

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 43

HA15-50-2

Centre for Addiction and Mental Health

February 28, 2017

Summary: The complainant submitted a correction request under the *Personal Health Information Protection Act* to the Centre for Addiction and Mental Health. The hospital agreed to make one of the requested corrections but denied the remainder. The complainant appealed the hospital's decision to this office and raised questions about the hospital's search for records. The adjudicator finds that some of the information the complainant seeks to correct constitutes the good faith professional opinions or observations of the physicians preparing the report and the exception under section 55(9)(b) applies to this information. The adjudicator also finds that the complainant failed to establish a right of correction under section 55(8) for the remaining information at issue. Finally, the hospital's search for a fax the complainant advises his family physician sent to the hospital is found to be reasonable.

Statutes Considered: *Personal Health Information Protection Act, 2004*, sections 3(1), 4(1), 54(1), 55(8), and 55(9)

Cases Considered: PHIPA Decisions 18 and 36.

BACKGROUND:

[1] The complainant submitted a correction request under the *Personal Health Information Protection Act* (PHIPA or the *Act*) to the Centre for Addiction and Mental Health (CAMH, custodian or hospital) to correct a consultation report.

[2] The hospital sent a letter to the complainant denying his correction request, in

part. The hospital agreed to correct a small portion of the report. However, the hospital denied the complainant's request to correct the remaining information. In its letter, the hospital states:

We are denying your request to have this information corrected because it consists of professional opinions or observations about you that were made in good faith, and the records are accurate and complete for the purposes for which we use the information.

[3] The complainant filed a 42-page complaint with this office and a mediator was assigned to the matter.

[4] Mediation did not resolve the complaint and the complainant continued to seek the requested corrections. The complainant also raised questions about the reasonableness of the hospital's search for a fax he advises his family physician sent to the hospital on his behalf.

[5] The complaint was transferred to adjudication and I decided to conduct a review. Each party was sent a Notice of Review which set out the relevant facts and issues in the inquiry. The hospital submitted written representations in response. The complainant did not provide a response to the notice but requested that his 42-page complaint be considered as his submissions.

[6] In this decision, I uphold the hospital's decision to not make the requested corrections as the good faith professional opinion and observation exception at section 59(9)(b) applies or the hospital is not required to correct the information under section 55(8). I also find that the hospital's search for the fax is reasonable.

RECORDS:

[7] The record the complainant seeks to have corrected is a consultation report, dated April 17, 2015 prepared by two psychiatrists.

ISSUES:

- A. Does the "professional opinion or observation" exception at section 55(9)(b) apply to any portions of the record?
- B. If the exception does not apply, has the complainant established that the information is incomplete or inaccurate for the purposes for which the hospital uses the information under section 55(8)?
- C. Did the hospital conduct a reasonable search for the complainant's personal health information records under section 54(1)?

SUMMARY OF THE CORRECTION REQUESTS:

[8] The complaint requested that the following 7 items¹ be corrected in the consultation report:

1. Information describing his overnight stay at another hospital. The complainant seeks to add additional information explaining the circumstances of his overnight stay.
- 2 & 3 Information referencing complaints the complainant filed with the College of Physicians and Surgeons Ontario (CPSO) against physicians at another hospital. The complainant seeks to specify the names of the physicians.
4. Information under the heading "Family History" describing a family member's addiction in the past tense. The complainant seeks to correct this information so that the addiction is described in the present tense.
5. Information under the heading "Mental Status Examination" which contains a description of the complainant's general appearance and behaviour. The complainant disagrees with the description.
6. Information under the heading "Mental Status Examination" which describes the complainant's cognitive function. The complainant questions the writers' assessment.
7. Information under the heading "Diagnosis". The complainant asserts that one of the diagnosis specified in this section is incorrect.

DISCUSSION:

[9] The parties appear to agree that the information at issue constitutes the complainant's personal health information (PHI). PHI is defined in section 4(1), 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,

¹ The requested corrections are described in detail and categorized by number from 1-7 in the revised Mediator's Report and Notice of Review the parties received from this office. This decision discusses the correction requests in general terms to ensure that the privacy of the complainant is protected.

(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,

[10] Section 4(3) adds to this discussion, covering mixed records that contain both personal health information as described in section 4(1) and other information about an individual:

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] The parties also do not dispute that the hospital is a "health information custodian" as defined in section 3(1), and that the complainant was given access to his health records before making his correction request.

[12] Section 55(8) of provides for a right of correction to records of PHI in some circumstances. It states:

The health information custodian shall grant a request for a 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.

[13] Section 55(9) 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.

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

[15] In all cases where a complaint regarding a custodian's refusal to correct records of PHI 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). Section 55(8) requires the individual asking for correction to:

- a) 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
- b) give the custodian the information necessary to enable the custodian to correct the record.

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

[17] Where the custodian claims that section 55(9)(b) applies, the custodian bears the burden of proving that the PHI at issue consists of a “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. If the exception applies, it does not matter whether or not the individual has met the onus in section 55(8) because even if the complainant satisfied this office that the information is incorrect or inaccurate under section 55(8), a finding that the exception in section 55(9)(b) applies will resolve the complaint.

[18] Given the nature of the information contained in the record, I have decided to commence my analysis under section 55(9)(b).

A. Does the “professional opinion or observation” exception at section 55(9)(b) apply to any portions of the record?

[19] In its representations, the hospital takes the position that some of the information the complainant seeks to correct “consists of a professional opinion or observation that was made in good faith”.

[20] The complainant’s representations did not specifically address this issue. However, attached to the complainant’s submissions is a fax from his family physician to one of the writers of the report.² It appears that the family physician sent the fax in support of the complainant’s position that the portion of the report which indicates that he was diagnosed with a particular disorder by his family physician should be corrected.

[21] Based on its consultations with the report writers, the hospital already corrected this portion of the report so that it reflects that another hospital, and not the

² This is the same fax the complainant submits the hospital failed to locate giving rise to his claim that the hospital’s search for responsive records was not reasonable.

complainant's family physician, had previously diagnosed the complainant with the disorder.

[22] During mediation, the complainant raised questions as to why the hospital was prepared to correct the diagnosis in the beginning of the report but not where it appears under the heading "Diagnosis" towards the end of the report. In response, the hospital wrote to the complainant and took the position that the information under the heading "Diagnosis" contains the good faith professional opinions and observations of the psychiatrists preparing the consultation report.

Decision and Analysis

[23] As set out above, section 55(9)(b) states that a health information custodian is not required to correct a record of PHI "...if it consists of a professional opinion or observation that a custodian has made in good faith about the individual". The purpose of section 55(9)(b) is to preserve "professional opinions or observations," accurate or otherwise, that have been made in good faith. This purpose is based on sound policy considerations, including the need for documentation that may explain treatments provided or events that followed a particular observation or diagnosis.

[24] Thus, a request for correction or amendment should not be used to attempt to appeal decisions or professional opinions or observations with which a complainant disagrees and cannot be a substitution of opinion, such as a complainant's view of a medical condition or diagnosis.

[25] The determination of whether the exception at section 59(9)(b) applies involves a two-part analysis. The first question is whether the PHI is a "professional opinion or observation." The second question is whether the "professional opinion or observation" was made "in good faith".

1. Whether the PHI qualifies as a "professional opinion or observation?"

[26] In order to qualify for the application of section 55(9)(b), I must find that the PHI is a "professional opinion or observation". In PHIPA Decisions 36 and 37 I found that section 55(9)(b) applies only where the information at issue consists of either a "professional opinion" or a "professional observation". I also found that only observations and opinions derived from the exercise or application of special knowledge, skills, qualifications, judgment or experience relevant to the profession should be defined as "professional observations" or "professional opinions" within the meaning of section 55(9)(b). These conclusions are consistent with the purpose of this provision, within the overall scheme of *PHIPA*.

[27] In this case, the consultation report was prepared by physicians, specializing in the field of psychiatry. In my view, much of the information the complainant seeks to have corrected contains the psychiatrists' observations and diagnosis of him, including their description of his appearance, behaviour and cognitive function made under the

heading "Mental Status Examination". Based on the record itself and the hospital's submission, I am satisfied that the diagnosis identified under the heading "Diagnosis" was based on the psychiatrists' independent examination and assessment of the complainant. Furthermore, I find that the psychiatrists preparing the report applied their professional knowledge and skills in making the comments, observations and diagnoses the complainant seeks to have amended in parts 5, 6 and 7 of his correction request.

[28] In arriving at this conclusion, I also considered the concerns raised by the complainant but note that the correction the hospital made at the beginning of the report did not alter the diagnosis previously made but instead clarified who made it.

[29] Accordingly, I find that this information referenced in parts 5, 6, and 7 of the correction request qualifies as the psychiatrists' professional opinions or observations, within the meaning of section 55(9)(b). The complainant's request to correct this information, in effect, seeks to substitute or rewrite the psychiatrists' opinions or observations contained in the consultation report. Given my findings, the complainant has no right to a correction unless it can be established that the professional opinions or observations in question were not made in good faith.

[30] This finding is consistent with the approach taken in PHIPA Decisions 36, 37 and 39 and the approach taken to similar provisions in other jurisdictions and previous decisions from this office dealing with correction requests of investigatory records.³

[31] I must now consider whether the professional opinions or observations contained in the consultant report were made in good faith.

2. If the PHI qualifies as a "professional opinion or observation," was it made "in good faith?"

[32] Court decisions have stated that a finding that someone has not acted in good faith can be based on evidence of malice or intent to harm another individual, as well as serious carelessness or recklessness. The courts have also stated that persons are assumed to act in good faith unless proven otherwise. Therefore, the burden of proof rests on the individual seeking to establish that a person has acted in the absence of

³ See Orders H2004-004, H2005-006 and H2005-007 from the Alberta Information and Privacy Commissioner's office (the AIPC). This approach is also consistent with the principles this office has applied in appeals determining whether an institution should correct a record containing the requester's personal information under sections 36(2) and 47(2) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and its provincial equivalent the *Freedom of Information and Protection of Privacy Act (FIPPA)*. Past orders from this office (For example Orders MO-3042, MO-3218, MO-3251, PO-2258 and PO-2549), under those acts, have held that when dealing with opinions and observations in records of an investigatory nature, it is not the truth of the recorded information that is determinative of whether a correction request should be granted, but rather whether or not what is recorded accurately reflects the observations and views of the individuals whose impressions are set out in the record.

good faith to rebut the presumption of good faith.⁴ Accordingly, in the context of section 55(9)(b), the burden rests on the individual seeking the correction to establish that the custodian did not make the professional opinion or observation in good faith.

[33] The hospital's position is that it has no duty to correct the professional opinions and observations contained in the report as they were made in good faith.

[34] The complainant's submissions do not specifically address this issue. However, the complainant's submissions raised concerns about the manner in which the hospital responded to his correction request, including the hospital's position that it did not receive his family physician's fax until it was resent.

[35] In my view, the complainant's concerns about the level of service he received from the hospital's privacy office does not relate to whether the writers of the report made the consultation report in bad faith. Based on the evidence before me, I find that there is insufficient evidence to rebut the presumption of good faith. There is no evidence of malice, intent to harm, serious carelessness or recklessness on the part of the writers of the consultation report.

Summary

[36] Much of the information the complainant seeks to correct contains the good faith professional opinions and observations of the writers who prepared the consultation report. Accordingly, the exception under section 55(9)(b) applies to parts 5, 6 and 7 of the correction request. This means that even if the complainant were to establish that this information was inaccurate or incomplete for the purpose for which it is used by the hospital, the hospital is not obligated to make the requested corrections under section 55(8).

[37] There is insufficient evidence to conclude that the exception at section 55(9)(b) also extends to the portions of the record that contains historic information about the complainant referenced in parts 1-4 of the correction request. Accordingly, I will go on to determine whether the complainant has established a right of correction for this information under section 55(8).

B. If the exception does not apply, has the complainant established that the information is incomplete or inaccurate for the purposes for which the hospital uses the information under section 55(8)?

[38] The remaining information at issue consists of the portions of the record which:

- refer an overnight stay at another hospital (part 1);

⁴ *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII)

- refer to two complaints the complainant filed with the CPSO against 2 psychiatrists from another hospital (parts 2 and 3); and
- refer to a family member's addiction in the past tense (part 4).

[39] The hospital submits that *PHIPA* does not require it to correct the above-noted information "because the complainant did not demonstrate to our satisfaction, that the information was inaccurate or incomplete for the purposes for which we use the information".

[40] The complainant's submissions did not specifically address whether these portions of the report are incomplete or inaccurate for the purposes for which the hospital uses the information.

[41] Recent decisions from this office have found that not all personal health information contained in records held by health information custodians needs to be accurate in every respect.⁵ In *PHIPA* Decision 36, I 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.

...

If a request is made to correct inconsequential bits of information that have no impact on the purposes for which the custodian uses the information, and 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.

[42] Applying this reasoning to the circumstances of the present complaint, I find that the hospital is not required to make the remaining corrections because the complainant has not demonstrated that the information is incomplete or inaccurate for the purposes for which the hospital uses the information. There is no evidence before me demonstrating that the hospital is relying on the information the complainant seeks to have corrected for a purpose relevant to the accuracy of the information.

[43] Accordingly, I find that the complainant has failed to establish a right of correction under section 55(8). As a result, the hospital does not have a duty under

⁵ *PHIPA* Decisions 36, 39 and 40.

PHIPA to correct parts 1-4 of the correction request.

C. Did the hospital conduct a reasonable search for the complainant's personal health information records under section 54(1)?

[44] The complainant's submissions raised questions about the hospital's search for a fax he advises was sent to the hospital on June 15, 2015 and June 23, 2015 by his family physician. The complainant claims that his family physician sent the fax to the hospital on his behalf but that his doctor did not receive a response.

[45] The hospital's correction decision, dated July 28, 2015 advised the complainant that it "... made attempts to locate the June 23, 2015 fax but have no record of having received [it]". In its letter, the hospital suggests that the complainant's doctor resend the fax.

[46] During mediation, the parties had discussions with the mediator about the complainant's concerns about his physician's fax not having been received by the hospital. The Revised Mediator's Report identified reasonable search as an outstanding issue.

[47] The Notice of Review sent to the parties invited their representations on this issue. In response, the complainant requested that his 42-page complaint be considered as his submissions. The complainant's submissions did not specifically address this issue but a common theme was his dissatisfaction with the level of service he received from the hospital's privacy office. The complainant takes the position that he is owed an explanation as to why the hospital failed to respond to his physician's fax.

[48] In its representations, the hospital takes the position that the reasonable search issue falls outside the scope of this complaint and states:

[t]he steps taken by CAMH to try and locate the faxes that the complainant advised were sent to us, were undertaken in an effort to determine if it would assist with his correction concerns. The issue of the existence of the faxes was never part of an access request made to CAMH, as defined in section 54 of *PHIPA*.

[49] The hospital submits that after obtaining access to the consultation report, the complainant contacted its privacy office with several questions regarding the accuracy and completeness of the report. The hospital advises that, in response, it told the complainant that it would consult the writers of the report and provide him a response. The complainant subsequently contacted the privacy office to advise that his physician had sent a fax to their attention.

[50] Despite its position, the hospital submits it took the following steps to locate the fax:

- The hospital's Health Information Specialist conducted a review of the complainant's health record;
- The hospital's Health Records Release of Information staff reviewed any documentation not yet processed and filed; and
- The hospital's privacy office consulted with the writers of the report who confirmed that they had not received a fax from the complainant's physician.

[51] The hospital advises that its privacy office then sent an email to the complainant to advise him that it could not locate the fax and requested that he supply the number it was sent to, so that it could be tracked.

[52] In response, the complainant provided a fax number which was not associated with the hospital. The hospital also advises that the number provided by the complainant appeared to be a phone line and not a dedicated fax line.

[53] The hospital submits that it advised the complainant that it could not locate the fax in its July 28, 2015 correction decision and again in a letter, dated August 6, 2015 to the complainant.

[54] In its representations, the hospital advises that it now has a copy of the fax, which is dated June 15, 2015 but was received by fax in November 2015. The fax bears a handwritten note that it was originally faxed in June 2015. The hospital provided a copy of this fax with its representations. The complainant also provided a copy to this office.

Decision and Analysis

[55] The issue of whether a custodian conducted a reasonable search for records has not been frequently addressed in decisions under *PHIPA*. However, there is a long line of decisions from this office addressing the issue of whether an institution under *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and its provincial equivalent the *Freedom of Information and Protection of Privacy Act (FIPPA)* has conducted a reasonable search for responsive records.

[56] In *PHIPA* Decision 18, Adjudicator Catherine Corban concluded that past orders from this office addressing the reasonable search issue under *MFIPPA* and *FIPPA* are instructive and stated:

As the access provisions in all three acts are substantially similar, in my view, the principles regarding reasonable search established in orders issued under *FIPPA* and *MFIPPA* are both relevant and informative.

[57] I agree and adopt the Adjudicator Corban's approach and apply it to the circumstances of this complaint.

[58] Where a complainant claims that additional records exist beyond those identified by the custodian, the issue to be decided is whether the custodian has conducted a reasonable search for records as required by sections 54(1).⁶ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the custodian's decision. If I am not satisfied, I may order further searches.

[59] *FIPPA and MFIPPA*, as well as *PHIPA*, do not require the custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁷ To be responsive, a record must be "reasonably related" to the request.⁸

[60] 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.

[61] Although a complainant will rarely be in a position to indicate precisely which records the custodian has not identified, the complainant still must provide a reasonable basis for concluding that such records exist.⁹

[62] Given the explanation provided by the hospital, I find that it is unnecessary for me to determine the issue of whether or not the fax is responsive to the complainant's request for his PHI. The hospital has adduced sufficient evidence to demonstrate that its search for the fax was conducted by experienced employees knowledgeable about the subject matter of the request and a reasonable effort to locate the fax was expended. In particular, the hospital's record management department conducted a search for the fax and its privacy office consulted the writers of the report in an effort to locate the fax.

[63] Further, there is insufficient evidence to establish that there is a reasonable basis to conclude that at the time the complainant made inquiries about the fax, it existed in the hospital's record holdings. In arriving at this conclusion, I note that the copy of the fax the complainant provided to this office references a fax number not associated with the hospital. It appears that the fax was subsequently sent to the hospital at a later date with a different fax number associated with the hospital.

[64] For the reasons stated above, I find that the hospital's search for the fax was reasonable.

⁶ Section 17 of *MFIPPA/FIPPA*; See also Orders P-85, P-221 and PO-1954-I.

⁷ Orders P-624 and PO-2559.

⁸ Order PO-2554.

⁹ Order MO-2246.

NO ORDER:

1. For the foregoing reasons, no order is issued

Original Signed by: _____
Jennifer James
Adjudicator

February 28, 2017 _____