

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 97

Complaint HA18-00159

A physician practicing in a medical clinic

August 29, 2019

**Summary:** The complainant submitted an access request to a physician for a copy of his complete patient chart from a medical clinic. After receiving the records to which he was given access, the complainant challenged the reasonableness of the physician's search for responsive records. In this decision, the adjudicator finds that no review of the complaint is warranted in accordance with sections 57(3) and 57(4)(a) of the *Personal Health Information Protection Act, 2004*, because there are no reasonable grounds for a review and the physician has responded adequately to the complaint.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, sections 53(2), 57(3) and 57(4)(a).

**Decisions Considered:** PHIPA Decisions 18 and 57.

### BACKGROUND:

[1] This decision addresses a complaint filed under the *Personal Health Information Protection Act, 2004* (PHIPA or the *Act*) by an individual regarding the searches conducted by a physician in response to the individual's access request for his medical records from a walk-in medical clinic.

[2] The physician issued a decision granting the requester access to 52 pages of medical records in 2016. In 2018, the requester contacted the physician seeking further

information about the contents of his medical records at the clinic. In July 2018, the physician granted the requester access to five additional pages consisting of transcriptions of the physician's handwritten notes and advised him that the 57 pages represented his complete patient chart from the clinic.<sup>1</sup>

[3] Because the requester was not satisfied that he had received all of the records he requested, he wrote to the physician again in September 2018, seeking access to "copies of my medical records ... from when I was at [the] walk-in facility in September 2006 to the earliest date in 2007 of the records received by me for my [earlier] request..." The requester believes that records from that visit in September 2006 up to the end of June 2007 ought to have been found by the physician, but were not.

[4] The requester submitted a complaint to the IPC in October 2018, because he believed that the physician had not responded to his September 2018 request within 30 days, as the *Act* requires. Although the IPC opened HA18-00159 as a deemed refusal complaint, it was soon understood that HA18-00159 was the replacement complaint for an earlier closed complaint about search.<sup>2</sup> Complaint HA18-00159 proceeded on the basis of the complainant's concern about additional records from 2006 and 2007 that he believes should have been found in addition to the ones to which he was given access.

[5] Shortly after the complainant filed his complaint with this office, the physician wrote to him and confirmed his position that the records given to the complainant to that point constituted his complete clinic chart. The physician's responses did not satisfy the complainant's concerns about the searches conducted.

[6] At the mediation stage of this complaint, each of the parties provided additional information and clarification of their positions. Ultimately, however, a mediated resolution of Complaint HA18-00159 was not possible and the file proceeded to the adjudication stage of the IPC's process for *PHIPA* complaints.

[7] After reading the complaint file, I wrote to the complainant advising him of my preliminary view that his complaint should not proceed to a review. I told the complainant that, based on sections 57(3) and 57(4)(a) of the *Act*, my preliminary assessment was that there are no reasonable grounds to review the subject matter of the complaint, and that the physician had responded adequately to the complaint. I invited the complainant to provide submissions to explain why his complaint about search should proceed to a review under the *Act*, if he disagreed with my preliminary view. I told the complainant that I would consider any submissions provided in response to the letter before I made a final decision. The complainant provided a

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<sup>1</sup> References to the physician in this decision include references to the physician's representative acting on his behalf.

<sup>2</sup> The previous complaint had been closed as a "late complaint" because it was submitted to this office after the time to do so had passed.

response to the letter. I decided it was not necessary to seek submissions from the physician in response, before making this final decision not to conduct a review into the complaint.

## **DISCUSSION:**

### **Should the complainant's reasonable search complaint proceed to a review under *PHIPA*?**

[8] Under sections 57(3) and (4) of *PHIPA*, I have the authority to decide whether or not this office should conduct a review of a complaint. These provisions state, in part:

3. If the Commissioner does not take an action described in clause (1)(b) or (c) or if the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified, the Commissioner may review the subject-matter of a complaint made under this Act if satisfied that there are reasonable grounds to do so.

4. The Commissioner may decide not to review the subject matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,

a. the person about which the complaint is made has responded adequately to the complaint;

[9] In a complaint under the *Act*, where a requester claims that additional records exist beyond those identified by a health information custodian, such as the physician, the issue to be decided is whether the custodian has conducted a reasonable search for records as required by sections 53 and 54 of *PHIPA*. The IPC has considered the issue of reasonable search in many orders issued under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act*. The IPC has also addressed the issue of reasonable search under *PHIPA* in numerous decisions.<sup>3</sup> I outline those principles below, and I adopt them in this decision.

[10] A key principle of these past orders and decisions that is relevant in this decision is the principle that the *Act* does not require the physician to prove with absolute certainty that further records do not exist. What the physician is required to do is provide sufficient evidence to show that he has made a reasonable effort to identify and

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<sup>3</sup> For example, *PHIPA* Decisions 18, 43, 57 and 61.

locate responsive records.<sup>4</sup> To be responsive, a record must be "reasonably related" to the request.<sup>5</sup>

[11] Past orders and decisions of the IPC have established that a "reasonable search" is one in which an experienced employee who is knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>6</sup>

[12] Additionally, although a requester will rarely be in a position to indicate precisely which records have not been located, the requester (complainant) still must provide a reasonable basis for concluding that such records exist.<sup>7</sup>

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

[13] The circumstances of this complaint, the response by the physician to the communications from the complainant and from this office earlier in the complaint, and the complainant's submissions are such that I find it unnecessary to conduct a review of the reasonableness of the physician's search for responsive records. In particular, the evidence provided by the parties before this complaint reached the adjudication stage of the *PHIPA* complaints process leads me to conclude that there is no reasonable basis for believing that additional responsive records from September 2006 to June 28, 2007 exist. Moreover, the complainant's submissions in response to my no review letter to him do not provide a reasonable basis for such a belief.

[14] The evidence on file, all of which I reviewed in reaching my decision, demonstrates a considerable amount of communication back and forth between the complainant and the physician prior to the complaint being made to this office, as well as afterwards. This started with the complainant's contact with the physician in June 2018, when he asked for further information about his patient chart at the medical clinic, which had been provided to him in December 2016 following his September 2016 access request for it.

[15] In response to this request for further information, the physician wrote the complainant a letter on July 23, 2018 that enclosed five additional pages, consisting of transcribed handwritten notes, and told him that the 57 pages that had been sent to him represented his complete patient chart from the medical clinic. The physician also provided answers to questions posed by the complainant, including descriptions of

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<sup>4</sup> PHIPA Decision 18; Orders P-624 and PO-2559.

<sup>5</sup> Order PO-2554.

<sup>6</sup> PHIPA Decisions 18 and 57; Orders M-909, PO-2469 and PO-2592.

<sup>7</sup> PHIPA Decision 18; Order MO-2246.

several of the records sent to him.<sup>8</sup>

[16] The complainant then wrote to the physician's representative in September 2018 stating that he sought access to "copies of my medical records from your client from when I was at his walk-in facility in September 2006 to the earliest date in 2007 of the records received by me for my request of September 2, 2016." The complainant had submitted the renewed request for these records because he recalled attending the physician's walk in facility in September 2006 to receive care for a specific condition after he moved back to the province that autumn. He believes that the physician ought to have located records from that time when he conducted searches.

[17] As noted previously, the complainant submitted a complaint to the IPC on October 24, 2018, because he thought that the physician had not responded to his September 2018 communication within the appropriate time. The IPC opened HA18-00159 as a deemed refusal complaint, but after some clarification, it proceeded with respect to the complainant's concerns about records that he believes should have been located in addition to the 57 pages of medical records already provided to him by the physician.

[18] On November 1, 2018, the physician wrote to the complainant, referring to "[his] inquiries of September 20 and 21, 2018, and of October 5, 10 and 24, 2018," as well as his prior access request of September 2, 2016, and stating, in part:

You were provided with a copy of your [medical clinic] chart on December 6, 2016. Further records were provided to you on July 23, 2018. The records provided to you commence at June 2007 and constitute your complete chart as of and up to, July 23, 2018.

[The physician] does not possess any of your records from the time before 2007.

[19] With the November 1, 2018 correspondence, the physician also provided a copy of a document later described by the complainant as "the consent signed and given to [the physician] to act as my dedicated practitioner." I note that this form, titled "Patient Enrolment and Consent to Release Personal Health Information," is signed and dated August 22, 2008.

[20] This response did not satisfy the complainant's concerns about the completeness of the searches conducted by the physician for records from the earlier time period that he believes should exist. In a November 12, 2018 letter to the IPC Registrar, the complainant asserted that the physician has not provided a satisfactory explanation for

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<sup>8</sup> For example, Cumulative Patient Profiles and patient encounter notes, including one from May 2008 relating to completion of a WSIB form.

why he did not locate records for the time period he is interested in – from approximately September 2006 to June 2007. The complainant stated that the appropriate resolution to his complaint would be for “[the physician] to scour his files and find the missing health records.”

[21] The complainant wrote to this office again on December 4, 2018, providing two attachments that consisted of a medical record and a letter written to him by the physician in September 2014. He also provided further information about the initial (late) complaint, HA18-120, and reiterated his concerns about the physician not locating records that would document the September 2006 visit he believes occurred, when “we ... met ... at his walk-in to discuss my healthcare needs and my intention to apply for ODSP at the local Ontario Works.” Subsequently, in January 2019, the complainant sent the IPC a copy of his submission to another tribunal regarding a matter related to this complaint.

[22] The mediation stage of this complaint commenced in February 2019. According to correspondence sent by this office to the complainant in March, the physician “confirmed that [he] has searched his records and maintains that he does not possess any records for you for prior to June 28, 2007.” The complainant responded that same month, stating:

I still haven't received copy of the record. That is probably because it doesn't exist because the physician misplaced or did not make. I was seen by him in September 2006 and he should have made record. From my records that I had requested from him it shows in the form that I completed to use his facility that I had attended his facility in 2006 without a specific date of when I had completed the form. I assume this since there is a 06 at the bottom of the form.

[23] The mediator contacted the physician to communicate the complainant's concerns and ask for clarification about the notation on the complainant's intake form for the medical clinic. The mediator pointed out the notation at the bottom of that form on the line beside “Family Doctor,” which the complainant thought contained the number “06.” The notation appears to read “N/A-06P.” In response to this questioning, the physician denied that the notation says “06” or that the form was signed in 2006; rather, he explained that “N/A” means “Not Available” and “ΦGP” means “No General Practitioner.”

[24] After receiving the mediator's report, which included that description and explanation of the notation, the complainant sent an email to this office on April 26, 2019, stating, in part:

I send this to request more information regarding the evidence. I would like statement by the subject [the physician] of what the numbers at the bottom of the evidence represents as well to the date of when they think this record was created. ...

My reason for this request for information and for it to become part of the investigation is that the records that I did get from the subject shows that my healthcare from the [medical clinic] began in 2007 when [another physician] had seen me ... The records that I received show that there is no history of me trying to get help for [certain symptoms] ... prior to 2013, which this piece of evidence would refute had it been confirmed that it had been made in September 2006 by the [medical clinic] administration when I arrived to apply for help for my healthcare needs.

... I insist to have statement by the subject as to what this piece of evidence is (why was it created), what the numbers at the bottom of the page represents and I believe that all records are to be given a date of its creation so perhaps they could use that education of theirs to come up with an estimate of when it was created and why there is no date posted on it. ...

[25] In reply to the complainant's email, this office notified him that this request for additional information, evidence and an investigation would be communicated to the adjudicator. When Complaint HA18-00159 proceeded to the adjudication stage of the complaint process, the entire file, including the complainant's April 2019 email, was provided to me. I have reviewed the complete file to assist me in deciding whether this complaint warrants a review under the *Act*.

[26] As stated, I wrote to the complainant inviting him to make submissions regarding my preliminary assessment of the circumstances of the complaint and my view that it ought not to proceed to a review.

[27] In response to my letter, the complainant asked me to continue with a review of his complaint so that his concerns could be addressed more fully. He stated:

I want the answers to the questions I have asked, including a statement of what the record that does not have a date to it is regarding (as well as a guess to when it was created).

As I have already stated, I [saw the physician] in the beginning of September 2006. No record of it exists in the records received that I requested full records of.

You have not provided an explanation that refutes my claim ... I suggest you ... gather the evidences I requested.

[28] I have considered the complainant's demand for further evidence regarding the alleged additional records from the medical clinic that would reflect healthcare he believes was provided to him by the physician during the specified time period in 2006 and 2007. Based on the complainant's communications during the entire process, I accept that they were sufficiently detailed to enable the physician to identify and locate

the records sought by making reasonable efforts, as required by section 53(2) of *PHIPA*.<sup>9</sup>

[29] Specifically, based on the information already available to me, I am satisfied that the physician made reasonable efforts to search for and locate medical records from the time period the complainant is concerned about. In a complaint about the adequacy of searches conducted for responsive records, the fact that a complainant may not accept the explanations provided to him does not, by itself, render his belief that additional responsive records should exist a reasonable one. In my view, this is true here regarding the complainant's rejection of the physician's position that all of the searches done have not resulted in locating any medical clinic records dating from September 2006 to June 28, 2007.

[30] I have also considered the physician's response to the complainant's request for information about the meaning of the notation at the bottom of the medical clinic intake form. The physician's explanation is that it means "No General Practitioner," rather than "06" as part of the year 2006, as the complainant suggested. In my view, this explanation of what the notation on the clinic intake form means is reasonable. The *Act* does not require the physician to speculate about what date this form was created on, nor would I ask the physician to do so were I to continue with a review of this complaint. Moreover, the complainant's concerns about the clinic intake form do not support his concern that additional responsive records from 2006 to 2007 exist, but have not yet been located by the searches already conducted.

[31] Additionally, I do not accept the complainant's suggestion that "a statement," by which he may mean an affidavit, is required to support the physician's position about the clinic intake form or any other record that the complainant believes is missing. While the complainant may wish to have "better evidence" or a more satisfying explanation for why the records he seeks appear not to exist, *PHIPA* does not require the physician to prove with absolute certainty that further records do not exist.

[32] Therefore, under the authority granted to me by sections 57(3) and 57(4)(a) of *PHIPA*, I am exercising my discretion not to conduct a review of this complaint. For the reasons set out above, I decline to review this complaint on the basis that there are no reasonable grounds to commence a review of the subject matter of the complaint and because I am satisfied that the physician has responded adequately to the complaint.

[33] I issue this decision in satisfaction of the notice requirement in section 57(5) of the *Act*.

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<sup>9</sup> Section 53(2) states that "The request must contain sufficient detail to enable the health information custodian to identify and locate the record with reasonable efforts."



**NO REVIEW:**

For the foregoing reasons, no review of this matter will be conducted under Part VI of the *Act*.

Original Signed by: \_\_\_\_\_

Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ August 29, 2019