within the two-year minimum retention period for electronic email records, outlined in its *Records Retention and Disposal Policy*.

[29] As noted above, the appellant did not provide any representations.

Analysis and findings

[30] For the reasons outlined below, I find that Trillium has conducted a reasonable search for responsive records.

[31] I am satisfied that Trillium has addressed the appellant's concern about deleted email records. At the request stage, he was advised that staff would search for responsive records in all email folders, including deleted folders, and he did not raise concerns with this approach. Trillium also provided its staff with instructions on how to do this.

[32] Other than advising the mediator that he believes additional records exist, the appellant did not provide any additional evidence to support this belief. Accordingly, I find this assertion alone falls short of establishing a reasonable basis for finding that additional responsive records should exist.

[33] As noted above, an institution is not required to prove with absolute certainty that further responsive records do not exist. Rather, institutions are required to demonstrate that they have made a reasonable effort to locate records.

[34] I have reviewed Trillium's representations. I am satisfied that Trillium has provided sufficient evidence to demonstrate that it made reasonable efforts to identify and locate responsive records. I am also satisfied that the individuals conducting the searches (as identified by the appellant), with guidance from its privacy office, are experienced employees knowledgeable about the subject matter of the request. I accept that Trillium has adequately explained the steps it took to search for records in response to the appellant's request. I also accept Trillium's explanation that it is unlikely that responsive records were destroyed based on its two-year minimum retention period for electronic email records.

[35] Accordingly, I find that Trillium's search for email records responsive to the appellant's request was reasonable and I uphold the reasonableness of its search.

¹¹ Again, as the issue of severances is not before me, I make no comment on whether Trillium's approach to severances was the correct one.

ORDER:

I find that Trillium's search was reasonable and dismiss the appeal.

Original Signed by: _____

Valerie Silva
Adjudicator

October 15, 2021 _____