

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 57

HA15-53

St. Michael's Hospital

October 24, 2017

**Summary:** An individual sought access to records related to his visits to St. Michael's Hospital. After conducting a search for records, the hospital issued a decision disclosing the ones it had identified as responsive to the request. The individual complained to this office due to his concern that the hospital had not located all the records he sought. In response to the complainant's concerns, the hospital carried out additional searches and issued several supplementary decisions. In the last decision, the hospital withheld information about other individuals from two records, explaining that the records were not "dedicated primarily to" the personal health information of the requester under section 52(3) of *PHIPA*. The complainant remained dissatisfied with the hospital's response and its search for records.

In this decision, the adjudicator concludes that the records contain the complainant's personal health information, but finds that the hospital properly withheld information from the records because they are not dedicated primarily to the complainant's personal health information. The adjudicator upholds the hospital's search for records.

**Statutes considered:** *Personal Health Information Protection Act, 2004*, sections 52(3) and 54.

**Decisions considered:** PHIPA Decisions 17, 18, 43 and 48.

### BACKGROUND:

[1] An individual submitted an access request to St. Michael's Hospital (SMH or the

hospital) under the *Personal Health Information Protection Act (PHIPA or the Act)* that stated, in part, as follows:<sup>1</sup>

The information I seek is the reasons behind the following actions and omission to act.

- 1) I allege there is a failure to respect "Due Process" in not allowing me to address the alleged issues in my Provincial Medical File/Records?
- 2) Refusal to discuss what caused more than one doctor to either inform or indirectly tell me why I had to go back to [a different Toronto hospital].
- 3) Refusal by Dr. [S] to discuss why I had to go back to [the other hospital] and what Dr. [L]'s surgical diagnosis was?
- 4) Being told by Dr. [I] that I had to go back to [the other hospital] to be treated.
- 5) Being told the chiropractors at St. Michael's Hospital refused to see me by Dr. [I] and the clerk at St. Michael's clinic.
- 6) Being told by Dr. [S] the chiropractor didn't want to see me.
- 7) On my initial visit to St. Michael's ER being told by the female doctor in St. Michael's emergency that I had to go back to [the other hospital] because the St. Michael's Wound Care Clinic was full and there was a long waiting list.
- 8) Refusal to discuss the reasons in an informed manner why I had to go back to Dr. [L] at [the other hospital].
- 9) Tardy and late response to my 3 weeks of phone messages to Dr. [S].

[2] After receiving the request, the hospital contacted the individual who submitted it to seek clarification. In correspondence sent to the hospital afterwards, the individual clarified that he did not want "daily health records," just the health records "as they relate to my questions contained in the initial fax." Specifically, he wanted records that would explain why physicians at SMH told him that he had to seek care at the other hospital and "why the chiropractor refused to see me" at SMH. The requester wanted to know "What is on my medical record that is the basis for telling me to 'go back to the

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<sup>1</sup> The names of the physicians identified in the request are represented by initials in this decision.

other hospital?" He sought the names of two physicians "who saw me in the ER 2 days before I was admitted." He also expressed concern that the situation might affect his treatment or care.

[3] The hospital issued an access decision on July 3, 2015 granting the individual full access to the records of personal health information from his visits to SMH's emergency department, his admission and his Out-Patient Clinic visits in December 2014 and January 2015, based on the dates given in his request. After receiving this decision, the individual submitted a complaint to this office. A file was opened to address the complaint and a mediator was appointed to explore the possibility of resolving it.

[4] At the outset of mediation, the hospital agreed to conduct an additional search for responsive records pertaining to Dr. S. Following this search, the hospital issued a supplementary decision on November 3, 2015, stating that it was not granting access to requested notes of the complainant's telephone conversation with Dr. S from February 2015 on the basis that such notes do not exist. SMH explained that although the physician "recalls having a telephone conversation with you after you were discharged from hospital [he] did not make any notes of this conversation." At this time, the hospital provided a second copy of the records initially disclosed to him in July 2015 and stated that "these are the only existing documents for the time period noted."

[5] The complainant was dissatisfied with this response because he felt that the hospital had artificially limited the scope of his request to records of conversations with Dr. S. What the complainant wanted, he advised the mediator, "included a week of Hospital staff conversations and the incidents at the follow-up Out Patient Clinic. The request is for the list of phone calls made." The complainant also wrote to the hospital to express his concern that other questions from his request had not been answered.

[6] SMH then conducted another search and located additional records consisting of emails in the chiroprapist's possession that had been created around the time of the complainant's appointment. In a second supplementary decision dated December 2, 2015, SMH granted access to these emails and also advised the complainant that:

The search was specifically for any notes, e-mails or letters that were generated during the time period in question. The physicians and the chiroprapist, involved with your care, were also asked whether they maintain their own separate records, including notes, e-mails, and letters in any databases/laptops, which would be responsive to your request.

All parties involved in your care confirmed that they do not keep separate records; neither do they have any other records, paper or electronic, in their possession pertaining to your care, with the exception of the chiroprapist who recalled that some e-mails were generated around the time of your appointment. The chiroprapist was able to find these e-mails and copies are attached for your review.

[7] The complainant subsequently advised the mediator that he was not satisfied by the hospital's November 3 and December 2, 2015 supplementary decisions, but said that he would endeavor to explain his "outstanding issues with respect to this complaint."

[8] SMH carried out a further search and issued a third supplementary decision on February 24, 2016 that provided the complainant with partial access to four additional records "potentially responsive" to the request. These emails had been located by searching the mailboxes of the relevant clinicians using the complainant's surname and hospital number for the period of December 9, 2014 to February 28, 2015. When asked about these records, the complainant expressed his continuing concerns with SMH's response to his request.

[9] Shortly before the mediation stage concluded, the hospital advised the mediator that it was relying on section 52(3) of *PHIPA* to deny access to parts of the records provided to the complainant in its final supplementary decision. SMH also stated that it had not withheld any records responsive to the complainant's request.

[10] No further mediation was possible and the complaint was transferred to the adjudication stage of the complaints process, where an adjudicator may conduct a review. The adjudicator commenced her review by providing SMH with the opportunity to provide submissions. Once she received SMH's submissions, she provided a copy to the complainant and invited him to respond to the issues set out in a Notice of Review by providing his own submissions. He did so. The complaint was then moved to the decision stage and was subsequently transferred to me.

[11] In this decision, I find the two partially withheld records are not dedicated primarily to the personal health information of the complainant under section 52(3). Therefore, the hospital was required to disclose only the personal health information of the complainant that could reasonably be severed from the records. I am satisfied that the hospital met this statutory obligation and I uphold the access decision. Further, I find that the hospital conducted a reasonable search for responsive records.

## **ISSUES:**

- A. Do the records contain "personal health information" as defined in section 4(1) of *PHIPA*?
- B. Are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of *PHIPA*?
- C. Did the hospital conduct a reasonable search for records responsive to the complainant's request?

## **DISCUSSION:**

[12] Before addressing the main issues of this complaint below, I note as a preliminary matter that the status of St. Michael's Hospital as a "health information custodian" under *PHIPA* is not in dispute. I am satisfied that the hospital is a health information custodian for the purposes of *PHIPA*,<sup>2</sup> and my analysis proceeds on that basis.

[13] Second, I acknowledge the concern expressed by the complainant that a decision should be made with reference to all of the information he has submitted – not solely based on the mediator's report, for example, or other communications viewed in isolation from the entirety of his correspondence. I confirm that I have reviewed all of the complainant's correspondence in the file including, but not limited to, his submissions of May 3 and November 1, 2016.

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

[14] I begin by determining whether the records contain personal health information as defined in section 4(1) of *PHIPA*. The parts of the definition that are relevant in this complaint state:

"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.

[15] Section 4(3) of *PHIPA* is also relevant and states that:

Personal health information includes identifying information that is not personal information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

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<sup>2</sup> Pursuant to clause 4.i. of section 3(1) of *PHIPA*, because the hospital is a hospital within the meaning of the *Public Hospitals Act*.

[16] Having reviewed the records, which both consist of emails from one hospital staff member to another, I find that they contain identifying information about the complainant. This identifying information relates to his physical or mental health and to the provision of health care to him fitting within paragraphs (a) and (b) of the definition of personal health information in the *Act*. Additionally, there is identifying information of this same kind that relates to other individuals in the two records. Further, I find that one of the records also contains information that relates to the substitute decision-maker of another individual for the purpose of paragraph (g) of the definition. Finally, one of the records is a "mixed" record, because it includes identifying information about individuals that is not personal health information by itself, but that is contained in a record that contains personal health information. As a result, I find that the records at issue are records of personal health information as defined in sections 4(1)(a), (b) and (g), as well as section 4(3), of *PHIPA*.

**B. Are the records "dedicated primarily to personal health information about the individual requesting access," within the meaning of section 52(3) of PHIPA?**

[17] The hospital withheld portions of the two records disclosed in its February 2016 access decision on the basis that the records are not dedicated primarily to the personal health information of the complainant. Under section 52(3) of the *Act*, if a record is not dedicated primarily to personal health information about the individual requesting access, the requester only has a right to access any personal health information that can reasonably be severed.<sup>3</sup>

[18] Briefly, SMH submits that the records at issue are not dedicated primarily to the personal health information of the complainant. SMH lists the factors outlined in PHIPA Decision 17 and sets out the ones it views as relevant for each record. Some of the factors considered by the hospital include the fact that the emails do not form part of the complainant's own health record. SMH notes that while the personal health information of the complainant appears in both records, it appears only as one entry in a list of three or five patients requiring follow-up or referrals to be completed by hospital staff. The inclusion of the complainant's personal health information in these records is not central to the purpose for which the records exist and, SMH asserts, the records would exist whether or not the complainant's personal health information was contained in them.

[19] From the complainant's submissions, I gather that he does not challenge the hospital's non-disclosure of other individuals' information. Indeed, the complainant's submissions suggest that he never sought these particular records and that he is

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<sup>3</sup> Section 52(3) of *PHIPA* states: 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.

concerned instead that there has been an ongoing failure to identify and locate the records he does seek. These particular concerns relate to the issue of search, which I will address in the next section of this decision.

[20] Section 52(3) has been treated as an issue in dispute during the review of this complaint and, for the sake of completeness, I will make a finding on it. As the hospital noted, this office's approach to the interpretation of section 52(3) was established in PHIPA Decision 17.<sup>4</sup> To determine whether a record is "dedicated primarily" to the personal health information of an individual within the meaning of section 52(3), this office takes into consideration various factors from the following (non-exhaustive) list, including:

- the quantity of personal health information of the requester in the record;
- whether there is personal health information of individuals other than the requester in the record;
- the purpose of the personal health information in the record;
- the reason for creation of the record;
- whether the personal health information of the requester is central to the purpose for which the record exists; and
- whether the record would exist "but for" the personal health information of the requester in it.<sup>5</sup>

[21] The records consist of email communications from one hospital staff member to another. Having considered the records from a qualitative perspective, I agree with SMH that the records are not "dedicated primarily" to the personal health information of the complainant. These records consist of lists of patients to be referred by hospital staff for further health care; the inclusion of the complainant's personal health information is incidental, not central, to this purpose. I accept that the records would exist regardless of whether or not they contained the complainant's personal health information. The emails are, effectively, "action lists" and do not arise directly from the complainant's clinical interactions at SMH. For these reasons, I find that the two records are not dedicated primarily to the personal health information of the complainant.

[22] Given the finding above, section 52(3) of *PHIPA* applies to the records and the complainant's entitlement under *PHIPA* is limited to access to the portions of personal health information about him that can reasonably be severed from the record.<sup>6</sup> I find

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<sup>4</sup> See also PHIPA Decisions 24, 30 and 33.

<sup>5</sup> PHIPA Decision 17, para 95.

<sup>6</sup> PHIPA Decisions 17, 27 and 33.

that the undisclosed personal health information is not about the complainant and that the hospital has reasonably severed the records to disclose the complainant's personal health information to him.

[23] I will now review the adequacy of the hospital's search for records under *PHIPA*.

**C. Did the hospital conduct a reasonable search for records responsive to the complainant's request?**

[24] Since the complainant claims that additional records exist beyond those identified by the hospital, I must decide whether the hospital conducted a reasonable search for records as required by sections 53 and 54 of *PHIPA*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the SMH's decision. If I am not satisfied, I may order further searches.

[25] For reviewing the adequacy of a custodian's search for records responsive to a request, the relevant part of *PHIPA* is section 54, which states, in part:

(1) A health information custodian that receives a request from an individual for access to a record of personal health information shall,

(a) make the record available to the individual for examination and, at the request of the individual, provide a copy of the record to the individual and if reasonably practical, an explanation of any term, code or abbreviation used in the record;

(b) give a written notice to the individual stating that, after a reasonable search, the custodian has concluded that the record does not exist, cannot be found, or is not a record to which this Part applies, if that is the case;

[26] The issue of whether a health information custodian (such as SMH) has conducted a reasonable search for records under *PHIPA* has been addressed in several IPC decisions, including PHIPA Decisions 18, 43 and 48. In PHIPA Decision 18, Adjudicator Catherine Corban concluded that the principles established in reasonable search orders issued under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are relevant in determining whether a custodian has conducted a reasonable search under *PHIPA*. The adjudicator concluded that the access provisions in all three acts are substantially similar and, therefore, that the principles long articulated under *FIPPA* and *MFIPPA* provide useful guidance in reviewing the search issue under *PHIPA*. I agree and I adopt the approach taken in PHIPA Decisions 18, 43 and 48 in this complaint.

***Representations***

[27] What follows is a summary of the parties' representations on this issue, which



were provided at the review stage of the complaint. At the beginning of this decision, I provided an overview of the complaint drawn from various sources, such as the hospital's multiple access decisions and the complainant's prior communications about the complaint.

[28] SMH takes the position that it conducted a reasonable search for the records requested by the complainant. The hospital states that its Director of Health Information Management Services (HIMS) led and coordinated the searches for responsive records: this individual personally verified the work done by the Release of Information and Privacy staff and, additionally, engaged relevant clinical staff on several occasions to ensure that all relevant records were located. The hospital notes that the HIMS Director is an experienced employee who was knowledgeable in the subject matter and acted in good faith.

[29] SMH acknowledges that when the complainant initially contacted the hospital in June 2015, he indicated that he did not want records of personal health information, but rather "the reasons behind ... actions and omissions" on certain dates and during encounters with certain health care personnel whose names he provided. According to SMH, after contacting the complainant to seek clarification, the hospital's HIMS Director advised him that she would refer him to SMH's Patient Relations Department to "facilitate the provision of answers to the questions posed by the complainant." The hospital states that its HIMS Director advised the complainant at that time that SMH would also disclose the portions of his health record that accorded with the dates he had given in the request.

[30] The hospital describes the efforts of its release of information staff and the patient relations advisor over the approximately eight-month period after receiving the initial access request. Some of this background appears in the overview of this decision, above. The description of SMH's actions includes identifying the systems and locations searched, which were the main clinical systems (Soarian and Sovera), as well as the relevant ambulatory clinics whose records would not be scanned into that main system. The hospital disclosed the records identified by this initial search to the complainant in the July 3, 2015 decision.

[31] Next, the hospital describes the steps taken to discern if additional records of the telephone conversation between the complainant and Dr. S existed, which resulted in Dr. S advising that he did not document the conversation because the complainant had been discharged and would not be seen again by him (Dr. S). Accordingly, the hospital states, no records exist that are responsive to the complainant's request for Dr. S's notes. The hospital conveyed this information to the complainant in the November 3, 2015 decision.

[32] The patient relations angle involved the Patient Relations Advisor also contacting relevant clinical personnel, such as Dr. S, the Chief of Emergency Medicine and the Program Director for Neurosurgery, Trauma and Mobility. These individuals were asked

if they maintained any records in a "private database/laptop/office" that would be responsive to the request. The hospital submits that the only additional records identified were held by a chiroprapist. Further inquiries were subsequently made of those same individuals and others regarding possible other records (emails specifically) that would be "relevant to the complainant's inquiries." These efforts by the Patient Relations Advisor led to the December 2, 2015 decision, which advised the complainant of these efforts and disclosed the chiroprapist's emails to him.

[33] SMH submits that it subsequently conducted another search of nine email accounts, using the complainant's surname and hospital identification number and the time period of December 9, 2014 to February 28, 2015. This search identified four additional records, two of which were disclosed fully and the other two disclosed in part under section 52(3) of *PHIPA*, as discussed above. The hospital issued its fourth and final decision on February 24, 2016.

[34] Based on interactions with, and questioning of, staff and the multiple searches conducted, the hospital concludes that it has located all responsive records. SMH maintains that no responsive records, that might have existed, were destroyed.

[35] The complainant responds to the hospital's submissions and the issues outlined by the adjudicator by expressing concerns with the manner in which the history of the complaint was set out and with the characterization of the issues.<sup>7</sup> The complainant sets out a chronological history of his contacts with SMH and with this office and maintains that "The issues brought up in this Adjudication can't be divorced from the lack of replies to both my: FAX's to SMH [and] FAX's and Hand-Delivered Letters to the IPC." Generally, however, the complainant alleges that SMH's submissions to the IPC has been underinclusive, misleading and/or superficial.

[36] Primarily, the complainant submits that SMH ignored his questions and, in this way, his request was mischaracterized from the beginning. He explains that his initial request was for personal health records to identify the staff and doctors in the emergency room on June 15, 2015, when he was allegedly advised that he would not be treated there and was directed to another hospital for treatment. The complainant asserts that SMH failed to release the specific information he requested: "Under OHIP, my visit to the Emergency Room was recorded before I was treated. SMH claims there isn't any records of this?" He directs my attention to the first six pages of his May 3, 2016 submission, in particular, where "it is clearly explained about the continual problems I face with specific portions of my Health Records not released. Tell me just how it is that my first visit to the SMH Emergency Room hasn't been recorded? SMH is refusing to release those records amongst others."

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<sup>7</sup> The complainant also expresses additional concerns about how the hospital responded to his request and how the IPC dealt with related matters prior to adjudication. However, these issues are not addressed in this decision.

[37] Regarding the hospital's search for, and disclosure of, health records, the complainant submits that these "releases and partial releases is a cumulative result of quantity NOT quality releases." This submission appears connected to the concern that he was not even seeking "the SMH Daily Health Records while I was an in-patient ... [and] ... which record vital signs and the like," but the other records he described that relate to his re-direction to the other hospital for treatment. He views the hospital's disclosures as a deflection from what "actually transpired" in the emergency department. The complainant asserts that SMH failed to contact the specific physicians and employees named in his initial request who should have records of what happened. The complainant questions whether there is documentary proof to support SMH's claims of certain steps being taken to locate the records he is seeking.

[38] The complainant also challenges the referral of his matter by SMH's release of information staff to the patient relations department, claiming that this was a means of sidestepping his request for the particular records he sought.

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

[39] In accordance with PHIPA Decision 18 and others,<sup>8</sup> a reasonable search under *PHIPA* 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.<sup>9</sup> To be responsive, a record must be "reasonably related" to the request.<sup>10</sup> If the hospital does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control, I have the authority to order a further search.<sup>11</sup>

[40] *PHIPA* does not require SMH to prove with absolute certainty that further records do not exist. However, SMH was required to provide sufficient evidence to me to demonstrate that it has made a reasonable effort to identify and locate responsive records.<sup>12</sup>

[41] In the circumstances of this complaint, I find that SMH has provided sufficient evidence to demonstrate that it made a reasonable effort to identify all responsive records within its custody and control, including any records that would relate to the experience in SMH's emergency department described by the complainant. Based on all of the information before me, I am satisfied that the search for records, coordinated by the hospital's Director of Health Information Management Services, was reasonable in its scope and, in fact, was expanded in response to new aspects or avenues being

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<sup>8</sup> See also PHIPA Decisions 17, 43 and 48.

<sup>9</sup> Orders M-909, PO-2469 and PO-2592. See also PHIPA Decision 17.

<sup>10</sup> Order PO-2554.

<sup>11</sup> Order MO-2185.

<sup>12</sup> Orders P-624 and PO-2559.

brought to their attention through the complaint process. Specifically, considering the description of the various searches conducted, I accept that experienced employees, who were knowledgeable in the subject matter and who would have been most likely to hold records that the complainant wanted to obtain through his request, were consulted.

[42] Past decisions on the issue of search have established that although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>13</sup> In this complaint, I accept that the hospital made a reasonable effort to clarify and confirm the scope of the request; that is, to determine what records the complainant sought. New information was provided during this process and this permitted the hospital to understand more precisely what records the complainant thought should exist, but which had not been located. Ultimately, on the entirety of the evidence, I find that the complainant has not provided a reasonable basis for me to conclude that additional records relating to the emergency department encounter of concern to him exist, but have not yet been located.

[43] The complainant attributes motives to the hospital in disclosing certain responsive records it did locate to him more than once. He believes the repeat disclosures were unnecessary and, apparently, that they were intended to divert attention away from other matters, actions or omissions of the hospital, including the failure to find the records he sought. Disclosing the same records more than once may have been unnecessary, but it does not follow from that conclusion that the repeat disclosure impugns, or is evidence of, an unreasonable search otherwise. Regardless, as I noted above, SMH was *not* required to establish with absolute certainty that no further responsive records exist.

[44] In part, SMH tried to address the complainant's request by referring him to the patient relations department to answer questions he asked in the request. In reviewing the reasonableness of the hospital's search, the issue is whether there are records in existence that might provide an answer to the complainant's questions. In this complaint, given the nature of the complainant's request, it was reasonable for HIMS to refer him to Patient Relations to assist him in addressing some of the concerns raised by the request, including the questions he had about the emergency department encounter with Dr. S, chiropody, and staff directing him to another hospital for treatment.

[45] In my view, the hospital's Director of Health Information Management Services clearly turned her mind to whether records might exist that were responsive to the complainant's request and the questions he asked. This guided the searches conducted. In this situation, I am satisfied that SMH made a reasonable effort to identify and locate

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<sup>13</sup> Order MO-2246. See also PHIPA Decisions 17 and 18.

responsive records and that it carried out its obligations in compliance with *PHIPA*. Accordingly, I uphold the hospital's search.

**NO ORDER:**

For the foregoing reasons, no order is issued.

Original Signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ October 24, 2017