

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 164

Complaint PA18-00751

Niagara Health System

November 3, 2021

**Summary:** The complainant submitted a request to the hospital for access to video surveillance clips of herself during an involuntary hospitalization ordered under the *Mental Health Act*. The hospital denied the complainant access to the responsive records. The hospital claims that granting the complainant access to the records could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the complainant or a risk of serious bodily harm to the complainant or another person under section 52(1)(e)(i) of *PHIPA*.

The adjudicator finds that the records are not “dedicated primarily to” the complainant’s personal health information (PHI). Accordingly, the complainant’s right of access under *PHIPA* is limited to her PHI that can reasonably be severed from the records. The adjudicator finds that the exemption under section 52(1)(e)(i) of *PHIPA* does not apply to the records and that the records are comprised wholly of the complainant’s PHI. Accordingly, the adjudicator orders the hospital to grant the complainant access to the records in full.

**Statutes Considered:** *Personal Health Information Protection Act, 2004*, sections 3(1), 4(1), and 52(3); *Freedom of Information and Protection of Privacy Act*, section 2(1) (definition of “institution”).

**Decisions Considered:** PHIPA Decisions 17, 34, 100, 117, 120 and 123.

### BACKGROUND:

[1] This decision addresses a decision of Niagara Health System (the hospital) to deny the complainant’s access to video surveillance taken of herself while she was a

patient at the hospital. The complainant's request sought:

Video surveillance footage of myself. Evening of [a specified date to the morning of specified date] in Psychiatric Emergency Services Dept (PFS) [specified year] in Emergency Department NHS – St. Catharines Site.

[2] The hospital located two video clips but claimed that the records qualified for exemption under section 49(a) in conjunction with section 20 (danger to safety or health) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*. The hospital also claimed that disclosure of the video clips to the complainant would constitute an unjustified invasion of another individual's personal privacy under section 49(b) of *FIPPA*.

[3] The complainant filed a complaint with this office and a mediator was appointed to the file. The mediator explored settlement with the parties and discussed whether the *Personal Health Information Protection Act (PHIPA)* applied. The hospital took the position that *PHIPA* did not apply to the complainant's request.

[4] During mediation, the hospital confirmed that it no longer relies on the personal privacy exemption under section 49(b) under *FIPPA* because the images of other individuals in the records belong to individuals acting in their professional capacity. However, the hospital maintained that the exemption section 49(a) in conjunction of section 20 under *FIPPA* applied.

[5] The complainant confirmed at the end of mediation that she continues to seek access to the two video clips. As no further mediation was possible, the file was transferred to adjudication, in which an adjudicator may decide to conduct an inquiry under *FIPPA*, and/or a review under *PHIPA*.

[6] After examining the file, I decided to conduct a review under *PHIPA*<sup>1</sup> and sent a Notice of Review to the hospital inviting its representations. The non-confidential portions of the hospital's representations were shared with the complainant in accordance with the IPC's confidentiality's criteria.<sup>2</sup> The non-confidential portions of the complainant's representations were provided to the hospital who submitted reply representations in response.

[7] After my receipt of the hospital's reply representations, the IPC issued *PHIPA* Decisions 117, 120 and 123, all of which addressed the issue of whether video

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<sup>1</sup> Whether initially called a review under *PHIPA* or an inquiry under *FIPPA* does not affect my ultimate conclusion that *PHIPA* applies here.

<sup>2</sup> The IPC's confidentiality criteria set out in the *Code of Procedure for Matters under the Personal Health Information Protection Act*.

surveillance records could reasonably be severed to provide patient requesters access to their personal health information. I subsequently wrote to the hospital and invited its representations on the possible application of these decisions and received supplemental representations in which the hospital took the position that PHIPA Decisions 117, 120 and 123 did not apply to the circumstances in this matter.

[8] I also notified eight individuals whose images are captured in the requested video clips alongside the complainant's image. These individuals were identified by the hospital as either medical or security staff. No other images of other individuals, such as patients or visitors, are captured in the records. I received written responses from two of the eight individuals notified, who objected to their images being released to the complainant. Another individual told the hospital's Privacy Officer they object to the release of their image but did not submit written representations to the IPC.

[9] In the Notices of Review sent to the parties and affected parties, I set out my preliminary view that the complainant's request is a request covered by both *PHIPA* and *FIPPA* and asked the parties to address the application of both statutes to the request.

[10] In this decision, I find that *PHIPA* applies to the complainant's request. I find that the complainant has a right of access under *PHIPA* to the information she seeks, which is her own image captured on video surveillance, including any background images of the hospital facility and any individuals acting in their professional capacity. I find, further, that the exemption in section 52(1)(e)(i) of *PHIPA* (risk of serious harm) does not apply.

[11] As a result, I order the hospital to grant the complainant access to the requested surveillance clips.

[12] Because I find that *PHIPA* entitles the complainant to all the information she seeks, I find it unnecessary to address any residual right of access under *FIPPA*.

## **RECORDS:**

[13] The records at issue are two video surveillance clips containing images (no audio) of the complainant at the hospital.

## **PRELIMINARY ISSUE:**

### **Does *PHIPA*, or *FIPPA*, or both, apply in these circumstances?**

[14] There is no dispute that the hospital is a body subject to *PHIPA* pursuant to section 3(1) of *PHIPA*, and an institution subject to *FIPPA* within the meaning of section 2(1) of *FIPPA*.

[15] As a result, in certain circumstances, the hospital is subject to both *PHIPA* and *FIPPA*. This means that when the hospital receives a request for access to information, it must decide whether *PHIPA*, or *FIPPA*, or both, apply to the request.

[16] In making this decision, the hospital must consider the nature of the request (i.e., whether the request is for personal health information, or for information that is not personal health information); the contents of the record(s) responsive to the request (i.e., whether the responsive record(s) contain personal health information, or information that is not personal health information); and, in the case of a request for personal health information, whether the requester is a person authorized under *PHIPA* to exercise a right of access to that information.<sup>3</sup>

[17] In this case, as noted above, there is no dispute that the complainant's request was for access to video clips in which she appears. In these circumstances, the complainant may have a right of access to this record under *PHIPA* or *FIPPA*, or both. In particular, if the record contains the complainant's personal health information, she has a right of access under *PHIPA*. Furthermore, whether or not the complainant has a right of access under *PHIPA*, she may have a right of access under *FIPPA* to other information in the record that is not personal health information.<sup>4</sup>

[18] In situations where both *PHIPA* and *FIPPA* could apply, the IPC's approach is to first consider the extent of any right of access under *PHIPA*, and then consider the extent of any right of access under *FIPPA* to any records or portions of records for which a determination under *PHIPA* has not been made.<sup>5</sup>

[19] Accordingly, I will first consider the complainant's right of access under *PHIPA*.

## **ISSUES:**

### **Access under *PHIPA***

- A. Do the records contain "personal health information" as defined in section 4 of *PHIPA*?
- B. Is each record "dedicated primarily" to the complainant's personal health information within the meaning of section 52(3) of *PHIPA*? If not, can the

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<sup>3</sup> See *PHIPA* Decision 17, *PHIPA* Decision 27, *PHIPA* Decision 73, *PHIPA* Decision 96, *PHIPA* Decision 107, and Order MO-3644.

<sup>4</sup> *PHIPA*, section 8(4); *FIPPA*, sections 10 and 47(1). For orders and decision addressing access under both statutes, see *PHIPA* Decision 17, *PHIPA* Decision 27, *PHIPA* Decision 30, *PHIPA* Decision 33, *PHIPA* Decision 73, *PHIPA* Decision 101, and Order MO-3531.

<sup>5</sup> *PHIPA* Decisions 17, 30, 33, 73 and 117.

complainant's PHI be reasonably severed from the portions not containing her PHI?

- C. Does the exemption in section 52(1)(e)(i) of *PHIPA* (serious harm to a person) apply to the complainant's PHI in the records?

## **DISCUSSION:**

### **Access under *PHIPA***

#### **A. Do the records contain "personal health information" as defined in section 4 of *PHIPA*?**

[20] In order to determine whether the complainant has a right of access to each record (or any portion of each record) under *PHIPA*, it is first necessary to determine whether the complainant's information in the record constitutes her "personal health information" within the meaning of *PHIPA*.

[21] "Personal health information" is defined in section 4 of *PHIPA*, in part, as follows:

(1) In [*PHIPA*],

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

(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,

(2) In this section,

"identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[22] In PHIPA Decision 17, this office adopted a broad interpretation of the phrase "personal health information". This office has applied this broad interpretation in subsequent orders and decisions.<sup>6</sup>

[23] The parties do not dispute that the records contain the complainant's PHI. Though it initially took a different position, the hospital concedes in its submissions in response to the Notice of Review that the records "contain PHI within the meaning of [section] 4(1)(b), particularly in consideration of the context of the access request, i.e., from a patient who was at the hospital for healthcare." The hospital also confirms that the records do not capture the images of other patients or visitors at the facility, and that the "complainant is visible in every frame of the two video clips."

[24] The hospital says that the only other individuals whose images are captured along the complainant's are security and hospital staff acting in their professional capacity. In the non-confidential portion of its representations, the hospital described the images captured in the records, as follows:

The surveillance clips show a corridor and one of the surveillance clips also includes a room with a bed. The video surveillance contains full images including full images and faces of a number of people. It is possible to identify security staff based on their uniform. There are other individuals in the video and it is not possible to determine from the surveillance clips alone, who they are and what their role is unless the individuals were known to the viewer. While [the hospital] knows where the surveillance clips originate, it would not be possible for a person viewing the video to identify that the surveillance clips were of a hospital, nor would be able to ascertain the specific role of individuals other than the security staff.

[25] I have reviewed the records and further confirm that the images of security and hospital staff captured in the records relate solely to their interaction with the complainant while she was a patient at the hospital. Their interactions with the complainant include their observation, monitoring, restraint and/or provision of health care to the complainant. There are no instances in the video clips I viewed that capture images of staff in the frame that are not interacting with the complainant. For example, there are no images of security or hospital staff members entering the room or walking down the corridor for a purpose unrelated to the provision of health care to the complainant.

[26] "Health care" is a broadly defined term in section 2 of *PHIPA* that includes any observation, examination, assessment, care, service or procedure that is done for a

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<sup>6</sup> See PHIPA Decision 52, PHIPA Decision 82, and Order MO-3531.

health related purpose and that:

- a. is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,
- b. is carried out or provided to prevent disease or injury or to promote health[.]

[27] Having regard to the above, I am satisfied that all portions of the video capturing the complainant's image, including her image alongside the images of security and hospital staff constitute the complainant's PHI as defined in paragraph (b) of section 4(1) of *PHIPA*. For the purpose of section 4(1)(b), the background images appearing with the complainant's image, such as the layout of the room, hallways and furniture also constitute the complainant's PHI.<sup>7</sup>

[28] Given my finding under section 4(1)(b), it is not necessary for me to decide whether the images of the complainant in the records also fit within paragraph (a) of the definition of PHI in section 4(1) of *PHIPA*.

**B. Are the records "dedicated primarily" to the complainant's personal health information within the meaning of section 52(3) of *PHIPA*? If not, can the complainant's PHI be reasonably severed from the portions not containing her PHI?**

[29] To determine the extent of the complainant's right of access to the records under *PHIPA*, I must review each record to determine whether it is "dedicated primarily" to the personal health information of the complainant. This is because the right of access in *PHIPA* applies either to a whole record under section 52(1)<sup>8</sup> or only to certain portions of a record of personal health information under section 52(3).

[30] Section 52(3) states:

Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

[31] If a record is dedicated primarily to the personal health information of the individual, the individual has a right of access to the entire record (subject to any

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<sup>7</sup> *PHIPA* Decisions 117, 120 and 123.

<sup>8</sup> Section 52(1) provides that an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless certain exemptions or conditions listed in paragraphs (a) to (f) apply.

applicable exemptions), even if it incidentally contains information about other matters or other parties.

[32] If, on the other hand, a record is not dedicated primarily to the personal health information of the individual, the right of access only applies to any PHI of the individual that can reasonably be severed from the record (subject to the applicability of any exemptions).

[33] This office's approach to the interpretation of section 52(3) was established in PHIPA Decision 17.<sup>9</sup> To determine whether a record is "dedicated primarily" to the personal health information of an individual within the meaning of section 52(3), this office takes into consideration various factors, including:

- the quantity of personal health information of the requester in the record;
- whether there is personal health information of individuals other than the requester in the record;
- the purpose of the personal health information in the record;
- the reason for creation of the record;
- whether the personal health information of the requester is central to the purpose for which the record exists; and
- whether the record would exist "but for" the personal health information of the requester in it.<sup>10</sup>

This list is not exhaustive.

[34] The hospital argues that the records are not "dedicated primarily" to the complainant's PHI and would have been created regardless of the complainant's attendance at the hospital. In support of its position, the hospital says that the video clips were extracted from its video surveillance system (VSS) and "are maintained primarily for a purpose other than the provision of health care." The hospital goes on to state that the purpose of its video surveillance system "is for the safety and security of professional staff, employees, visitors, volunteers and patients." The hospital provided a copy of its Video Surveillance policy with the non-confidential portions of its representations.

[35] The complainant's takes the position that she is entitled to access as the records

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<sup>9</sup> See also PHIPA Decisions 24, 30, 33, 53 and 73.

<sup>10</sup> PHIPA Decision 17, para 95.



contain her PHI, whether or not each clip is “dedicated primarily” to her PHI.

[36] There is no dispute between the parties that the records contain the complainant’s PHI. As noted above, the hospital confirmed that the complainant’s image appears in every frame of the requested clips.

[37] However, the approach in PHIPA Decision 17 requires the consideration of other factors such as the purpose the information serves in the records, the reasons for the record’s creation, and its uses. This “qualitative approach” takes into account considerations such as whether the PHI at issue is central to the purpose for which the record exists, and whether the record would exist “but for” the personal health information of the individual in it.<sup>11</sup>

[38] From a qualitative perspective, I agree with the hospital’s position that the presence of the complainant’s PHI in the records is incidental to the security purposes of the records. I am satisfied that the requested video clips would have been created regardless of the complainant’s admission to the hospital on the day in question. In arriving at this decision, I considered the hospital’s representations along with its Video Surveillance Policy and confirm that the purposes identified in the policy relate to facilitate a safe environment for patients, staff and visitors.

[39] Based on my review of the records along with the submissions of the parties, I am satisfied that none of the records are dedicated primarily to the complainant’s PHI. In my view, the videos were made for security purposes relating to the health and safety of individuals who attend the hospital for various purposes. I also note that recent decisions<sup>12</sup> from the IPC found that a patient’s PHI contained in a video captured by a hospital’s video surveillance system was incidental to the security purpose of the video and was not dedicated primarily to that individual’s PHI.

[40] Having regard to the above, in applying the “record-by-record” method of analysis adopted by this office, I find that none of the video clips are dedicated primarily to the complainant’s PHI. Accordingly, the complainant’s right of access is limited to the portions of the records containing her PHI that can reasonably be severed from any portions of the records not her containing her PHI. However, as I find below, all portions of the clips contain her PHI.

***Can the complainant’s PHI reasonably be severed from the portions not containing her PHI?***

[41] Section 52(3) of *PHIPA* states:

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<sup>11</sup> PHIPA Decision 17.

<sup>12</sup> PHIPA Decisions 117, 120 and 123.

Despite subsection (1) [setting out exemptions from the right of access in *PHIPA* ], if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

[42] In this case, the hospital concedes that the records relate solely to the complainant's PHI. I have viewed the records myself and am satisfied that every part of the records contain the complainant's PHI. This means that if the records do not contain exempt information, the complainant is entitled to access the whole record despite the records being found not "dedicated primarily" to her PHI.

**C. Does the exemption in section 52(1)(e)(i) of *PHIPA* apply to the complainant's PHI in the records?**

[43] The hospital initially denied the complainant access to the records, claiming the exemption under section 49(a) in conjunction with section 20 of *FIPPA*. In its representations, the hospital maintained this position but claimed that section 52(1)(e)(i) would apply if I found that the records contained the complainant's PHI and that the governing statute is *PHIPA*. In its supplemental representations, the hospital concedes that the records contain the complainant's PHI and argues that the flow-through provision in sections 52(1)(f)(i) and (ii)(A) of *PHIPA* with reference to sections 49(a) and 20 of *FIPPA* could also apply. I have decided to commence my analysis with the hospital's claim that the exemption at section 52(1)(e)(i) applies.

[44] Section 52(1)(e)(i) states:

Subject to this Part [Part V of *PHIPA*], setting out the rights of access and correction], an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

(e) granting the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,

[45] The purpose of section 52(1)(e)(i) is to protect the treatment, recovery and physical security of a patient and others. This exemption must be approached in a sensitive manner given the difficulty of predicting future events.

[46] Section 52(1)(e)(i) of *PHIPA* is similar to the exemptions in sections 14(1)(e), 20, and 49(d) of *FIPPA*, which apply where disclosure could reasonably be expected to endanger the health, life or safety of an individual.<sup>13</sup> In order to satisfy the burden of proof under sections 14(1), 20, or 49(d), it is not enough for the institution denying access to take the position that the harms are self-evident from the record. The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>14</sup>

[47] In *PHIPA* Decision 34, Adjudicator John Higgins determined that the standard of proof required under section 52(1)(e)(i) of *PHIPA* is the same as the standard under sections 14(1), 20 and 49(d) of *FIPPA*.

### ***Representations of the parties***

#### *The hospital's representations*

[48] The hospital relies on a document it calls a "Briefing Note: Review of the Responsive Records"<sup>15</sup> in support of its position that granting the complainant access to the requested video clips could reasonably be expected to result in the harm contemplated in section 52(1)(e)(i). The hospital explains that its Director of Mental Health (Director), who is a clinical nurse by background, prepared the briefing note which refers to the psychiatrist's assessment conducted during the complainant's

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<sup>13</sup> Section 14(1)(e) states that a head may refuse to disclose a record where the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Section 20 states that a head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. Section 49(d) states that a head may refuse to disclose to the individual to whom the information relates personal information that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual.

<sup>14</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>15</sup> Initially, the hospital referred to this document as a "Clinical Review of the Responsive Records". It indicates that a copy was shared with the mediator and an updated copy was provided to me with its representations. In its reply representations, the hospital states that the document contains "confidential information provided to support the organization's decision making for the purpose of an access request" and is not the type of document that would be found in the complainant's medical records. The hospital provided a third version of the document with its supplemental representations. The hospital indicates that the most recent version, contains "some material previously provided as the 'Clinical Review of Responsive Records' [along with updated] material to include new information, and also to clarify that [this] is a briefing document for the purposes of institutional decision-making. It is not a stand-alone clinical assessment of the complainant for the purposes of providing healthcare."

admission to the hospital. The complainant was not provided a copy of this document with her copy of the non-confidential portions of the hospital's representations, despite her specific request for same, as I was satisfied that the IPC's confidentiality criteria were met.<sup>16</sup> However, based on the complainant's submissions, it would appear that she has a copy of the psychiatrist's assessment referred to in the briefing note.

#### Risk of harm to self

[49] In the non-confidential portions of its representations, the hospital says that the complainant was admitted under an involuntary hold under a Form 1,<sup>17</sup> "based on the identification of significant risks to herself and others." The hospital indicates that at the time it made its access decision, the complainant continued to receive treatment on an outpatient basis and it concluded that "exposure to the surveillance video would cause a significant setback in the complainant's clinical progress."

[50] The hospital also submitted confidential submissions in addition to what is stated in the briefing document. Without disclosing the contents of the confidential portions of the hospital's representations, I note that the hospital takes the position that the complainant's recollection of the events depicted in the video clips does not reflect what is seen in the records. For this reason, the hospital submits that granting the complainant access could reasonably be expected to result in risk of serious harm to her treatment or recovery or result bodily harm to herself.

#### Risk of harm to others

[51] In addition, the hospital argues that granting the complainant access could reasonably be expected to result in serious bodily harm to the security and hospital staff depicted in the records. In support of this argument, the hospital states in the non-confidential portions of its representations:

Further to the psychiatric assessment and the clinical review of the surveillance footage and the complainant's personal health information by the Director, as described above, [the hospital] believes that there is

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<sup>16</sup> In her representations, the appellant asserts that the briefing note is a record of her PHI which she is entitled to access. However, the hospital asserts that the briefing note is an internal document created for institutional decision-making purposes regarding the complainant's access request and would qualify for exemption under *PHIPA* or *FIPPA*. The issue of whether or not this document is a record of PHI and if so, whether the complainant is entitled to access is outside the scope of this complaint. If the complainant wants to seek access to this document, she may file a request under *FIPPA* or *PHIPA* for access.

<sup>17</sup> A Form 1 is an "Application by Physician for Psychiatric Assessment" as contemplated under section 15 of the *Mental Health Act*. The Form 1 allows a doctor to hold an individual in a psychiatric facility for up to 72 hours in order for the individual to undergo a psychiatric assessment.

significant risk to the safety of [the hospital's] nursing and security staff. The faces of nursing and security staff are clearly visible and the individual staff could be identified by the complainant should she review the video.

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It is important to note that as the complainant continues in the outpatient program at the hospital, she is likely to encounter [security and hospital staff] on an ongoing basis and it would be possible to recognize them from viewing the video.

### ***The complainant's representations***

[52] In the non-confidential portions of her representations, the complainant indicates that she has copies of written records relating to her hospitalization but seeks access to the video clips for the following reason:

The provision of this record is integral to verifying what treatment I received and who the providers of health care were while attending [the hospital] on that visit. There are multiple discrepancies between my recollection and the written record.

[53] The complainant also asserts that access to the records would better equip her to discuss her concerns with Patient Relations.

[54] The complainant also submitted confidential representations. Without disclosing the content of these submissions, I note that the complainant asserts that any concern the hospital may have about her attending the hospital on a regular basis is unwarranted as she no longer attends the outpatient program. The complainant also provided confidential submissions explaining why she believes that withholding her access to the video clips has negatively impacted her health. The complainant's confidential submissions also outline the reasons she continues to have questions about the care she received from the hospital during her admission.

### ***Hospital's reply and supplemental representations***

[55] The hospital acknowledges that the complainant no longer attends the outpatient program but maintains that granting her access to the requested video clips could reasonably be expected to lead to a risk of harm to herself or others under section 52(1)(e)(i). The hospital explains that the complainant "visits the hospital from time to time [and] therefore may recognize [security or hospital staff] from the video clips. In addition, the complainant is certainly aware of their place of employment".

[56] In support of its position, the hospital refers me to an updated briefing note which it states contains "some material previously provided as the "Clinical Review of Responsive Records" [along with updated] material to include new information..."

[57] Without disclosing the content of the new information added to the briefing note, I note that it contains a section which indicated that over a year has passed since the original briefing note was prepared. The updated briefing note indicates that the Director undertook a review of the complainant's medical records and assessed that concerns regarding the risk of harm to the complainant continue to exist. The updated briefing note indicates that despite that the passage of time, the complainant has exhibited pattern of behaviour that gives rise to the harms contemplated in section 52(1)(e)(i).

### ***The affected parties' representations***

[58] As noted above, I sent a Notice of Review inviting the written representations of the eight individuals whose images appear alongside the complainant's in the requested video clips. The affected parties' images relate solely to their interactions with the complainant that include their observation, monitoring, restraint and/or provision of health care to her.

[59] Two of the eight affected parties provided a written response objecting to the release of their images to the complainant. Another affected party told the hospital's Privacy Officer that they objected to the release of their image and planned to submit written representations to the IPC. However, as of the date of this decision, I have not received this individual's written representations which were due several weeks ago.

[60] The individuals who provided written representations had similar concerns regarding the potential release of the requested video clips. They argue that granting the complainant access to the records could reasonably be expected to lead to a risk of harm to themselves under section 52(1)(e)(i). They raised a concern that if the video clips were released to the complainant they could end up on social media which could lead to their being recognized outside the hospital facility. They said that they work in an environment that is well-known to be dangerous at times and they already face hostility from patients and visitors on a regular basis. They also argue that even if their faces were obscured from the video clips released to the complainant, they could easily be identified (by frequent patients and visitors to the hospital) by their stature, stride and posture.

### ***Decision and analysis***

[61] At issue are the images of the complainant along with identifiable security and hospital staff captured in the video clips.

[62] As mentioned above, in PHIPA Decision 34, Adjudicator Higgins determined that a custodian seeking to rely on the exemption at section 52(1)(e)(i) of *PHIPA* must provide evidence demonstrating a risk of harm that is well beyond the merely possible or speculative. The custodian does not need to prove that providing access will in fact result in the harms contemplated by the exemption. The type and quantity of evidence

required is dependent on the type of issue and seriousness of the potential consequences.

[63] I have reviewed the confidential and non-confidential submissions of the parties along with the views of the affected parties who object to the release of their images to the complainant. Having done so, I am not satisfied that section 52(1)(e)(i) applies to the records in the particular circumstances of this complaint.

[64] In my view, the circumstances in this matter differ from those in PHIPA Decision 34. In that matter, Adjudicator Higgins found that granting a patient access to notes created by medical professionals could reasonably be expected to result in serious harm to the treatment or recovery of the patient in question or risk of serious bodily harm to others. In making his decision, Adjudicator Higgins relied on a statement provided by the patient's treating psychiatrist. The treating psychiatrist stated that the complainant in that matter "would likely misinterpret the records and potentially incorporate the content into his delusional beliefs ultimately affecting nursing staff, with the result of possible violence against the authors of the drafted notes."

[65] Adjudicator Higgins ultimately found that the custodian's evidence, provided by an expert, demonstrated a risk of harm that is well beyond the merely possible or speculative.

[66] I also find that the circumstances in this matter differ from those in PHIPA Decision 100 in which the IPC found that the exemption in section 52(1)(e)(i) applied. In PHIPA Decision 100, Adjudicator Jaime Cardy found that granting a patient access to records containing his PHI from his former psychotherapist could reasonably be expected to result in a risk of serious harm to his treatment or recovery or a risk of bodily harm to the psychotherapist or her colleagues. In making her decision, Adjudicator Cardy took into consideration the custodian's evidence of violent and threatening behaviour by the complainant, which included police involvement and resulted in the complainant being arrested and charged. Also considered was the complainant's new therapist's statement that granting the complainant access to any records related to his treatment by his former psychotherapist would be "highly triggering." In PHIPA Decision 100, Adjudicator Cardy stated:

Based on the parties' submissions, including the specific and compelling evidence provided by the custodian, I am satisfied that section 52(1)(e)(i) applies to the records at issue. There is ample evidence before me demonstrating the complainant's history of threatening behaviour directed toward himself and others, including the custodian. This includes evidence of the complainant misinterpreting communications as threatening and an attack on his health, safety, and well-being. I am satisfied that the complainant has acted in harmful ways against himself and others as a result of communications relating to his past treatment with the custodian,

and that there is a reasonable prospect that reviewing the records may result in similar harm.

[67] Though the hospital in the matter before me submitted evidence provided by an expert, I find that its evidence falls short of demonstrating a risk of harm that is well beyond the merely possible or speculative, for the following reasons.

*Risk of harm to self*

[68] Based on my review of the confidential and non-confidential representations of the parties along with the records themselves, I disagree with the hospital's submission that the complainant has minimal recollection of events depicted in the video. The complainant recounted her recollection of events in the confidential portions of her representations along with information she obtained from accessing her medical records. Though the complainant has questions about what occurred during her admission, I am satisfied that the complainant is aware of the general circumstances surrounding the care she received during her admission to the hospital, including the circumstances which led to security staff being present. In addition, I note that despite the passage the time, the complainant continues to ask questions about her admission to the hospital and gives the impression of an individual who has carefully reviewed the medical records in her possession and is eager to have discussions with Patient Relations to discuss the care she received during her admission.

[69] Based on the information before me, including the confidential submissions made by the hospital, I find there is insufficient evidence to conclude that granting the complainant access to the video clips could reasonably be expected to result in a risk of serious harm to herself, her treatment or recovery. I find that the hospital's evidence falls short of demonstrating a risk of harm that is well beyond the merely possible or speculative. In support of its position, the hospital relies on the circumstances of the complainant's admission – that she was admitted under an involuntary mental health hold under a Form 1, including the attending psychiatrist's diagnosis along with other related mental health diagnosis. Without disclosing the specific contents of the confidential portions of the hospital's representations, I note that the connection the hospital seeks to establish between the withheld information and the contemplated harm in section 52(1)(c)(i) is that granting the complainant access would trigger her and could reasonably be expected to cause the complainant to act unpredictably. However, for the reasons stated above, I disagree with the hospital's assessment that the complainant's recollection of the events is poor. In any event, I am not satisfied that the hospital's evidence, confidential or otherwise, sufficiently demonstrate a risk of harm that is well beyond the merely possible or speculative.

*Risk to others*

[70] I also disagree with the hospital's and the affected parties' submission that granting the complainant access to the video clips could reasonably be expected to



result in serious bodily harm to security and hospital staff whose images are contained in the records. I find that this evidence falls short of demonstrating a risk of harm to others that is well beyond the merely possible or speculative. Again, the hospital relies on the circumstances of the complainant's admission and various mental health diagnoses in support of its position. In my view, the hospital's evidence lacks the type of detail required to establish a connection between granting the complainant access to the records and the contemplated harm.

[71] I also find that the evidence of the affected parties speculative. The affected parties paint a picture of working in an environment where they are routinely confronted by patients and visitors. However, their evidence fails to explain why granting the complainant access of the video clips that relate to her could reasonably establish a risk of serious bodily harm to themselves. Instead, their evidence suggests that in every case where a confrontation is captured between staff and a patient on video, granting access to the video could reasonably be expected to result in a risk of serious bodily harm to staff by either the patient or someone else to views the video. In my view, the affected parties' evidence is too speculative and their general concerns about their work environment are not sufficient to demonstrate a risk of harm that is well beyond the merely possible.

### *Summary*

[72] Based on the above reasons, I find that there is insufficient evidence before me demonstrating that the exemption in section 52(1)(e)(i) applies to the records.

[73] The hospital also relies on the flow-through provision in sections 52(1)(f)(i) and (ii)(A) of *PHIPA* with reference to sections 49(a) and 20 of *FIPPA* (danger to safety or health).<sup>18</sup> Section 20 of *FIPPA* states:

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<sup>18</sup> 52 (1)(f) of *PHIPA* states:

Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

(f) the following conditions are met:

(i) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or is acting as part of such an institution, and

(ii) the custodian would refuse to grant access to the part of the record,

(A) under clause 49 (a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record

Section 49(a) and 20 of *FIPPA* states:

49 A head may refuse to disclose to the individual to whom the information relates personal information,

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[74] The language of section 20 of *FIPPA* is similar to that in section 52(1)(e)(i) of *PHIPA*, though the latter arguably covers a wide range of contemplated harms. The hospital's evidence on the section 20 exemption is virtually the same evidence already adduced (and mentioned above) in support of the hospital's position that section 52(1)(e)(i) applies. Further, as noted above, the adjudicator in PHIPA Decision 34 determined that same standard of proof required under both provisions. I find that the applying the evidence of the hospital and affected parties' to the flow-through provision in sections 52(1)(f)(i) and (ii)(A) of *PHIPA* produces the same result. The evidence falls short of demonstrating a risk of harm that is well beyond the merely possible or speculative for the same reasons noted above that I found section 52(1)(e)(i) does not apply. As a result, I find that the flow-through provision in sections 52(1)(f)(i) and (ii)(A) with reference to sections 49(a) and 20 also do not apply to the circumstances of this matter.

[75] As I found that the records, in their entirety, consist of the PHI of the complainant and do not contain exempt information, it is not necessary to also consider the applicability of section 52(2), which provides for severance of exempt information before granting access.

[76] Accordingly, I will order the hospital to grant the complainant access to the requested video clips in full.

## **ORDER:**

1. I order the hospital to provide the complainant with access to the two video clips at issue.
2. If the hospital decides to charge a fee for access, it is to give the complainant an estimate of the fee in accordance with section 54(10).
3. For the purposes of order provisions 1 and 2, the date of this decision should be treated as the date of the access request.

Original Signed by: \_\_\_\_\_

November 3, 2021 \_\_\_\_\_

(a) where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information

20 A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

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Jennifer James  
Adjudicator