

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 240

Complaint HA21-00195

A named physician

March 26, 2024

Summary: The complainant made a request under *PHIPA* for access to her medical records in the possession of a named physician, who is a relative of the complainant. The physician released several records to the complainant, but denies that she held those records in the capacity of a health care provider to the complainant. The complainant filed a *PHIPA* complaint against the physician based on a belief that the physician has additional records to which the complainant has a right of access under *PHIPA*.

In this decision, the adjudicator concludes that the physician is not governed by *PHIPA* in respect of the records the complainant seeks; accordingly, there is no right of access under *PHIPA* to such records if they exist. As there are no reasonable grounds to review the matter under *PHIPA*, the adjudicator dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, sections 2 (definitions); 3; 4 (definition of "personal health information"); 52; and 57(3) and (4).

OVERVIEW:

[1] This decision addresses a complaint made under the *Personal Health Information Protection Act, 2004 (PHIPA)* against a named physician and the Family Health Organization (FHO)¹ with which the physician practises. The physician is a relative of the

¹ A Family Health Organization is a primary care payment model in Ontario for group-based practices.

complainant.

[2] The complaint arises from the complainant's request, addressed to the physician at the FHO, for "all medical information, medical files, and personal information" in the physician's possession relating to the complainant. While the physician provided the complainant with records in response to the request, the physician takes the position that this release was made outside *PHIPA*, as the records did not arise in the context of a health care relationship.

[3] The complainant asserts that the physician *did* provide health care to her on several occasions, so that *PHIPA* applies to her request for records of her personal health information held by the physician. The complainant complained to the Office of the Information and Privacy Commissioner of Ontario (IPC) about the physician's failure to identify and to release under *PHIPA* additional records that the complainant believes the physician has in her possession. The complaint proceeded to the adjudication stage after the matter could not be resolved through mediation.

[4] At the adjudication stage, based on all the information provided by the parties at earlier stages of the complaint, I formed the preliminary view that *PHIPA* does not apply in the circumstances of this complaint.

[5] I informed the complainant of the reasons for my preliminary view, and my preliminary assessment that there are no reasonable grounds to proceed with a review of the complaint under *PHIPA*. I invited the complainant to provide submissions on my preliminary assessment, which I would consider before making a final decision on the matter. Although the complainant requested and was given an extension of time to make these submissions, she did not do so by the extended deadline date. However, in arriving at my decision, I have considered the complainant's extensive submissions made at earlier stages of the IPC process.

[6] 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 dismiss the complaint.

DISCUSSION:

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

[7] Sections 57(3) and (4) of *PHIPA* set out the IPC's authority to review or not to review a complaint. These sections state, in part:

(3) If the Commissioner does not take an action described in clause (1) (b) or (c) [which relate to 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 this Act 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[...]

[8] Having considered all the circumstances of the complaint, I decline to conduct a review of this matter. This is because I find *PHIPA* does not apply in respect of the records the complainant seeks from the physician. My reasons follow.

Does PHIPA apply to the complainant's request for records in the physician's possession?

[9] Because the complaint concerns the right of access and certain definitions under *PHIPA*, it is helpful to begin by setting out the relevant statutory provisions.

[10] Section 52 of *PHIPA* grants an individual a right of access, subject to limited exceptions, to records of the individual's "personal health information" that are in the custody or under the control of a "health information custodian."

[11] "Personal health information" is defined in section 4 of *PHIPA* to include identifying information about an individual that relates to her physical or mental health (paragraph (a) of the definition at section 4(1) of *PHIPA*), and to the providing of health care to the individual (paragraph (b) of the definition). It also includes other identifying information about the individual contained in a record that contains personal health information of the type enumerated in section 4(1) of *PHIPA* [section 4(3)].

[12] Section 3 of *PHIPA* addresses the definition of "health information custodian." In particular, section 3(1) sets out a list of persons who may qualify as health information custodians, subject to the operation of sections 3(3) to 3(11) of *PHIPA*.² Section 3(1) states, in part:

In [*PHIPA*], "health information custodian", subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any:

1. A health care practitioner or a person who operates a group practice of health care practitioners.

4. A person who operates one of the following facilities, programs or services:

² Sections 3(4) to 3(11) of *PHIPA* are not relevant in this complaint. I address section 3(3) further below.

vii. A centre, program or service for community health or mental health whose primary purpose is the provision of health care.

[13] The terms "health care" and "health care practitioner," which appear in section 3(1), are defined at section 2 *PHIPA*.

[14] *PHIPA* defines "health care practitioner" to include "a person who is a member within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care," and "any other person whose primary function is to provide health care for payment" (paragraphs (a) and (d) of the definition at section 2).

[15] The term "health care" is defined at section 2 of *PHIPA* as follows:

"health care" means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,

(a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,

(b) is carried out or provided to prevent disease or injury or to promote health, or

(c) is carried out or provided as part of palliative care,

and includes,

(d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for the use of an individual, pursuant to a prescription, and

(e) Repealed: 2020, c. 13, Sched. 3, s. 8 (1).

(f) a home and community care service that is funded under section 21 of the *Connecting Care Act, 2019*.[.]

[16] I do not understand it to be in dispute that the physician is a licensed member of the College of Physicians and Surgeons of Ontario who provides health care, within the meaning of *PHIPA*, in connection with the FHO.³

[17] *PHIPA* sets out an exception to the definition of health information custodian for a

³ Counsel for the physician has explained that the physician initially practised with a physician group that later became a registered FHO under a different name. The FHO later moved to a new location and adopted a slightly different name. In this decision, I will refer to the physician group with which the physician practised, and currently practises, under all its various names, as the FHO.

health care practitioner who is an “agent” of another health information custodian.⁴ The term “agent” is defined at section 2 of *PHIPA* to mean, in relation to a health information custodian:

... 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[.]

[18] The effect of the exception at section 3(3)1 is that a person who may otherwise meet the definition of “health care practitioner” in *PHIPA* (and thus be a health information custodian in the person’s own right) may in some circumstances be an “agent” of a custodian.

[19] In either event, records of personal health information in the custody or under the control of a health information custodian—including through an agent of the custodian—are subject to the right of access in *PHIPA*.

[20] Records of personal health information that are not in the custody or under the control of a health information custodian are not subject to the right of access in *PHIPA*.

Application of the law to the facts before me

[21] This complaint arises from the complainant’s request, sent to the FHO, for “all medical information, medical files and personal information” relating to the complainant in the possession of the physician.⁵

[22] In response to the request, the physician located several records about the complainant, and provided them to her. As I will explain further below, the physician asserts that this release was made outside *PHIPA*.

[23] The records consist of handwritten notes prepared by the complainant; a letter written by the physician “informally connecting” the complainant to a particular clinic, and

⁴ Paragraph 1 of section 3(3) states: “Except as is prescribed, a person described in any of the following paragraphs is not a health information custodian in respect of personal health information that the person collects, uses or discloses while performing the person’s powers or duties or the work described in the paragraph [...]: A person described in paragraph 1, 3 or 5 of the definition of “health information custodian” in subsection (1) who is an agent of a health information custodian.”

⁵ While the complainant also requested information relating to her deceased father, I do not understand the current complaint to concern records relating to her father. The evidence before me also indicates that another individual is the estate trustee for the complainant’s deceased father, with the effect that the complainant would not be entitled to exercise a right of access under *PHIPA* to records of her deceased father’s personal health information (sections 5, 23(1)4, 25 of *PHIPA*). I shared this understanding of the facts in my preliminary assessment letter to the complainant.

a consultation received from the clinic on the same date; and two pages of the complainant's bloodwork results ordered by another physician. All these records date from over 20 years ago.

[24] The complainant believes that the physician has other records in her possession that she has not provided. Among the records the complainant seeks is a referral letter that the complainant believes the physician wrote before writing the letter to the clinic (which letter was released to the complainant).

[25] The physician asserts that she has given the complainant complete copies of all the records about the complainant in her possession, and there are no other records to provide.

[26] For the purposes of this complaint, I accept that the records the complainant seeks would qualify as records of her personal health information within the meaning of *PHIPA*.

[27] I also accept that, in general, the physician is governed by *PHIPA* in respect of personal health information that she handles in connection with her work as a physician, including with the FHO, whether in this context she is a health information custodian or an agent of a custodian with respect to that information.⁶ In either case, *PHIPA* would apply to records of an individual's personal health information in the custody or under the control of the relevant custodian, and the individual would be entitled under *PHIPA* to make a request for access to those records.

[28] In this case, however, I conclude that the records the complainant seeks from the physician are not held by the physician in the role of a health information custodian or agent. The result is that *PHIPA* does not apply to the complainant's request.

[29] As noted above, the complainant's request sent to the FHO is for "all medical information, medical files and personal information" relating to the complainant in the physician's possession.

[30] It does not appear to be in dispute that the complainant was not and is not a patient of the FHO itself. During the complaint process, the physician conducted a search of the FHO's hard copy patient charts and its electronic medical records system for records relating to the complainant, and located none.⁷ I do not understand the complainant to be challenging the physician's statement that there are no patient records for the

⁶ It may be that the physician is the person who operates the group practice or the program provided by the FHO, and who is thus the custodian with respect to personal health information in the custody or under the control of the FHO. Or it may be that another person operates the FHO, with the physician's acting as an agent of the FHO in respect of personal health information she handles in connection with her work for the FHO. Alternatively, the physician may be a custodian in her own right, as a "health care practitioner" independent of the FHO (or any other custodian), in respect of the records the complainant seeks. My findings would be the same in any of these cases.

⁷ Counsel for the physician confirmed that the FHO's hard copy and electronic patient records include records of patient care provided by the FHO under its previous names and at its previous location.

complainant within the FHO's record-holdings. Based on the information before me, I conclude that the FHO is not a health information custodian in respect of records of the complainant's personal health information.⁸

[31] I have next considered whether the physician, independent of the FHO, is a health information custodian in respect of the complainant's personal health information. I understand the complainant to be making this claim when she asserts that the physician, over a defined period of time about 20 years ago, provided refill prescriptions and on one occasion prescribed a certain medication to the complainant.

[32] The physician denies that she ever provided health care to the complainant. She states that she is not, and has never been, the complainant's family doctor, and does not maintain records about the complainant as a patient. In response to the complainant's specific examples, the physician says she has no recollection or record of providing the complainant with prescriptions for medication, including any refills, or providing any other health care to her.

[33] With respect to the records the physician located and provided to the complainant, the physician explains that these were not found within her "professional records," which I understand to mean records in her custody or under her control in connection with her work as a physician. Instead, the physician says, she held these records as "personal records," in the role of a family member.

[34] The records the physician held in this personal capacity include the complainant's own handwritten notes, and the letter the physician wrote "informally connecting" the complainant to a clinic. With regard to the latter record, the physician notes that the College of Physicians and Surgeons of Ontario recognizes a distinction between the act of making a formal medical referral for a patient (which she denies occurred here) and the provision of an "informal recommendation" to a family member about a specific physician and facilitating contact between the family member and that physician.⁹

[35] Regarding the two pages of the complainant's bloodwork ordered by another physician, dating from nearly 25 years ago, the physician states that she did not requisition this lab work, and does not recall why or how the results came to be shared with her.

[36] Thus, for all the records the physician located and provided to the complainant, the physician maintains that she held these records in a personal context, in the role of a family member assisting her relative, and not as a provider of health care to the

⁸ This finding covers the scenarios in which physician is the person who operates the FHO, or is an agent of the FHO in respect of personal health information in the custody or under the control of the FHO.

⁹ Counsel for the physician refers to the College policy titled "Physician Treatment of Self, Family Members, or Others Close to Them" and a companion advice document, both of which are available on the College's website.

complainant.

[37] Moreover, with respect to the additional record the complainant seeks (a referral letter that the complainant believes the physician wrote over 25 years ago), the physician notes that pursuant to the College's policy on medical records management, physicians are to retain medical records for adult patients for ten years following the date of last entry in the record.¹⁰ I understand the physician to be saying that even if *PHIPA* were applicable in the circumstances (which she denies), such a record would not reasonably be expected to exist

[38] In response to the physician's submissions, the complainant provided the IPC with additional evidence at the mediation stage. This evidence includes a copy of an insurance policy card, and communications from an estate lawyer. As this additional evidence is not relevant to deciding the issues before me, it is not necessary for me to describe it in further detail here.

[39] Having considered all the evidence before me, I conclude that *PHIPA* does not apply to the complainant's request for records in the physician's possession.

[40] I accept the physician's evidence that she has not maintained records about the complainant in the capacity of a provider of health care to the complainant, but rather in a personal capacity as the complainant's relative. In arriving at this decision, I have considered the voluminous evidence provided by the complainant in support of her assertion that the physician provided health care to her in the past. The documentary evidence provided by the complainant does not establish a health care relationship between the physician and the complainant, and in the face of the physician's explicit denial, I find unpersuasive the complainant's unsupported assertions about such a relationship.

[41] On this point, with respect to the particular records arising from the physician's "informally connecting" the complainant with a clinic, I find credible the physician's account of events leading up to her recommendation of a particular health care provider for the complainant, and of her purpose in facilitating an introduction between them. In this context, I find relevant the College policy to which the physician refers, which supports a finding that the physician's limited and discrete involvement in facilitating this connection does not qualify as "health care" within the meaning of *PHIPA*.¹¹

¹⁰ I understand the physician to be referring to the College policy titled "Medical Records Management," available on the College's website.

¹¹ Even if I were persuaded that the physician's limited role in this regard could qualify as health care, so that records arising from the informal recommendation could be subject to an access request under *PHIPA*, it is my view that the specific record the complainant seeks (i.e., a referral letter dating from over 25 years ago) would not reasonably be expected to exist, considering the passage of time and the College's guidance to its members on records management. Thus, even if I were to accept that the records the complainant seeks existed at one time, and were subject to the right of access in *PHIPA*, I would find no reasonable basis in these circumstances to order further searches under *PHIPA*.

[42] For these reasons, I conclude that *PHIPA* does not apply to the complainant's request giving rise to this complaint. As such, there is no reasonable basis to proceed with a review of this matter under *PHIPA*. I accordingly decline to conduct a review.

[43] I dismiss the complaint.

NO REVIEW:

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

Original Signed By: _____
Jenny Ryu
Adjudicator

_____ March 26, 2024