

Information and Privacy Commissioner,  
Ontario, Canada



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

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PHIPA DECISION 228

Complaint HA22-00217

Pioneer Manor Long-Term Care Home

October 5, 2023

**Summary:** This decision involves a request made by an executor of an estate under the *Personal Health Information Protection Act, 2004* (the *Act*) for access to all records of personal health information of a patient who died while in residence at the Pioneer Manor Long-Term Care Home (the custodian). The custodian denied access to the records, claiming that some of the records did not qualify as personal health information. The custodian also denied access to information it deemed to be personal health information on the basis that the executor was not permitted to access it under the *Act*. The custodian suggested that the complainant make a request for information under the *Municipal Freedom of Information of and Protection of Privacy Act* because it is part of the City of Greater Sudbury.

In this decision, the adjudicator finds that the *Act* governs this request, that all of the records contain the deceased's personal health information as defined in section 4(1), and that the executor has a right of access to the personal health information of the deceased individual under section 52(1) of the *Act*. The adjudicator orders the custodian to issue an access decision to the executor under the *Act* without recourse to a time extension.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, sections 3(1)4ii, 4(1)(a), 4(1)(b), 4(1)(g), 4(4), 25(1) and 52(1).

**Decisions Considered:** PHIPA Decisions 15, 17, 19, 33, 154, 208 and 220.

## **BACKGROUND:**

[1] This decision resolves the issues raised as a result of a complaint about an access decision made by the Pioneer Manor Long-Term Care Home (the custodian) under the *Personal Health Information Protection Act, 2004* (the *Act*). The request was made shortly after the death of a resident of the custodian. The request was for access to all of the deceased individual's records relating to two identified incidents, including witness statements and RN/RPN notes. The access request also included records of the deceased's "DOS" ratings, fluid intake and output, and weights during a specified time frame.

[2] The access request form was signed by the executor and estate trustee of the deceased, the former spouse. The executor was represented throughout the request and this eventual complaint by the deceased's daughter. References to the complainant in this decision are to the daughter, acting on behalf of the executor and estate trustee.

[3] The custodian acknowledged receipt of this request and advised the complainant that it would require a copy of the legal documents that appointed her mother as executor and estate trustee. The complainant subsequently submitted a copy of her father's will to the custodian. In the will, the complainant's mother is named as the "Executrix and Trustee" of the will.

[4] The custodian then issued an access decision to the complainant, denying access to the requested records. The custodian stated:

This letter is to advise you that (sic) City of Greater Sudbury has considered your request and no information will be released at this juncture. The request for disclosure of the aforesaid records do not meet the requirements of section 38(4) of Ontario's *Personal Health Information Protection Act, 2004* (PHIPA) dealing with disclosure of information concerning deceased individuals.

[5] The custodian further stated:

Despite the decision above; you can follow the freedom of information process outlined here:

<https://www.greatersudbury.ca/city-hall/freedom-of-information/> and contact Clerk's Services Department for further assistance in the disclosure of information under the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56.

[6] The complainant then filed a complaint of the custodian's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[7] During the mediation of the complaint, the complainant stated that her mother should be provided with access to the health records. The custodian advised the mediator that some of the requested records did not qualify as personal health information, stating:

Because City of Greater Sudbury – Pioneer Manor is governed by MFIPPA as well, the requestor was directed to it as an avenue for potential access to the requested records.

[8] Regarding any personal health information in the records, the custodian stated:

City of Greater Sudbury – Pioneer Manor does not challenge the power of the deceased's ET to request disclosure of personal health information, however, under section 38(4), the Health Information Custodian (Pioneer Manor) can only disclose information about the deceased individual only in the circumstances specified under the Act.

[9] After receiving the custodian's response, the mediator sought clarification from the custodian regarding whether the information in the request qualified as personal health information, and why the disclosure provisions rather than the access provisions were applied to the access request. The mediator also sought clarification regarding the custodian's application of *MFIPPA* to this request.

[10] The custodian responded to the mediator, indicating that while some of the information requested did qualify as personal health information, the requirements of section 38(4) of the *Act* for disclosure were not met. The custodian took the position that there is no language in the *Act* that allows access to the information of a deceased individual outside of section 38, and that the IPC does not have the jurisdiction to read language into the legislation.<sup>1</sup> The custodian also advised the mediator that it had considered "section 54 of the *Act*"<sup>2</sup> but reiterated that the only relevant provision is section 38(4).

[11] The file then moved to the adjudication stage of the complaints process, where an adjudicator may conduct a review. I sought and received representations from the custodian and the complainant. Portions of the custodian's representations met the IPC's confidentiality criteria. I will not be setting out the confidential portions in this decision, although I have taken the information in them into consideration.

[12] In this decision, I find that the *Act* governs this request, that all of the records contain the deceased's personal health information, and that the complainant has a right of access to the deceased's personal health information under section 52(1) of the *Act*. Given the complainant's right of access to the personal health information under the *Act*,

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<sup>1</sup> Section 38(4) is under Part IV of the *Act*, which addresses the collection, use and disclosure of personal health information.

<sup>2</sup> Section 54 is under Part V of the *Act*, which addresses access to records of personal health information.

I order the custodian to issue an access decision to the complainant in light of these findings, without recourse to a time extension.

## **RECORDS:**

[13] The request is for the deceased's personal health information during a specified time frame, including information relating to two identified incidents. The records consist of emails, a letter of concern from the complainant, meeting notes, notes regarding an incident, critical incident reports, investigation notes, the deceased's admission record, DOS record, interdisciplinary progress notes, the medication administration record, physician's orders, progress notes, the deceased's care plan, the bedside Kardex, a letter from the custodian to the complainant, and the access request.

## **ISSUES:**

- A. Does the *Act* or the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, or both, apply in the circumstances of this complaint?
- B. Does each record at issue contain "personal health information" as defined in section 4 of the *Act*?
- C. Does the estate trustee have a right of access to the deceased individual's personal health information under section 52(1) of the *Act*?

## **DISCUSSION:**

**Issue A: Does the *Act* or the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, or both, apply in the circumstances of this complaint?**

[14] Part V of the *Act* grants an individual a right of access to records of personal health information that are in the custody or under the control of a health information custodian, subject to limited exceptions.

[15] *MFIPPA* 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.

[16] As the custodian claims that it is subject to both the *Act* and *MFIPPA*, a preliminary question for this type of custodian, on receiving a request for access to information, is whether the *Act* or *MFIPPA*, or both, applies.

[17] Where both the *Act* and *MFIPPA* apply, the right of access to records of personal

health information is governed by the *Act*.<sup>3</sup> The right of access in the *Act* can only be exercised by the individual to whom the information relates (section 52), or their “substitute decision-maker”—a person authorized to make a request for access on the individual’s behalf (sections 5(1), 23, 25).

### ***Representations***

[18] The custodian submits that both the *Act* and *MFIPPA* apply in the circumstances of this request. The custodian argues that the only right of access under the *Act* is section 52(1) which provides individuals with the right to obtain access to records of their own personal health information, and that there is no language in the *Act*, other than section 38(4), that allows anyone access to the personal health information of a deceased individual.

[19] Regarding *MFIPPA*, the custodian submits that it directed the complainant to make an access request to it under *MFIPPA* because it is part of the City of Greater Sudbury, but notes that the right of access to information of a deceased individual under *MFIPPA* is not absolute.

[20] The complainant’s position is that the applicable legislation in this request is the *Act* and that the records should be released under the *Act*.

### ***Analysis and findings***

[21] In this matter, there is no dispute that the custodian is an institution subject to *MFIPPA* under section 2(1)<sup>4</sup> of that statute and is also subject to the *Act* as a health information custodian as defined in section 3(1) of the *Act*.<sup>5</sup>

[22] As previously stated, in situations where the *Act* and *MFIPPA* could both apply, the IPC’s approach is to first consider the extent of any right of access under the *Act*, and then consider the extent of any right of access under *MFIPPA* to any remaining portions of the record for which a determination has not been made under the *Act*.<sup>6</sup> In this matter, the complainant’s request is for records of the deceased’s personal health information during a specified time that he was a resident at the custodian’s facility. Below, I find that any right of access to this information is to be determined under the *Act*. Therefore, it is not necessary to consider whether *MFIPPA* applies to the records.

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<sup>3</sup> See PHIPA Decision 33.

<sup>4</sup> See section 2(1) of *MFIPPA* (definition of “institution”). The information regarding the custodian also being an “institution” under *MFIPPA* was provided by the custodian.

<sup>5</sup> In the definition of a “health information custodian,” the relevant section in this complaint is section 3(1)4ii of the *Act* which states that a “health information custodian” includes a long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*.

<sup>6</sup> For example, see PHIPA Decisions 17, 27, 30 and 123.

**Issue B: Does each record at issue contain “personal health information” as defined in section 4 of the *Act*?**

[23] One of the issues identified by the custodian is whether the information in the records qualifies as the “personal health information” of the deceased. That term is defined in section 4 of the *Act* and states, in part:

(1) 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,

(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,

(g) identifies an individual’s substitute decision-maker.

(2) In this section,

“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.

[24] In PHIPA Decision 17, the IPC adopted a broad interpretation of the phrase “personal health information” (see particularly paragraphs 65-68). The IPC has applied this broad interpretation in subsequent decisions and orders.<sup>7</sup>

***Representations***

[25] The custodian submits that the information in the records relating to the first incident, as well as the “DOS” ratings, fluid intake and output, and weights all qualify as

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<sup>7</sup> For example, see PHIPA Decisions 52 and 82, and Order MO-3531.

the deceased's personal health information.

[26] Conversely, the custodian argues that the records relating to the second incident do not qualify as the deceased's personal health information because the exception in section 4(4)(a) of the *Act* applies to this information. In particular, the custodian submits that the information in these records relates primarily to one or more employees in response to a concern raised by the complainant.

[27] The complainant's position is that the custodian has confirmed that the records contain her father's personal health information, which should be released.

[28] In further support of her position, the complainant also refers to the custodian's actions in response to a prior access request for the same information that was made prior to her father's death. At that time, the custodian advised her that the access request had been received and that the custodian would be in contact with her when the information was ready to be picked up. The complainant points out that during the processing of the request the custodian did not state that the information being requested fell under section 4(4). The complainant submits that the custodian's position that most of the information falls within section 4(4) did not arise until the adjudication stage of this complaint.

### ***Analysis and findings***

[29] I have reviewed all of the records at issue and I find that all of the records contain information that qualifies as the personal health information of the deceased. In particular, I find that the records contain information identifying the deceased with information that relates to his physical and mental health, including his health history. This information, I find, falls within paragraph (a) of the definition of personal health information set out in section 4(1). The records also contain information identifying that the deceased was receiving health care from the custodian, which I find also qualifies as his personal health information as defined in paragraph (b) of the definition. Further, I find that some of the records identify the complainant as her father's substitute decision-maker, which falls within paragraph (g) of the definition.

[30] The custodian's position is that section 4(4)(a) applies to some of the records, and that these records do not contain personal health information because they relate primarily to one or more employees of the custodian in response to a concern raised by the complainant. I do not agree with the custodian and find that it has not met the requirements of the exception in section 4(4) of the *Act*. Section 4(4) sets out an exception to the definition of "personal health information," as follows:

(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.

**[emphasis added]**

[31] The custodian's representations refer to only section 4(4)(a). In order for the exception to apply, both sections 4(4)(a) and 4(4)(b) must apply to the information at issue. For example, in PHIPA Decision 154 Adjudicator Jenny Ryu found that the type of information that falls within the exception in section 4(4) includes information contained in the occupational health and safety record of a custodian's employee. In making this finding, she found that in order for section 4(4)(a) to apply, the information must relate primarily to one or more employees of the custodian, and for section 4(4)(b) to apply, the record must be maintained for a purpose *other* than the provision of health care.

[32] Section 2 of the *Act* defines "health care" to mean:

... any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,

(a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,

(b) is carried out or provided to prevent disease or injury or to promote health, or

(c) is carried out or provided as part of palliative care,

and includes

(d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for the use of an individual, pursuant to a prescription, and

(e) a community service that is described in subsection 2(3) of the Home Care and Community Services Act, 1994 and provided by a service provider within the meaning of that Act[.]

[33] In PHIPA Decision 15, I interpreted the meaning of "health care" in section 2,



finding that health care must be for a "health-related purpose."<sup>8</sup> More recently, the IPC has applied this interpretative approach in decisions finding that the provision of co-parenting counselling services (to manage parenting issues)<sup>9</sup> and services to coordinate individuals' access to third-party programs<sup>10</sup> do not qualify as "health care" within the meaning of the *Act*.

[34] I agree with and adopt the approaches taken in these PHIPA Decisions. In this case, the information which the custodian claims falls within the exception in section 4(4) is contained in records that deal with an incident involving the deceased and certain employees of the custodian. These records include notes of employee interviews, incident reports and other notes. I find that these records, while involving these employees, do not relate primarily to them, nor were these records maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employees or other agents of the custodian.

[35] In fact, I find on my inspection of the records that they relate primarily to the deceased – specifically an incident involving him, and that these records were maintained for the purpose of documenting an incident involving the provision of health care to the deceased, as it is as defined in section 2. As a result, I find that both requirements of the exception in section 4(4) have not been met with respect to the information in these records and the exception does not apply to the records.

[36] As a result, I find that all of the records contain the personal health information of the deceased. I will now determine whether the access provision in section 52(1) applies to the complainant's request for access to the deceased's personal health information.

**Issue C: Does the estate trustee have a right of access to the deceased individual's personal health information under section 52(1) of the *Act*?**

[37] The estate trustee's right of access to the deceased's personal health information is governed by section 52 of the *Act*. This section reads, in part:

- (1) Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless [...]
- (2) Despite subsection (1), an individual has a right of access to that part of a record of personal health information about the individual that can

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<sup>8</sup> I found that the service provided by a psychologist was not provided for a health-related purpose, but rather for the purpose of assisting in the development of a parenting plan in the best interests of a child.

<sup>9</sup> PHIPA Decision 126.

<sup>10</sup> PHIPA Decision 134.

reasonably be severed from the part of the record to which the individual does not have a right of access as a result of clauses (1) (a) to (f).

(3) Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

[38] The custodian's position is that section 52(1) does not apply to this access request and that there is no language in the *Act* that allows anyone access to the personal health information of a deceased individual outside of the disclosure provision in section 38(4) of the *Act*.

[39] The *Act* draws a distinction between the provision of "access" to personal health information, and the "disclosure" of personal health information by a health information custodian. Individuals have a right of access to records of personal health information about themselves in the custody or control of health information custodians, subject to limited and specific exceptions.

### ***Representations***

[40] The custodian's position is that the complainant does not have an "automatic" right to access the deceased's personal health information under section 52(1) of the *Act*, and that, in fact, there is no language in the *Act* that allows anyone access to the personal health information of a deceased individual outside of section 38 of the *Act*.

[41] The complainant submits that the custodian has failed to justify its decision under the *Act* to deny access to the records, stating:

It is unreasonable and unprofessional that the Home acknowledges that my family and I are entitled to access some of the requested information, however they continue to withhold this lawful access and their continued refusal to the undisputed information is unbecoming of an institution that knows or ought to know better.

### ***Analysis and findings***

[42] The issue to be determined is whether the estate trustee of the deceased's estate has a right of access to the deceased's records of personal health information.

[43] An individual's right of access under section 52(1) of the *Act* must be exercised by the individual about whom the records relate or – because of section 25(1) of the *Act* – that person's lawfully authorized substitute decision-maker on his or behalf. The health information custodian is obliged to respond to the request for access and, if no exceptions apply, provide access.

[44] On death, the authorized substitute decision maker is the estate trustee or, in the absence of an estate trustee, the person who has assumed responsibility for the administration of the deceased's estate. Section 5(1) of the *Act* defines a substitute decision-maker as:

"substitute decision-maker," in relation to an individual means, unless the context requires otherwise, a person who is authorized under this Act to consent on behalf of the individual in the collection, use or disclosure of personal health information about the individual.

[45] With respect to persons who may consent, paragraph 4 of section 23(1) of the *Act* states:

If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure by a health information custodian of personal health information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent:

4. If the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.

[46] In this case, the complainant, acting on behalf of the estate trustee for the deceased's estate has made the request for access. For the reasons that follow, I find that the estate trustee is entitled to access the deceased's records of personal health information under section 52(1) of the *Act*.

[47] The IPC has addressed the issue of access to the personal health information of a deceased individual under the *Act* in a number of decisions. For example, in PHIPA Decision 17, access was granted by a public hospital to the father as the substitute decision maker of an infant who had died while being treated at the hospital. In PHIPA Decision 33, the estate trustee of a deceased patient of a public hospital was granted access to a number of records relating to the deceased's care. In PHIPA Decision 208, the estate trustee of her deceased father, who was a resident at the custodian's facility was granted access to records relating to him. In PHIPA Decision 220, the estate trustee for his deceased wife, who had been a patient at a public hospital, was granted access to his wife's personal health information. In all three of the decisions dealing with access requests from estate trustees, the custodians responded to these requests by disclosing the records of personal health information to the estate trustees, subject to any applicable exemptions in the *Act*.

[48] As these decisions illustrate, it is well established that an authorized substitute decision maker, such as an estate trustee has a right of access to the personal health information of the relevant deceased individual under section 52(1) of the *Act*.

[49] In summary, I find that section 52(1) of the *Act* applies to this access request and

that the estate trustee has a right of access to the records of personal health information of the deceased individual.

## **SUMMARY OF FINDINGS**

- any right of access to the records is to be considered under the *Act* rather than *MFIPPA*,
- all of the records contain the personal health information of the deceased, and
- the estate trustee has a right of access to the personal health information of the deceased under section 52(1) of the *Act*.

## **ORDER:**

For the foregoing reasons, pursuant to section 61(1) of the *Act*:

1. I order the custodian to issue an access decision letter to the complainant within **15 days** of this decision, without recourse to a time extension, and to ensure that the decision is in accordance with the findings I have made in this decision, namely that all of the records contain the deceased's personal health information and the complainant has a right of access to the records under section 52(1).
2. I order the custodian to provide the IPC with a copy of the decision letter it sends to the complainant.

Original Signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

October 5, 2023 \_\_\_\_\_