

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 108

Complaint HA19-00043

A Hospital

February 5, 2020

Summary: The complainant submitted a correction request under section 55(1) of the *Personal Health Information Protection Act* to a hospital with respect to a record relating to his past admission to the hospital. The hospital denied the correction request citing sections 55(8) and 55(9) of the *Act*, but advised the complainant that he could have a statement of disagreement attached to the record under section 55(11). The adjudicator finds that the information the complainant seeks to correct is the good faith professional opinion or observation of the physician who prepared the record, such that the exception under section 55(9) applies. Therefore, she finds that no review is warranted in accordance with sections 57(3) and 57(4) because there are no reasonable grounds for a review.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, sections 3(1), 4(1), 57(3), 57(4), 55(1), 55(8), 55(9) and 55(11).

Decisions Considered: PHIPA Decisions 37 and 39.

BACKGROUND:

[1] This decision addresses a complaint filed with the Office of the Information and Privacy Commissioner (this office or the IPC) under the *Personal Health Information Protection Act* (the *Act* or *PHIPA*) by an individual regarding a correction request that he made to a hospital.

[2] The complainant was a patient at the hospital in 1994. The complainant, who was represented by his substitute decision-maker, sought to have a record relating to his admission at the hospital corrected on the basis that he believes it contains false statements. The record in question is a Form 1 Application by Physician for Psychiatric

Assessment under the *Mental Health Act*. The complainant also requested that the record not be disclosed or used without his express consent.

[3] In response to the correction request, the hospital issued a decision refusing to correct the record on the following grounds:

We could not confirm that information in the Form 1 that you requested corrected is false. The Form 1 contains a professional opinion and observation that a physician made in good faith about [the complainant], and therefore the content of the Form 1 cannot be corrected.

[4] The hospital's decision letter explained the complainant's right to have a Statement of Disagreement attached to the record and indicated that it had, in fact, gone ahead and attached such a statement setting out the complainant's concerns.

[5] Upon receiving the hospital's decision letter, the complainant filed a complaint with this office and Complaint HA19-00043 was opened. A mediator was appointed to explore the possibility of resolving the issues in the complaint.

[6] During mediation, the complainant explained why he thinks the record at issue contains false statements. Specifically, the complainant submitted that certain statements in the record are not supported or corroborated by the police reports associated with the complainant's admission to the hospital. The complainant asked that the statements he believes to be false be "struck out."

[7] Also during mediation, the hospital clarified that it was relying on sections 55(8) and 55(9)(b) of the *Act* to deny the correction request. In particular, the hospital stated:

The statement [at issue] in the Form 1 that the [complainant] requested to correct is a record of communication reported to the physician by others (e.g. witnesses or involved parties), and is a professional observation recorded at the time of the creation of [the] Form 1. Therefore, we still rely on section 55(9)(b) of [the *Act*] in our refusal to correct this information in the Form 1.

Please note that a Form 1 is itself a professional opinion of a physician and is only used for the purpose of an application for a psychiatric assessment (i.e. Form 1 is a document of a physician's opinion that the patient should have a psychiatric assessment). Form 1 is not valid beyond 72 hours. Thus, the hospital can also rely on 55(8) of *PHIPA* in refus[ing] to correct the document, [...] not because there is no evidence that the information in the Form 1 is incorrect, but because the information in the Form 1 is not "inaccurate for the purposes for which the custodian uses the information." There is no obligation to correct information in this Form 1 from [...] 1994 as the document was created to apply for a psychiatric

assessment for the patient at that time, and this document can no longer be used for this purpose and will not be used for the patient's care in future.

[8] In a separate communication to the mediator, the hospital also said that it takes the position that the information at issue consists of a professional observation that the physician made in good faith about the complainant.

[9] The mediator advised the complainant of the hospital's reasons for denying his correction request. The complainant was not satisfied with the explanation, and asked that the file proceed to the next stage of the complaint process.

[10] In light of the above, the mediator determined that a mediated resolution was not possible in the circumstances and the complaint was streamed to the adjudication stage of the IPC's process for *PHIPA* complaints.

[11] After reviewing the file, I sent a letter to the complainant advising that my preliminary view was that their complaint did not warrant a review under sections 57(3) and (4) of the *Act*, and giving the complainant an opportunity to provide representations in response. The complainant responded by saying that they had nothing further to add to the information provided to this office during the earlier stages of the complaint.

[12] After reviewing the complainant's submissions, as well as the entirety of the file, I find that there are no reasonable grounds for a review under section 57(3) and 57(4)(a) of the *Act*, because even if the complainant is able to satisfy the requirements of section 55(8), the "professional opinion or observation [...] made in good faith" exception in section 55(9) applies such that the hospital would not be required to correct the record. I am also satisfied that the hospital has responded adequately to the complaint.

DISCUSSION:

Preliminary matters

[13] Section 55(1) of the *Act* provides for a right of correction in certain circumstances. This section states:

If a health information custodian has granted an individual access to a record of his or her personal health information and if the individual believes that the record is inaccurate or incomplete for the purposes for which the custodian has collected, uses or has used the information, the individual may request in writing that the custodian correct the record.

[14] The terms "health information custodian" and "personal health information" are

defined in sections 3(1)¹ and 4(1)², respectively. There is no dispute that the information the complainant seeks to correct is his personal health information, or that the hospital is a health information custodian, as those terms are defined in the *Act*. There also does not appear to be a dispute that the complainant was given access to his records of personal health information prior to submitting his correction request. Therefore, the sole issue in this complaint is whether the hospital has a duty to correct the record, as requested by the complainant.

Should the complainant's correction complaint proceed to a review under the *Act*?

[15] I have the authority under sections 57(3) and (4) of the *Act* to decide whether to conduct a review of a complaint regarding a health information custodian's decision not to grant the requested correction. 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.

¹ The term "health information custodian" is defined in section 3(1), in part, as:

Subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any:

4. A person who operates one of the following facilities, programs or services:

- i. A hospital within the meaning of the *Public Hospitals Act*, a private hospital within the meaning of the *Private Hospitals Act*, a psychiatric facility within the meaning of the *Mental Health Act* or an independent health facility within the meaning of the *Independent Health Facilities Act*.

² The term "personal health information" is defined in section 4(1), in part, as:

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.

[16] Above, I set out section 55(1) of the *Act*, which provides individuals with a right to request correction to records of their personal health information under certain circumstances. The obligation of a health information custodian to grant such a request is addressed in section 55(8), which 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.

[17] Section 55(9) of the *Act* contains exceptions to this obligation to correct records. It states:

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.

[18] Read together, these provisions set out the criteria pursuant to which an individual is entitled to a correction of his or her records of personal health information. The purpose of section 55 is to impose a duty on health information custodians to correct records of personal health information that are inaccurate or incomplete for the purposes for which the custodian uses the information, subject to the exceptions set out in section 55(9) of the *Act*. Below, I consider the hospital's decision in light of the exception provided in section 55(9), in particular.

The "professional opinions or observations" exception in section 55(9)(b)

[19] The exception in section 55(9)(b) states that a health information custodian is not required to correct a record of personal health information "if it consists of a professional opinion or observation that a custodian has made in good faith about the individual." In PHIPA Decision 39, the adjudicator considered the application of section 55(9)(b) and stated the following:

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.

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.**³ [emphasis added]

[20] The determination of whether the exception at section 59(9)(b) applies involves a two-part analysis. The first question is whether the information at issue is a "professional opinion or observation." In PHIPA Decision 37, the adjudicator determined that the adjective "professional" in section 55(9)(b) modifies both the nouns "opinion" and "observations," such that the exception applies only where the information at issue consists of either a "professional opinion" or a "professional observation." The adjudicator held that such opinions and observations are subjective in nature and are derived from the exercise or application of special knowledge, skills, qualifications, judgment, or experience relevant to the particular profession.

[21] The second question under a section 55(9)(b) analysis is whether the professional opinion or observation was made "in good faith." Individuals are presumed to have acted in good faith, unless proven otherwise. Therefore, the burden of proof rests on the individual seeking to establish that a person has not acted in good faith. Determinations of whether a person has acted in good faith can be based on evidence of bad faith, such as, for example, evidence of malice, carelessness, recklessness, or an intent to harm another individual.⁴

[22] In its correspondence with the mediator, the hospital explains that the record at issue consists of a professional opinion because, as a Form 1, it documents a physician's opinion that the complainant required a psychiatric assessment. The hospital also maintains that the record contains professional observations that were recorded by the physician in good faith.

[23] In reviewing the file, I note that the complainant's initial concern and complaint to this office were about portions of the record that describe police officers' observations of the complainant's behaviour, as communicated to and recorded by the physician. The complainant maintains that these descriptions are inaccurate and are "very detrimental and malicious." In support of this position, the complainant provided documentation that he obtained from the police which, he maintains, contradict these portions of the record at issue. The complainant submits that the recorded observations were "lies" that were "thrown in by police to convey the kind of profile on [the complainant] they wished to invent."

³ At paragraphs 26-27.

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

[24] Although the complainant initially took issue only with portions of the record reflecting the police's observations, I note that at the end of the mediation stage, the complainant also said, "all the other statements on the Form 1 are false."

[25] Based on my review of the materials before me, I am satisfied that the record at issue was prepared by a physician who assessed the complainant upon his admission to the hospital. I accept that the physician who authored the record possessed special knowledge, skills, qualifications, judgment, and experience in medicine.

[26] The information that the complainant seeks to have corrected consists of both the physician's observations, assessments, and opinions regarding the complainant's behaviour, as well as the physician's record of information provided to him by the police officers who brought the complainant to the hospital. Based on my review of the record, I am satisfied that the physician applied his professional knowledge and judgment in documenting his examination of the complainant, which included making note of information that had been communicated to him by the responding officers. Accordingly, I find that the information that the complainant wants corrected qualifies as the physician's professional opinions or observations within the meaning of section 55(9)(b). Given this finding, the complainant does not have a right to a correction of this information unless he can establish that the physician's professional opinions or observations were not made in good faith.⁵

[27] As mentioned above, the physician is presumed to have acted in good faith, and an individual seeking a correction has the onus of establishing otherwise. Having regard to the complainant's submissions in particular, I conclude that there is not sufficient evidence to support a finding that the physician acted in bad faith. The complainant takes issue with the content of the record on the basis that the police fabricated details when communicating their observations of the complainant to the physician; however, he has not provided any evidence to support a finding that the physician acted carelessly or recklessly, or with malice or an intent to harm.

[28] Accordingly, I find that the exception to the hospital's obligation to correct the record in section 55(9)(b) of the *Act* applies. Therefore, even if the complainant were able to establish that the record was inaccurate or incomplete for the purposes for which it is used by the hospital, the hospital would not be required to make the requested corrections under section 55(8).

Conclusion

[29] As set out above, sections 57(3) and 57(4) establish my authority to decline to

⁵ This finding is consistent with the approach taken in past PHIPA Decisions, including PHIPA Decision 36, 37, 39, 43, 67, and 103.

review a complaint. For the reasons stated above, I have decided not to review this complaint on the basis that there are no reasonable grounds to do so, as I am satisfied that the exception at section 55(9)(b) applies.

[30] I note that in responding to the complainant's request, the hospital advised that while it was declining to correct the record as requested, the complainant was entitled to have a Statement of Disagreement attached to the record, in accordance with section 55(11) of the *Act*.⁶ Therefore, I am satisfied that the hospital has responded adequately to the complaint for the purposes of section 57(4)(a).

NO REVIEW:

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

Original signed by _____
Jaime Cardy
Adjudicator

February 5, 2020 _____

⁶ As noted above, in this case, the hospital has attached such a statement setting out the complainant's concerns.