

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 219

Complaint HA21-00169

Halton Healthcare Services

August 17, 2023

Summary: The complainant made a request to Halton Healthcare Services (the custodian) under *PHIPA* for records containing her personal health information, including images taken from endoscopic ultrasound procedures. The complainant filed a complaint to the IPC claiming that additional ultrasound images should exist. In this decision, the adjudicator finds that the custodian conducted a reasonable search and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A (as amended), 53, and 54.

Decisions Considered: PHIPA Decision 17.

Cases Considered: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, [2011] 3 S.C.R. 708.

BACKGROUND:

[1] This decision resolves a complaint from a patient that Halton Healthcare Services (custodian or HHS) failed to conduct a reasonable search for endoscopic ultrasound images (images) relating to three endoscopic ultrasound procedures (procedures) that took place at the custodian's facility.

[2] The complainant submitted an access request under the *Personal Health*

Information Protection Act (the *Act*) to the custodian. The request was for the complainant's medical chart and images taken during procedures that occurred in March 2019, November 2020 and September 2021.

[3] The custodian issued an access decision to the complainant granting her access to her medical chart, including the operative records prepared by the treating physician for the March 2019, November 2020 and September 2021 procedures. The custodian also granted the complainant access to the image from the procedure performed on September 2021.

[4] The complainant filed a complaint with the Information and Privacy Commissioner of Ontario (IPC) claiming that images should exist for the March 2019 and November 2020 procedures. The complainant also said that the September 2021 image provided to her was unreadable. A mediator was assigned to the file to explore settlement with the parties.

[5] During mediation, the custodian conducted further searches and located an image from the March 2019 procedure. The custodian also sent the complainant another copy of the September 2021 image.

[6] The complainant confirmed her receipt of the images but continued to take the position that additional or better-quality records exist. The complainant says that the copies of the two images provided to her continue to be unreadable.

[7] No further mediation was possible and the file was transferred to the adjudication stage of the review process. I decided to commence a review and invited the written representations of the custodian. The custodian's representations were shared with the complainant who was given an opportunity to respond, which she did. The custodian provided reply representations, which again were shared with the complainant who submitted sur-reply representations in response.¹

[8] Throughout her representations, the complainant alleges that the custodian has "intentionally" withheld better quality images of the ultrasound images. In the alternative, the complainant says that the custodian "intentionally destroyed" the original copies of the ultrasound images in question. The complainant provided background information and several attachments including an audio recording in support of this argument. The complainant says that she has been treated "inappropriately" by hospital staff and that she has filed a complaint against the treating

¹ The parties did not object to portions of their representations being exchanged with one another. Accordingly, none of the confidentiality criteria set out in the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* was applied.

physician with his regulator.²

[9] I note that in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,³ the Supreme Court of Canada reaffirmed its finding in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*⁴ that an administrative decision maker is not required to explicitly address every argument raised by the parties. Moreover, the fact that a decision maker's reasons do not address all arguments will not, on its own, impugn the validity of those reasons or the result.⁵

[10] I wrote this decision with this principle in mind. In the course of my review, I have considered all of the information that has been put before me. However, for the sake of succinctness, I only summarize the points that I find to be directly related to the issue of whether the custodian conducted a reasonable search.

[11] For the reasons below, I find that the custodian conducted a reasonable search for the requested ultrasound images and dismiss the complaint.

RECORDS:

[12] Images of endoscopic ultrasound procedures the complainant says took place March 2019, November 2020 and September 2021.

DISCUSSION:

[13] The sole issue in this complaint is whether the custodian conducted a reasonable search in response to the complainant's request for endoscopic ultrasound images.

[14] When a requester claims that additional records exist beyond those identified by a 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 *PHIPA*. These sections address the written request that an individual may make to a custodian to exercise a right of access to records, and the obligations on the custodian in responding to the access request. These sections of *PHIPA* require the custodian to make reasonable efforts to identify and to locate requested records. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the custodian's decision. If I am not satisfied, I may order further searches.

² The complainant says that the custodian "forged" her signature on the consent to treatment form and "altered [her] medical records to cover up that [she] woke up during the procedure." However, she confirmed says that she filed a separate complaint with the IPC to address these concerns.

³ 2019 SCC 65, at paragraphs 128 and 301 [*Vavilov*].

⁴ 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].

⁵ *Vavilov*, *supra* note 4, at paragraph 91; *Newfoundland Nurses*, *ibid*, at paragraph 16.

[15] In PHIPA Decisions 17 and later decisions,⁶ the IPC found the principles outlined in IPC orders that address the issue of reasonable search under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart are applicable to *PHIPA*. These decisions establish that *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.⁷ To be responsive, a record must be “reasonably related” to the request.

[16] Although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁸

The parties’ representations

[17] In response to her access request for the ultrasound images the custodian says it provided the complainant copies of the March 2019 and September 2021 images and that no image exists for the November 2020 procedure.

[18] The complainant says that the March 2019 and September 2021 images are not readable and that better-quality records should exist. The complainant also does not accept the custodian’s assertion that no images exist for November 2020. The complainant says that she has a reasonable basis for concluding that better quality or original copies exist.

[19] The custodian says it conducted a reasonable search for responsive records. In support of its position, the custodian set out the following arguments in its representations and the three affidavits which accompanied its representations:

- Upon the custodian’s receipt of the complainant’s access request, its Release of Information Specialist (specialist) searched the patient’s health records in the electronic medical records (EMR) and any paper-based records relating to the complainant with the result of one image (September 2021) being located and provided to the complainant. The custodian says that the specialist also consulted with its Gastroenterology Department and Diagnostic Imaging Department and confirmed that no additional records were located in these departments.
- The custodian says that its Manager of Health Records (manager) got involved after the complainant questioned the initial search results. The manager coordinated a further search and contacted the Diagnostic Imaging Department

⁶ See for example PHIPA Decisions 18, 43, 48, 55, 57, 61, 65, 73, 89, 126 and 217.

⁷ Orders P-624 and PO-2559; PHIPA Decisions 17 and 18.

⁸ Order MO-2246; PHIPA Decisions 17 and 18.

and GI Surgical Program (surgical program). The manager says that her investigations confirmed that:

- Neither the Diagnostic Imaging Department or GI Surgical Program retain images taken during endoscopic ultrasound procedures, and
- images are not always taken by physicians during the procedures.
- The custodian also says that its Information Access and Privacy Coordinator⁹ (coordinator) also contacted the Clinical Resource Nurse and requested “a thorough search be conducted for images in the GI application.” The nurse, in turn, contacted the manufacturer of the endoscopic ultrasound machine to determine if images from prior examinations are stored within the unit. The nurse subsequently received confirmation that no images were stored on the unit.
- The coordinator also says that she conducted “an additional search” of the complainant’s patient records, including the electronic health records, any paper-based records and any records stored on microfilm or microfiche” which resulted in the March 2019 image being located in the custodian’s microfilm record holdings.
- The coordinator says that she also contacted the treating physician who confirmed that “he does not take or print images during every EUS procedure.” The coordinator also said that the physician told her that “if any images are printed by him, they are stapled to the outpatient record and sent to Health Records for scanning into the patient’s electronic medical record.

[20] The custodian also says that it took “reasonable steps” to “improve the print quality of the images in an effort to satisfy the complainant’s request for clearer images.”¹⁰ The custodian says that it also had the images provided to the complainant reviewed by the Clinical Resource Nurse who indicated that “they were of sufficient clarity to permit a knowledgeable individual to review them.”

[21] Finally, the custodian responds that “it is not possible that [the requested records] were destroyed.” The custodian says that its retention practices require it to retain endoscopic ultrasound images, if taken during a procedure, for a period of ten years “after the death of the last visit of the out-patient to whom the record relates.”

[22] The complainant says that the images provided to her “are scanned/microfilm copies where the image quality is degraded to the point where the images can’t be

⁹ This individual holds a joint role with the custodian and also holds the position of Release of Information Specialist.

¹⁰ The coordinator says that she reprinted the September 2021 using “a higher resolution printer” but that March 2019 image “was poor because they were printed from the microfilm.”

used to inform my care since they are not of diagnostic quality.” The complainant explains that the images provided to her were reviewed by a specialist who told her that the images were “useless” and that she would need to repeat the procedures if better quality images were not available.¹¹

[23] The complainant says that the custodian should have the original copies of the images in its record holdings. In support of her position, the complainant says that the custodian’s representations concede that “the original printed image is stapled to my outpatient record.” It appears that the complainant takes the position that the custodian should have, in its record holdings, two sets of images for the procedures performed March 2019 and September 2021. The original image the complainant says must have been printed and stapled to her paper record and the electronic copy scanned in her electronic record.

[24] In the alternative, the complainant submits that the custodian should be required to provide her an explanation if the original images were destroyed. The complainant also asserts that she should be allowed to view the images at the custodian’s facility.

[25] With respect to the November 2020 image, which the custodian says does not exist, the complainant says that the custodian should be required to seek the treating physician’s confirmation as to whether an image was taken for the November 2020 image. The complainant says that as a result of the procedure that took place in November 2020 a more invasive follow-up procedure occurred in December 2020. The complainant says that “it doesn’t make sense why there is images for one but not the other.” The complainant also questions the custodian’s search results given that the March 2019 image was not initially located and only located on microfilm after she filed a complaint with the IPC.

[26] Finally, the complainant argues that the custodian has “inconsistent processes for handling endoscopic ultrasound images” and suggests that its processes are in contravention with its legislative obligations. The complainant takes the position that “[i]f the equipment being used has the ability to produce images, those images should be printed/saved.” The complainant cites section 12(1) of *PHIPA* and argues that the custodian “is in breach ... if it failed to protect the images stored on the endoscopic ultrasound [machine] from loss by not printing images.”

[27] In its reply representations, the custodian says that the treating physician “confirmed that images are not always taken or printed. If they are printed, it is his practice to have them stapled to the outpatient record and forwarded to the Health Records for scanning into the patient’s health record.”

¹¹ One of the documents attached to the complainant’s representations is an estimate from a clinic based in the United States which outlines the estimated international self-pay costs for another procedure and imaging. The document appears to have been prepared by the clinic’s financial/patient services staff and does not refer to a specialist’s opinion that the images are “useless.”

[28] The custodian also says in its reply representations that its health records department has been closed to the public since the declaration of COVID-19. Section 54(1)(a) of *PHIPA* specifies that at the request of an individual, the custodian is to make the records available to the individual for examination. The custodian provided further information in its reply representations about its retention policies and states:

[H]ealth records generated in clinical areas at Halton Healthcare are sent to our Health Records department for digitizing. Once necessary work effort related to the information received from the clinical areas is completed, the original paper records are securely disposed of. This includes any endoscopic ultrasound images that would have been taken during the complainant's procedures.

Prior to November 2021, inpatient visits were kept on paper and later microfilmed. The March 2019 procedure was part of an inpatient visit and was therefore microfilmed. Outpatient clinics, emergency department visits and day surgery charts have been scanned by Health Records into the electronic medical records system since 2015. As of November 2021, all charts, including records from inpatient visits, are scanned into the electronic medical records system.

As such, the only responsive records available are the records in the electronic medical records system or on microfilm, copies of which have been printed and provided to the complainant.

[29] In response, the complainant made several arguments in support of her position that the custodian has a legislative obligation to print and store ultrasound images for every procedure performed at its facility. The complainant's sur-reply representations also outline the steps she believes the custodian should have taken to respond to her request, such as undertaking further inquiries from the treating physician, clinical nurse and the manufacturer of the ultrasound machine.

Decision and analysis

Insufficient basis to conclude that additional, or original printed copies of the records should exist

[30] As stated above, the complainant must establish a reasonable basis for concluding that additional records exist for a further search to be ordered.

[31] The complainant says that she has a reasonable basis for believing that additional, including original copies, of images relating to the three procedures should exist. The complainant says that the treating physician told her that the images in question exist and references a letter¹² the physician sent her in support of her

¹² Dated, October 29, 2021.

argument. I have reviewed this letter and am not satisfied that its contents confirm that the physician told the complainant that the requested images exist. Instead, the physician told the complainant that he does not keep copies of ultrasound images in his electronic record holdings and that the custodian "has these in your chart". In my view, this explanation is consistent with the information the custodian provided about the physician's practice of stapling images, if printed, to the patient's file. The complainant also says that the custodian's Diagnostic Imaging department told her "there would have to be images on file at the hospital" for the three procedures in question. In my view, this assertion on its own is not sufficient to establish a reasonable basis that additional images exist. Similarly, the fact that the custodian located an additional image as the result of a further search does not establish a reasonable basis that additional images exist.

[32] The complainant alleges that the custodian has an obligation under *PHIPA* to print and save any images related to her ultrasound procedures. The complainant also argues that images should be routinely printed if the equipment being used has the ability to store images and that the custodian has breached its obligations under the *PHIPA* if it failed to do this.

[33] Section 12(1), along with section 13(1) set out health information custodians' obligations under *PHIPA* regarding the security and handling of patient's personal health information (PHI). These sections state, in part:

12 (1) A health information custodian shall take steps that are reasonable in the circumstances to ensure that personal health information in the custodian's custody or control is protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the information are protected against unauthorized copying, modification or disposal.

13 (1) A health information custodian shall ensure that the records of personal health information that it has in its custody or under its control are retained, transferred and disposed of in a secure manner and in accordance with the prescribed requirements, if any.

[34] In my view, the custodian provided a reasonable explanation as to why images are not taken and printed every time a procedure occurs. In addition, the custodian confirmed with the manufacturer that the machine itself does not store images. Though I appreciate that the complainant may have had an expectation going into each procedure that an image would be available for her viewing at a later date, I am not satisfied that the custodian's failure to locate additional images demonstrates that a breach of its obligations under *PHIPA* regarding the security and handling of the complainant's PHI occurred. Similarly, I am not satisfied that the complainant's arguments about the custodian's obligations under *PHIPA* establishes a reasonable basis to conclude that the additional images, including original copies should exist. I am also

not persuaded by the complainant's arguments that the custodian is in breach of its obligations under *PHIPA* by not making better-quality copies of the images available. I know of no requirement under *PHIPA* or other legislation which requires the custodian to produce a better-quality of a record than the quality of the record in its record-holdings. In addition, it is up to the complainant to make a request directly to the custodian if she wishes to inspect any record of her PHI in its record-holdings.

[35] Finally, the complainant's argument that "it doesn't make sense why there is images for one but not the other" suggests that by not locating the November 2020 image, the custodian failed to retain the complainant's PHI relating to the endoscopic ultrasound procedures performed. This is not the case. Though the custodian may not have located images related to all of the procedures in question, the complainant was provided with copies of the contemporaneous operative records prepared by the treating physician for the March 2019, November 2020 and September 2021 procedures. It is these records which record the physician's measurements and observations taken during the procedures.

The custodian's search efforts were reasonable

[36] As stated above, *PHIPA* does not require the custodian to prove with absolute certainty that further records do not exist. Instead, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

[37] The complainant questions the custodian's search efforts given that the March 2019 image was not initially located and only located after she filed a complaint with the IPC. The complainant takes the position that the custodian could have done more to locate responsive records and says that it should be required to consult additional individuals including the treating physician.

[38] However, having regard to the evidence presented I am satisfied that the custodian provided a detailed explanation in its representations and affidavits of the efforts it made to identify and locate the requested records. The custodian's combined searches located images for two procedures. In my view, the custodian provided a reasonable explanation of why it concluded that no image existed for the November 2020 procedure. The custodian's submissions also identify the individuals who conducted and coordinated the searches in addition to identifying other staff and departments consulted. The custodian also provided information about its retention policy and provided an explanation regarding its conclusion that any ultrasound images in its record-holdings would not have been destroyed. In addition, the custodian provided a written explanation of all steps taken in response to the request, including details of its multiple searches.

[39] Having regard to the above, I am satisfied that the custodian made reasonable efforts to locate the requested images.

Summary

[40] For the reasons stated above, I find that the complainant has failed to establish a reasonable basis to conclude that additional or original copies of the requested images should exist. In addition, I am satisfied that the custodian's search for images in question was reasonable.

ORDER:

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

Original signed by: _____
Jennifer James
Adjudicator

_____ August 17, 2023