

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 182

Complaint HA19-00244

Dr. Imran Naqvi

May 27, 2022

Summary: The complainant made an access request to a psychiatrist (the custodian) under the *Personal Health Information Protection Act* (the *Act*), for records of personal health information relating to himself. After reviewing the records the custodian provided him, he made a complaint to the IPC on the basis that further records exist that are responsive to his access request, raising the issue of reasonable search. In this decision, the adjudicator finds that the complainant has established that further records may exist, and also that the custodian did not provide sufficient evidence that the search for records was reasonable. The custodian is ordered to conduct a further search for records responsive to the complainant's request and to provide a written explanation to the complainant regarding the results of the search.

Statutes Considered: *Personal Health Information Protection Act, 2004, S.O. 2004, c. 3*
Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, sections 53 and 54.

BACKGROUND:

[1] This decision disposes of the sole issue raised as a result of a complaint made under the *Personal Health Information Protection Act* (the *Act*) to the Information and Privacy Commissioner of Ontario (the IPC). The requester had made an access request under the *Act* to a psychiatrist (the custodian) for all health records on file at the custodian's office relating to the requester during a specified time period. By way of background, the requester had been referred to the custodian on an out-patient basis following an admission to a hospital.

[2] The requester (now the complainant) then filed a complaint with the IPC, stating that he had not received a response from the custodian regarding his access request. As a result, the IPC opened complaint file HA19-00151. During the intake stage of the complaints process, the complainant advised the analyst that, since filing the complaint, the custodian had provided him with a copy of his records of personal health information, but did not provide him with a written decision regarding the access request. The complainant decided to withdraw complaint HA19-00151, and the file was closed.

[3] After reviewing his records of personal health information, the complainant wrote to the custodian, detailing both the records he had received from the custodian (relating to five appointments the complainant had with the custodian), and those which he believed should have also been in the package of records, but were not. In his letter to the custodian, the complainant advised that he believed that there should be records relating to two further appointments he had with the custodian above and beyond the five appointments referred to above. The complainant also asked that the custodian provide him with any other records he had relating to the complainant.

[4] The IPC then received a complaint from the complainant stating that additional records should exist in the custodian's custody or control. As a result, Complaint HA19-00244 was opened and the issue in the complaint (the present complaint) is the reasonableness of the custodian's search for records.

[5] During the intake stage of the complaints process, the custodian provided the complainant with a decision letter and another set of records. The custodian's decision stated that he was providing the complainant with a complete copy of his "medical chart," which had been previously provided to him approximately 11 days prior when the complainant had attended at the custodian's office and picked up a copy of his records of personal health information. The custodian also advised that if the complainant sought hospital records, he would have to contact the hospital because the custodian did not have access to those records.

[6] The complainant was not satisfied with the records and asked that the matter proceed to mediation. During the mediation of the complaint, the complainant stated that he had identified discrepancies in the records that he had received from the custodian, which led him to believe that the custodian may have additional records responsive to his request.

[7] In particular, the complainant stated that he had been given a different number of pages of records between the first and second set of records. He stated that some of the appointment summaries he had been provided with in the first set of records included handwritten notations. He described the appointment summaries provided in the second set of records as template documents containing no handwritten notations. He advised the mediator that he would like to be provided with any contemporaneous handwritten notations made by the custodian at the time of the appointments as part of

his request.

[8] The complainant also stated that there was a note in his records that he had attempted suicide but that no other records he had been provided which referenced this. The complainant stated that because the custodian made this claim, the custodian should have additional records in his custody documenting this claim.

[9] The custodian advised the mediator that he was currently under practice restrictions by the College of Physicians and Surgeons of Ontario (the CPSO) which required him to modify his record-keeping to ensure legibility. Regarding the discrepancies between the two sets of records that were provided to the complainant, the custodian advised the mediator that as part of the modification of his record-keeping practices, the custodian's staff had typed out the handwritten portions of the notes, added these to the complainant's records of personal health information, and subsequently whited-out the handwritten portions. The custodian stated that this had taken place before providing the complainant with the second set of records. The custodian stated that his office had not retained copies of the handwritten notes in their original state, and so he could not provide the complainant with copies of them.

[10] The custodian further advised the mediator that he keeps hard copies of records, does not have electronic records, and that he had provided the complainant with all the records he had in the complainant's file.

[11] The complaint then moved to the adjudication stage of the complaints process, where an adjudicator may conduct a review. I provided the custodian, initially, with the opportunity to provide representations on the issue of reasonable search, but did not receive representations from him. I then sought and received representations from the complainant.

[12] The complainant's representations address the issue of reasonable search, which I deal with below. However, the complainant has also raised a number of concerns he has about the substance and quality of health care with which he was provided, the substance and quality of the custodian's notes, as well as his general record-keeping practices.¹ Some of these concerns are not within the IPC's jurisdiction and the only issue placed before me at adjudication was that of reasonable search. As a result, I will not be addressing the complainant's additional concerns in this decision.

[13] For the reasons that follow, I find that the complainant has established that further records may exist. I also find that the custodian did not provide sufficient evidence that the search for records was reasonable. The custodian is ordered to conduct a further search for records responsive to the complainant's request and to provide a written explanation to the complainant regarding the results of the search.

¹ I note that there is no allegation of a breach of the complainant's privacy under the *Act*.

DISCUSSION:

[14] The sole issue in this complaint is whether the custodian conducted a reasonable search for records responsive to the complainant's access request under section 54 of the *Act*.

[15] Where a complainant claims that additional records exist beyond those identified by the 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 the *Act*. If the IPC is satisfied that the search carried out was reasonable in the circumstances, the custodian's decision will be upheld. If the IPC is not satisfied, it may order further searches.

[16] The complainant questions whether the custodian has located all records related to his contacts with the custodian. In his view, further such records should exist.

[17] *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.² To be responsive, a record must be "reasonably related" to the request.³

Representations

[18] The complainant submits that the first set of records he received consisted of five appointment summaries, whereas the second set of records consisted of nine appointment summaries,⁴ leading him to believe that even more records may exist. Further, the complainant's position regarding the notation in his records of an alleged attempted suicide is that there should be more records that exist regarding that alleged incident (which the complainant denies happened). In addition, the complainant is of the view that the custodian should have records from the hospital which referred him to the custodian.

[19] With respect to the fact that the custodian indicated during mediation that the handwritten notes were transcribed in the second set of records, the complainant submits that if the handwritten notes were transcribed as described by the custodian, the handwritten notations that were present on the first set of records should have been transcribed in the second set of records, but were not. As an example, the complainant points out that records in the first set reflecting three appointments have handwritten notations directly on them, but the second set does not have these notations transcribed directly on them.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ I note that in his communication with the custodian prior to filing his complaint with the IPC, the complainant refers to seven appointments he believes took place.

[20] In addition, the complainant argues that there is not sufficient evidence to conclude that the search to identify and locate responsive records was conducted by an experienced employee knowledgeable in the subject matter of the request, particularly given that the handwritten notations, which were on the first set of records, were subsequently whited out and not scanned for retention prior to being whited out. As a result, the complainant submits, those records no longer exist.

[21] Further, the complainant submits that when a handwritten hard copy is transcribed using an electronic device, that device more than likely has some form of electronic data retention capability. He concludes that the mere act of printing a hard copy of the transcribed record does not negate the existence of an electronic version of the same record.

[22] In sum, the complainant's position is that the custodian has not provided sufficient evidence to show that he conducted a reasonable search for responsive records and, for this reason, he requests that the IPC order the custodian to conduct a further search for records and provide evidence of that search.

[23] During the review of the complaint, I asked the custodian to provide a written summary of all steps taken in response to the request. In particular, the custodian was asked the following questions:

1. Did the custodian contact the complainant for additional clarification of the request? If so, please provide details including a summary of any further information the complainant provided.
2. If the custodian did not contact the complainant to clarify the request, did he:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the custodian outline the limits of the scope of the request to the complainant? If yes, for what reasons was the scope of the request defined this way? When and how did the custodian inform the complainant of this decision? Did the custodian explain to the complainant why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

5. Do responsive records exist which are not in the custodian's possession? Did the custodian search for those records? Please explain.
6. Please respond to the complainant's assertion that further records of his communications with the custodian should exist.

[24] As previously stated, the custodian did not provide representations to the IPC in response to the above-referenced questions.

Analysis and finding

[25] The IPC has extensively canvassed the issue of reasonable search for responsive records in orders issued under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act*. It has also addressed the issue of reasonable search under *PHIPA*.⁵ In addition to what is set out in *PHIPA* Decision 18, principles outlined in orders of this office addressing reasonable search under *FIPPA* and *MFIPPA* are instructive to the review of this issue under *PHIPA*.

[26] As previously stated, *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.⁶ To be responsive, a record must be "reasonably related" to the request.⁷

[27] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁸

[28] A further search will be ordered if the custodian does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁹

[29] Although a complainant will rarely be in a position to indicate precisely which records the custodian has not identified, the complainant still must provide a reasonable basis for concluding that such records exist.¹⁰

[30] I find that the search for records responsive to the complainant's request does not meet the threshold for being "reasonable." My reasons for this finding regarding the custodian's search for records responsive to the complainant's access request are two-

⁵ *PHIPA* Decision 18, *PHIPA* Decision 43.

⁶ Orders P-624 and PO-2559.

⁷ Order PO-2554.

⁸ Orders M-909, PO-2469 and PO-2592.

⁹ Order MO-2185.

¹⁰ Order MO-2246.

fold.

[31] First, I find that the complainant has established a reasonable basis for concluding that further records may exist. In particular, I find that it would be reasonable to conclude that there may be further records in the custodian's custody regarding the alleged suicide attempt.

[32] Second, and mainly, I find that the custodian has not provided sufficient evidence to show that he has made a reasonable effort to search for responsive records. I acknowledge that the custodian provided information to the IPC during the mediation of the complaint. This information was that two sets of records were disclosed to the complainant. The first set of records included handwritten notes. The second set of records showed the transcription of the handwritten notes separately, and the handwritten notes had been whited out. The custodian also advised the IPC during mediation that he only keeps hard copy records and does not keep electronic copies of records.

[33] But that does not end the matter. Despite the fact that the custodian provided this information to the IPC, I find that he has not provided sufficient evidence for me to make a finding that his search for records was reasonable. In particular, the custodian was asked to provide affidavit evidence in response to the specific questions I posed in the Notice of Review. The custodian did not provide any representations to the IPC answering those questions or provide any other evidence. As a result, I find that the custodian's search for records was not reasonable and I will order him to conduct a further search for records and provide to provide an explanation of the search to the complainant, as set out in the order provisions, below.

ORDER:

For the foregoing reasons, pursuant to section 61(1)(c) of the *Act*:

1. I order that the custodian conduct a further search for records responsive to the complainant's access request within **30 days** of the date of this decision.
2. I order the custodian to issue a decision to the complainant that provides the complainant with a written explanation of the search and the results of the search, including answering the questions that I had previously asked the custodian regarding the search for records. This decision is to be issued within **30 days** of the date of this decision.
3. Should further records be found as a result of the search ordered in order provision 1, I order the custodian to include a decision on access to the records in its decision referred to in order provision 2.

Original Signed by: _____

May 27, 2022 _____

Cathy Hamilton
Adjudicator