

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 162

Complaint HA19-00184

[Dr. Melanie Ursell]

October 13, 2021

Summary: The complainant submitted a correction request under the *Personal Health Information Protection Act* to a neurologist to correct two consultation reports the neurologist had prepared. The neurologist refused to make the requested corrections, relying on section 55(8) and/or 55(9) and the complainant filed a complaint with the IPC. The adjudicator finds that the complainant has failed to demonstrate that the information in the records is incomplete or inaccurate for the purposes for which the neurologist uses the information. As a result, the neurologist's decision not to make the requested corrections is upheld.

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

BACKGROUND:

[1] This decision addresses a neurologist's decision to refuse to make a patient's requested corrections to two consultation reports. The patient, who is the complainant in the matter before me, was referred to the neurologist (the custodian) by another physician (the referring physician). Following the referral, the complainant requested and received copies of the custodian's consultation reports, which the custodian had prepared for the referring physician.

[2] Upon receipt of the reports, the complainant made a correction request under section 55 of the *Personal Health Information Protection Act (PHIPA or the Act)* to the custodian. The custodian issued a decision denying the complainant's request that she

correct the two reports. The initial report is dated July 30, 2013 (initial report) and was prepared by the custodian after her initial assessment of the complainant. The custodian saw the complainant for a follow-up appointment and prepared a second report, dated October 28, 2013, which was sent to the referring physician (follow-up report).

[3] The custodian's decision letter did not cite specific sections of *PHIPA*. However, the wording of custodian's decision indicated that the complainant had not satisfied the requirements of section 55(8) of *PHIPA* (which are described below). The custodian's decision also suggested that the exceptions to the duty to correct the records in sections 55(9)(a) and/or (b) of *PHIPA* apply in the circumstances of this complaint.

[4] The complainant filed a complaint with the Information and Privacy Commissioner (the IPC) and a mediator explored resolution with the parties. However, mediation did not resolve the complaint and the matter was transferred to adjudication where an adjudicator may conduct a review. I decided to commence my review by sending a Notice of Review to the custodian that set out the facts and issues in the complaint and invited her written representations. The custodian provided representations in response, which were provided to the complainant along with a Notice of Review. The complainant decided not to provide representations during the review stage but confirmed that he wanted the materials he provided the mediator to be considered as his submissions in response to the Notice of Review.¹

[5] In this decision, I find that the complainant has failed to establish that the records are incomplete or inaccurate for the purpose for which the information is used. Accordingly, the custodian is not required to correct the records under section 55(8), and I dismiss the complaint.

RECORDS AND SUMMARY OF CORRECTION REQUESTS:

[6] The records at issue consist of two reports, dated July 30, 2013 (the initial report) and October 28, 2013 (follow-up report).

[7] The complainant requested that the following three corrections be made to the four-page initial report:

Correction 1 That a statement be added to the report that the complainant requested that the referring physician investigate his complaints about his back and that the referring physician refused to investigate the

¹ I confirm that for the purposes of this complaint, the complainant's submissions consist of his letter addressed to the IPC Registrar, dated August 13, 2019, which attached his completed IPC Complaint Form, and his letter addressed to the Mediator, dated December 11, 2019. None of this material is subject to mediation privilege.

complainant's back complaints.

Correction 2 That the statement on page 2 that "He has not treated this in the past" be labelled as untrue and inaccurate.

Correction 3 That a statement be added to page 3 of the report to include the complainant's description of the custodian's behaviour as follows:

I found her rude and she kept cutting me off and asking me questions that I had no answers to and even though I said that I didn't know she persisted to get answers even though I already answered appropriately. She must have done it four times because I just put my head down after I said "I don't know" and just waited for her to finish and let my response sink in.

[8] The complainant requested that the following two corrections be made to the two- page follow-up report:

Correction 4 That a notation be added that the complainant advised the custodian that he experienced lower back pain during the clinical visit.

Correction 5 That a notation be added that the complainant requested to be tested for MS and the custodian denied the request, including her reasons for the denial.

DISCUSSION:

[9] There is no dispute, and I find that the neurologist, who prepared the two records at issue, is a health information custodian under section 3(1) of *PHIPA*. Further, the parties agree, and I find, that the records contain the complainant's personal health information (PHI)² as defined in section 4(1) of *PHIPA*. Accordingly, section 55(1) applies and the complainant was entitled to request a correction of the reports in question.

[10] The sole issue before me is whether the custodian is required to make corrections to the records as requested by the complainant.

² PHI is defined in section 4(1) of *PHIPA*, in part as follows:

"personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

Does the custodian have a duty to make the requested corrections?

[11] Section 55(8) provides for a right of correction to records of PHI in some circumstances. It 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.

[12] Section 55(9) sets out exceptions to the obligation to correct records, as follows:

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.

[13] Read together, these provisions set out the criteria pursuant to which an individual is entitled to a correction of his or her records of PHI. The purpose of section 55 of the *PHIPA* is to impose a duty on health information custodians to correct records of PHI that are inaccurate or incomplete for the purposes for which they use the information, subject to the exceptions set out in section 55(9).

[14] In all cases where a complaint regarding a custodian's refusal to correct records of PHI is filed with the IPC, the individual seeking the correction has the onus of establishing whether or not the "record is incomplete or inaccurate for the purposes for which the custodian uses the information" pursuant to section 55(8). Section 55(8) requires the individual asking for correction to:

- a. demonstrate to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information, and
- b. give the custodian the information necessary to enable the custodian to correct the record.

[15] If the above is established, the question becomes whether or not any of the exceptions that are set out in section 55(9) apply. In this case, the custodian submits that the complainant has failed to discharge the onus in section 55(8) for all the corrections requested.

[16] The custodian also claims that the exception at section 55(9)(a) applies to correction 1, in which the complainant seeks to add a notation to the initial report regarding a conversation the complainant says he had with the referring physician. Finally, the custodian argues that the “professional opinion or observation” exception in section 55(9)(b)³ applies to correction 3, which is the complainant’s request to add his comments about the service he felt he received from the custodian to the initial report.

[17] Depending on the circumstances of the correction request, the information that the individual is seeking to have corrected and the reasons for the custodian’s refusal to correct the records, the IPC adjudicator may approach the analysis initially under section 55(8) or under section 55(9). In the complaint before me, I will commence my analysis under section 55(8).

Submissions of the parties

Corrections 1 and 2

[18] The complainant requests that the custodian add a notation to the initial report regarding a request the complainant made to the referring physician to investigate his back pain (correction 1). The complainant also requests that the custodian add to the report certain details of his past back pain and a notation about the type of over-the-counter medication taken for his back pain.

[19] The custodian submits that during her assessment of the complainant, she took a complete history from him. She states that “even if [the referring physician] did refuse to investigate [the complainant’s] back complaints, this is irrelevant to [her] assessment of the [complainant] on July 30, 2013.” Similarly, the custodian states that part of the medical history she obtained from the complainant was that he took over-the-counter medication for headaches. She argues that the complainant’s request that a notation be added to say that he took this medication for back pain is not relevant for the purposes for which she uses the information, because the complainant was referred to her to investigate headaches he was experiencing. The custodian provided a copy of the faxed referral form she received from the referring physician and states:

There is nothing in the referral note that indicates [that the complainant] requested [the referring physician] to investigate his complaints about his back or that [the referring physician] refused to investigate [the back complaints]. The referral note is in [the complainant’s] chart, so the record already contains information that he was not referred for investigation of his back.

³ Where the custodian claims that section 55(9)(b) applies, the custodian bears the burden of proving that the PHI at issue consists of a “professional opinion or observation” about the individual. However, once the custodian has established that the information qualifies as a “professional opinion or observation”, the onus is on the individual seeking a correction to establish that the “professional opinion or observation” was not made in good faith.

[20] Finally, the custodian argues the complainant did not provide any documentary evidence, such as records from the referring physician or other attending physicians, that support his claim that the report contains incomplete or inaccurate information.

Correction 3

[21] The complainant requests that a statement be added to page 3 of the initial report that describes the complainant's perception of the level of service he received from the custodian.

[22] The custodian argues that she "is not required to amend [the complainant's] medical record, to include his opinion of the appointment" and that the complainant has failed to demonstrate that the record is incomplete or inaccurate for the purposes for which she uses the information.

Correction 4

[23] The complainant requests that a notation be added to the follow-up report that he told the custodian that he experienced lower back pain. The custodian replies that the report indicates that the complainant reported lower back pain and that medical imaging was ordered to investigate the pain. The custodian takes the position that the complainant has failed to demonstrate that the record is incomplete and argues that the record itself "contains the very information [the complainant] has requested be included."

Correction 5

[24] The complainant requests that a notation be added to the follow up report that he asked the custodian to test him for MS and the custodian denied this request. The complainant also requests that the record be amended to include the custodian's reasons for denying his request to be tested for MS. The complainant insists that he made this request and did so at the urging of a family member who is a nurse.

[25] The custodian does not agree with the complainant's recollection that he asked to be tested for MS and that she denied this request, and states in the representations that she:

... adamantly disputes that [the complainant] requested to be tested for MS or that [she] denied this request. There is no information available [that suggest that her] recollection of the appointment, consistent with contemporaneous documentation, is incorrect.

[26] The custodian goes on to argue that the complainant's evidence fails to demonstrate that she is required to make this requested correction. In addition, the custodian submits that the complainant has failed to demonstrate that the record is incomplete or inaccurate for the purposes for which she uses the information.

Analysis and Decision

[27] For the reasons stated below, I find that the complainant has not discharged the onus in section 55(8) of establishing that the custodian is required to make the requested corrections.

[28] As stated above, under section 55(8) of the *Act*, an individual seeking correction to records of personal health information must demonstrate, to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information. In addition, section 55(8) requires the individual requesting the correction to give the custodian the information necessary to enable the custodian to correct the record. Both conditions must be met for the onus to be discharged.

[29] The IPC's approach in interpreting section 55(8) was set out in PHIPA Decision 36 and has been consistently adopted in later IPC decisions.⁴ These decisions have established that not all PHI contained in records held by health information custodians needs to be accurate in every respect. These decisions have found that if a request is made to correct inconsequential bits of information that have no impact on the purposes for which the custodian uses the information, and the custodian is not relying on the information for a purpose for which the accuracy of the information is relevant, the custodian is not required to correct the information.

[30] I have reviewed the complete complaint file before me, including the complainant's letters to the registrar and mediator, and I find that the custodian is not required to make the requested corrections. In my view, the complainant's evidence falls short of demonstrating that the parts of the records he asks to be corrected are "incomplete or inaccurate" for the purposes for which the custodian uses the information. I find that the corrections sought by the complainant do not impact information that would affect the purposes for which the custodian uses the information. Based on the fax referral prepared by the referring physician, the complainant was referred to the custodian for a neurological consultation regarding headaches the complainant was experiencing. The custodian's use of the information is limited to the purposes of her consultation.

[31] Since the complainant has not established the first requirement of section 55(8), and both requirements must be met, I find that the custodian is not required to make requested corrections. Given my finding, it is not necessary for me to determine whether the complainant has satisfied the second requirement of section 55(8) by providing the custodian with the information necessary to correct the two reports.

[32] It is also not necessary given my finding that I determine whether the exceptions at section 55(9)(a) or section 55(9)(b) apply in the circumstances of this matter.

⁴ See for example PHIPA Decisions 39, 40, 59, 81, and 85.

[33] Having regard to the above, I find that the custodian is not required to make the requested corrections and I dismiss the complaint.

Is the complainant's correction request a valid statement of disagreement?

[34] Next, I will consider whether the complainant has prepared a statement of disagreement that meets the requirements of section 55(11) of *PHIPA*. Section 55(11) states, in part:

A notice of refusal under subsection (3) or (4) must give the reasons for the refusal and inform the individual that the individual is entitled to,

(a) prepare a concise statement of disagreement that sets out the correction that the health information custodian has refused to make;

(b) require that the health information custodian attach the statement of disagreement as part of the records that it holds of the individual's personal health information and disclose the statement of disagreement whenever the custodian discloses information to which the statement relates;

[35] In his IPC complaint form, the complainant states that he would be satisfied if his correction request, dated July 25, 2018, were attached to the records. During mediation, the complainant took the position that the custodian is required to treat his correction request as his statement of disagreement and attach it to the two reports. The complainant also asked that file materials generated in the course of his IPC complaint be attached to the two reports.

[36] However, the custodian refused to treat the complainant's correction request as a statement of disagreement and attach it to the two reports. In her submissions, the custodian takes the position that the complainant's correction request does not meet the requirements of section 55(11)(a) as it goes into detail about the complainant's opinion about the quality of service he received from the custodian during her examinations. The custodian also suggests that the IPC prepare a statement of disagreement on the complainant's behalf.

Analysis and finding

[37] As noted above, the complainant did not provide representations in response to the Notice of Review sent to him, which also invited him to respond to any issue arising from the custodian's representations.

[38] Having regard to the information before me, I accept that it was reasonable for the custodian to refuse to attach the complainant's correction request to the records as his statement of disagreement. Though five specific corrections are identified in the complainant's letter, much of the letter focusses on concerns the complainant has with

the custodian's conduct during the initial consultation appointment. The letter also addresses the complainant's concerns about the amount of time the custodian took to respond to his correction request. Finally, the letter asks the custodian to review certain sections of *PHIPA* and provide a statement regarding whether other records may exist.

[39] In my view, the complainant's correction request does not meet the requirements of a statement of disagreement in section 55(11)(a) and thus should not be treated as such. Given the issues and concerns the complainant raises in his letter, I find that it goes well beyond providing a concise statement of disagreement that sets out the correction that the custodian refused to make. Accordingly, I find that the custodian is not required by section 55(11)(b) to treat the complainant's correction request of July 25, 2018 as a statement of disagreement and attach it to the reports.

[40] I also find that the complainant's request that the IPC's file materials regarding his correction request also be copied and attached to the records is not in accordance with section 55(11)(a). Section 55(11)(a) sets out that the individual requesting the correction is to prepare the statement of disagreement. In addition, it is not the role of the IPC to prepare a statement of disagreement on the complainant's behalf when there is a dispute between the parties.

[41] Accordingly, if the complainant still wishes for a statement of disagreement to be attached to the reports in question, he will have to prepare a statement that conforms to the requirements of section 55(11)(a). In response, the custodian should adopt a liberal interpretation of section 55(11) in accessing whether the statement of disagreement conforms to the requirements. Should the custodian refuse to attach the complainant's new statement of disagreement, the complainant may file a complaint with this office for a determination as to whether the new statement meets the requirements of section 55(11)(a).

NO ORDER:

For the foregoing reasons, no order is issued.

Original Signed By: _____
Jennifer James
Adjudicator

October 13, 2021 _____