Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 15

Complaint HA14-76

Dr. Raymond Morris

August 24, 2015

Summary: The complainant made a request under section 55 of the *Personal Health Information Protection Act, 2004* (*PHIPA*) to a psychologist to correct a Custody and Access Assessment Report that the psychologist had completed at the request of legal counsel for the parents of a child. The complainant is one of the parents. The psychologist denied the complainant's request. In this review of the complaint, the psychologist takes the position that he was not a "health information custodian" for the purpose of the Custody and Access Assessment Report. In this decision, the adjudicator finds that the psychologist was not a "health information custodian" within the meaning of that term in section 3(1) of *PHIPA* for the purpose of preparing the Custody and Access Assessment Report. The right to request a correction under *PHIPA* therefore does not apply and there is no basis for a complaint about the denial of the complainant's correction request.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched. A, as amended, sections 2 (definition of health care and health care practitioner), 3(1), 20(2) and 55(1).

Cases Considered: *Hooper v. College of Nurses of Ontario* (2006), 81 O.R. (3d) 296 (Div. Ct.); *Wyndowe v. Rousseau,* 2008 FCA 39.

Decisions Considered: HC-050014-1.

BACKGROUND

[1] The complainant made a multi-part correction request under section 55 of the *Personal Health Information Protection Act* (*PHIPA*) to Dr. Raymond Morris. In particular, the complainant requested corrections to a Custody and Access Assessment Report (the report) that was prepared by Dr. Morris. The report had been requested by legal counsel for the complainant and his former spouse (the parents), respectively. Dr. Morris was retained by the parents to conduct the assessment, which was intended to provide a comprehensive custody and access assessment as referenced in section 30 of the *Children's Law Reform Act*.[1]

[2] The report was completed by Dr. Morris and provided to the parents and their respective legal counsel. Subsequently, the complainant submitted a correction request to Dr. Morris. Dr. Morris responded to the complainant's request, offering to correct minor typographical errors, but denying the remainder of the request. Dr. Morris advised the complainant that his observations were accurate based on the information provided to him by various sources, including interviews conducted with the parents, the child and various third parties. The complainant then sent Dr. Morris correspondence setting out his concerns with Dr. Morris' decision to decline the remaining requested changes to the report.

[3] The complainant subsequently filed a complaint about Dr. Morris' correction decision to this office.

[4] During the mediation of the complaint, Dr. Morris took the position that he was not a "health information custodian" under *PHIPA* for the purposes of the correction request, because he did not provide health care to the parents or their child. The complainant argued that Dr. Morris is a health information custodian under *PHIPA*, and that the corrections he requested should be made to the report.

[5] The complaint then moved to the adjudication stage of the complaints process, where an adjudicator conducts a review under section 57(3) of *PHIPA*. The preliminary issue in this complaint is, in this particular circumstance, whether Dr. Morris is a "health information custodian" as defined in section 3(1) of *PHIPA*. If I find that Dr. Morris is a "health information custodian" in these circumstances, then section 55 of *PHIPA* applies to Dr. Morris. Conversely, if I find that Dr. Morris is not a "health information custodian" for the purposes of preparing the report, then section 55 of *PHIPA* does not apply, and there is no basis for a complaint under *PHIPA* about the refusal to make the correction. Initially, I provided Dr. Morris with the opportunity to provide representations on this issue and he did so. I then shared the portions of Dr. Morris' representations addressing the issue in the complaint with the complainant, from whom I also received representations.

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[1] R.S.O. 1990, Chapter C.12.

[6] For the reasons that follow, I find that for the purposes of preparing the Custody and Access Assessment Report, Dr. Morris is not a "health information custodian" within the meaning of that term in section 3(1) of *PHIPA*. No complaint is available under *PHIPA* about a refusal of the complainant's correction request and the complaint is, therefore, dismissed.

RECORD

[7] The record at issue is the Custody and Access Assessment Report prepared by Dr. Morris at the request of legal counsel for the parents of a child.

DISCUSSION

[8] The preliminary issue in this complaint is whether Dr. Morris is a "health information custodian" as defined in section 3(1) of PHIPA for the purpose of preparing the Custody and Access Assessment Report. If Dr. Morris is not a health information custodian in these circumstances, there is no right to request a correction under PHIPA. The relevant sections of PHIPA are:

- Section 3(1), which sets out the definition of "health information custodian;" and
- Section 2, which sets out the definitions of "health care practitioner" and "health care;" and
- Section 55 of the Act, which are the provisions concerning the correction of a record of personal health information.

Representations

[9] Dr. Morris advises that he is a psychologist who is registered to practice in Ontario. He indicates that in his practice he has particular expertise in the area of parental disputes over the custody of and access to children. In this case, he was asked by each legal counsel representing the parents of a child to conduct a comprehensive custody and access assessment, as the parents were in a dispute over the custody and access of that child. The parents consented to Dr. Morris conducting this assessment. Dr. Morris provided this office with a copy of the retainer contract (the agreement) signed by the parents.

[10] The agreement states that pursuant to section 30 of the *Children's Law Reform Act*, Dr. Morris was retained to act as an assessor to determine the needs of the child and the capacity and willingness of each of the parents to meet those needs. The agreement also provides that Dr. Morris was to provide recommendations regarding: decision-making affecting the child; information-sharing regarding the child; and the nature and schedule of the child's living arrangements. The agreement states that Dr. Morris would complete a written report outlining his findings and recommendations and

that he may be called as a witness by either party in a legal proceeding. In addition, the agreement states that Dr. Morris, as an assessor, is an impartial third party whose role is to perform a complete evaluation in order to arrive at recommendations for a parenting plan that will be in the best interests of the child.

[11] Dr. Morris submits that he did not provide health care within the meaning of *PHIPA* to the complainant or his family members, including the child. Dr. Morris states that the service he provided to the complainant was an expert opinion related to the development of a parenting plan in the best interests of the child. Dr. Morris goes on to state that his mandate required the gathering of information, the assessment and interpretation of data, and providing a rationale for the recommended parenting plan. Moreover, Dr. Morris states that he used psychological testing, clinical interviewing and behavioural observations as methods to gather the data to form his expert opinion.

[12] Dr. Morris states:

> . . . [A]ny assessor of matters related to custody and access of children, are mandated to collect assessment data related to the evaluation of personality as it impacts on parenting, which includes personal histories and an evaluation of mood, cognition and behavior among other important components of an evaluation in the best interests of the child. The whole idea of the referral is that feedback or disclosure of such information will be provided to both parents and legal counsel initially in the hope that they will use it to settle their dispute, or if that is not possible, present it as evidence to support or oppose in a trial.

[13] The complainant submits that Dr. Morris is a "health information custodian" for the purposes of his request for correction of the report because: Dr. Morris describes himself on his website as a psychologist registered as a member of the College of Psychologists of Ontario; and psychology is regarded and treated as a regulated health profession under the *Regulated Health Professions Act, 1991.*[2]

[14] The complainant states:

> The practice of psychology in Ontario, then, falls legally, logically and intuitively into the category of "health profession" and registered psychologists are, it follows, health care practitioners. They practice a form of health care. Dr. Morris, as a practicing psychologist, is a health care practitioner, as he practices a profession which falls within the health care rubric in Ontario.

[15] Further, the complainant submits that the services Dr. Morris provided fall within

[2] S.O. 1991, c.38, s.5.

the definition of "health care" and "health care practitioner" set out in *PHIPA*. In particular, the complainant notes that Dr. Morris admits to providing services such as observing, examining, and assessing. The complainant argues that the definition of "health care" in *PHIPA* is not limited to treatment only and that the services provided by Dr. Morris, as described in his representations, were for the health-related purpose of evaluating the psychological well-being of the parents and the child. The complainant goes on to argue that while Dr. Morris was not required to provide psychological treatment in the course of preparing the report, he carried out some key activities that comprise "health care," namely assessment and diagnosis.

[16] Lastly, the complainant submits that because Dr. Morris is a "health care practitioner," he is, by definition a "health information custodian" within the meaning of section 3(1) of *PHIPA*. The complainant argues that Dr. Morris' report contains personal health information about him and others and that Dr. Morris has custody and control over the report. The complainant also states that it is his position that the report should be corrected, as it contains a number of errors.

Analysis and findings

[17] On the particular facts of this case and for the reasons that follow, I find that for the purposes of preparing the Custody and Access Assessment Report, Dr. Morris is not a "health information custodian" as defined in section 3(1) of *PHIPA*. Consequently, I also find that the correction obligations set out in section 55 of the *Act* do not apply to Dr. Morris, insofar as this report is concerned, and no complaint under *PHIPA* is available about the refusal of the correction request.

[18] The definition of a "health information custodian" is set out in section 3(1) of PHIPA, which states in part:

> "health information custodian", subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any:
>
> 1. A health care practitioner or a person who operates a group practice of health care practitioners.
>
> . . .

[19] Section 2 of *PHIPA* further defines a "health care practitioner," in part, as:

> (a) a person who is a member within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care,

[20] Section 2 of *PHIPA* also further defines "health care," in part, to mean:

> In this Act,
>
> "health care" means 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,
>
> . . .

[21] Section 55(1) of *PHIPA* states:

> If a health information custodian has granted an individual access to a record of his or her personal health information and if the individual believes that the record is inaccurate or incomplete for the purposes for which the custodian has collected, uses or has used the information, the individual may request in writing that the custodian correct the record.

[22] The definition of "health care practitioner" in section 3(1) is premised on the fact that the health care practitioner must be providing health care. Further, "health care" as defined in section 2 of *PHIPA* must be for a "health-related purpose." In my view, on the facts of this particular case, the service provided by Dr. Morris was not provided for a health-related purpose, but rather for the purpose of assisting the parents, and possibly the courts, to develop a parenting plan which would function in the best interests of the child. Therefore, and for the further reasons set out below, I find that Dr. Morris was not providing health care when he provided a service in this capacity. Consequently, I find that Dr. Morris was not a "health information custodian" as defined in section 3(1) for the purpose preparing the Custody and Access Assessment Report. As set out below, this interpretation of *PHIPA* is consistent with the decision of this office in complaint number HC-050014-1, with the policy behind subsection 20(2) of *PHIPA*, with the decision of the Federal Court of Appeal in *Wyndowe v. Rousseau,*[3] and with public guidance provided by the Ministry of Health and Long-Term Care in relation to the definition of "health care."

[3] 2008 FCA 39 (*Wyndowe*).

[23] The decision in HC-050014-1[4] concerned a complaint by an individual who was an employee of a municipality. The complainant alleged that his personal health information was disclosed in contravention of *PHIPA* to management staff at the municipality by a nurse working in the employee assistance unit of the municipality while providing disability management services. Disability management services involved the development and implementation of plans to facilitate the return to work by employees of the municipality. This office held that neither the nurse nor the municipality, as the person who operates the disability management program provided by the employee assistance unit, were health information custodians within the meaning of section 3 of *PHIPA* in providing these services. This office stated that the disability management services were not provided for a health-related purpose, but for the purpose of assisting employees to return to work, and therefore the nurse and the municipality could not be said to be providing health care in this capacity.

[24] This interpretation of *PHIPA* is consistent with the policy behind section 20(2) of *PHIPA*, which states:

> A health information custodian described in paragraph 1, 2, 3 or 4 of the definition of "health information custodian" in subsection 3 (1), that receives personal health information about an individual from the individual, the individual's substitute decision-maker or another health information custodian for the purpose of providing health care or assisting in the provision of health care to the individual, is entitled to assume that it has the individual's implied consent to collect, use or disclose the information for the purposes of providing health care or assisting in providing health care to the individual, unless the custodian that receives the information is aware that the individual has expressly withheld or withdrawn the consent.

[25] Section 20(2) permits certain health information custodians, such as health care practitioners who collect personal health information from the individual or another health information custodian, to assume the individual's implied consent to collect, use and disclose that information for the purpose of providing health care unless the individual has expressly withheld or withdrawn consent. The policy behind this subsection is to facilitate collections, uses and disclosures of personal health information in the health system that individuals generally expect to occur without express consent. In interpreting the meaning of "health care" in the context of a complaint regarding correction under section 55 of *PHIPA*, I am mindful that a broad interpretation of "health care" would affect the scope of personal health information that may be collected, used, or disclosed without express consent in other circumstances. If Dr. Morris was found to be providing "health care" within the meaning of section 2 of *PHIPA* in the context of this complaint, this would, for example, permit other health

[4] The Adjudication Summary is available on the website of the Office of the Information and Privacy Commissioner/Ontario: https://www.ipc.on.ca/images/Findings/up-HC_050014_1.pdf.

information custodians to disclose personal health information to Dr. Morris, and also permit Dr. Morris to disclose the report to other health information custodians, on the basis of assumed implied consent (if the other elements of subsection 20(2) were met) without requiring the express consent of the individual. In my view, it would not be reasonable to assume an individual's implied consent when the report was created for the purpose of assisting the parents, and possibly the courts, to develop a parenting plan which would function in the best interests of the child.

[26] The interpretation adopted is also consistent with the decision of the Federal Court of Appeal in *Wyndowe v. Rousseau*. That case involved a request for access by an insured person to the handwritten notes of a physician in Ontario who was retained by an insurance company to conduct an independent medical examination of the insured person. The Federal Court of Appeal acknowledged that *PHIPA* does not apply to physicians performing an independent medical examination. In particular, at paragraph 17, the Federal Court of Appeal stated:

> Subsequent to the events that led to this appeal, Ontario adopted the Personal Health Information Protection Act, 2004 (S.O. 2004, c. 3, Sched. A). The Act applies to health care and to "health information custodians". It is common ground that it does not apply to doctors performing an IME.

[27] Further, in the document entitled *Personal Health Information Protection Act, 2004: An Overview for Health Information Custodians*, the Ministry of Health and Long-Term Care states that "a nurse advising an employer with respect to back to work requirements" is not a health information custodian given, when acting in such a capacity, the nurse is not providing health care as defined in *PHIPA*.[5] In particular, page 37 of the document states as follows:

> **Q8.** I am not a "health information custodian", but employ health information custodians, such as regulated health professionals. How will the Act affect our operations?
>
> **A8.** To the extent that your employees who are "health care practitioners" within the meaning of the Act, are providing health care, they will be considered health information custodians and therefore, must comply with the provisions of the Act. A "health care practitioner" is defined as a person who provides "health care" and is a member of a regulated health profession, a drugless practitioner (like a naturopath) or a social worker. The Information and Privacy Commissioner could investigate a complaint made against your employees and for that purpose would have a right to enter your business premises, review records, and compel testimony. **If the health professional in your organization does not provide "health care" within the meaning of the Act, that health**

[5] The Ministry's document (see note 6) refers to *PHIPA* as "the Act."

> **professional is not a health information custodian. Often, there will be health professionals, such as nurses, who will be employed as teachers for example. The nurse as a teacher in a school is not subject to the Act (e.g. physician employed by an insurance company reviewing submitted medical claims for the insurance company; nurse advising employer with respect to back to work requirements for an injured employee, where the nurse is not providing health care to the employee** [sic]**.** (emphasis added)[6]

[28] I have taken into consideration the complainant's argument that the definition of "health care" in *PHIPA* is not limited to treatment only and can include services such as observing, examining and assessing by a health care practitioner. However, as previously stated, I find that "health care" as defined in *PHIPA* must also be for a "health-related purpose."

[29] In coming to this conclusion I have also considered the decision of the Divisional Court in *Hooper v. College of Nurses of Ontario.*[7] That case involved the disclosure of portions of the occupational health and safety file of a nurse employed by the Sunnybrook and Women's College Health Sciences Centre to the College of Nurses of Ontario.

[30] The Divisional Court held that pursuant to section 76 of the Health Professions Procedural Code, being Schedule 2 to the *Regulated Health Professions Act, 1991,*[8] the investigator appointed by the College of Nurses of Ontario had the jurisdiction to request and use the records from the Sunnybrook and Women's College Health Sciences Centre. The Divisional Court further held that the Sunnybrook and Women's College Health Sciences Centre had the jurisdiction to disclose these records to the College of Nurses of Ontario. The Divisional Court stated that the Occupational Health and Safety Department was providing health care and therefore the information contained in the records at issue was personal health information as defined in section 4 of *PHIPA*. This decision does not discuss how this interpretation of "health care" would more broadly affect the collection, use, and disclosure of personal health information on the basis of assumed implied consent pursuant to section 20(2) of *PHIPA.*[9]

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[6] Ontario, Ministry of Health and Long-Term Care, *Personal Health Information Protection Act, 2004: An Overview for Health Information Custodians*, (August 2004), at 37, available online: http://www.health.gov.on.ca/en/common/legislation/priv_legislation/docs/info_custodians.pdf.
[7] (2006), 81 O.R. (3d) 296 (*Hooper*).
[8] S.O. 1991, c. 18.
[9] As also noted by the Court, this disclosure was not the subject matter of a complaint to this office under *PHIPA*. The Sunnybrook and Women's College Health Sciences Centre was not a party in that application. This office was also not a party in that application.

[31] On my review of this decision, it was not necessary for the Divisional Court to decide whether or not the Occupational Health and Safety Department was providing health care and therefore that the information contained in the records was personal health information. If they were not records of personal health information, the disclosure would not be subject to *PHIPA*. Alternatively, if they were records of personal health information, the disclosure would be permitted, as the Divisional Court noted, pursuant to sections 9(2)(e) and 43(1)(b) of *PHIPA*. As a result, the statement by the Divisional Court that the Occupational Health and Safety Department was providing health care and that the information in the records was personal health information is *obiter dicta* as it was unnecessary to the decision in the case.

[32] The decision in *Hooper* is difficult to reconcile with that in *Wyndowe*, where the Federal Court of Appeal confirmed that physicians performing an independent medical examination are not "health information custodians" for the purpose of *PHIPA*. I note that in the *Hooper* case, the Divisional Court did not have this office's interpretation of section 20(2) of *PHIPA* or the findings in HC-050014-1 before it. In all these circumstances, I am satisfied that the decision in *Hooper,* as it relates to what constitutes health care and personal health information, is not binding on me.

[33] In conclusion, applying the approach taken by this office, as well as the *Wyndowe* decision, I find that Dr. Morris was not a "health information custodian" within the meaning of that term in section 3(1) of *PHIPA* for the purposes of preparing the Custody and Access Assessment Report. As a result, Section 55 of *PHIPA*, which sets out the obligations of a health information custodian who receives a request for correction of a record of personal health information, does not apply and there is no basis for a complaint under *PHIPA*.

NO ORDER:

1. For the foregoing reasons, no order is issued.

Original signed by: August 24, 2015
Cathy Hamilton
Adjudicator