

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 42

HA16-137

Dr. Mary McIntyre

February 2, 2017

**Summary:** The complainant sought access to records of her personal health information from Dr. Mary Elizabeth McIntyre (Dr. McIntyre). This order determines that Dr. McIntyre is deemed to have refused the complainant's request for access. Dr. McIntyre is ordered to provide a response to the complainant regarding her request for access to records of her personal health information in accordance with the *Personal Health Information Protection Act, 2004*, and without recourse to a time extension, no later than February 10, 2017.

**Statutes considered:** *Personal Health Information Protection Act, 2004*, ss. 2, 3, 4, 23, 53, 54 and 56.

### BACKGROUND:

[1] This is a complaint under the *Personal Health Information Protection Act, 2004* (the *Act*). The complainant seeks access to records of her personal health information that are in the custody or control of Dr. McIntyre.

[2] On October 19, 2015, the complainant contacted the Information and Privacy Commissioner of Ontario's Office (IPC) stating that she had made several requests to Dr. McIntyre for access to records of her personal health information. The complainant advised the Analyst assigned to this case that the last written request for access was submitted sometime between 2010 and 2011 and that she did not receive a response to any of the requests made.

[3] Pursuant to section 56(3) of the *Act*, a complaint shall be made in writing and shall be filed within six months from the time at which the health information custodian refuses or is deemed to have refused the individual's request for access. As the complainant was not within the timeframe to file a complaint with the IPC, the Analyst advised the complainant that she can submit a fresh written request for access to her records. The Analyst advised the complainant that if she was not satisfied with the decision regarding access received from Dr. McIntyre or if she did not receive a response within 30 days of her request or a notice extending the time for a response in accordance with sections 54(2), (3) and (4) of the *Act*, she could file a complaint with the IPC. The Analyst provided the complainant the contact information of Dr. McIntyre's legal counsel (Legal Counsel) as Dr. McIntyre's contact information was not available.

[4] The complainant contacted Legal Counsel by telephone on October 26, 2015, and requested access to her records of personal health information. The complainant advised the Analyst that despite Legal Counsel's assurance that she would receive a response to her request, no such response was provided.

[5] On October 26, 2016, the complainant made a fresh written request for access to her records of personal health information to Dr. McIntyre by sending the request directly to Legal Counsel. A response was not provided to the complainant's request and notice of extension of time was not given to the complainant.

[6] In an effort to resolve this complaint, legal counsel at the IPC wrote to Legal Counsel on November 1, 2016 and advised that if a response to the access requests was not provided, the complaint would proceed to review. Legal counsel at the IPC attempted to speak to Legal Counsel after receiving a voicemail from him, but her call and voicemail were not returned.

[7] On December 12, 2016, this complaint proceeded to review against Dr. McIntyre.

## **DISCUSSION:**

### **Issue A: Are the records at issue "records" of "personal health information" as defined in sections 2 and 4 of the *Act*?**

[8] Section 2 of the *Act* defines a "record" as:

...a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record.

[9] Section 4(1) of the *Act* states, in part:

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,

(c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual’s health number, or

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

[10] “Identifying information” is defined in section 4(2) of the *Act* as information that identifies an individual or for which it is reasonable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

[11] The IPC was advised that the requested records relate to the provision of health care to the complainant by Dr. McIntyre. I am satisfied that the records contain identifying information about the complainant that relates to the provision of health care to the complainant by Dr. McIntyre.

[12] As a result, I find that the records at issue are records of personal health information as defined in sections 2 and 4 of the *Act*.

**Issue B: Is Dr. McIntyre a “health information custodian” as defined in section 3(1) of the *Act*?**

[13] The *Act* provides an individual with the right of access to records of personal health information about the individual that are in the custody and under the control of a “health information custodian”. The term “health information custodian” is defined in section 3 of the *Act*, which reads, in part:

In this *Act*,

“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.

...

[14] Section 3(11) of the *Act*, states as follows:

Subject to subsection (12), a health information custodian does not cease to be a health information custodian with respect to a record of personal health information until complete custody and control of the record, where applicable, passes to another person who is legally authorized to hold the record.

[15] A “health care practitioner” is a term defined in section 2 of the *Act*, which reads in part as follows:

“health care practitioner” means,

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

...

(d) Any other person whose primary function is to provide health care for payment

...

[16] “Health care” is also defined in section 2 of the *Act*, in part, 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

...

[17] Section 1(1) of the *Regulated Health Professions Act, 1991* includes the following definitions of "member" and "college":

In this *Act*,

"College" means the College of a health profession or group of health professions established or continued under a health profession *Act*;

...

"member" means a member of a College:

[18] Applying the definitions, I find that Dr. McIntyre was a "health care practitioner" within the meaning of the *Act* and therefore a health information custodian. Although Dr. McIntyre is not currently a practicing member of the College of Physicians and Surgeons of Ontario, she was a practicing member of the College of Physicians and Surgeons of Ontario at the time she provided health care to the complainant and her primary function was to provide health care for payment.

[19] The records at issue in this complaint were compiled in the course of Dr. McIntyre providing health care to the complainant. Section 3(11) of the *Act* provides that a health information custodian does not cease to be a health information custodian until complete custody and control of the record, where applicable, passes to another person who is legally authorized to hold the record. There is no evidence to suggest that Dr. McIntyre has ceased to be a health information custodian. I find that Dr. McIntyre is a health information custodian that has custody or control of the records of personal health information as a result of or in connection with the provision of health care to the complainant.

**Issue C: Did Dr. McIntyre respond to the request for access in accordance with section 54 of the *Act*? Is Dr. McIntyre in a deemed refusal situation pursuant to section 54(7) of the *Act*?**

[20] Section 53(1) of the *Act* states that an individual may exercise a right of access to a record of personal health information by making a written request for access to the health information custodian that has the custody or control of the personal health information.

[21] Section 54 of the *Act* requires a health information custodian that receives a request from an individual for access to a record of personal health information about that individual to provide a response as soon as possible in the circumstances, but no later than 30 days after receiving the request. In certain circumstances, within 30 days

after receiving the request for access, a health information custodian may give the individual written notice extending the time for a response for a further period of time not to exceed 30 days.

[22] If a response or notice of extension is not given within 30 days after receiving a request for access, the health information custodian is deemed to have refused the individual's request for access pursuant to section 54(7) of the *Act*, which states:

If the health information custodian does not respond to the request within the time limit or before the extension, if any, expires, the custodian shall be deemed to have refused the individual's request for access.

[23] In addition to previous requests to Dr. McIntyre for her records of personal health information, on October 26, 2016, the complainant made a fresh written request for access. The complainant indicated, and I have concluded, that Dr. McIntyre has not responded to the complainant's request for access in compliance with section 54 of the *Act*.

[24] There is no evidence to suggest that, within the 30 days of receiving the request for access, Dr. McIntyre provided the complainant with written notice extending the time for a response for a further period of time not exceeding 30 days. In any event, this additional 30-day period would have expired long ago.

[25] The Analyst assigned to this complaint made several attempts, which were unsuccessful, to resolve this complaint.

[26] On December 12, 2016, the IPC sent a Notice of Review to Legal Counsel. The Notice of Review stated that the complainant filed a complaint alleging that Dr. McIntyre was deemed to have refused the complainant's request for access by not giving a response within the time period set out in section 54 of the *Act*. The Notice of Review requested that Dr. McIntyre, as the health information custodian, immediately respond to the complainant's request for access and to forward a copy to the Analyst at the IPC assigned to this complaint. The Notice of Review indicated that if Dr. McIntyre failed to do so by December 28, 2016, the IPC may issue an order requiring Dr. McIntyre to provide a response to the complainant. The complainant did not receive a response from Dr. McIntyre or Legal Counsel by the deadline set out in the Notice of Review.

[27] On January 3, 2017, the Analyst contacted Legal Counsel and left him a voicemail regarding the complaint. On January 12, 2017, Legal Counsel contacted the Analyst and requested more time to locate the requested records. The complainant agreed to extend the time for the response to January 20, 2017.

[28] On January 19, 2017, Legal Counsel contacted the Analyst to advise that he will know whether the complainant's requested records had been located by the end of the day on January 23, 2017. Legal Counsel did not advise if the complainant's records

were found, nor has a response to the October 26, 2016 request for access been provided.

[29] It is important to note that the circumstances which led to the issuance of Order HA11-55 against Dr. McIntyre are nearly identical to those in this complaint.

[30] The following passage by then Assistant Commissioner Brian Beamish in Order HA11-55 is worth repeating:

My office has encouraged Dr. McIntyre to meet her statutory obligations under the Act by providing the complainant with a response to her request for access to records of personal health information. The lack of response from Dr. McIntyre to the written request for access of the complainant which was made more than six months ago, on May 19, 2011, is unacceptable. This has been further exacerbated by the lack of response from Dr. McIntyre and her Legal Counsel to attempts by this office to contact them.

As I stated in Order HO-009, the right of an individual to access his or her records of personal health information is essential to the exercise of other statutory and common law rights, including the right of an individual to determine for himself or herself what shall or shall not be done with his or her own body, the right of an individual to "informational self-determination" and the right of an individual to require the correction or amendment of personal health information about themselves. It is also vital in ensuring continuity of care, for example, where an individual has decided to seek health care from another health care provider.

[31] The lack of response from Dr. McIntyre to the written request for access made by the complainant is completely unacceptable. I find therefore that Dr. McIntyre is deemed to have refused the complainant's request for access dated October 26, 2016 pursuant to section 54(7) of the *Act*.

## **ORDER:**

1. Dr. McIntyre shall provide a written response to the complainant regarding her request for access to the records of her personal health information in accordance with the *Act* and without recourse to a time extension no later than **February 10, 2017**.
2. In order to verify compliance of Provision 1 of this Order, Dr. McIntyre shall provide me with a copy of the response referred to in Provisions 1 by, **February 10, 2017**. This should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original Signed by: \_\_\_\_\_  
Rita Najm  
Analyst

February 2, 2017 \_\_\_\_\_