

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## PHIPA DECISION 237

Complaint HA22-00026

Ottawa Fertility Clinic

February 9, 2024

**Summary:** In PHIPA Decision 217, the adjudicator found the clinic had failed to demonstrate reasonable efforts to identify and locate records responsive to a request for the clinic's complete paperwork relating to vials of donor sperm sent to the clinic for the purpose of fertility treatment. The adjudicator ordered the clinic to conduct a further search. In this final decision, the adjudicator finds the clinic has now complied with its obligations under *PHIPA* to conduct a reasonable search. The complaint is dismissed.

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

**Decisions Considered:** PHIPA Decision 217.

### BACKGROUND:

[1] This final decision follows PHIPA Decision 217, which addressed a complaint filed by a client of the Ottawa Fertility Clinic (the clinic). The complaint arose from the complainant's request to the clinic under the *Personal Health Information Protection Act, 2004 (PHIPA)* for "complete paperwork" regarding five vials of donor sperm she had supplied to the clinic for the purpose of fertility treatment. The records the complainant seeks can generally be described as paperwork confirming the delivery, handling, storage, and preparation of the donor sperm vials. (I set out the full text of the complainant's detailed request further below.)

[2] The complainant was dissatisfied with the clinic's responses to her request and filed the current complaint with the Office of the Information and Privacy Commissioner of Ontario (IPC). Among other bases for her complaint, the complainant believed the clinic had failed to identify and locate all records responsive to her request.

[3] In PHIPA Decision 217, I found that the records sought by the complainant, if they exist, would be records of her personal health information within the meaning of *PHIPA*, and thus subject to the requirements of *PHIPA*. I also found that the clinic had failed to demonstrate reasonable efforts to identify and locate these records, which are reasonably related to her detailed request. Among other reasons, I noted that the complainant had provided evidence of the clinic's obligations under federal regulations to maintain certain documentation about its donor sperm handling activities, giving rise to a reasonable basis to believe additional responsive records may exist. I found the clinic had not adequately addressed this evidence during the review. I therefore ordered the clinic to conduct a further search for responsive records.

[4] Following PHIPA Decision 217, the clinic conducted further searches and provided representations describing its search efforts. The complainant had an opportunity to address the clinic's submissions, which she did. The parties' representations were shared with one another in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act*.

[5] In this final decision, I find the clinic has now satisfied its obligations under *PHIPA* to conduct a reasonable search in response to the complainant's access request. I dismiss the complaint.

## **DISCUSSION:**

### **Did the clinic conduct a reasonable search for records responsive to the complainant's request?**

[6] In PHIPA Decision 217, I ordered the clinic to conduct a further search for records responsive to the complainant's request for "complete paperwork" regarding five vials of donor sperm she provided to the clinic. She specified that the request encompasses records containing the following information about the donor sperm she provided:

1. Shipping documents accompanying the five vials sent by the sperm bank to the clinic, including: proof of delivery documents (indicating date, time, and person who received the package); labelling (including donation code, donor ID code, summary documents, and vial identification codes); documentation related to the contents of the vials; packaging; storage instructions; and handling instructions provided by the sperm bank.

2. Documentation produced by the clinic prior to storage of the five vials in its facilities, including: dates and times of inspection and handling; and reports on inspection of package and of each vial (identification code, specification, assessment of compliance with Health Canada regulations and guidelines, persons responsible for inspection and handling).
3. Details regarding the storage of the five vials at the clinic, including: dates and times the vials were placed in storage; type of storage tank; storage contract identifying the length of storage; identification of the place where the vials are stored; and persons responsible for storage and the storage contract.
4. Documentation related to the one vial that was used, including: date and time when the vial was removed from storage; records on thawing procedure (type of thawing); identification code, specification, safety, viability, and quality assurance; and persons responsible for quality assurance.

[7] I ordered the clinic to provide me with a detailed explanation of its search efforts, and the clinic's decision on access to any additional records it locates as a result of these searches.

[8] In compliance with PHIPA Decision 217, the clinic conducted additional searches. These searches are described in affidavits from its GMP [Good Manufacturing Practices] quality control and research program manager (who also acts as the clinic's privacy officer), and the clinic's assisted reproductive technologies lab director. These employees reported conducting additional searches of clinic and laboratory electronic systems, including shared network drives and electronic medical records systems. As a result of these searches, the clinic identified a number of records, all but one of which it released to the complainant. The clinic withheld one record on the basis the record does not contain the complainant's personal health information.

[9] In response, the complainant asserts that the newly identified records do not respond to her request for records relating, generally, to the delivery, handling, storage, and preparation of the donor sperm she provided to the clinic. She says that while some of the newly identified records contain some of the details she seeks (for example, dates compiled in an Excel spreadsheet, or appearing as "added hand-written notes" on another document), her request is for the "primary/original source records from which the information was derived."

[10] I understand from the complainant's detailed representations that the purpose of her request is to confirm the clinic's receipt, handling, verification, and storage of the donor sperm vials she purchased from another source and had delivered to the clinic. The complainant indicates she has reason to believe there were irregularities and inconsistencies in the clinic's handling of the donor sperm vials, and in the clinic's documentation of these activities. She takes the position that the records identified by the clinic to date are irrelevant and non-responsive to her request, and/or incomplete

and inaccurate. For this reason, she continues to seek the “primary/original source records” documenting the delivery, handling, storage, and preparation of her donor sperm vials— this includes, for instance, any packing slips and instructions that were enclosed in the shipment of vials received by the clinic, which would confirm delivery of the vials to the clinic.

[11] Because it is clear the complainant seeks paper records that accompanied the donor sperm vials, and not electronic records of the type canvassed in the clinic’s searches to date, I asked the clinic to specifically address its search for these types of paper records. I also asked the clinic to explicitly state whether it currently has, or ever had, custody or control of “documents confirming the delivery” of the complainant’s donor sperm to the clinic. The purpose of my questions was to determine whether there could exist responsive paper records in clinic record holdings that had not yet been searched (or electronic copies of such records that had not been located through the clinic’s searches to date). I also asked the clinic to address whether responsive records could once have existed but no longer exist.

[12] The clinic says that while the private shipping company that made the delivery (FedEx) might have custody of documents confirming its delivery of the complainant’s donor sperm vials to the clinic, the clinic did not receive (and does not now have) this documentation from FedEx. It is thus the clinic’s assertion that it does not have, and never had, custody or control of the particular records the complainant seeks.

[13] In reply, the complainant maintains her position, set out in her earlier submissions, that the clinic “ought to have known that all essential and crucial records and documents related to the donor sperm vials were in the paper form enclosed with the shipment.” It is her assertion that the records the clinic has produced to date cannot be considered authentic or reliable proof of delivery of the vials to the clinic, or of the clinic’s proper handling of the vials. She makes other allegations against the clinic that are outside the scope of this complaint and that I will not canvass here. I noted in PHIPA Decision 217 that the matter of whether the clinic has complied with federal regulations is not a matter for determination under *PHIPA*. Similarly, the complainant’s requested remedy of an order that the clinic store unused donor sperm vials for an indefinite period, pending the outcome of concurrent legal processes, is not one that is available under *PHIPA*.

[14] The sole matter remaining for me to decide in this review is whether the clinic has met its obligation under *PHIPA* to conduct a reasonable search in response to the complainant’s access request. I find that the clinic has now fulfilled this duty. In PHIPA Decision 217, I noted that *PHIPA* does not impose an obligation on the clinic to create or to maintain the particular records the complainant seeks; I found, however, that the clinic had failed to properly respond to the complainant’s request because it had failed to address certain records that could reasonably be expected to exist.

[15] The clinic has now directly addressed these records, and has explained why they

do not exist in the clinic's record holdings. The complainant's allegations of clinic misconduct do not establish a reasonable basis to believe the records she seeks would be located through additional searches. In addition, the broader harms alleged by the complainant cannot be cured by an order under *PHIPA* for further searches.

[16] 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*. *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.<sup>1</sup> I am satisfied the clinic has met this burden here.

[17] For these reasons, I uphold the clinic's search for responsive records. I dismiss complaint.

**NO ORDER:**

For the foregoing reasons, I find the clinic has conducted a reasonable search in satisfaction of its obligations under *PHIPA*. I dismiss the complaint.

Original signed by: \_\_\_\_\_  
Jenny Ryu  
Adjudicator

February 9, 2024 \_\_\_\_\_

---

<sup>1</sup> Orders P-624 and PO-2559; *PHIPA* Decisions 17 and 18.