

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 40

Complaint HA15-36

Dr. Jonathan Welchner

January 19, 2017

**Summary:** The issues in this complaint are whether four letters sent by Dr. Welchner (the custodian) to the complainant contain the complainant's personal health information and whether they are subject to correction under section 55 of the *Personal Health Information Protection Act*. The complainant requested that 26 portions of these letters be struck out. In this decision, the adjudicator finds that the records contain the complainant's personal health information, but that the custodian is not obliged to make the corrections the complainant requested. The complainant did not demonstrate that the information in the records is inaccurate for the purposes for which the custodian uses the information. The custodian's decision not to make the requested corrections is upheld.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, sections 3(1), 4(1), 55(8) and 55(9).

**Decisions Considered:** PHIPA Decision 36.

### BACKGROUND:

[1] This decision disposes of the issues raised as a result of a complaint made about Dr. Jonathan Welchner (the custodian). The complainant made two requests to the custodian for corrections to his personal health information under the *Personal Health Information Protection Act, 2004* (the *PHIPA*) contained in four letters that the complainant had received from the custodian over a five-month period.

[2] In both correction requests, the complainant attached a detailed list identifying the information he was of the view was incorrect and the reason(s) for the requested correction(s). In each instance, the complainant asked that the incorrect information be struck out.

[3] In response, the custodian issued two decision letters, denying the correction requests. The custodian claimed the application of section 55(9) of *PHIPA*, and informed the requester of his right to file a statement of disagreement as provided by section 55(11). The complainant subsequently filed a complaint with this office.

[4] During the mediation of the complaint, the complainant advised the mediator that section 55(9) did not apply in these circumstances, as the information he identified as incorrect does not consist of the custodian's professional opinion and/or observation.

[5] The custodian advised the mediator that the information in the records reflect his opinion and would not be subject to correction. In addition, the custodian advised that he was of the view that the records are not the type captured by section 55 of *PHIPA*, but rather factual information and good faith explanations with respect to particular events that took place in relation to the termination of the doctor-patient relationship between the custodian and the complainant.

[6] The complaint file then moved to the adjudication stage of the complaints process, where an adjudicator may conduct a review. I decided to conduct a review. I sought and received representations from the complainant and the custodian. For the reasons that follow, I find that the custodian is not required to make the corrections requested by the complainant. No order is issued and the complaint is dismissed.

## **RECORDS:**

[7] The records at issue consist of four letters that were authored by the custodian and sent to the complainant. The letters are in relation to the termination of the doctor-patient relationship by the custodian, including the reasons for the termination. As previously stated, the complainant does not seek to add information to the letters. Instead, he seeks to have 26 portions of the letters struck out. In general terms, the letters consist of:

- Letter 1 – in this letter, the custodian notifies the complainant that the doctor-patient relationship has been terminated and the reasons why;
- Letter 2 – in this letter, the custodian provides further details regarding the reasons for the termination of the doctor-patient relationship;
- Letter 3 – in this letter, the custodian responds to correspondence he received from the complainant; and

- Letter 4 – this letter is an access decision made by the custodian in response to the complainant’s access request made under *PHIPA*.

## **ISSUES:**

- A. Do the records contain personal health information as defined in section 4(1) of *PHIPA*?
- B. Does the custodian have a duty to make the requested corrections under section 55 of *PHIPA*?

## **DISCUSSION:**

### **Issue A: Do the records contain personal health information as defined in section 4(1) of PHIPA?**

[8] At the outset, there is no dispute between the parties that Dr. Welchner is a *health information custodian* as defined in section 3(1) of *PHIPA* and that the complainant had been a patient of the custodian until the relationship was terminated by the custodian. In addition, there is no dispute that the complainant was given access to the records at issue before making his correction requests. I will determine whether the four records contain the complainant’s personal health information.

[9] Personal health information is defined in section 4(1) of *PHIPA* which states, in part:

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 or provider of health care to the individual,

[10] Section 4(3) further clarifies the definition of personal health information, stating:

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.

[11] While not directly addressing whether the records contain personal health information, the custodian submits that the specific requests for correction relate in substance to the termination of the doctor-patient relationship and not to any medical or diagnostic information about the complainant.

[12] The complainant submits that the records contain his personal health information because *PHIPA* does not limit the definition of personal health information to medical or diagnostic information about a patient, but also includes information which relates to the providing of health care to the individual. In particular, the complainant argues that the records qualify as his personal health information because they relate to the custodian's continuing refusal to provide him with health care.

[13] As previously stated, the records consist of four letters written by the custodian to the complainant. Having reviewed the records, I find that all four of them contain the complainant's personal health information. First, I find that the records are in recorded form and contain identifying information about the complainant. Second, I find that they qualify as containing the complainant's personal health information under paragraphs (a) and (b) of section 4(1). In particular, I find that:

- One of the letters sets out information about the complainant's physical health, which falls under paragraph (a) of the definition of personal health information; and
- All four letters relate to the providing of health care, or in this case, the discontinuation of providing health care to the complainant, including the identification of the custodian as the former provider of health care to the complainant. For example, the letters set out the reasons why the custodian terminated the doctor-client relationship, and address follow-up issues such as providing interim care, the complainant obtaining access to his personal health information and the clarification of a misunderstanding between the parties. In my view, the content of these letters falls under paragraph (b) of the definition of personal health information.

[14] Having found that the records contain the personal health information of the complainant, I will go on to determine whether the custodian has an obligation to make the corrections to the records, as requested by the complainant.

**Issue B: Does the custodian have a duty to make the requested corrections under section 55 of PHIPA?**

[15] One of the enumerated purposes of *PHIPA* is that individuals have a right to require the correction or amendment of personal health information about themselves, subject to limited and specific exceptions as set out in it.<sup>1</sup>

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<sup>1</sup> See section 1(c) of *PHIPA*.

[16] Section 55(8) of *PHIPA* provides for a right of correction to records of personal health information in some circumstances. It states:

The health information custodian shall grant a request for correction under subsection (1) if the individual demonstrates, to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information and gives the custodian the information necessary to enable the custodian to correct the record.

[17] Section 55(9) of *PHIPA* sets out exceptions to the obligation to correct records, as follows:

Despite subsection (8), a health information custodian is not required to correct a record of personal health information if,

(a) it consists of a record that was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise and authority to correct the record; or

(b) it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[18] Read together, these provisions set out the criteria pursuant to which an individual is entitled to a correction of his or her records of personal health information. The purpose of section 55 of *PHIPA* is to impose a duty on health information custodians to correct records of personal health information that are inaccurate or incomplete for the purposes for which they use the information, subject to the exceptions set out in section 55(9) of *PHIPA*.

[19] In all cases where a complaint regarding a custodian's refusal to correct records of personal health information is filed with this office, the individual seeking the correction has the onus of establishing whether or not the *record is incomplete or inaccurate for the purposes for which the custodian uses the information* pursuant to section 55(8). As previously stated, section 55(8) requires the individual requesting a correction to:

- Demonstrate to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information, and
- Give the custodian the information necessary to enable the custodian to correct the record.

[20] If the above is established, the question becomes whether or not any of the exceptions in section 55(9) apply.

[21] Where the custodian claims that section 55(9) applies, the custodian bears the

burden of proving that the personal health information at issue consists of *professional opinion or observation* about the individual. However, once the custodian has established that the information qualifies as a professional opinion or observation, the onus is on the individual seeking a correction to establish that the professional opinion or observation was not made in good faith.

### ***Representations***

[22] The custodian reiterates that the four records at issue are letters from him to the complainant setting out the reasons why he terminated the doctor-patient relationship. The custodian also states that, at the complainant's request, he agreed not to forward the first two letters to any of the complainant's future health care providers.

[23] The custodian further submits that none of the requests for correction relate to any medical information about, or diagnosis of, the complainant. The custodian's position is that the complainant has made the correction requests in order to attack the termination of the doctor-patient relationship, and that this is not the purpose of the correction scheme contemplated by *PHIPA*.

[24] The custodian also argues that the correction request should be denied because:

- the corrections requested are to the custodian's opinion and statement of regret regarding the termination of the doctor-patient relationship;
- the corrections requested were not with respect to the complainant's health information, but were with respect to the custodian's good-faith opinion and recollection; and
- the records at issue accurately outline and record the custodian's position and would not be subject to correction in any event.

[25] The complainant submits that his personal health information in the records is inaccurate for the purposes for which the custodian is using it, and that the custodian is using this information as the basis for refusing to provide him with medical care. The complainant also states that the custodian has attempted to use deception to make a law-abiding citizen (the complainant) appear to have committed an alleged crime and that the purpose of his request is to establish his innocence. The complainant argues that none of the requested corrections involve any professional opinion or observation, stating:

This section of the Act does not provide exemption for non-professional opinions whether they be *good faith* opinions or otherwise. The custodian did not observe me committing the alleged crime, nor did he exercise or apply special knowledge, skills, qualifications, judgment relevant to his profession in arriving at his *opinion* on the matter.

[26] The complainant further argues that the custodian did not act in good faith in respect of the information contained in the records that he has requested be corrected.

[27] Both parties provided further detailed information regarding each correction requested, but I will not re-produce them in this order, as to do so would reveal the substance of the records.

### ***Decision and Analysis***

[28] I find that the custodian is not required to grant the correction request because the complainant has not demonstrated that the records are incomplete or inaccurate for the purposes for which the custodian uses the information. In addition, the complainant has not provided the custodian with the information necessary to enable him to correct the records.

[29] Recently, in PHIPA Decision 36, Adjudicator Jennifer James set out the approach to be applied when interpreting section 55(8) of *PHIPA*. Adjudicator James stated:

There is no question that the accuracy of records containing personal health information is essential to the effective provision of health care. However, the correction provisions of *PHIPA* are limited by the requirement that the individual requesting the correction *demonstrate to the satisfaction of the custodian that the record is incomplete or inaccurate for the purposes for which the custodian uses the information*. The accuracy of the information that is requested to be corrected is therefore connected to the purposes for which the information is used.

In interpreting these provisions of the *PHIPA*, I find it helpful to have regard to section 11(1) which requires health information custodians that use PHI about an individual to take *reasonable steps to ensure that the information is accurate, complete and up-to-date as is necessary for the purposes for which it uses the information*. The duty to use accurate information under section 11(1) can be viewed as the corollary to the duty to correct inaccurate information under section 55(8). In both, the purpose for which the information is used is key to understanding the scope of the duty.

The following discussion in *Guide to the Ontario Personal Health Information Protection Act*<sup>2</sup> elaborates on the relationship between the accuracy of personal health information and the purposes of its use, in section 11(1):

[The] obligations regarding the use and disclosure of personal health information include an important limitation.

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<sup>2</sup> Halyna Perun et al. (Toronto: Irwin Law Inc., 2005).

Through PHIPA's inclusion of the phrase *as is necessary for the purposes* of the use or disclosure, the accuracy, completeness and up-to-date character of the information is tied to the purposes of the use and disclosure. *As a result, the personal health information upon which a health information custodian relies need not be accurate or complete in every respect. It may be inaccurate or incomplete in a way that is not significant to the custodian because the custodian is not relying on it for a purpose relevant to the inaccuracy or omission.* [my emphasis].

[30] Adjudicator James went on to find that she was satisfied that not all personal health information contained in records held by a health information custodian needs to be accurate in every respect. She also found that where the custodian is not relying on the information for a purpose relevant to the accuracy of the information, the custodian is not required to correct the information.

[31] Adopting Adjudicator James' approach and applying it to the circumstances of this complaint, I find that the custodian is not required to make the corrections requested by the complainant because he has not demonstrated that the records are inaccurate for the purposes for which the custodian uses the information. The information provided by the complainant, in my view, consists of a disagreement about the circumstances leading to the termination of the doctor-patient relationship and the custodian's use of language in the records. While the parties disagree about aspects of the factual basis for the termination of the doctor-patient relationship, the fact remains that the relationship has been terminated. As such, I find that the custodian will not be using the four letters at issue for any purpose, as he is no longer providing care to the complainant and has indicated that he will not be forwarding the first two letters to any of the complainant's future health care providers. In other words, I find that the custodian is not relying on any of the records for a purpose relevant to the accuracy of the information contained in them. Consequently, I find that the custodian does not have a duty to correct the records under section 55(8) of *PHIPA*.

[32] In addition to providing individuals with a right to access their personal health information, *PHIPA* gives individuals the right to attach a statement of disagreement to the record conveying their disagreement with any information contained in the record. This option is available to the complainant.

## **NO ORDER:**

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

Original Signed By:

\_\_\_\_\_  
Cathy Hamilton

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January 19, 2017



Adjudicator