

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 133

Complaint HA17-103

Dr. John Stronks

October 14, 2020

Summary: A lawyer submitted a request under the *Personal Health Information Protection Act (PHIPA)* for access to his client's personal health information. Dr. John Stronks (the custodian) issued a decision granting complete access to the requested records upon payment of a fee of \$216.75 for the processing of the request. The lawyer (now the complainant) filed a complaint with the Information and Privacy Commissioner about the custodian's fee.

In this decision, the adjudicator finds that the custodian's fee of \$216.75 exceeds the amount of "reasonable cost recovery" under section 54(11) of *PHIPA*. She orders that the fee be reduced to \$31.75.

The adjudicator also finds that although the custodian failed to provide a fee estimate as required by section 54(10) of *PHIPA*, in this case no useful purpose would be served by requiring the custodian to provide the complainant with a fee estimate as the appropriateness of the custodian's fee is resolved by this decision.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, sections 5(1), 23, 25, 52, 53, and 54(10) and (11).

Decisions Considered: Orders HO-009, HO-014, PHIPA Decision 17 and PHIPA Decision 111.

BACKGROUND:

[1] A lawyer submitted a request under the *Personal Health Information Protection Act (PHIPA)*, for access to his client's personal health information. The request made it clear that the records were to be sent to the lawyer.

[2] Dr. John Stronks (the physician or the custodian) issued a decision in response to the request, granting complete access to the records containing the complainant's client's personal health information. The custodian advised that there was a fee of \$300.30 for the processing of the request. The fee was broken down to the following components:

- \$150 for correspondence
- \$75 for chart research
- \$40.30 for printing incoming faxes, per page
- \$35 for postage & handling

[3] The lawyer advised the custodian that, in their view, this amount was not consistent with this office's PHIPA Decision HO-009 which sets out guidelines for custodians charging fees under *PHIPA*.

[4] After hearing the lawyer's concerns, the custodian issued a revised invoice in the amount of \$216.75. The fee was broken down into the following components:

- \$150 for professional rate (@ \$300/hr x 1/2 hr)
- \$30 for printing, 1st 20 pages
- \$1.75 printing, per page following 1st 20 pages (7pgs x \$0.25)
- \$35 for postage & handling

[5] The lawyer provided the custodian with \$35.85 advising that again, in his view, the fee of \$216.75 was not consistent with this office's PHIPA Decision HO-009 and PHIPA Decision HO-14 which set out guidelines for custodians charging fees under *PHIPA*. The lawyer stated that, in his view, a review of the records could not take more than 15 minutes. The lawyer also stated that the custodian was not asked to review the records.

[6] The lawyer, now the complainant, filed a complaint with the Information and Privacy Commissioner of Ontario (this office or the IPC) with respect to the fee charged by the custodian.

[7] During mediation, the custodian maintained that the \$216.75 fee is appropriate. The complainant continues to take the position that the fee is inconsistent with the guidelines set out in PHIPA Decision HO-009. In particular, the complainant takes issue

with the fee the custodian is charging for reviewing the records as he did not request that they be reviewed.

[8] As a mediated resolution could not be reached, the matter was transferred to the adjudication stage of the complaint process in which I conducted a review of the complainant and sought and received representations from the parties.

[9] In this decision, I find that the custodian's fee for providing access to the complainant's records of personal health information exceeds the amount of reasonable cost recovery allowable under *PHIPA*. I reduce the fee to \$31.75.

[10] I also find that although the custodian failed to provide a fee estimate as required by section 54(10) of *PHIPA*, in this case no useful purpose would be served by requiring the custodian to provide the complainant with a fee estimate as the appropriateness of the custodian's fee is resolved by this decision.

DISCUSSION:

Does the custodian's fee exceed the amount of reasonable cost recovery?

[11] As set out above, the complainant disputes the custodian's fee for providing access to the requested records. In particular, the complainant disputes the portion of the fee charged for the time spent by the custodian to review the records prior to granting access to them because he maintains that he did not request a review.

[12] Under *PHIPA*, custodians have the discretion to charge a fee for providing an individual with access to their own personal health information. Sections 54(10) and (11) state:

Fee for access

54 (10) A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part or provides a copy of it to an individual under clause (1) (a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee.

Amount of fee

(11) The amount of the fee shall not exceed the prescribed amount of the amount of reasonable cost recovery, if no amount is prescribed.¹

¹ As of the date of this decision, there is no *PHIPA* regulation that prescribes fees for access.

[13] Section 54(11) of *PHIPA* prohibits a health information custodian from charging a fee that exceeds “the prescribed amount” or the “amount of reasonable cost recovery.” Given the absence of a regulation prescribing the amount of the fee that may be charged, this office has the authority pursuant to Part VI of *PHIPA* to conduct a review to determine whether the fee charged exceeds “the amount of reasonable cost recovery” within the meaning of *PHIPA*.

[14] The expression “amount of reasonable cost recovery” in section 54(11) is not defined in *PHIPA*. However, this office has previously considered the meaning of this phrase for the purposes of the fee provisions in *PHIPA*.² Applying the modern rule of statutory interpretation, this office has concluded that the phrase “reasonable cost recovery” in *PHIPA* does not mean “actual cost recovery,” or full recovery of all the costs borne by a health information custodian in fulfilling a request for access to an individual’s own personal health information.³ This office has also concluded that the use of the word “reasonable,” to describe cost recovery suggests that costs should not be excessive, and that, as a whole, section 54(11) must be interpreted in a manner that avoids creating a financial barrier to the important purpose of *PHIPA*, which is to provide a right of access to one’s own personal health information.⁴

[15] These past decisions further concluded that a fee scheme set out in a proposed regulation to *PHIPA*, published by the Minister of Health and Long-Term Care in 2006 (the “2006 framework”),⁵ though never adopted, provides the best framework for determining the amount of “reasonable cost recovery” under *PHIPA*.⁶ I agree with this reasoning and apply it here.

[16] The 2006 framework establishes a set fee of \$30 that the custodian may charge to complete specifically defined work required to respond to a request, as well as fees that a custodian may charge over and above that set fee. The 2006 framework reads, in part, as follows:

Fees for access to records

25.1(1) For the purposes of subsection 54(11) of [*PHIPA*], the amount of the fee that may be charged to an individual shall not exceed \$30 for any or all of the following:

² Orders HO-009 and HO-014.

³ Orders HO-009, HO-014 and *PHIPA* Decision 17.

⁴ Orders HO-009, HO-014 and *PHIPA* Decision 17.

⁵ Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol. 139-10 (11 March 2006). Available online here: <https://files.ontario.ca/books/139-10.pdf>

⁶ Orders HO-009, HO-014 and *PHIPA* Decision 17.

1. Receipt and clarification, if necessary, of a request for a record.
2. Providing an estimate of the fee that will be payable under subsection 54(10) of [*PHIPA*] in connection with the request.
3. Locating and retrieving the record.
4. Review of the contents of the record for not more than 15 minutes by the health information custodian or an agent of the custodian to determine if the record contains personal health information to which access may be refused.
5. Preparation of a response letter to the individual.
6. Preparation of the record for photocopying, printing or electronic transmission.
7. Photocopying the record to a maximum of the first 20 pages or printing the record, if it is stored in electronic form, to a maximum of the first 20 pages, excluding the printing of photographs from photographs stored in electronic form.
8. Packaging of the photocopied or printed copy of the record for shipping or faxing.
9. If the record is stored in electronic form, electronically transmitting a copy of the electronic record instead of printing a copy of the record and shipping or faxing the printed copy.
10. The cost of faxing a copy of the record to a fax number in Ontario or mailing a copy of the record by ordinary mail to an address in Canada.
11. Supervising the individual's examination of the original record for not more than 15 minutes. 54(10) of [*PHIPA*] in connection with the request.

(2) In addition to the fee charged under subsection (1), fees for the services set out in Column 1 of Table 1 shall not, for the purposes of subsection 54(11) of [*PHIPA*], exceed the amounts set out opposite the service in Column 2 of the Table.

[17] I note that section 25.1(2) of the 2006 framework indicates that a custodian may charge fees over and above the set \$30 in amounts set out in an attached table. The following two items in that table are of particular note in the circumstances of this review:

ITEM	COLUMN 1	COLUMN 2
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1	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages
12	For the review by a health information custodian or an agent of the custodian of the contents of a record to determine if the record contains personal health information to which access or disclosure may or shall be refused	\$45 for every 15 minutes after the first 15 minutes

The custodian's explanation of the \$216.75 fee

[18] As set out above, the custodian's revised invoice explained the \$216.75 fee as follows:

Professional rate (@ \$300/hr × ½ hr)	\$150.00
Printing (1 st 20 pages)	\$ 30.00
Printing (7pgs × \$0.25)	\$ 1.75
Postage & handling	\$ 35.00

[19] The custodian submits that the fee is reasonable and that it should be upheld. In particular, the custodian submits that even if the complainant did not ask that he review the requested records prior to granting access to them, he is entitled to conduct a review and charge a fee for that review. He also submits that, in this case, the portion of the fee that reflects the charge for his professional review is reasonable and should be upheld.

[20] The custodian argues that a physician has a professional and legal obligation to review the entirety of a patient's medical record prior to granting access to it under *PHIPA*. The custodian submits that when responding to a request from a patient for access to their own medical record, the entire medical record must be reviewed and a physician's failure to review medical records before providing access to them would place the physician in a "potentially negligent situation."

[21] The custodian takes the position that his fee of \$150 for the time he spent reviewing the records is reasonable and should be upheld.

[22] The custodian submits that the review of medical records to identify the portions of personal health information that may not be disclosed can take a considerable amount of time and can only be done by the physician "both because of the expertise required as well as the confidential and sensitive nature of the file." He submits that identifying portions of personal health information that may not be disclosed is part of a physician's responsibility. As a result, he submits that is reasonable for a physician to charge his

hourly rate for the time spent reviewing records to ensure that access is being granted to only that which is permitted under *PHIPA*.

[23] The custodian submits that in this case, it took him 45 minutes to review the responsive personal health information. He states that he charged for 30 minutes of review time and that his \$150 fee is based on half his hourly rate.⁷

The complainant disputes the custodian's fee

[24] The complainant takes the position that the custodian's fee should not be upheld. The complainant argues that the initial request for the clinical notes and records on file for his client did not ask that the custodian conduct a review of the records. He states that he further offered the custodian the flexibility of delivering the requested records by email or by fax so as to reduce the cost of producing the records.

[25] The complainant points to section 54(1)) of *PHIPA* which requires a health information custodian to provide a fee estimate. He submits that he was not provided with a fee estimate and had he been provided with one he would have had the opportunity to emphasize that he did not request a review of the records prior to receiving them, but also that he would prefer to receive the requested records by email or by fax in order to reduce the cost.

[26] The complainant takes the position that the amount of reasonable cost recovery for being provided with the requested records is \$35.85. He submits that this calculation is based on the flat \$30 fee for photocopying the first 20 pages of records, and then \$0.25 per page for the subsequent 7 pages (\$1.75), plus 13% HST. The complainant submits that this fee would include photocopying, preparing a response letter, locating the record and 15-minutes of review, among other services listed in the 2006 fee framework adopted in Order HO-009. The complainant submits that despite not having been adopted, the 2006 framework remains the best framework for determining the amount of "reasonable cost recovery" under *PHIPA*.

[27] The complainant also submits that *PHIPA* dictates that the fee charged by the custodian must not be so excessive as to create a financial barrier to accessing health information. He submits that requiring his client to bear the cost of \$216.75 for 27 pages of her own medical records creates a substantial financial barrier to her ability and right to access her own medical records. He does not provide any further evidence regarding his client's financial position, nor did he or his client request a fee waiver.

⁷ In his submissions, the custodian does not explain why he only charged for 30 minutes for review when the actual time spent was 45 minutes.

The custodian's reply

[28] Replying to the complainant's position that had he received an estimate in advance he would have emphasized that he was not requesting a review of the records, the custodian reiterates the CMPA's recommendations about reviewing records in its policy on medical records transfer, set out above. The custodian further submits that as a review of the records is "professionally responsible and advisable" a requester should not be able to "opt out" of the professional standard of care with respect to reviewing records as "it poses a liability risk to the custodian as a health care professional."

Analysis and finding applying the 2006 fee framework and the principle of "reasonable cost recovery"

[29] As noted above, previous IPC orders⁸ and PHIPA Decision 17 conclude that the 2006 fee scheme set out in the proposed regulation to *PHIPA* provides the best framework for determining the amount of "reasonable cost recovery" under section 54(11) of *PHIPA*. I agree with this and apply the 2006 framework here.

[30] In my review of this complaint, I find that the custodian has not applied the principles set out in the 2006 framework in a manner that results in "reasonable cost recovery." In applying the 2006 framework to the circumstances of this complaint in a manner that is in keeping with the principle of "reasonable cost recovery," I find that the custodian is permitted to charge a total fee of \$31.75 for the 27 pages of responsive records, as set out below:

Flat rate fee for the tasks set out in section 25.1(1) of the 2006 framework including: <ul style="list-style-type: none">• 15 minutes of review• 20 pages of photocopies• packing and mailing the records• administrative tasks		\$30.00
Fee for photocopies or computer printouts after the first 20 pages	7pgs × \$0.25	\$1.75

⁸ Orders HO-009 and HO-014.

Fee for the review of the records after the first 15 minutes	0min ×\$45	\$0.00
Total Cost		= \$31.75

The \$30 set fee in the 2006 framework

[31] In applying the 2006 framework, one must first consider the set fee of \$30 that section 25.1(1) of the 2006 framework permits a custodian to charge to account for some of the work required to respond to a request. Included in that \$30 charge are fees for a number of listed administrative tasks involved in processing the request, such as the first 15 minutes of review by the health information custodian to determine if the record contains personal health information to which access may be refused, and photocopying or printing of the first 20 pages of the responsive records. It also includes costs incurred for packaging the photocopied or printed copy of the record for shipping and for mailing a copy of the record by ordinary mail to an address in Canada.

[32] Section 25.1(2) of the 2006 framework references Table 1 which, as previously indicated sets out defined fees that a custodian is permitted to charge, over and above the set \$30 fee, for a number of defined tasks. These include \$0.25 per page for photocopying beyond the first 20 pages and \$45 for every 15 minutes of review by a health information custodian after the first 15 minutes.

Reasonable cost recovery for photocopying the records

[33] Applying the 2006 framework, the fee for photocopying the first 20 pages of the complainant's records of personal health information is accounted for in the \$30 set fee. Under Item 1 of Table 1 of the 2006 framework, the custodian is permitted to charge \$0.25 per page for photocopying beyond those first 20 pages. Therefore, in the circumstances of this complaint where 27 pages of responsive records have been identified, the custodian is permitted to charge \$1.75 for the remaining 7 pages of records.

[34] I note the complainant indicated both in the request itself, as well as in his representations, that she would receive the records via email or fax rather than as paper copies if it would reduce the fee. The custodian did not respond to the complainant's comment.

[35] In PHIPA Decision 111, I found that a custodian can charge a fee for scanning records in order to provide them to the complainant on CD if the records are not already available in electronic format and do not require severing. In that decision, I considered the activity of scanning paper records to be a necessary component of making them available on CD. I found that a custodian may charge fees for scanning and determined that such fees should be calculated at the same rate as the photocopying charges set out in the 2006 framework.

[36] In my view, the reasoning set out in PHIPA Decision 111 regarding scanning paper records in order to provide them to a complainant on CD, is similarly applicable where paper records are to be provided by email or fax. While the method of receipt is different, in all of these circumstances, paper records would need to be photocopied or scanned in order to be provided to the complainant in the alternative format, in this case by email or fax.

[37] In keeping with my reasoning in PHIPA Decision 111, I accept that for the purposes of the current complaint, unless the records are already available in an electronic format that would permit them to be emailed or faxed without having to be photocopied or scanned, the custodian is entitled to charge scanning fees at the same rate as for photocopying under the 2006 framework (\$0.25 per page for each page beyond the initial 20 pages).

[38] Neither party has provided evidence regarding whether any of responsive records are available electronically and are able to be provided to the complainant without being scanned. If there are responsive records that meet that criteria, the custodian must reduce its fee by \$0.25 per page, accordingly.

Reasonable cost recovery for reviewing the records

[39] The complainant argues that his client should not be charged for the time spent by the custodian to conduct a review of her medical records before access is granted to them because the custodian was not to conduct such a review. The custodian takes the position that he is entitled to review the requested records prior to providing the complainant with access to them regardless of whether or not the complainant requests such review. I agree with the custodian that a review of the records must be undertaken.

[40] In PHIPA Decision 111, I stated that in order for a custodian to fulfill its obligations under *PHIPA* and to ensure that it is granting access only to the personal health information to which the requester is entitled under *PHIPA*, the custodian is allowed to conduct a review of the requested records. In keeping with that decision, I find in this current complaint that for the custodian to ensure that in responding to the complainant's request he is granting access to only the information to which the complainant is entitled under *PHIPA*, he must conduct a review of the records prior to providing access to them.

[41] As set out above, the custodian's fee for reviewing the complainant's medical records was \$150 and this was based on charging for 30 of the 45 minutes spent by the physician to review the records at the physician's hourly rate.

[42] As stated above, the 2006 fee scheme set out in the proposed regulation to *PHIPA* provides the best framework for determining the amount of "reasonable cost recovery" under *PHIPA*. Applying the 2006 framework to the circumstances, the custodian is entitled to charge \$45 for every 15 minutes of review after the first 15 minutes, which is accounted for in the set fee of \$30. Therefore, under the 2006 framework, the allowable fee for 30 minutes of review beyond the first 15 minutes is \$90, if the custodian charges for the entire 45 minutes of review undertaken in this case.

[43] However, even if a fee of \$90 for 30 minutes of review (in addition to the first 15 minutes of review encompassed in the standard \$30 set fee to respond to a request) is in keeping with the 2006 framework, it must also be found to be in accordance with the principle of “reasonable cost recovery” mandated by section 54(11) of *PHIPA*. To determine if the fee charged for reviewing records represents “reasonable cost recovery” I must decide whether it was reasonable for the custodian to take 45 minutes to review the 27 pages of responsive records.

[44] In *PHIPA* Decision 111, I determined that not every type of record containing personal health information subject to *PHIPA* requires the same amount of time for review. I found that records with standard, predictable content require only a straightforward review with minimal time needed to determine whether they contain information to which access may be refused. For these types of records, I determined a review time of five seconds per page was appropriate. I found that other records, which by their nature, have the potential to contain information to which access may be refused, require a more detailed and lengthy review. For these types of records, I determined a review time of two minutes per page was appropriate.

[45] I have not been provided with any details about the content of the records that are at issue in this complaint. However, the request is for the complainant’s client’s own personal health information contained in her medical records held by the client’s family physician. The College of Physicians and Surgeons’ policy entitled “Medical Records Documentation”⁹ sets out the types of information or records that a physician must include in a patient’s medical record. This includes a patient health summary containing information such as medical history, allergies and drug reactions, immunization records and ongoing health conditions. This also includes clinical notes detailing complaints, assessments, diagnosis, treatment and follow-up, as well as prescriptions issued, tests requisitioned, referrals made and any associated reports and results, including laboratory and pathology. In my view, these types of records include or are similar to those which I found in *PHIPA* Decision 111 as requiring a straightforward review. I have no evidence before me to suggest that any of the records at issue have the potential to contain personal health information that may required a more detailed and lengthy review.

[46] As a result, and in the absence of evidence to the contrary, in my view it is reasonable to conclude that the 27 pages of responsive records would require only a straightforward review at five seconds per page. Accordingly, I find that a reasonable amount of time for the custodian to review 27 pages of records containing the complainant’s own personal health information is encompassed in the first 15 minutes of review that are accounted for in the set fee of \$30 per request. Given the nature and number of responsive records, I find that when the 2006 fee framework is applied, the custodian is not permitted to charge review fees in excess of what is accounted for in the

⁹ College of Physicians and Surgeons of Ontario Policy on *Medical Records Documentation*, updated November 2020. Available here: <https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Medical-Records-Documentation>

set fee of \$30. I accept that, in the circumstances, this amounts to "reasonable cost recovery" as required by section 54(11) of *PHIPA*.

The custodian's fees for "postage & handling" are not allowed

[47] In the breakdown of the \$216.75 fee, the custodian included a charge of \$35 for "postage & handling," but no further information was provided to explain this amount.

[48] I do not allow the custodian's charge of \$35 for "postage & handling." Paragraphs 8 and 10 of section 25.1(1) of the 2006 framework stipulate that the \$30 set fee includes costs for the packaging of the photocopied records for shipping or faxing and the cost of mailing a copy of the record by ordinary mail to an address in Canada. The remaining paragraphs of section 25.1(1) account for costs incurred for a variety of administrative tasks required in the processing of the request.

[49] In the absence of evidence demonstrating that the "postage & administration" fees charged by the custodian are for any of the types of tasks that are listed in Table 1 of the 2006 framework, I find that they are subsumed within the \$30 set fee in section 25.1(1). Therefore, I do not uphold the portion of the custodian's fee for "postage & handling."

Summary of the allowable fee

[50] Applying the 2006 fee framework in light of the principle of "reasonable cost recovery" set out in section 54(11) of *PHIPA*, I find that the custodian is permitted to charge the \$30 set fee and \$1.75 for photocopies and I have disallowed the custodian's fees for any review time beyond 15 minutes and for "postage & handling." As a result, I have found that the custodian is permitted to charge the complainant a fee of \$31.75 for responding to the request. However, if any of the responsive records are available electronically and can be provided to the complainant without being scanned, the fee should be reduced accordingly.

Should the custodian be required to provide the complainant with a fee estimate in this case?

[51] In his representations, the complainant raises the issue that the custodian failed to provide him with a fee estimate prior to sending the invoice setting out the fee for access to the requested records.

[52] Section 54(10) of *PHIPA* requires that the custodian provide a requester with an estimate of the fee before charging them a fee for access to their records of personal health information.

[53] The IPC's Guideline on "Fees, Fee Estimates and Fee Waiver" (the Guideline), provides provincial and municipal institutions governed by *MFIPPA* and *FIPPA* guidance on issuing a fee estimate under public sector access legislation. While it does not specially address fee estimates issued under *PHIPA* it provides useful information about the purpose

of a fee estimate which, in my view, is equally applicable to the mandatory fee estimates required under section 54(10) before charging a fee for access under *PHIPA*.

[54] The Guideline advises that a fee estimate "provides the requester with a reasonable understanding of the costs involved in providing access...to help the requester make an informed decision as to whether or not to pay the fee and pursue access." It states that the fee estimate "can also assist the requester in deciding whether to narrow the scope of a request in order to reduce the fees."

[55] In the circumstances of the current request, the custodian did not provide the complainant with a fee estimate as required by section 54(10) of *PHIPA* before providing him with an invoice setting out the fee for access to his client's personal health information. In failing to do so, I acknowledge that the custodian did not comply with *PHIPA*. Nevertheless, the complainant exercised his right to file a complaint about the fee with this office, mediation occurred and I have now conducted a review into this matter. Therefore, while the custodian did not act in accordance with section 54(10) of *PHIPA* by failing to provide a fee estimate, in this case I find that there would be "no useful purpose" to be served by requiring the custodian to provide the complainant with a fee estimate at this time. Having said that, the custodian is reminded that when responding to a request for access to personal health information under *PHIPA*, section 54(10) requires that it provide a requester with a fee estimate prior to doing the work to process the request and charging a fee for access to the requested information.

ORDER:

1. I do not uphold the custodian's fee and I order that it be reduced to \$31.75. In light of the revised fee, the custodian is to provide the complainant with a refund of \$4.10.
2. If any of the responsive records are available in electronically and are transferrable without being scanned, I order the custodian reduce its fee by \$0.25 per page.

Original signed by: _____

Catherine Corban
Adjudicator

October 14, 2020 _____