

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 197

Complaint HA21-00167

William Osler Health System - Peel Memorial Centre

January 17, 2023

Summary: Under the *Personal Health Information Protection of Privacy Act, 2004 (PHIPA)* the complainant submitted a correction request to the William Osler Health System – Peel Memorial Centre (the custodian) requesting that notes made in her medical record indicating that she had a specified medical condition be struck from her record. The custodian denied the complainant's request on the basis of section 55(9)(b) of *PHIPA* which sets out an exception to a custodian's duty to correct at section 55(8) of *PHIPA* provided that the information consists of professional opinions or observations made in good faith. In this decision, the adjudicator upholds the custodian's refusal to correct the personal health information in the record under section 55(8) of *PHIPA* because the exception at section 55(9)(b) applies. She dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, sections 3(1), 4(1), 55(1), 55(8), 55(9)(b), 55(11), 55(12) and 55.6.

Decisions Considered: PHIPA Decisions 37, 39 and 43.

BACKGROUND:

[1] This complaint arises from the complainant's request that corrections be made to consultation notes in her medical record, under section 55(1) of the *Personal Health Information Protection Act, 2004 (PHIPA or the Act)*.

[2] The complainant, who visited the William Osler Health System – Peel Memorial Centre (the hospital or the custodian) on May 6, 2013, asserts that consultation notes

made by an attending physician indicating that she had a specified medical condition are inaccurate. She requested that her medical record be corrected by having all references indicating that she had the particular condition at the time of her visit be struck from the notes. In her correction request she explained that while she had expressed concern about whether she had contracted the condition and asked to be tested for it, she did not have the condition at that time and did not tell the physician that she had it.

[3] The custodian reviewed the requester's correction request and issued a decision letter refusing to make the requested corrections. The custodian advised the complainant that her request was denied on the basis of section 55(9)(b) (professional opinion or observation) of *PHIPA*, which is an exception to a custodian's duty to grant a correction request in certain circumstances set out at section 55(8) of *PHIPA*.

[4] The complainant disagreed with the custodian's refusal to make the requested corrections and filed a complaint to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to reach a resolution between the parties.

[5] During mediation, the custodian confirmed that its final position is that the consultation notes in the complainant's medical record consist of professional opinions or observations made in good faith by a health care provider and that it is refusing the complainant's correction request on the basis of the exception to its duty to correct, found at section 55(9)(b) of *PHIPA*.

[6] The custodian advised that, as contemplated by section 55(11) of *PHIPA*, the complainant submitted a statement of disagreement that the custodian attached to her medical records. The custodian also advised that it placed a consent directive (commonly known as a "lock-box") on the record containing the information subject to the complainant's correction request.¹

[7] The complainant continues to take the position that the custodian should correct the medical record by striking out any reference in the consultation notes to her having the specified condition.

[8] As a mediated resolution between the parties was not reached, the complaint was moved to the adjudication stage where an adjudicator may conduct a review.

[9] As the adjudicator assigned to the complaint, I decided to conduct a review into the complaint. During my review, I sought and received representations from both parties which were shared between them in accordance with the IPC's *Code of*

¹ Under *PHIPA*, an individual can request to have a consent directive applied to their medical record to withhold or withdraw their consent to have a custodian collect, use and disclose their personal health information and to provide express instructions to custodians not to use or disclose their personal health information without consent. This will be discussed in more detail, below.

Procedure for Matters under the Personal Health Information Protection Act, 2004.

[10] For the reasons that follow, I uphold the custodian's refusal to correct the complainant's medical record based on the exception at section 55(9)(b) of *PHIPA* because the information that the complainant seeks to have corrected consists of the physician's professional opinions or observations, made in good faith. Based on my findings, I uphold the physician's decision not to make the requested corrections and I dismiss the complaint with no order.

RECORDS:

[11] The records at issue in this review are physician consultation notes in the complainant's medical record, dated May 6, 2013 (the consultation notes).

DISCUSSION:

[12] In this complaint, there is no dispute that the custodian is a "health information custodian" as defined in section 3(1) of *PHIPA*.² There is also no dispute that the consultation notes that the complainant seeks to have corrected contain identifying information, in recorded form, about the complainant that qualifies as her personal health information within the meaning of section 4(1) of *PHIPA*.³ Additionally, there is no dispute that the complainant has a right to request correction of the consultation notes under section 55(1) of *PHIPA*.⁴

[13] The sole issue to be determined in this review, is whether the custodian has a duty to make the requested corrections to the complainant's personal health information in her medical record. That duty is set out in section 55(8) of *PHIPA*, as follows:

The health information custodian shall grant a request for a correction under [section 55(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.

[14] Although section 55(8) imposes a duty on the custodian to grant a request for

² Under section 3(1) 4. i of *PHIPA*.

³ Under section 4(1)(a) and (b) of *PHIPA*.

⁴ Section 55(1) provides that "If a health information custodian has granted an individual access to a record of his or her personal health information and if the individual believes that the record is inaccurate or incomplete for the purposes for which the custodian has collected, uses or has used the information, the individual may request in writing that the custodian correct the record." The right to require the correction of one's own personal health information is also one of the stated purposes of *PHIPA*. It is set out in section 1(c).

correction if certain conditions are met, the wording of the section makes it clear that the onus to demonstrate that the custodian must fulfill their duty rests with the individual requesting that the correction be made. Specifically, section 55(8) requires that the individual making the request for correction:

- 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] The purpose of section 55(8) is to impose a duty on health information custodians to correct a record of an individual's personal health information where the record is inaccurate or incomplete for the purposes for which the custodian uses the information, subject to the limited and specific exceptions to that duty which are set out in section 55(9) of *PHIPA*. The exception at section 55(9)(b), which is the only exception that is relevant to this review, states:

Despite [the duty to correct at section 55(8)] a health information custodian is not required to correct a record of personal health information if,

...

(b) it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[16] Read together, sections 55(8) and 55(9) set out the criteria pursuant to which an individual is entitled to a correction of a record of her own personal health information.

[17] It is important to also note that section 55(10) states that upon granting a request for a correction, the health information custodian shall make the requested correction by recording the correct information in the record and striking out the incorrect information in a manner that does not obliterate the record. There is no right in *PHIPA* to have the incorrect information in a record removed, replaced, or amended in such a manner that the incorrect information is completely obliterated - it must remain legible.

[18] Therefore, if the IPC orders that personal health information in a record be corrected, the order can only require a custodian to strike out the incorrect information in such a way that the original entry remains legible.

[19] In all cases where a complaint regarding a custodian's refusal to correct records of personal health information 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) of

PHIPA. However, as the application of either of the exceptions in section 55(9) obviates the duty to correct in section 55(8), I will first consider whether the exception in section 55(9)(b) applies to the notes at issue.⁵

Section 55(9)(b) – exception to the duty to correct

[20] For the reasons that follow, I find that the exception at section at section 55(9)(b) applies in this complaint and the custodian is relieved of its duty to correct set out in section 55(8) of *PHIPA*.

[21] The purpose of section 55(9)(b) is to preserve “professional opinions or observations,” *accurate or otherwise*, that have been made in good faith. This purpose is based on sound policy considerations, including the need for documentation that may explain treatments provided or events that followed a particular observation or diagnosis. This approach is consistent with the approach taken to similar provisions in other jurisdictions.⁶

[22] Where a “professional opinion or observation” is involved, section 55(8) does not give a right to request a correction that amounts to a substitution or change to the custodian’s “professional opinion or observation,” unless it can be established that the professional opinions or observations were not made in good faith. Moreover, a request for correction or amendment should not be used to attempt to appeal decisions or professional opinions or observations with which a complainant disagrees and cannot be a substitution of opinion, such as the complainant’s view of a medical condition or diagnosis.⁷

[23] Where the custodian claims that section 55(9)(b) applies, the custodian bears the burden of proving that the personal health information at issue consists of a “professional opinion or observation” about the individual. However, as explained below, 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.

[24] Section 55(9)(b) involves a two-part analysis. The first question is whether the personal health information is a “professional opinion or observation.” The second question is whether the “professional opinion or observation” was made “in good faith.”

⁵ Depending on the nature of the correction request, the information the individual seeks to have corrected, and the reasons for the custodian’s refusal of the request, the IPC may approach the analysis in a correction complainant initially under section 55(8) or under section 55(9): *PHIPA* Decision 36.

⁶ See for example Orders H2004-004, H2005-006 and H2005-007 of the Information and Privacy Commissioner of Alberta.

⁷ *PHIPA* Decision 43

Does the personal health information qualify as a "professional opinion or observation?"

[25] In order for section 55(9)(b) to apply, the personal health information must either qualify as either a "professional opinion" or a "professional observation." Only those observations and opinions that require a health information custodian or an agent to exercise or apply special knowledge, skills, qualifications, judgment or experience relevant to their profession should be defined as "professional observations" or "professional opinions" within the meaning of section 55(9)(b) of *PHIPA*.⁸

[26] The custodian submits that the consultation notes, which were prepared during the complainant's hospital visit, document the physician's professional opinions and observations in responding to the complainant's medical concerns. The custodian submits that the consultation notes and the diagnosis were based on the patient's self-reported history at the time, as well as a clinical exam.

[27] From my review of the consultation note and the custodian's representations, I am satisfied that the personal health information that it contains constitutes "professional opinions" or "professional observations" as required by the first part of the two-part analysis for the exception at section 55(9)(b) to apply. In my view, it is clear that the professional opinions and observations contained in the consultation note arise from the application of the physician's professional judgement and experience and include his diagnosis. It is also clear that these professional opinions and observations were gathered during the course of both a conversation with the complainant and a clinical exam.

[28] In her representations, the complainant submits that the consultation note is inaccurate, in particular with respect to the references to her having the specified medical condition which she submits she does not have and submits that she did not tell the physician she had. She also submits that at the hospital she told the attending physician that she was experiencing a particular symptom but, in the consultation notes, he has recorded a completely different symptom. She provided a highlighted copy of the consultation note to demonstrate her position that the consultation note contains inaccurate information.

[29] As noted above, however, the application of the section 55(9)(b) exception does not turn on whether the personal health information at issue is objectively true or accurate. The section 55(9)(b) exception may apply to personal health information, even if that information is inaccurate, where that information qualifies as a "professional opinion or observation," made in good faith. Therefore, even if it could be demonstrated that the physician inaccurately documented the fact that the complainant had the specified condition, I am satisfied that the information in the consultation notes represents the exercise of the physician's professional knowledge and experience in the

⁸ PHIPA Decisions 36, 37 and 43.

course of information-gathering to arrive at a clinical judgment. The fact that this information may be inaccurate as a result of a misunderstanding or misapprehension of communication between the physician and the complainant does not affect its characterization as professional opinion or observation within the meaning of section 55(9)(b).

Was the professional opinion or observation made "in good faith?"

[30] The second part of the two-part analysis to determine whether section 55(9)(b) applies requires that there be reasonable grounds to conclude that the professional opinions or observations containing the personal health information that the complainant seeks to have corrected were made "in good faith." If it can be established that the professional opinions or observations were not made in good faith, then the section 55(9)(b) exception to the duty to correct cannot apply.

[31] Court decisions have stated that a finding that someone has not acted in good faith can be based on evidence of malice or intent to harm another individual, as well as serious carelessness or recklessness. The courts have also stated persons are assumed to act in good faith unless proven otherwise. Therefore, the burden of proof rests on the individual seeking to establish that a person has acted in the absence of good faith to rebut the presumption of good faith.⁹ In the context of section 55(9)(b) of *PHIPA*, the burden rests on the individual seeking the correction to establish that the custodian did not make the professional opinion or observation in good faith.

[32] In her representations the complainant describes the circumstances that led her to decide to go to the hospital. She also explains that because of the particular circumstances that led her to visit the hospital she asked that particular tests be done, including one that would reveal whether she had the specified medical condition. She states that she did not tell the physician that she already had the specified condition because she did not have it but requested that a test be done to determine whether she had recently contracted the condition. She submits that the physician misunderstood her and recorded in his notes that she had the specified condition. It is this information that she wishes to have struck from the notes.

[33] While I acknowledge that the complainant believes that the physician misunderstood much of what she communicated to him and that the notes therefore inaccurately describe what she was experiencing at the time, most particularly that she had an existing medical condition that she did not have, the complainant's evidence does not establish the requisite reasonable grounds to rebut the presumption that the notes consist of professional opinions or observations made in good faith. The complainant has not demonstrated that the professional opinions or observations were not made in good faith. Additionally, as noted above, the section 55(9)(b) exception can apply to professional opinions and observations even if they are inaccurate. Thus,

⁹ *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (*CanLII*)

even if the physician's opinions and observations recorded in the notes were untrue as a result of a misunderstanding between the physician and the complainant, this would not, in my view, be sufficient to establish intentional fault or malice, or serious carelessness or recklessness amounting to bad faith on the part of the physician in arriving at his professional opinions and observations.

[34] I also note that in her representations, the complainant expresses her opinion that given the circumstances that led to her visit to the hospital, the attending physician did not respond to her particular concerns appropriately. My understanding of her representations in this regard is that her underlying suggestion is that the physician was inclined to make inaccurate or unfair observations and opinions about the complainant as a result of information that she communicated to him about the circumstances that led her to seek medical care. However, in my view, the evidence that she has provided is not sufficient to establish malice amounting to bad faith on the part of the physician in arriving at professional opinions and observations recorded in the notes.

[35] I find, therefore, that the professional opinions and observations were made in good faith.

[36] As the second part of the two-part analysis has been met, I find that the exception at section 55(9)(b) applies and the custodian has no duty to correct.

Statement of Disagreement and consent directive ("lock box")

[37] Sections 55(11) and (12) of *PHIPA* give an individual whose correction request has been refused the right to require the custodian to attach a statement of disagreement to the record conveying their disagreement with any information contained in the record. A statement of disagreement can set out their requested corrections to the record.

[38] It is my understanding that the complainant has exercised her right in this regard. Subject to certain conditions, the complainant is also entitled to require that the custodian make all reasonable efforts to disclose the statement of disagreement to a person to whom the custodian has already disclosed the record at issue.¹⁰

[39] Additionally, under *PHIPA* an individual can request to have a consent directive, commonly known as a "lock box," applied to restrict access to their personal health information. As explained in *PHIPA* Decision 148, the term "lock box" is not defined in *PHIPA*. It is a term commonly used to describe the right of individuals to withhold or withdraw their consent to the collection, use or disclosure of their personal health information for health care purposes and to provide express instructions to custodians not to use or disclose their personal health information for health care purposes without consent.¹¹ A directive can be applied to withhold or withdraw an individual's consent to

¹⁰ *PHIPA*, sections 55(10)(c), 55(11)(c) and 55(12).

¹¹ Relevant sections include sections 19, 20(2), 37(1)(a), 38(1)(a), 50(1)(e) and 55.6 of *PHIPA*.

have a custodian collect, use and disclose their personal health information.¹²

[40] It is my understanding that the complainant has exercised her right to apply a consent directive to the consultation note that is at issue in this complaint and that it was applied as requested.

ORDER:

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

Original Signed by: _____
Catherine Corban
Adjudicator

_____ January 17, 2023

¹² Notably, section 19 of *PHIPA* states: (1) If an individual consents to have a health information custodian collect, use or disclose personal health information about the individual, the individual may withdraw the consent, whether the consent is express or implied, by providing notice to the health information custodian, but the withdrawal of the consent shall not have retroactive effect. (2) If an individual places a condition on his or her consent to have a health information custodian collect, use or disclose personal health information about the individual, the condition is not effective to the extent that it purports to prohibit or restrict any recording of personal health information by a health information custodian that is required by law or by established standards of professional practice or institutional practice.