

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 227

Complaint HA22-00057

Central Community Health Centre

September 28, 2023

Summary: The complainant sought a copy of specific letter sent from his former doctor upon the transfer of his care to the custodian. The custodian conducted multiple searches and did not locate the specified letter. The complainant was not satisfied with the custodian's response and filed a complaint to the IPC challenging the reasonableness of the custodian's searches. In this decision, the adjudicator finds the custodian's searches reasonable and dismisses the complaint.

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

BACKGROUND:

[1] This decision determines the issue of reasonable search as part of a health information custodian's response to a request for records received under the *Personal Health Information Protection Act (PHIPA)*.

[2] By way of background, the requester's health care was transferred to a family doctor at the Central Community Health Centre (the custodian) in 2016. The requester believes that his former doctor wrote a letter to his new doctor about his pain medication, when transferring his care. The requester is seeking a copy of this letter and submitted a request to the custodian under *PHIPA* "for any and all communication involving [the requester] with [the custodian]."

[3] The custodian reviewed the requester's medical records and was not able to

locate the letter that the requester was seeking. The custodian wrote to the requester stating that the letter had not been located and that the only correspondence between the doctors concerned the transfer of the requester's medical records upon the transfer of care.

[4] The requester, now complainant, filed a complaint with the Information and Privacy Commissioner of Ontario (IPC). The complainant stated that he believed that the letter existed because the new doctor had read the letter to him during a consultation.

[5] During the mediation stage of the complaint process, the custodian set out its position in a letter that included the steps taken to search for the letter by its Privacy Officer and the Director of Primary Care and their belief that the letter did not exist.

[6] The complainant was provided with a copy of the custodian's letter and attachments but remains dissatisfied with the custodian's response to his request.

[7] As a mediated resolution was not achieved, the file was transferred to the adjudication stage of the complaint process for determination of the sole issue of the reasonableness of the custodian's search.

[8] I am the adjudicator assigned to this complaint and I decided to conduct a review. I invited the parties to submit representations addressing the facts and issues set out in a Notice of Review. The custodian submitted two affidavits from the individuals responsible for responding to the complainant's request. These affidavits and the exhibits were shared with the complainant. The complainant commented on the custodian's affidavits in email correspondence that I have accepted as his representations. The complainant also provided me with a copy of a decision from the College of Physicians and Surgeons of Ontario (CPSO) that was issued following a complaint that he made about the care provided by the new doctor.

[9] I invited the custodian to submit representations responding to the complainant's position and a summary of the relevant portion of the CPSO decision. The CPSO decision was not shared with the custodian due to confidentiality concerns.

[10] For the reasons that follow, I find that the custodian conducted a reasonable search and dismiss the complaint.

RECORD:

[11] A letter from the complainant's old family doctor to his new family doctor regarding pain medication.

DISCUSSION:

[12] The sole issue in this complaint is whether the custodian conducted a reasonable search for the specific record being sought by the complainant. In complaints where a complainant believes that a record exists and has not been located by a custodian, the issue is whether the custodian conducted a reasonable search in response to the request, as required by sections 53 and 54 of *PHIPA*. These sections provide for the right of an individual to request access to a record of personal health information and for a custodian to conduct a reasonable search for a record in response to a request.

[13] The reasonableness of the custodian's search for the specified letter from the complainant's old family doctor to the new family doctor when his care was transferred, is the sole issue to be decided in this complaint. If I am satisfied that the search carried out by the custodian was reasonable in the circumstances, I will uphold the custodian's decision. If I am not satisfied, I may order further searches.

[14] Previous decisions addressing the issue of reasonable search under *PHIPA* have been guided by the principles established in orders issued under the *Freedom of Information and Protection of Privacy Act* and its municipal equivalent, the *Municipal Freedom of Information and Protection of Privacy Act*.¹

[15] *PHIPA* does not require the custodian to prove with absolute certainty that the record being sought does not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate the responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[16] 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.⁴ 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.⁵

[17] 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.⁶

¹ PHIPA Decisions 17 and 18.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

The custodian's representations and evidence

[18] As noted in the background above, the custodian set out the steps it took in response to the complainant's request in a letter during the mediation stage of the complaint. In its letter, the custodian stated that it does not have custody of the letter that the complainant is seeking. Following receipt of the complainant's request, which was made via a voicemail message, the custodian confirmed the complainant's identity before conducting a search of the complainant's electronic medical records.

[19] The custodian explained that the complainant then requested all letters sent from his former doctor to his new doctor. The custodian located one letter, which related to the transfer of the complainant's medical records. The custodian stated that it offered to provide the complainant with a copy of this correspondence but the complainant did not follow up on this offer.

[20] The custodian stated that its searches had been carried out by its Privacy Officer and the Director of Primary Care. The custodian stated that it does not keep paper records and the electronic medical records had been searched. The custodian also stated that all patient records are located in its electronic medical record holdings and processes are in place to ensure that no patient records are kept separate from its electronic records. The custodian submitted that it is confident that the letter the complainant is seeking does not exist.

[21] During my review, the custodian provided affidavits from its Privacy Officer and the Director of Primary Care, the two individuals who conducted the searches. The Privacy Officer describes their employment experience and the custodian's policy and procedure regarding requests for personal health information.

[22] The Privacy Officer describes the steps they took to verify the complainant's identity and to clarify the nature of the record that they had requested. They explain that after the complainant's care was transferred to the custodian, their electronic chart was also transferred and uploaded to the custodian's electronic medical records system.

[23] The Privacy Officer states that by the time that the complainant's application for access was received, the new doctor was no longer associated with the custodian and was not serving its patients. The Privacy Officer then describes the custodian's electronic only record keeping and the searches of the complainant's chart that included the records transferred from his former family doctor. The Privacy Officer states that the letter that the complainant is seeking was not located in the electronic medical records system.

[24] The complainant's correspondence with the Privacy Officer in which he is notified of the results of the searches and requests "any and all communication" involving himself between the two doctors, is appended to the affidavit. Following receipt of this further request, the Privacy Officer describes how, together with the Director of Primary

Care, they conducted searches through the entirety of the complainant's electronic medical records for the letter the complainant was seeking and any other communication involving the complainant.

[25] The Privacy Officer states that the only correspondence between the doctors that was located was a letter requesting the transfer of the complainant's previous medical records that the complainant signed in 2016 and the cover letter from the previous doctor providing the medical records.

[26] The Privacy Officer concludes that the custodian does not have a letter about pain medication from the complainant's former physician and speculates about its existence. The custodian's Information Privacy policies and procedures in relation to personal health information are also appended to the affidavit, including the Policy and Procedure for Handling Applications for Access to Records and the Record Retention and Destruction Policy and Procedure

[27] The custodian also provided an affidavit from the Director of Primary Care who describes their experience working for the custodian and the searches they carried out. The Director of Primary Care explains that all medical records are maintained electronically and that no patient records are kept separate to the electronic records. They confirm that the record that the complainant is seeking was not within the custodian's record holdings and the only communications located involving the complainant were the two letters identified in the Privacy Officer's affidavit. The Director of Primary Care states that they are confident that the letter the complainant is seeking does not exist in the custodian's record holdings.

The complainant's representations

[28] The complainant's representations focus on a decision from the CPSO following a complaint he made regarding the care provided by his family doctor, the recipient of the letter he is seeking. In his complaint to the CPSO, the complainant expresses concern that the new doctor relied upon his former doctor's directions about pain medication that were set out in a letter. This is the letter that the complainant is seeking to access. The complainant maintains that the contents of the letter were read out to him in his consultation with the new doctor when he transferred his care to the custodian.

[29] The complainant states that the new doctor read the letter to him and that he believes the CPSO has seen the letter. The complainant submits that this casts doubt on the custodian's conclusion that the letter has never existed. As I have noted, the complainant provided me with a copy of the CPSO decision.

[30] The complainant does not directly address the reasonableness of the custodian's searches in response to his request but makes submissions about his concerns surrounding the care that he has received as a result of the contents of the letter.

The custodian's reply representations

[31] I provided the custodian with an opportunity to respond to the complainant's assertion that the CPSO had seen the letter that is the subject of his complaint. In response, the custodian states that as part of the CPSO's investigation into the complaint, it provided the CPSO with a copy of the complainant's clinical notes from his medical care. The custodian states that since learning of the complainant's assertion, it reviewed the complainant's medical records again and did not locate the letter that the complainant is seeking.

[32] The custodian reiterates that there is no correspondence in the complainant's medical records from the complainant's former doctor about pain medication. The only communications in the complainant's records are the letters described in the affidavits. The custodian maintains that the letter the complainant is seeking is not within the complainant's records.

Analysis and findings

[33] For the reasons that follow, I am satisfied that the custodian has expended reasonable efforts to locate the letter in response to the complainant's request.

[34] From my review of the complainant's representations and the decision of the CPSO, I accept that there is a reasonable basis for the complainant's belief that a letter was sent from his former doctor to his new doctor regarding his care. In particular, I acknowledge the complainant's recollection of the new doctor reading to him the contents of a letter from his former family doctor during a clinical consultation after the transfer of his care.

[35] In addition, I note that the new doctor refers to having taken a letter "into consideration" as part of their decision making regarding the complainant's care. This is recorded in the summary of the doctor's response to the complainant's concerns regarding his care within the CPSO decision. The complainant relies upon the CPSO decision as evidence that the letter he is seeking exists and to undermine the custodian's assertion in its initial representations that the letter has never existed. The complainant submits that the contents of the CPSO decision lead him to believe that the CPSO has seen the letter.

[36] The issue before me in this complaint is the reasonableness of the custodian's search of records within its custody or control in response to the complainant's request to access the specific letter sent to his new doctor. It is not necessary for me to make a finding about the existence of that letter. *PHIPA* does not require a custodian to prove with absolute certainty that the record being sought does not exist.⁷

[37] As I am satisfied that there is a reasonable basis for the complainant's belief that

⁷ PHIPA Decision17.

the letter he is seeking exists, I do not agree with the custodian's initial submission that the letter has never existed. The custodian reaches this conclusion as the only explanation for not being able to locate the letter. In my view, this explanation is inconsistent with the complainant's recollection and the reference to a letter in the CPSO decision. However, I accept the custodian's subsequent position that a letter regarding pain medication is not within its record holdings.

[38] Notwithstanding that I find there is a reasonable basis for the complainant's belief that the letter he is seeking exists, on the totality of the evidence before me, I find that the custodian conducted reasonable searches of the records within its custody or control to locate the letter. In my view, the absence of an explanation for not being able to locate the letter does not render the custodian's searches unreasonable or its response to the complainant's request otherwise inadequate.

[39] I have reviewed the custodian's Record Retention and Destruction Policy and Procedure, which provides for records of personal health information to be retained for 10 years from the date of the last entry in the record. In my view, it is unlikely that the letter the complainant is seeking has been destroyed. The transfer of the complainant's care took place in 2016, which is within the record retention period.

[40] From my review of the custodian's affidavits from its Privacy Officer and the Director of Primary Care, I am satisfied that the searches conducted in response to the complainant's request have been carried out by individuals who are experienced employees knowledgeable in the subject matter of the request. In addition, I am satisfied that the custodian has provided evidence of the types of records it maintains (electronic records only) and that these have been searched multiple times for a letter from the complainant's former doctor regarding pain medication. The fact that the custodian's searches have located other correspondence from the complainant's former doctor assures me that the searches have been done in a manner that was reasonable and would have located the letter if it was within the custodian's record holdings.

[41] In summary, I find that the custodian has conducted a reasonable search in response to the complainant's request, as required by *PHIPA*.

ORDER:

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

Original Signed By: _____
Katherine Ball
Adjudicator

September 28, 2023