

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 211

Complaint PA20-00191

A public hospital

June 23, 2023

Summary: A complainant requested that a public hospital make his requested changes to certain hospital records concerning him, and to circulate those changes (or, in the alternative, a statement of his disagreement with the contents of the original records) to a list of individuals or groups within the hospital. The hospital refused his requests, including on the basis he had not established the duty to correct in section 55(8) of the *Personal Health Information Protection Act, 2004 (PHIPA)*, and that the information at issue falls within the exception to the duty to correct for professional opinions or observations made in good faith (section 55(9)(b) of *PHIPA*). The hospital also refused to circulate his statement of disagreement to named hospital agents on the basis there is no duty in *PHIPA* to do so. In addition to his complaint to the IPC about the hospital's decisions, the complainant challenged the constitutionality of the hospital's actions in a Notice of Constitutional Question served on the IPC and on the Attorneys-General of Ontario and Canada.

In this decision, the adjudicator determines there are no reasonable grounds to review the complaint under *PHIPA*. She accordingly exercises her discretion under sections 57(3) and (4) not to conduct a review, and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, sections 2 (definitions); 4 (definition of "personal health information"); 6(1); 55(8); 55(9)(b); and 55(11), (12), and (13).

OVERVIEW:

[1] This decision addresses a complainant's request that a public hospital make his

requested changes to emails and other hospital notes made by hospital staff in the course of their interactions with him. The complainant also requested that the hospital circulate his requested changes (or, in the alternative, a statement of his disagreement with the contents of the original records) to a number of individuals and groups within the hospital who the complainant believed had seen the original records.

[2] The complainant initially pursued this matter as a correction request to the hospital under the *Freedom of Information and Protection of Privacy Act (FIPPA)*, which applies to the hospital in its capacity as an institution subject to *FIPPA*. After the hospital refused the complainant's requests, he filed a privacy complaint under *FIPPA* with the Office of the Information and Privacy Commissioner of Ontario (IPC). For reasons I explain further below, although the IPC opened this matter as a complaint under *FIPPA*, the applicable statute is the *Personal Health Information Protection Act, 2004 (PHIPA)*, which applies to the hospital in respect of the complainant's requests relating to records of his personal health information in the hospital's custody or control.

[3] During the course of the IPC process, the complainant challenged the constitutionality of the hospital's actions, outlining his claims in a Notice of Constitutional Question served on the IPC and on the Attorneys-General of Ontario and Canada.

[4] In the discussion that follows, I explain why I have decided this matter does not warrant a review under sections 57(3) and (4) of *PHIPA*. I also explain why I decline to consider the claims raised in the complainant's Notice of Constitutional Question. I dismiss the complaint.

BACKGROUND:

[5] Following some interactions with hospital agents,¹ the complainant sent the hospital a 49-page document in which he stated that he is pursuing his right under section 47 of *FIPPA* to request correction of, or exercise his right to attach a statement of disagreement in respect of, "the combined meaning" of certain hospital records. This document was accompanied by an audio file that the complainant described as an audio recording of himself, a different hospital, and a municipal police force.

[6] There followed a number of written communications between the complainant and the hospital concerning the complainant's request. These communications are lengthy, and I summarize only the relevant portions here.

[7] In these communications, the hospital asked the complainant for clarification of

¹ I recognize that the complainant asserts that the primary purpose of his interactions with hospital agents was not to receive health care, but rather related to a police criminal investigation. I address his claims further below.

the corrections he seeks. The hospital took the position that the 49-page document the complainant had provided did not contain a proper correction request. The hospital's position was based on its view that this document did not address particular hospital records, but rather his general dissatisfaction about not having received a querulous paranoia assessment as part of the services he received from the hospital.

[8] The hospital asked the complainant to make a proper correction request, which it would grant or deny. The hospital also advised the complainant that in the event it refused his correction request, he could submit a statement of disagreement, but that such a statement "must be concise (1-2 pages)." The hospital advised the complainant that the statement of disagreement would be attached to the record(s) to which the correction request relates, and would be disclosed whenever the hospital disclosed the record(s).

[9] The complainant was dissatisfied with the hospital's responses, and raised his concerns with the IPC. To address this matter, the IPC opened this file as an appeal under *FIPPA*.

[10] The hospital is both an "institution" within the meaning of *FIPPA* (section 2(1) of *FIPPA*), and a "health information custodian" within the meaning of *PHIPA* (section 3(1) of *PHIPA*),² and may be subject to one or both statutes in different circumstances. As I explain below, to determine which statute applies in the circumstances, it is necessary to consider the circumstances of the request and the records at issue.

[11] By the end of the mediation stage of the IPC process, the following records were identified as the records at issue (i.e., the records to which the complainant seeks to have corrections made, or to have a statement of disagreement attached):

- Two email strings in which hospital staff discuss matters relating to the complainant;
- A crisis response call summary;
- Two Mobile Crisis Team [MCT] progress notes; and
- An MCT exit note.

[12] During the mediation stage, the complainant identified two principal issues in his complaint, which I summarize as follows:

- That the hospital refused to correct the "combined meaning" of hospital notes, including statements by hospital agents about the complainant's having "paranoid ideas;" about there being "no psychiatric crisis;" about there being "no

² Specifically, the "person who operates" the hospital is a health information custodian within the meaning of paragraph 4.i of section 3(1) of *PHIPA*.

further role for MCT;" and about the hospital's not providing (i.e., by not offering as a service) a certain psychiatric assessment.

- That the hospital failed to attach a statement of disagreement prepared by the complainant "to the record" (which record is not specified), and further failed to circulate the statement to nine named individuals or bodies within the hospital (for example, "leaders in the Mental Health Department").

[13] During mediation, the hospital issued decision letters addressing both items.

[14] With respect to the requested corrections, the hospital refused the correction requests on the following bases:

- That the email records (containing statements to the effect that the requested psychiatric assessment is not provided at the hospital) are not "inaccurate or incomplete for the purposes for which" the hospital uses the information, and therefore do not give rise to the duty to correct in section 55(8) of *PHIPA*; and
- With respect to the remaining records (containing statements to the effect that there is no psychiatric crisis present, and that there is no further role for the Mobile Crisis Team in the complainant's case), that the exception to the duty to correct at section 55(9)(b)³ of *PHIPA* (professional opinion or observation made in good faith) applies.

[15] In respect of each of the denied correction requests, the hospital advised that a "statement of disagreement will be attached."⁴

[16] With respect to the complainant's request that his statement of disagreement be sent to the nine individuals or groups he identified, the hospital stated the following:

We will attach your statement of disagreement to your records. We have not distributed your statement of disagreement to the nine parties you identified because the original records have not been disclosed to these parties.

The requirements of section 55(11) of [*PHIPA*] provide that where a correction request has been denied, it requires that a health information custodian attach a concise statement of disagreement to the relevant record of personal health information and disclose the statement of disagreement whenever the custodian discloses the record to which the statement of disagreement relates.

³ In one of its decisions, the hospital cites section 59(9)(b), which section does not exist in *PHIPA*. However, it is clear from the context that the hospital means to refer to section 55(9)(b).

⁴ During the mediation stage of the complaint process, the complainant prepared a 13-page statement of disagreement as a "more concise" version of the 49-page document he originally sent to the hospital.

Some parties you identified “used” these records, but the records were not “disclosed” to any parties you identified as required by section 55(11). We have therefore not distributed your statement of disagreement to these parties. The statement of disagreement will be attached to your records and included with any further disclosures of the record.

[17] The complainant remained dissatisfied with the hospital’s responses. Because the matter could not be resolved through mediation, the file was transferred to the adjudication stage of the IPC process.

[18] After the close of the mediation stage, the complainant served a Notice of Constitutional Question on the IPC, and on the Attorneys-General of Ontario and Canada.

[19] After considering all the materials in the file,⁵ I formed the preliminary view that the applicable statute is *PHIPA*, not *FIPPA*. This was based on my view that the records at issue are records of the complainant’s “personal health information” within the meaning of that term in *PHIPA*. Among other things, the records contain identifying information about the complainant relating to his physical or mental health, and to the providing of health care to him (paragraphs (a) and (b) of the definition at section 4(1) of *PHIPA*). They also contain other identifying information about him in records that contain personal health information of the sort described above (section 4(3) of *PHIPA*).

[20] It was also my preliminary view that the complaint failed to raise reasonable grounds for a review under *PHIPA*. With respect to the Notice of Constitutional Question, it was my preliminary view that the Notice had been served outside the time limits established by the IPC, and in any event did not raise reasonable grounds to establish the claimed breaches of the complainant’s rights under the *Canadian Charter of Rights and Freedoms*.

[21] I set out the above preliminary views, and my reasons, in a letter to the complainant. In this letter, I invited the complainant to provide representations in the event he disagreed with my preliminary assessment. The complainant made extensive representations in response, which I have considered in arriving at my decision.

[22] For the reasons that follow, I conclude that no review of this matter is warranted under *PHIPA*. I dismiss the complaint.

DISCUSSION:

Should the complaint proceed to a review under *PHIPA*?

[23] As the adjudicator, I have the authority to decide whether this complaint should

⁵ Subject to any limitations imposed by section 57(2) of *PHIPA*.

proceed to a review under *PHIPA*. This power is set out in sections 57(3) and (4) of *PHIPA*, which state, in part:

(3) If the Commissioner does not take an action described in [section 57(1) (b) or (c), which concern attempts at settlement] or if the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified, the Commissioner may review the subject-matter of a complaint made under [*PHIPA*] if satisfied that there are reasonable grounds to do so.

(4) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,

(a) the person about which the complaint is made has responded adequately to the complaint[.]

[24] After considering the additional representations made by the complainant at the adjudication stage, I maintain my view that there are no reasonable grounds to proceed to a review of this matter, including because the hospital has responded adequately to the complaint. My reasons follow.

The applicable statute is PHIPA

[25] First, I will briefly address some arguments made by the complainant in objecting to my preliminary assessment that the applicable statute in these circumstances is *PHIPA*, not *FIPPA*.

[26] The complainant states that he did not receive “health care” from the hospital, and did not have a relationship with the hospital as a patient. He says that the primary purpose of the records was not a health care purpose, but rather a “police criminal investigation” purpose, and that a secondary purpose of the records was to *prevent* his receiving any health care. The complainant describes the series of events that led to his interactions with hospital agents that are documented in the records at issue.

[27] I have examined the records, and I am satisfied they are records of the complainant’s “personal health information” within the meaning of *PHIPA* for the reasons explained above, which were also set out in my preliminary assessment letter to the complainant. These records of the complainant’s personal health information are held by the hospital in its capacity as a health information custodian within the meaning of section 3(1) of *PHIPA*. Thus, whatever the nature of the events that led to the complainant’s interactions with hospital staff, the records at issue (which arose from those interactions) are subject to *PHIPA*. In confirming this finding, I explicitly reject the complainant’s claim that the records are not subject to *PHIPA* because (he says) they document the hospital’s refusal to provide a certain kind of health care to him. Even if true, this would not be relevant to my finding that *PHIPA* is the applicable statute.

The hospital responded adequately to the complaint about the complainant's correction requests

[28] As the complaint concerns the right of correction under *PHIPA*, it is helpful to set out the relevant statutory provisions here.

[29] Section 55(1) of *PHIPA* sets out the right of an individual to request a correction to records of the individual's personal health information. This section states:

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.

[30] Section 55(8) sets out a duty on the part of a health information custodian to grant a request for correction where certain conditions are met. However, section 55(9) provides exceptions to the duty to correct in some circumstances. In refusing the complainant's correction request, the hospital says the conditions in section 55(8) are not met, and also relies on the exception at section 55(9)(b). These sections of *PHIPA* state:

(8) 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.

(9) Despite subsection (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.

[31] A custodian who refuses a correction request has certain duties under *PHIPA*. Among other things, the custodian must inform the individual of the reasons for the refusal, and of certain rights of the individual in view of the refusal. These include the right of the individual to prepare and to require the custodian to disclose a concise statement of disagreement in some circumstances. Sections 55(11), (12) and (13) of *PHIPA* state:

(11) 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;

(c) require that the health information custodian make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified under clause (10) (c) if the custodian had granted the requested correction; and

(d) make a complaint about the refusal to the Commissioner under Part VI.

(12) If a health information custodian, under subsection (3) or (4), refuses a request for a correction under subsection (1), in whole or in part, or is deemed to have refused the request, the individual is entitled to take the actions described in any of clauses (11) (a), (b), (c) and (d).

(13) If the individual takes an action described in clause (11) (b) or (c), the health information custodian shall comply with the requirements described in the applicable clause.

[32] Section 55(10)(c), which is cited in section 55(11)(c), applies where a custodian grants a request for correction under section 55(1). It describes the circumstances in which a custodian must, to the extent reasonably possible, give notice of the correction, and the persons to whom that notice must be provided. Section 55(10)(c) states:

Upon granting a request for a correction under subsection (1), the health information custodian shall [...] at the request of the individual, give written notice of the requested correction, to the extent reasonably possible, to the persons to whom the custodian has disclosed the information with respect to which the individual requested the correction of the record, except if the correction cannot reasonably be expected to have an effect on the ongoing provision of health care or other benefits to the individual

[33] The effect of sections 55(11), (12) and (13) is that in certain circumstances, a custodian who refuses an individual's correction request in respect of personal health information must make all reasonable efforts to disclose the individual's statement of disagreement to the persons to whom the custodian previously disclosed that personal health information.

[34] In this context, I considered the complaint about the hospital's responses to the complainant's request for correction to certain records in the hospital's custody or control.

The duty to correct in section 55(8) is not established in respect of the personal health information at issue in the email records

[35] The hospital refused the complainant's correction requests on two grounds. The first ground is that with respect to the email records, the complainant had not established the circumstances giving rise to the duty to correct in section 55(8) of *PHIPA*.

[36] Specifically, the hospital takes the position that the complainant has not established that the records are inaccurate or incomplete for the purposes for which the hospital uses the information. The records contain statements to the effect that the psychiatric assessment the complainant seeks is not provided at the hospital. The hospital maintains that this kind of assessment is not provided at the hospital. On this basis, the hospital refused the complainant's request that the records be corrected to indicate that this kind of assessment is provided at the hospital.

[37] I have considered the complainant's voluminous representations to the IPC, including those made in response to my preliminary assessment letter at the adjudication stage. In his representations to me, the complainant alleges contraventions of various sections of the *Criminal Code* and other statutes (besides *FIPPA* and *PHIPA*) by various parties, including the hospital, a municipal police force, and private individuals. He explains his reasons for the specific corrections he seeks, including by recounting in detail certain incidents and legal proceedings in which he has been involved. His evidence includes his filings in some of those legal proceedings. Throughout his representations, the complainant makes broader allegations of systemic racism, unfairness, and inequality.

[38] I see no reasonable ground to proceed with a review of the hospital's refusal to correct certain hospital records on the basis the complainant did not meet the duty in section 55(8). The complainant's extensive submissions to the hospital (and provided to the IPC) do not establish a reasonable basis to believe that a particular kind of assessment is provided at the hospital, or that the records are otherwise incomplete or inaccurate within the meaning of section 55(8). I also have insufficient evidence that the complainant provided the hospital with the information necessary to make his requested corrections. Given this, I see no reasonable basis for the complainant's assertion that the duty at section 55(8) is established in these circumstances, and I decline to conduct a review of his complaint based on this assertion.

The exception in section 55(9)(b) (good faith professional opinions or observations) applies to the personal health information at issue in the remaining records

[39] The second ground on which the hospital refused the complainant's correction request is the exception at section 55(9)(b) of *PHIPA* to the duty to correct.

[40] The IPC has recognized that the purpose of the section 55(9)(b) exception 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

[41] Where a "professional opinion or observation" is involved, section 55(8) does not give an individual the right to request a correction that effectively 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; it cannot be a substitution of opinion, such as the complainant's view of a medical condition or diagnosis.⁷

[42] Where a 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, 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.

[43] In summary, section 55(9)(b) involves a two-part analysis. The first question is whether the personal health information at issue is a "professional opinion or observation." The second question is whether the "professional opinion or observation" was made "in good faith." I find that both parts of the test are met in this case.

[44] The records at issue under this heading consist of progress notes, exit notes, and similar records arising from the complainant's interactions with the hospital's Mobile Crisis Team (MCT). The statements at issue in these records contain assessments made by members of the MCT in the course of providing health care to the complainant. These assessments concern the complainant's psychiatric state, and the role that the MCT could play in his care. I find these statements qualify as "professional opinions" or "professional observations" within the meaning of section 55(9)(b).

[45] The second part of the test requires consideration of any evidence that the professional opinions or observations were not made in good faith. I have considered the complainant's detailed submissions alleging bad faith on the part of the hospital. These include claims that the hospital's failure to bring "rebuttal evidence" for each of the statements at issue in the records is evidence of bad faith. I understand the complainant to be challenging the accuracy of the statements he seeks to have corrected. As noted above, however, the section 55(9)(b) exception can apply to

⁶ See for example Orders H2004-004, H2005-006 and H2005-007 of the Information and Privacy Commissioner of Alberta, cited in PHIPA Decision 36.

⁷ PHIPA Decision 36.

information, whether or not it is accurate, provided the professional opinion or observation in question was made in good faith. Even if the complainant had provided evidence of the inaccuracy of the statements (which he has not), this alone would not establish bad faith for the purposes of the section 55(9)(b) exception.

[46] More generally, the complainant ascribes bad motives and improper conduct to various individuals with whom he has interacted at the hospital. I find these allegations to be unsupported by the evidence, and an insufficient basis to establish bad faith for the purposes of section 55(9)(b). As one example, the complainant claims that the hospital's refusal to circulate his statement of disagreement demonstrates bad faith on the part of the hospital. However, the hospital's compliance with its obligations under sections 55(11) to (13) of *PHIPA* (which issue I will address under the next heading) has no relevance to the question of whether the professional opinions or observations contained in the records were made in "good faith" at the relevant time. The complainant has provided insufficient evidence to displace the assumption of good faith in the circumstances.

[47] I conclude there are no reasonable grounds to review the complaint about the hospital's reliance on the section 55(9)(b) exception in these circumstances.

The hospital has complied with its obligations under sections 55(11) to (13) of PHIPA

[48] Under this heading, I will consider the complaint that the hospital failed to circulate the complainant's statement of disagreement to the nine individuals and groups (for example, "leaders in the Mental Health Department") that he identified.

[49] As noted above, sections 55(11) to (13) of *PHIPA* establish a duty in some circumstances on a custodian who has refused a correction request in respect of personal health information "to make all reasonable efforts to disclose the statement of disagreement" to "the persons to whom the custodian has disclosed" that personal health information.

[50] The hospital refuses to provide the complainant's statement of disagreement to these nine individuals and groups because it denies that it ever "disclosed" the records at issue to these individuals and groups. Instead, the hospital states that some (but not all) of these individuals "used" the records within the meaning of that term in *PHIPA*.

[51] The terms "use" and "disclose" are defined at section 2 of *PHIPA* as follows:

"disclose", in relation to personal health information in the custody or under the control of a health information custodian or a person, means to make the information available or to release it to another health information custodian or to another person, but does not include to use the information, and "disclosure" has a corresponding meaning;

"use", in relation to personal health information in the custody or under the control of a health information custodian or a person, means to view, handle or otherwise deal with the information, subject to subsection 6 (1), but does not include to disclose the information, and "use", as a noun, has a corresponding meaning.

[52] Section 6(1), which is cited in the definition of "use," states:

For the purposes of this Act, the providing of personal health information between a health information custodian and an agent of the custodian is a use by the custodian, and not a disclosure by the person providing the information or a collection by the person to whom the information is provided.

[53] The term "agent" (which appears in section 6(1), above) is defined at section 2 of *PHIPA* as follows:

"agent", in relation to a health information custodian, means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent's own purposes, whether or not the agent has the authority to bind the custodian, whether or not the agent is employed by the custodian and whether or not the agent is being remunerated[.]

[54] I understand the hospital to be saying that it did not "disclose" the records at issue to the nine individuals and groups the complainant identified because:

1. Not all nine individuals or groups accessed the records; and
2. Any individuals who accessed the records are "agents" of the hospital within the meaning of *PHIPA*, so that their accesses to the records are "uses" of those records, rather than "disclosures" of the records, within the meaning of those terms in *PHIPA*.

[55] As a result, the hospital says, the duty to disclose the statement of disagreement does not arise in relation to the nine individuals and groups the complainant identified.

[56] Based on my understanding of the facts, I shared with the complainant my preliminary view that the hospital appropriately determined that the obligation in *PHIPA* to disclose a statement of disagreement does not arise in the circumstances. It was thus my preliminary view that there are no reasonable grounds to proceed to a review on this aspect of the complaint.

[57] I have summarized the complainant's responding representations above. To the extent they address this particular issue, I understand the complainant to be saying

that the circulation of his statement of disagreement to the named hospital individuals and groups will assist him in addressing some serious and damaging consequences arising from misinformation they received about him. Among other things, he says that correcting their misapprehensions about him will assist him in obtaining necessary health care. As noted above, he also asserts that the hospital's refusal to circulate his statement of disagreement is evidence of bad faith.

[58] I maintain my view that the hospital complied with its obligations under *PHIPA* with respect to the statement of disagreement. I agree with the hospital that any accesses to the records at issue by agents of the hospital qualify as uses of personal health information, pursuant to section 6(1) of *PHIPA*, and are not disclosures of his personal health information by the hospital to those individuals or groups. As a result, the obligation in *PHIPA* to disclose the statement of disagreement does not arise. In these circumstances, I see no reasonable ground to proceed with a review of the complaint relating to these matters.

The Notice of Constitutional Question does not raise reasonable grounds to establish a breach of the complainant's Charter rights, and was served outside the time limits established by the IPC for raising a constitutional question

[59] Lastly, I will address the complainant's Notice of Constitutional Question, which he served on the IPC after the close of the mediation stage of the IPC process.

[60] As an administrative tribunal with the jurisdiction to decide questions of law, the IPC has the authority to decide constitutional issues, including those arising under the *Charter*.⁸

[61] Section 30 of the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* (the *PHIPA* Code) addresses constitutional questions raised by a party to a complaint. Section 30.01 of the *PHIPA* Code defines "constitutional question" as follows:

30. In this section, "constitutional question" means that:

⁸ See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII), in which the court stated that administrative tribunals that have jurisdiction to decide questions of law arising under a legislative provision are presumed to have jurisdiction to decide the constitutional validity of that provision, unless there is evidence the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law (at para 3). The IPC's powers under *PHIPA*, *FIPPA* and the *Municipal Freedom of Information and Protection of Privacy Act* include the power to decide questions of law, and there is no evidence the legislature clearly intended to exclude from the scope of these powers the consideration of *Charter* issues. The IPC has addressed constitutional issues in a number of previous orders issued under the public sector legislation: see, among others, Orders PO-3686, MO-3314, and PO-4065.

a) the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act, or of a rule of common law is in question; or

b) a remedy is claimed under section 24 (1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

[62] In the Notice of Constitutional Question the complainant served on the IPC, he identifies the constitutional issues as follows (reproduced verbatim):

The [complainant] Intends To Question [the hospital's] Interpretation Of PHIPA 55(11c) "Disclosed ... To Have An Effect" Re Correction Or Statement Of Disagreement As Excluding 9 Persons That 55(1) "Uses Or Has Used" The False Information And PHIPA 57(2c) Mediation Privilege As Having Jurisdiction To Violate 219 Criminal Code, S7 Charter Rights Against Attempted Manslaughter Lies To Cause Death Or Prison Or Mental Institution Or Homelessness.

[63] In this 25-page document, I understand the complainant to be raising the following issues, among others:

- The hospital's refusal to make his requested corrections to the records.
- The hospital's refusal to disclose his statement of disagreement to the nine individuals and groups he identified in his correspondence to the hospital.
- The hospital's interpretation of the term "disclose" (in sections 55(10)(c) and 55(11)(c) of *PHIPA*), which he characterizes as overly narrow.
- The hospital's interpretation of the term "concise" in deciding that his original 49-page document is not a "concise" statement of disagreement (within the meaning of section 55(11)(a) of *PHIPA*). The complainant characterizes the hospital's interpretation as unconstitutionally arbitrary, narrow, and grossly disproportionate.
- The hospital's refusal to resolve "any ambiguity regarding the interpretation of" *PHIPA* by "deciding the matter under section 47" of *FIPPA*. The complainant asserts that *FIPPA* is the proper statute in the case of any ambiguity because (he says) the hospital's original release of records to him was made under *FIPPA*.
- The hospital's issuing of decisions to him at the mediation stage. The complainant asserts that this leads to a waiver of mediation privilege.

[64] More generally, the complainant asserts that the hospital's actions breached his rights under the *Canadian Charter of Rights and Freedoms*, including his rights under

sections 7 (life, liberty, and security of the person), 8 (security against unreasonable search or seizure), 9 (right not to be arbitrarily detained or imprisoned), 10 (rights on arrest or detention), 12 (right not to be subjected to any cruel and unusual treatment or punishment), and 15 (equality before and under the law and equal protection and benefit of the law) of the *Charter*. He also cites a number of sections of the *Criminal Code* that he asserts have been violated.

[65] In my correspondence to the complainant, I shared with him my preliminary view that the claims set out in the Notice of Constitutional Question do not establish a breach of his *Charter* rights.

[66] In particular, for the reasons given above, it was my preliminary view that the hospital responded adequately to his complaints relating to his requests for correction and circulation of a statement of disagreement. I explained that I see no reasonable basis to review his claims that the hospital's actions in this regard breached his *Charter* rights.

[67] I also stated that I see no reasonable basis to review the assertion that the hospital interpreted *PHIPA* in manner that is unconstitutional or that otherwise resulted in a breach of the complainant's *Charter* rights. I said that I found the other claims raised in the Notice of Constitutional Question, including the claims about a waiver of privilege at the mediation stage, to be unclear and unsupported by evidence.

[68] Additionally, I shared my preliminary view that the time limits for raising a constitutional question in this matter had passed, and that I ought not to exercise my discretion to consider the claims raised in the Notice of Constitutional Question.⁹

[69] I have summarized the complainant's responding representations above. I understand the complainant's arguments on this particular issue to be as follows:

⁹ Section 30.02 of the *PHIPA* Code sets out the procedure for a party to raise a constitutional question in the context of a *PHIPA* matter before the IPC. It requires that a party raising a constitutional question notify the IPC and the Attorneys-General of Canada and Ontario of the question "as soon as the circumstances requiring this notice become known."

The IPC's *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *FIPPA* Code) and *Practice Direction 9* under the *FIPPA* Code also address the raising of a constitutional question in the context of an appeal under *FIPPA* or its municipal counterpart. Section 3 of *Practice Direction 9* provides that an appellant will be permitted to raise a constitutional question "at first instance or an additional constitutional question only within a 35-day period after giving the IPC notice of his or her appeal." Section 4 gives the adjudicator discretion not to consider a constitutional question raised after the applicable time limit.

I shared with the complainant my preliminary view that his Notice of Constitutional Question (served over two years after he submitted his complaint to the IPC) was filed well after the time limits contemplated by section 30.02 of the *PHIPA* Code and/or the *FIPPA* Code and *Practice Direction 9* under the *FIPPA* Code, and that there are no circumstances warranting an extension of the time limits in this case.

- Section 47 of *FIPPA* (which sets out the rights of access and correction in respect of an individual's personal information in the custody or control of a *FIPPA* institution) does not require a constitutional question.
- The meaning of "as soon as" (in the phrase "as soon as the circumstances requiring this notice become known" in the *PHIPA* Code) is not defined. It is consistent with the *FIPPA* Code to interpret this phrase to mean 32 days.
- The Notice of Constitutional Question was filed 32 days after the close of mediation. It was only after the close of mediation that certain statements and decisions of the hospital became "final decisions" that could be subject to a constitutional question.
- There is no pressing and substantial objective to justify defrauding the complainant's section 7 *Charter* rights to life, health, safety, and security, and the hospital's actions did not constitute a minimal impairment of these *Charter* rights.

[70] I have considered the complainant's submissions on this issue. Even I were to accept the claim that the Notice of Constitutional Question was filed in time, I maintain my view that the Notice does not raise reasonable grounds to establish a breach of the complainant's *Charter* rights. The additional representations filed by the complainant on this issue do not assist in this regard.

[71] On this basis, I exercise my discretion not to review the constitutional claims raised by the complainant in his Notice of Constitutional Question.

NO REVIEW:

For the foregoing reasons, no review of this matter will be conducted under Part VI of *PHIPA*.

Original signed by: _____
Jenny Ryu
Adjudicator

_____ June 23, 2023