

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 104

Complaint HA18-59

Mount Sinai Hospital

December 5, 2019

Summary: This decision disposes of the sole issue raised as a result of a complaint made under the *Personal Health Information Protection Act* (the *Act*) regarding Mount Sinai Hospital (the hospital). The complainant made an access request to the hospital under the *Personal Health Information Protection Act* for a copy of her full medical chart. The complainant's position is that further records should exist in the hospital's custody and control. In this decision, the adjudicator finds that the two searches the hospital conducted for records responsive to the complainant's access request were reasonable and no order is issued. The complaint is dismissed.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Schedule A, as amended, sections 53 and 54.

Decisions Considered: PHIPA Decision 18.

BACKGROUND:

[1] This decision disposes of the sole issue raised as a result of a complaint made under the *Personal Health Information Protection Act* (the *Act*) regarding Mount Sinai Hospital (the hospital). The requester made an access request to the hospital under the *Personal Health Information Protection Act* for a copy of her full medical chart, including records from the Centre for Addiction and Mental Health (CAMH), St. Michael's Hospital and possibly other hospitals over a specified time period.

[2] The hospital granted the requester full access to the records and provided a copy of her medical chart from its Psychiatry Department.

[3] The requester, now the complainant, made a complaint to this office about the hospital's decision.

[4] During the mediation of the complaint, the complainant advised the mediator that she believed further records responsive to her request exist. Although she could not identify all of the records that she believed were not given to her, she claimed that the hospital had not provided various psychological assessments and referral documents.

[5] In support of her assertion that further records exist, the complainant relied on a particular medical note made from a doctor. The note stated, in part, that the complainant had seen another resident on two occasions for a psychotherapy assessment. As a result, the complainant believed that the hospital had not conducted a reasonable search for her records.

[6] In response to the complaint, the hospital informed the mediator that its Psychiatry Department stores clinic patient charts on paper, including any referral or consult documentation forwarded to the clinic by external care providers. The hospital advised that it provided the complainant with a complete and accurate copy of her chart. The hospital also advised that, during a meeting with the complainant to review the notes in her chart, it gave her copies of "the main intake notes" prepared by two doctors.

[7] The hospital informed the mediator that the relevant doctors within its Psychiatry Department and its Administrative Director of Psychiatry have confirmed that no more records exist. In addition, the hospital advised that it believes the complainant is seeking records that it does not have. The hospital advised that, in a letter sent to the complainant, a doctor within its Psychiatry Department informed her that there is information about the complainant at both CAMH and St. Michael's Hospital, and that she could make access requests directly to those hospitals.

[8] As a result, the hospital advised the mediator that, in its view, it had conducted a reasonable search for records in its custody.

[9] The mediator informed the complainant of the hospital's response. The mediator also confirmed with the complainant that, as of the date of the mediator's report, she had not made access requests to CAMH or St. Michael's Hospital for her records.

[10] The file was transferred to the adjudication stage of the complaints process where an adjudicator may conduct a review under the *Act*. The adjudicator assigned to the complaint sought, and received representations from the hospital and the complainant. The file was then transferred to me to continue the review.

[11] For the reasons that follow, I find that the hospital conducted a reasonable search for records, no order is issued, and I dismiss the complaint.

DISCUSSION:

Preliminary Issues

[12] There is no dispute between the parties that the information at issue constitutes the complainant's personal health information. Personal health information is defined in section 4(1) of the *Act*, in part as follows:

"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,

[13] Section 4(3) adds to this discussion, covering 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.

[14] The parties also do not dispute that the hospital is a "health information custodian" as defined in section 3(1) of the *Act*.

ISSUE:

[15] As the complainant claims that additional records exist beyond those identified by the hospital, the reasonableness of the hospital's search is the sole issue in this complaint. In particular, the complainant has identified five categories of records that she believes are responsive to her request made under the *Act*, but that were not provided to her by the hospital.

[16] In order to determine whether the hospital conducted a reasonable search for records of personal health information as required by the *Act*, it was asked the following questions:

1. Did the hospital contact the complainant for additional clarification of the request? If so, please provide details including a summary of any further information the complainant provided.
2. If the hospital did not contact the complainant to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the hospital outline the limits of the scope of the request to the complainant? If yes, for what reasons was the scope of the request defined this way? When and how did the hospital inform the complainant of this decision? Did the hospital explain to the complainant why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the hospital's possession? Did the hospital search for those records? Please explain.

[17] The adjudicator assigned to the file asked the hospital to provide this information in the form of an affidavit signed by the person or persons who conducted the actual search.

Representations

[18] The hospital provided its representations by way of a sworn affidavit made by the psychiatrist who conducted the initial search, as well as the hospital's Psychiatrist-in-Chief and the Administrative Director of Psychiatry. The affiants submit that the hospital conducted a reasonable search for records responsive to the complainant's request. In particular, the hospital advises that one of its physicians (also an affiant) met with the complainant over ten years ago to review all notes in her Psychiatry Clinic chart. At that time, the physician provided the complainant with hard copies of notes prepared by two other physicians. Several years later, the hospital submits, it received an access request from the complainant under the *Act* and within 30 days, a complete copy of her Psychiatry Clinic chart was disclosed to her.

[19] In addition, the hospital submits, the first physician referred to in this decision

continued to communicate with the complainant in an effort to assist her navigate the various health information custodians who may have additional records related to her care. The hospital advises that the complainant had received care within at least two other hospitals, and that her chart at the hospital contains information specific to her care at Mount Sinai Hospital. The hospital argues that while it is true that the Psychiatry Clinic chart contains some information from other hospitals, such as referral records, the complainant was advised to contact the other hospitals to obtain records from them. The physician provided the complainant with contact information of the other hospitals, but it appears that the complainant did not submit requests to either hospital.

[20] The hospital further submits that the complainant's request was for a complete copy of the Psychiatry Clinic chart, which was disclosed to her, and that it did not limit the scope of the complainant's access request.

[21] With respect to the search for responsive records, the hospital advises that the search was conducted by the first physician. All Psychiatry Clinic charts were and are currently stored in paper form. The complainant was not satisfied with the physician's search, as a result, the Psychiatrist-in-Chief and the Administrative Director of Psychiatry conducted subsequent searches, which did not produce additional records. The hospital further submits that it has not destroyed any of the complainant's records because its retention policy only permits the destruction of records 28 years after the patient's last visit. The complainant's final visit with less than 10 years ago.

[22] The complainant submits that she plans to make access requests to the other two hospitals referred to by the affiant. In addition, she advised that she is now better able to narrow down the search to a few specific records that she believes the hospital has, but has not disclosed to her. The records, the complainant submits, relate to one particular visit made to the hospital over 10 years ago.

[23] The complainant also submits that when she met with the physician, there was not enough time allotted for her to review her entire charts. As a result, she argues, she made a verbal request to obtain a hard copy of her chart, but only received two intake assessment notes. She further submits that she was never advised by the physician to make a formal access request under the *Act*. The complainant goes on to argue that nine years later, after frustrating email communications with the physician and other hospital staff, she made a formal access request under the *Act* for her records of personal health information. The complainant advises that she received records from the hospital, but submits that other records exist. In particular, the complainant is of the view that the following records exist, but were not provided to her:

- a referral received by the hospital from a named physician addressed to a male resident psychiatrist working during a specified time period; and
- an intake assessment note made by the resident during the same time period.

[24] In reply, the hospital submits that it maintains its position that the search for

records responsive to the complainant's request was reasonable, and that the complainant has been provided with a complete and accurate copy of her record of personal health information. The hospital goes on to state the following:

The Hospital does not have clinical records in its custody or control that identify additional clinicians involved in [the complainant's] care. If it would be helpful to [the complainant], the Hospital can attempt to contact the male residents who worked at Mount Sinai Hospital between [specified time period] to determine if there is recollection of an appointment with [the complainant] . . .

[25] In sur-reply, the complainant submits that the hospital has not been honest, transparent and upfront regarding communications between the hospital and the complainant. The complainant argues that she made three informal requests for a copy of her file, and experienced unnecessary challenges in trying to obtain a copy of her health record. The complainant advises that she has since made access requests to both CAMH and St. Michael's Hospital. She received records from CAMH, but none of the records listed above were present in the CAMH chart. She has yet to receive records from St. Michael's Hospital, but has been advised by staff there that there is only a one page "brief note" written by a physician, not a resident.

[26] The complainant goes on to state the following:

. . . I would like to suggest that instead of having the hospital call a number of past residents in an attempt to reach someone who I only met once nearly a decade ago, that it would be more helpful if they could provide me with a list of names of the residents who worked at Mount Sinai from [specified time period], I can assure you with great confidence that I will recognize his name immediately.

My hope, after confirming the identity of the resident psychiatrist I met at Mount Sinai in [year], is – with your help- to give this hospital the opportunity to perform a more direct and thorough search for the missing documents I'm requesting, and which they would have custody of.

Analysis and findings

[27] This office has extensively canvassed the issue of reasonable search in orders issued under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart. It has also addressed the issue of reasonable search under the *Act* in, for example, PHIPA Decision 18, in which Adjudicator Catherine Corban found that the provisions concerning reasonable search in response to an access request in the public sector access statutes are substantially similar to those contained in the *Act*. Adopting and applying the approach taken by Adjudicator Corban, the principles outlined in orders of this office addressing reasonable search under those statutes are instructive to my review of this issue under the *Act*. In the discussion that follows, I will

accordingly refer to orders of this office addressing reasonable search under those statutes.

[28] Where a requester under the *Act* claims that additional records exist beyond those identified by a health information custodian, the issue to be decided is whether the health information custodian has conducted a reasonable search for records as required by sections 53 and 54 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the health information custodian's decision. If I am not satisfied, I may order further searches.

[29] The *Act* does not require a health information custodian to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹ To be responsive, a record must be "reasonably related" to the request.²

[30] Under the *Act*, 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.³ A further search will be ordered if the health information custodian does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴

[31] Having carefully reviewed all of the evidence before me, including both parties' complete representations, I am satisfied that the two searches conducted by the hospital for records responsive to the complainant's request were reasonable and are in compliance with its obligations under the *Act*.

[32] I find that the hospital has provided sufficient evidence to demonstrate that it made a reasonable effort to identify all responsive records within its custody and control. Based on the information before me, I accept the hospital's argument that it interpreted the access request broadly, and that it provided the complainant with a complete copy of her record of personal health information.

[33] Under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart, although a requester will rarely be in a position to indicate precisely which records the health information custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁵ In PHIPA Decision 18, Adjudicator Corban found that this requirement was equally

¹ Orders P-624 and PO-2559.

² Order PO-2554.

³ Orders M-909, PO-2469 and PO-2592.

⁴ Order MO-2185.

⁵ Order MO-2246.

applicable in determining whether a health information custodian conducted a reasonable search under the *Act*. I agree with and adopt this approach, and in the circumstances of this complaint, I find that the complainant has not provided a reasonable basis to conclude that additional records relating to her and the hospital exist.

[34] While the complainant is of the view that there should be a referral made to a particular resident psychiatrist, as well as an intake note prepared by him, the evidence before me suggests that the hospital took the requisite reasonable efforts to attempt to respond to the complainant's access request and inquiries regarding its search for her record of personal health information.

[35] For these reasons, I am satisfied that the hospital has discharged its onus and has demonstrated that it has conducted a reasonable search in compliance with its obligations under the *Act*.

NO ORDER:

For the foregoing reasons, no order is issued.

Original signed by _____
Cathy Hamilton
Adjudicator

December 5, 2019_____