

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 156

Complaint HA18-00198

Firefly

August 9, 2021

**Summary:** The complainant made a number of requests to the custodian for records relating to her two children, who received services from the custodian. She later requested information about herself as well as about her children. The custodian issued several decisions, after which it maintained it had located and granted full access to all records responsive to the complainant's requests. The complainant challenged the reasonableness of the custodian's searches, including by identifying other records that she believed ought to exist. The adjudicator finds that the custodian conducted a reasonable search in accordance with its obligations under the *Personal Health Information Protection Act, 2004*. She dismisses the complaint.

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

### BACKGROUND:

[1] This decision addresses a complaint about the reasonableness of a health information custodian's search for records responsive to a complainant's requests. In this decision, I find that the custodian conducted a reasonable search in accordance with its obligations under the *Personal Health Information Protection Act, 2004 (PHIPA)*.

[2] The complainant is the mother of two children who received services from Firefly, a provider of health and developmental services to children and families. There is no dispute that Firefly is a "health information custodian" within the meaning of *PHIPA* (section 3).

[3] Under *PHIPA*, the complainant made several requests to the custodian for access to her children's records.<sup>1</sup> As the interpretation of her requests is relevant in this complaint, I

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<sup>1</sup> From the materials before me, it appears that the complainant shares custody of the children with the children's father. As the parties do not dispute the matter, in this decision I will assume without deciding that

reproduce the language of her written requests here:<sup>2</sup>

- A request for “any and all notes and reports made in regards to [the complainant’s two daughters]. To include any discussions with [the complainant] or their father ... To include speech notes & any counselling.” The request covers a time period of about 15 months.
- A request for “a copy of all records for both” children.
- A request for “records for [the complainant’s two children]. Records to include, but not limited to: emails, notes, reports, any correspondence.” This request covers a time period of about four and a half years, and includes some overlap with the time period set out in the first request.

[4] The custodian issued a number of access decisions in response to the requests and follow-up discussions between the complainant and the custodian. The custodian maintained that through its various decisions, it has granted the complainant full access to all responsive records about the children. In these decisions, the custodian describes various types of responsive records that it has located and released to the complainant, including children’s assessments and reports, file documentation concerning an intake meeting and an initial assessment (for specified dates), and documentation about tele-mental health services.

[5] The complainant believed that the custodian had not located all records responsive to her requests, and she complained to the Office of the Information and Privacy Commissioner/Ontario (IPC) about the adequacy of the custodian’s searches. During the mediation stage of the complaint process, the custodian conducted further searches and released some additional information to the complainant.

[6] The custodian explains that it initially severed some records to remove certain information about the children’s father before releasing them to the complainant. The custodian states that it later provided the complainant with new copies of these records without severances, based on a re-evaluation of the withheld information by its new privacy officer. The custodian also provided the complainant with an index of records on three occasions to accompany records that it released to her.

[7] During the mediation stage of the complaint process, the complainant informed the custodian through the mediator that she wanted the custodian to “provide all records for both children and myself.”

[8] In response to that request, the custodian issued another decision, and took the position that it has provided the complainant with all responsive records. The custodian maintains that other than the records to which it has already granted full access, there exist no other responsive records.

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the complainant is entitled under *PHIPA* to request access to records of her children’s personal health information.

<sup>2</sup> The complainant indicates that she made other requests for her children’s records that were not formal requests under *PHIPA*. Nothing prevents a custodian from responding to access requests made orally or outside *PHIPA*: section 52(6). However, the rights and obligations in *PHIPA* relating to access requests apply to requests made in writing.

[9] The complainant continues to believe that additional records exist. At the end of the mediation stage, she identified seven individuals who are or were employed by the custodian, who she believes created or should have additional records responsive to her requests. The additional records include notes (including handwritten notes), subpoenas and other communications. The complainant's belief is based on her understanding of the types of records that staff members are required to maintain. In addition, the complainant advises that she witnessed staff members creating some of the records that she is seeking.

[10] The IPC conducted a review of this matter, during which the custodian and the complainant provided representations that were shared in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*. The complaint was transferred to me to complete the review.

[11] In this decision, I find that the custodian conducted a reasonable search for records. I dismiss the complaint.

## **DISCUSSION:**

### **Did the custodian conduct a reasonable search for records responsive to the complainant's request?**

[12] When a requester claims that additional records exist beyond those identified by a custodian, 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*. These sections address the written request that an individual may make to a custodian to exercise a right of access to records, and the obligations on the custodian in responding to the access request. These sections of *PHIPA* require the custodian to make reasonable efforts to identify and to locate requested records. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the custodian's decision. If I am not satisfied, I may order further searches.

[13] In *PHIPA* Decisions 17, 18, and later decisions,<sup>3</sup> the IPC found applicable to *PHIPA* the principles outlined in IPC orders that address the issue of reasonable search under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart. These decisions establish that *PHIPA* does not require the custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>4</sup> To be responsive, a record must be "reasonably related" to the request.<sup>5</sup>

[14] Although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>6</sup>

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<sup>3</sup> Among them, *PHIPA* Decisions 43, 48, 52 and 57.

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

<sup>5</sup> Order PO-2554; *PHIPA* Decision 18.

<sup>6</sup> Order MO-2246; *PHIPA* Decision 18.

***Parties' representations, and my findings***

[15] The custodian maintains that it has provided all records reasonably related to the complainant's requests, and, in some instances, provided duplicate copies of records in an attempt to address the complainant's belief that it has not conducted adequate searches. The custodian describes the responsive records as her children's health records, and (in response to the later request made at the mediation stage) "records for her children and herself."

[16] The custodian reports that it considered the list of additional records that the complainant believes must exist (as reproduced in the Notice of Review it received from the IPC). These records include notes (including handwritten notes), subpoenas, and communications relating to seven named individuals. The custodian states that it has located one document identified in that list: a summons to witness with cover letter from a law firm, addressed to a particular staff member. The custodian explains that this record was not identified as a record of personal health information, and for this reason it did not provide a copy to the complainant after its earlier searches. Besides this record, the custodian says it has none of the additional records identified by the complainant.

[17] The custodian provides details of the searches it has conducted to arrive at this determination. The custodian says it was not necessary to contact the complainant because her requests were detailed and specific, and it interpreted the complainant's requests literally, without narrowing their scope.

[18] The custodian reports that it searched its electronic medical record system called EMHware, which is the only electronic health record-keeping system used by its clinicians. Two staff members (its Clinical Manager and its Director of Systems and Performance Management/Privacy Officer), both of whom are very knowledgeable in the system, searched EMHware for the children's records by name and date of birth. The custodian explains that each child has a record in EMHware, and that it has granted the complainant access to each child's entire record in EMHware.<sup>7</sup>

[19] In addition, although the children are too young to have any records in paper format (because the custodian had already transitioned from paper to electronic format when the children began receiving services), the custodian searched for any archived paper records for the children. It found no paper records for either child.

[20] The Clinical Manager also asked program administrative assistants to search their electronic paper and filing systems to look for records relating to the children. They were asked in particular to ensure that there were no documents pending upload into the children's EMHware records. This search yielded no additional records.

[21] In addition to the above searches, the Clinical Manager and Privacy Officer interviewed six staff members, five of whom were named in the list set out in the Notice of Review, and an additional individual not named there, but whom the custodian identified because of the possibility she might have responsive records. The custodian asked these staff members whether they had notes (including handwritten notes), reports,

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<sup>7</sup> As I discuss below at paragraph 35, there is no evidence to suggest that the custodian would have health records for complainant herself in EMHware or other formats.

communications or records of any kind about either of the children or about the complainant not stored in EMHware. These interviews did not yield any additional records.

[22] The custodian states that two individuals listed in the Notice of Review are no longer employees of the custodian. However, the custodian reports that it has provided the complainant with all relevant records from these former staff members that are in EMHware, and that neither left behind any additional notes (including handwritten notes), paper or electronic records.

[23] The custodian also addresses the complainant's assertion that she witnessed the creation of other records that have not been located. The custodian agrees it is possible the complainant saw staff members writing notes during meetings or the delivery of services to her children. However, the custodian asserts that any handwritten notes that once existed and that have not already been produced must have been securely shredded, in accordance with its practice that staff shred any handwritten notes after they have been used to create records in EMHware.

[24] In addition, to the extent the complainant's requests cover handwritten notes of staff from administrative meetings (in which category the custodian includes meetings with the complainant about "her concerns around access to information and her children's services"), the custodian maintains that it has already provided the complainant with any such records that exist. If additional records of this nature once existed but have not been produced, the custodian says such records must have been securely shredded, as there is no legal or organizational obligation to keep them.

[25] The complainant had opportunities to respond to the custodian's representations. In her detailed representations, the complainant raises some matters of significant concern to her, including the custodian's practices around the release of children's information to custodial parents, and about its staff members' handling of confidential information. I have considered all the complainant's representations, but in this decision I will address them only in relation to the issue of the reasonableness of the custodian's search for responsive records, which is the subject of the IPC's review. I have considered but I will not set out the particulars of other matters that are not the subject of the review.

[26] The complainant states that despite the custodian's multiple decisions, she has not yet received a complete set of records responsive to her requests. She explains the reasons for her belief.

[27] The complainant explains that although she has been told that staff notes are not kept and are shredded once a report has been made (in EMHware), she does not believe this happens in practice. The complainant gives as an example an instance where she met with the custodian's CEO to discuss the children's care, and to request help in accessing her children's files. She reports that at the time of that meeting, she had not yet received a report (and thus the notes to prepare that report should have been available); however, she did not receive any notes at that time.

[28] The complainant also states that this particular report, once prepared, did not include all the information that had been provided to the custodian. She states that the custodian's staff have told her that the purpose of its file documentation is "to complete a clinical assessment, determine a service plan and establish goals" for counselling. In the

complainant's view, this demonstrates that more records exist, because she believes that the records she has been given to date would not permit the custodian to fulfil these objectives.

[29] I draw no conclusions about the adequacy of the custodian's searches from this evidence. I am not persuaded that the complainant's opinion about the clinical usefulness of the records she has received to date is a reasonable basis for concluding that additional records exist. It is also not clear to me that the custodian interpreted the meeting the complainant describes as giving rise to an access request, and that, in response, it failed to locate records that existed at that time. However, I understand the complainant to be asserting that the custodian may not follow its own records retention practices, which may be relevant in deciding whether the custodian conducted reasonable searches in response to the specific access requests under consideration in this review.

[30] The complainant describes other instances in which communications and meetings she had with staff of the custodian are not, in her view, properly reflected in the records she has received. She recounts a meeting with a staff member regarding one of her children that lasted over an hour, during which she witnessed that staff member taking notes. The complainant reports that the meeting is only reflected in a summary email from the staff member that is neither accurate nor thorough, and that the meeting is not documented at all in the EMHware records, which is inconsistent with the custodian's claim that EMHware is the designated record-keeping application.

[31] The staff member with whom the complainant had this meeting is one of the individuals that the custodian interviewed as part of its search efforts. The custodian reported that this individual (along with the others) had no additional records (including notes) beyond those that were already provided to the complainant. I agree with the complainant that one might reasonably expect a staff member to document in EMHware the type of meeting the complainant describes. It is possible this staff member believed it was not necessary to document this type of meeting in EMHware, or believed that her email summary alone was a sufficient record of the meeting. It is possible that by failing to document the meeting in EMHware, the staff member did not act in accordance with the custodian's practices or other expectations of its staff around documentation. I make no findings in this regard, as they do not bear on the issue of the reasonableness of the custodian's search.

[32] I have, however, considered the complainant's evidence about the absence of potentially responsive records. In my view, this evidence is ambiguous, and weighed against the custodian's evidence about its multiple searches of EMHware and paper record-holdings, including its interview with this particular staff member, does not support a finding that additional records exist.

[33] The complainant directs my attention to the summons to witness located by the custodian during the review stage of this complaint. She explains that a lawyer served that particular staff member with the summons because of that staff member's knowledge of a conversation that had taken place. The complainant reports that she has not received any records about this conversation and was not made aware of it. She also reports that the records she has received to date indicate that the lawyer also spoke with a different staff member regarding the children. Because this second staff member also attended family

court at the request of the lawyer, the complainant believes there must also be a summons to witness for her.

[34] I do not find this to be persuasive evidence. The custodian explained that it did not initially identify the summons as a responsive record, but once aware of the fact that the complainant seeks access to this type of document, the custodian confirmed that it has no other such records. The second staff member identified by the complainant is a former employee of the custodian (one of the two former employees that the custodian addressed in its representations). The custodian explained that the EMHware records it provided to the complainant include those created by the former employees, and that there are no additional notes or other paper or electronic records left behind by these former employees.

[35] It appears that during the complaint process, the complainant expanded her original requests (for access to her children's records) to include a request for her own information. There is no dispute between the parties that the children's information is their "personal health information" within the meaning of *PHIPA* (section 4), and so subject to the right of access in *PHIPA*. I have no evidence before me to determine whether the complainant's information in the hands of the custodian is her own personal health information, so also subject to a right of access in *PHIPA*. For example, I have no evidence to suggest that the complainant also received services from the custodian. Nonetheless, the custodian appears to have taken into account the expanded request in conducting its additional searches during the complaint process. While the custodian's searches of its health records (in both EMHware and paper format) appear to have been limited to information about the children,<sup>8</sup> the custodian specifies that it asked particular staff members who were involved with the children and the complainant about the existence of any additional records (including handwritten notes) about either of the children or about the complainant. As noted, these searches yielded no additional records.

[36] The custodian also had an opportunity to respond to the complainant's argument that additional legal documents ought to exist. The custodian confirms that other than the children's complete health records in EMHware, which it has already provided, and some additional clinical or administrative records outside EMHware, which it has also provided, there exist no other records.

[37] Without making findings on whether the custodian ought initially to have treated the summons as a responsive record, or whether the complainant's own information held by the custodian is subject to *PHIPA*, I am satisfied that the custodian has conducted reasonable searches in response to the complainant's requests, and that its searches included searches for the additional information specified by the complainant. Even though the custodian initially understood the complainant's requests to be limited to the children's formal health records in EMHware (as the custodian acknowledges), it later understood that she seeks records outside EMHware, and it accordingly conducted searches outside that system. The custodian also provided evidence of its searches for the specific documents and types of records identified by the complainant.

[38] In these circumstances, I am satisfied that the custodian has met its obligations under *PHIPA* to conduct a reasonable search. The fact that it did not locate the specific

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<sup>8</sup> I observe that in identifying additional records that she believes ought to exist, the complainant did not claim that there should be EMHware or other health records about herself.

records described by the complainant is not a reasonable basis for concluding that additional records exist. The evidence before me demonstrates that the custodian made reasonable efforts to identify and locate responsive records, including those that arguably go beyond the scope of her original requests.

[39] Finally, the complainant raises some concerns about the different formats and appearance of the various health records she has received, and about the disorganized manner in which they are presented. This leads her to believe that she has not received the children's EMHware records in their entirety.

[40] The complainant provided some pages of the children's EMHware records to illustrate her concerns. Some pages, appearing in landscape format, contain dated entries, with some entries referring to attachments that do not themselves appear in the entries. For example, an entry might indicate that there was email correspondence between named parties on a particular date, but it does not include that email. The complainant also draws my attention to what appear to be large gaps of blank space between some entries.

[41] Other EMHware pages appear in portrait format, and appear to be of a different nature than the landscape format records described above. The example provided by the complainant is a page containing a long block of text that appears to document a telephone conversation. While this page includes an identifier code, print date and another unidentified date, the complainant says that it is difficult to cross-reference the two sets of EMHware records to determine which portrait format page corresponds to which entry in the landscape format pages. The complainant also directs my attention to one handwritten note that was provided to her, which appears to be an attachment associated with some other EMHware entry. She says that although the custodian has attempted to organize the records by inscribing handwritten numbers on certain entries in the landscape format pages and on some of the portrait format pages, it is still difficult (and sometimes impossible) to know which pages correspond to which entry.

[42] I am sympathetic to the complainant's concerns. Based on the sample pages she provided, I can see how it could be time-consuming, at least, and often difficult for the complainant (or another requester) to understand how certain EMHware records relate to others. I understand that the custodian has tried to help by numbering certain pages and entries appearing on pages, but without a clearer explanation of its numbering method for the entries (because the samples I have been shown are not numbered in order), the custodian has created more confusion for the complainant and contributed to her belief that gaps in the records reflect missing or destroyed information.

[43] Based on all the evidence before me, however, I do not reach the same conclusion. The complainant proposes that the two different formats (landscape and portrait) for the records is evidence that the custodian uses more than one record-keeping mechanism, contrary to its assertion that EMHware is the only electronic program used by its clinicians to keep health records. I find no reasonable basis for this claim. The custodian explained at an earlier stage of the complaint that different categories of EMHware records ("case notes printout list," and "case note details") appear by default in its system in a particular orientation, and that changing the orientation would have to be done manually for each page, and would not result in displaying any more or different information than what she has already received. I accept this explanation, and I find no basis to require the custodian



to provide a new copy of each page of the records in the other format, as the complainant has requested. I have also considered the complainant's arguments about the "blank spaces" and irregular handwritten numbering in the records, but taking into consideration all the evidence before me, I am not convinced this demonstrates that additional records could be located through further searches by the custodian.

[44] For all the reasons given above, I uphold the custodian's search for records. I recognize nonetheless that the complainant's dissatisfaction with the custodian's search may be related to a number of valid questions that she has raised, and that the custodian would be in the best position to answer. These include questions about how to organize and understand the records that she has been given, and about the custodian's expectations of its staff around clinical documentation. During the complaint process, the custodian indicated a willingness to assist the complainant where possible to address her concerns. I encourage the custodian to communicate directly with the complainant to address these questions.

**NO ORDER:**

For the foregoing reasons, I dismiss the complaint and issue no order.

Original signed by \_\_\_\_\_  
Jenny Ryu  
Adjudicator

August 9, 2021 \_\_\_\_\_