

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 137

Complaint HA19-00134

Royal Centre of Plastic Surgery

December 18, 2020

Summary: A lawyer submitted a request under the *Personal Health Information Protection Act* (the *Act*) for access to records of his client's personal health information from the Royal Centre of Plastic Surgery (the custodian). The custodian issued a decision granting access to the records upon payment of a \$141 fee. The complainant, through his lawyer, filed a complaint with this office regarding that fee. In this decision, the adjudicator finds that the custodian's fee exceeds the amount of "reasonable cost recovery" under section 54(11) of the *Act*. She orders that the fee be reduced to \$30.00.

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

Decisions Considered: Orders HO-009, HO-014, PHIPA Decisions 17, 111, 132, and 133.

BACKGROUND:

[1] This complaint arises out of a request that was made under the *Personal Health Information Protection Act* (the *Act* or *PHIPA*) to the Royal Centre of Plastic Surgery (the custodian) for access to records of personal health information, and the fees that the custodian assessed for the purpose of granting access. In particular, the requester's representative sought access to records for the period between January 24, 2016 and February 5, 2019, as follows:

All clinical notes and records; operative reports; pathology reports; consultation notes; physician notes; treatment records; laboratory results; emergency room records; discharge summaries; diagnostic imaging

reports; electrocardiograms (ECGs); product identification labels; statement of accounts; prescription summary and; any and all other documentation you have on file for this patient.

[2] In response, the custodian advised that access to eight pages of health records would be granted in full upon payment of the following fee:

Chart preparation and photocopy fee:	\$125.00
HST (13%):	\$16.25
Total:	\$141.25

[3] In a subsequent letter, the custodian clarified that it calculated its fee as follows:

As per [Canadian Medical Protective Association (CMPA)] guidelines, [a named physician] is required to review all charts that medical records/notes have been requested for. As we are sure you are aware, the first 15 minutes are free, but all time spent thereafter are subject to [the physician's] hourly rate.

[The physician's] hourly rate: \$500/hr (\$8.33/min)

Total review time: 30 minutes

Time billed for: 15 minutes

15 minutes @\$8.33/min	=\$124.95
HST	=\$16.24
Total	=\$141.19

[4] The requester's representative made a complaint to this office regarding the fee charged by the custodian.

[5] A mediator was assigned to explore the possibility of resolving the issue in dispute. During the mediation stage of the complaint process, the complainant's representative took the position that the \$141.19 fee is unreasonable because it exceeds the amount of "reasonable cost recovery" permitted under section 54(11) of the *Act*. In his view, reasonable cost recovery would be calculated as follows: "\$30/first 20 pages + \$0.25 per page thereafter + 13%HST + reasonable review time." The custodian advised the mediator that it would not reduce the fee.

[6] As a mediated resolution was not achieved, the file was transferred to the

adjudication stage of the complaint process. I decided to conduct a review under the *Act*, which I began by inviting the custodian to provide written representations for my consideration. I then invited the complainant to provide written submissions addressing the issues and responding to the custodian's position. The complainant provided submissions. I shared the non-confidential portions of the complainant's submissions with the custodian and invited its response.

[7] For the reasons that follow, 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 the *Act*. I reduce the fee to \$30.

RECORDS:

[8] At issue are eight pages of records relating to the complainant.

PRELIMINARY ISSUE:

[9] There is no dispute between the parties that the Royal Centre of Plastic Surgery is a "health information custodian" as that term is defined in section 3(1) of the *Act*, or that the records at issue are records of the complainant's "personal health information" as that term is defined in section 4(1) of the *Act*.

DISCUSSION:

Does the custodian's fee exceed the amount of reasonable cost recovery allowable under section 54(11) of the *Act*?

[10] Sections 54(10) and (11) of the *Act* provide custodians with the discretion to charge a fee for providing an individual with access to their own personal health information. These sections state

(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.

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

[11] Section 54(11) of the *Act* prohibits a health information custodian from charging a fee that exceeds "the prescribed amount" or the "amount of reasonable cost recovery." As of the date of this decision, there is no regulation that prescribes fees for access under *PHIPA*. This office has the authority, pursuant to Part VI of the *Act*, to

conduct a review to determine whether the fee charged exceeds “the amount of reasonable cost recovery” within the meaning of the *Act*.

[12] The expression “amount of reasonable cost recovery” is not defined in the *Act*. However, this office has previously considered the meaning of this phrase for the purposes of the fee provisions in *PHIPA*.¹ Applying the modern rule of statutory interpretation, this office has concluded that the phrase “reasonable cost recovery” 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.² 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 the *Act*, which is to provide a right of access to one’s own personal health information.³

[13] These past orders concluded that a fee scheme set out in a proposed regulation to the *Act*, published by the Minister of Health and Long-Term Care in 2006 (the “2006 framework”),⁴ though never adopted, provides the best framework for determining the amount of “reasonable cost recovery” under the *Act*. I agree with this reasoning, and will apply the 2006 framework in this decision.

[14] The 2006 framework establishes a set fee that custodians may charge to complete specifically defined work required to respond to a request. It also prescribes the fees that custodians 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:

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 the *Act* in connection with the request.
3. Locating and retrieving the record.

¹ See, for example, Orders HO-009 and HO-014.

² Orders HO-009, HO-014, and PHIPA Decision 17.

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

⁴ Notice of Proposed Regulation under *PHIPA*, published in *Ontario Gazette* Vol 139-10 (11 March 2006). Available online here: <http://files.onatriogovernment.ca/gazettedocs/139-10.pdf>.

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 or disclosure may or shall be refused.

5. Preparation of a response letter.

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 examination of the original record for not more than 15 minutes.

(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 [the *Act*], exceed the amounts set out opposite the service in Column 2 of the Table.

[15] Section 25.1(2) of the 2006 framework indicates that a custodian may charge fees over and above the set \$30 fee in amounts that are set out in the following table:

ITEM	COLUMN 1	COLUMN 2
1	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages
2	For making and providing a paper copy of a record from microfilm or microfiche	50 cents per page
3	For making and providing a floppy disk or a compact disk	\$10

	containing a copy of a record stored in electronic form	
4	For making and providing a microfiche copy of a record stored on microfiche	50 cents per sheet
5	For making and providing a copy of a microfilm of a record stored on microfilm that is,	
	i. 16 mm	\$25 per reel
	ii. 35 mm	\$32 per reel
6	For printing a photograph from a negative or from a photograph stored in electronic form, per print,	
	i. measuring 4" × 5"	\$10
	ii. measuring 5" × 7"	\$13
	iii. measuring 8" × 10"	\$19
	iv. measuring 11" × 14"	\$26
	v. measuring 18" × 20"	\$32
7	For making and providing a copy of a 35 mm slide	\$2
8	For making and providing a copy of an audio cassette	\$5
9	For making and providing a copy of a ¼", ½" or 8mm video cassette,	
	i. that is one hour or less in length	\$20
	ii. that is more than one hour but not more than two hours in length	\$25
10	For making and providing a copy of a ¾" video cassette,	
	i. that is not more than 30 minutes in length	\$18
	ii. that is more than 30 minutes but not more than one hour in length	\$23
11	For producing a record stored on medical film, including x-ray, CT and MRI films	\$5 per film

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
13	For supervising examination of original records	\$6.75 for every 15 minutes

Representations

[16] In its correspondence to the complainant, the custodian explained the calculation of its fee as follows:

The physician's hourly rate: \$500/hr (\$8.33/min)

Total review time: 30 minutes

Time billed for: 15 minutes⁵

15 minutes @\$8.33/min =\$124.95

HST (13%) =\$16.24

Total =\$141.19

[17] During my review, the custodian stated that it "does not feel that the fee for the requested service is inappropriate," and that its fee for access was "clearly outlined in advance."

[18] The complainant maintains that the custodian's fee is in excess of the "reasonable cost recovery" allowable under section 54(11) of the *Act*.

[19] The complainant notes that the custodian has billed for 15 minutes of a physician's time based on the \$500 hourly rate set out in the CMPA guidelines. The complainant maintains that as a "membership-based not-for-profit organization that provides legal defence, liability protection, and risk management education to physicians," the CMPA is not a regulated body and therefore "its guidelines are just that, guidelines."

⁵ The custodian advised that the first 15 minutes of review were free, so the time billed for was the remaining 15 minutes. The custodian has not explained why the first 15 minutes of review are free.

[20] In contrast, the complainant submits that there is an access regime established under the *Act* and enforced by this office, which is the "binding legislation" in respect of the fees permitted for providing access.

[21] In the complainant's view, the custodian is charging fees for services that were not performed by the physician named in the custodian's fee decision. The complainant says that he is simply asking for a copy of the records, "not for [the physician's] extensive professional review," and, as such, the physician is "not required to spend any time evaluating, revising and/or editing the existing records."

[22] The complainant refers to Orders HO-014 and HO-009, which adopted the 2006 framework for calculating fees. Based on the fee scheme established by the 2006 framework, the complainant submits that the "reasonable cost recovery" fee for access to eight pages of records should be \$33.90, calculated as follows:

\$30 for the first 20 pages, including 15 minutes of review time

\$3.90 for HST

Total: \$33.90

Analysis and findings

[23] As noted above, previous IPC decisions⁶ conclude that the 2006 framework set out in the proposed regulation provides the best method for determining the amount of "reasonable cost recovery" under section 54(11) of the *Act*. I agree with this and will apply the 2006 framework for the purposes of this review.

[24] Applying that 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 the complainant a total fee of \$30.00 for access to the eight pages of records responsive to his request.

The \$30 set fee in the 2006 framework

[25] First, I must consider the set fee that section 25.1(1) of the 2006 framework allows a custodian to charge to account when responding to access requests. Included in the set fee of \$30 are charges for a number of administrative tasks involved in processing requests, such as the first 15 minutes of review by the custodian to determine if the record contains personal health information to which access may be denied, and photocopying or printing of the first 20 pages of responsive records. The \$30 set fee also includes the cost of packaging the photocopied or printed copies of the

⁶ Orders HO-009 and HO-014, and PHIPA Decisions 17, 111, 132, and 133, for example.

records and sending them, by ordinary mail, to an address in Canada.

[26] I find that the custodian is permitted to charge the complainant the \$30 set fee provided for under section 25.1(1) of the 2006 framework. In the context of this complaint, the set fee covers 15 minutes of review by the physician, photocopying eight pages of records, and sending the copies by ordinary mail to the complainant.

[27] Next, I will consider whether there are any additional fees allowable under section 25.1(2) of the 2006 framework. In particular, I will consider the costs allowable for the time spent reviewing records, since the custodian has not indicated that any of the other costs in Table 1, referred to in section 25.1(2), apply and, based on the evidence before me, I am satisfied that none do.

Reasonable cost recovery for reviewing the records

[28] In PHIPA Decision 111, Adjudicator Catherine Corban stated that in order for a custodian to fulfill its obligations under the *Act*, it is allowed to conduct a review of the requested records. I agree, and I accept that the custodian must conduct a review of the requested records prior to providing access to them. The purpose of this review is to ensure that, in responding to the complainant's request, the custodian is granting access only to information to which the complainant has a right of access under the *Act*.

[29] As set out above, the custodian's fee for reviewing the complainant's records was \$124.95. This portion of the fee was based on 15 of the 30 minutes of the physician's review time, and calculated at the physician's hourly rate of \$500 per hour, or \$8.33 per minute.

[30] As stated above, the 2006 framework establishes the method for determining the amount of "reasonable cost recovery" under the *Act*. Applying the 2006 framework to the circumstances of this complaint, the custodian is entitled to charge \$45 for every 15 minutes of review after the first 15 minutes (which are accounted for in the set fee of \$30 under section 25.1(1)).

[31] However, as noted by Adjudicator Corban in PHIPA Decisions 132 and 133, even if a fee of \$45 for 15 minutes of review (in addition to the first 15 minutes of review covered by the \$30 set fee) 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 the *Act*. 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 30 minutes to review the eight pages of responsive records.

[32] In PHIPA Decision 111, Adjudicator Corban determined that not every type of record containing personal health information subject to the *Act* requires the same amount of time for review. She 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,

Adjudicator Corban determined that a review time of five seconds per page was appropriate. In contrast, she 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 those types of records, Adjudicator Corban determined a review time of two minutes per page was appropriate.

[33] As the custodian did not provide detailed representations in support of its fee, I do not have evidence before me regarding the content of the records that are at issue in this complaint. However, the request is for all of the clinical notes and records of the complainant's own personal health information, which are held by the custodian.

[34] In PHIPA Decisions 132 and 133, Adjudicator Corban noted that the College of Physicians and Surgeons' policy entitled "Medical Records Documentation"⁷ 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.

[35] In my view, these types of records include or are similar to those which Adjudicator Corban found in PHIPA Decisions 111, 132, and 133 would require a straightforward review. I have no evidence before me to suggest that any of the records at issue have the potential to contain the kinds of personal health information that may require a more detailed or lengthy review.

[36] Therefore, I find that it is reasonable to conclude that the eight pages of responsive records would require a straightforward review by the custodian, which can be completed at a rate of five seconds per page. Accordingly, I find that a reasonable amount of review time falls within the 15 minutes accounted for in the set \$30 fee under section 25.1(1) of the 2006 framework. In other words, I find that when the 2006 framework is applied, the custodian cannot charge additional review fees in excess of what is accounted for in the set \$30 fee. I find that, in the circumstances, this amounts to "reasonable cost recovery" as required by section 54(11) of the *Act*.

Summary of the allowable fee

[37] In light of the principle of "reasonable cost recovery" set out in section 54(11) of the *Act*, I find that the custodian is permitted to charge the complainant no more than the \$30 set fee allowable under section 25.1(1) of the 2006 framework.

⁷ 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>

ORDER:

1. I order the custodian to reduce its fee to \$30.00.

Original Signed by: _____

Jaime Cardy
Adjudicator

December 18, 2020 _____