

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 241

Complaint HA23-00137

North Bay Regional Health Centre

April 26, 2024

Summary: Two sons of a deceased patient requested under the *Act* that the hospital make several corrections to the death note of their mother. The hospital granted two corrections related to the date and circumstances of their mother's death but denied a third related to the cause of death.

In this decision, the adjudicator finds that the information the sons want corrected, the impact of their mother's mental health in her death, is a professional opinion or observation made in good faith by the attending physician, and the section 55(9)(b) exception to the duty to correct therefore applies. He upholds the decision of the hospital and dismisses the complaint.

Statute Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004 c. 3, Sched. A, sections 55(1), 55(8), and 55(9)(b).

BACKGROUND:

[1] The requesters, the sons of a deceased patient (the mother) made a correction request under the *Personal Health Information Protection Act, 2004* (the *Act*) to the North Bay Regional Health Centre (the hospital). The requesters asked for three corrections to be made to their mother's death note prepared by the attending physician at the hospital. The first two correction requests related to the date of the mother's death, the hospital's efforts to notify the requesters about her condition and later death, and who was present at the time of her death. The hospital agreed to correct the date of the death and the part about who was present during the death.

[2] The third correction request, the subject of this complaint, related to the cause of the mother's death. The correction request was as follows:

While we as family accept that we are not medical professionals, we believe it is important that it be noted our mother's mental health was a significant factor both in her admission to hospital and in her death. [...]

[3] The hospital denied the correction request, stating that the physician who created the death note reviewed the request and determined that the documentation represents an observation made in good faith during the provision of care. The hospital received a statement of disagreement from the requesters and, pursuant to section 55(11) of the *Act*, added it to the mother's medical record.

[4] The requesters, now the mother's representatives, appealed the hospital's refusal to make the correction to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the representatives confirmed that they were only appealing the hospital's decision regarding the third correction request. In support of their request, the representatives also indicated to the hospital which information in the mother's medical record they believed was "sufficient to demonstrate the hospital's awareness of [their] mother's serious mental health issues," pointing to several documents that they stated support making the correction. The hospital maintained its position, relying on sections 55(8) and (9) of the *Act* to deny the request.

[5] No further mediation was possible, and the complaint was moved to the adjudication stage of the complaints process, where an adjudicator may conduct a review. I conducted a review, where I sought and received representations from the hospital and the representatives. Representations were shared in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*.

[6] For the reasons that follow, I find that the hospital does not have a duty under the *Act* to correct the mother's personal health information in the death note and dismiss the complaint.

RECORDS:

[7] The sole record at issue is the death note of the mother.

DISCUSSION:

[8] The parties do not dispute, and I find, that the hospital is a health information custodian as defined in section 3(1) of the *Act*. Further, I find that the death note contains the mother's personal health information as defined in section 4(1) of the *Act*. It is also not disputed that the representatives are entitled under paragraph 4 of section 23(1) to exercise the right of access and correction on behalf of their deceased mother.

Accordingly, the sole issue in this complaint is if the hospital has a duty under the *Act* to correct the death note in accordance with the representatives' request.

[9] Section 55(1) of the *Act* provides for a right of correction to records of personal health information in some circumstances. It permits an individual, or in this case her representatives, who have received access to her personal health information to request that a custodian correct a record "if the individual believes that the record is inaccurate or incomplete for the purpose for which the custodian has collected, uses or has used the information ..."

[10] Section 55(8) imposes a duty on health information custodians to correct records of personal health information in some circumstances. It states:

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.

[11] Section 55(9) sets out exceptions to this duty. The hospital has relied on section 55(9)(b) in its representations, which states:

Despite subsection (8), a health information custodian is not required to correct a record of personal health information if,

it consists of a professional opinion or observation that a custodian has made in good faith about the individual.

[12] Read together, sections 55(8) and 55(9) set out when an individual is entitled to a correction of a record of their own personal health information.

[13] In this case, the hospital has refused the representatives' request for correction both on the grounds that they have failed to satisfy the requirements of section 55(8) (to demonstrate that the record is incomplete or inaccurate for the purposes for which the custodian uses the information ...), and that the exception at section 55(9) applies (that the record consists of a good faith professional opinion or observation).

[14] Depending on the nature of the correction request, the information that the individual seeks to have corrected, and the reasons for the custodian's refusal of the request, the IPC may approach the analysis in a correction complaint initially under section 55(8) or 55(9).¹ In this case I begin by determining if the exception at section 55(9) applies.

[15] For the reasons that follow, I find that the exception at section 55(9)(b) applies to

¹ PHIPA Decision 36.

the complaint, and I therefore do not need to consider if the representatives have satisfied the requirement of section 55(8). The wording of section 55(9) makes it clear that even if a complainant satisfies the IPC that the information is incorrect or inaccurate within the meaning of section 55(8), a finding that an exception in section 55(9) applies will result in a finding that the custodian has no duty to correct.

Section 55(9)(b): exception for professional opinion or observations

[16] The purpose of section 55(9)(b) 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.²

[17] Where a “professional opinion or observation” is involved, section 55(8) does not give a right to request a correction that 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. Additionally, 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 and cannot be a substitution of opinion, such as the complainant’s view of a medical condition or diagnosis.

[18] Where the 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.

[19] Therefore, section 55(9)(b) involves a two-part analysis. The first question is whether the personal health information is a “professional opinion or observation.” The second question is whether the “professional opinion or observation” was made “in good faith.”

The personal health information qualifies as a “professional opinion or observation.”

[20] In order for section 55(9)(b) to apply, the personal health information must either qualify as either a “professional opinion” or a “professional observation.” Only those observations and opinions that require a health information custodian or an agent to exercise or apply special knowledge, skills, qualifications, judgment or experience

² See for example Orders H2004-004, H2005-006 and H2005-007 of the Information and Privacy Commissioner of Alberta.

relevant to their profession should be defined as “professional observations” or “professional opinions” within the meaning of section 55(9)(b) of the *Act*.

[21] The record in this complaint is a death note prepared by a hospital physician. It documents the physician’s admitting diagnosis of the mother and discusses her treatment at the hospital prior to her death, specifying various investigations that took place and diagnoses following these investigations. It also provides details about the days prior to the mother’s death, and the circumstances surrounding it.

Representations

[22] The hospital submits that the death note was created by the on-call physician that provided care to the mother at the end of her life. It states that the death note refers to the mother’s admitting diagnosis and the results of investigations, which contain the professional opinions or observations of other treating healthcare professionals. It explains that the statements in the death note reflect the mother’s admitting diagnosis, as determined by her admitting physicians and notes the results of the various investigations that the mother underwent.

[23] It submits that those results were all observations or opinions of the physicians that provided her with care. It states that the death note reflects the physician’s review of the mother’s medical records and professional observations or opinions about the mother’s admitting diagnosis, the investigations undertaken, their results, and the significance, or lack thereof, of other issues that may have arisen during the admission.

[24] The representatives did not provide specific representations on whether the personal health information in the death note constitutes professional opinion. Generally, they submit that the death note is inaccurate, stating that it is illogical and indefensible for the hospital to list physical factors while refusing to list mental health factors on the death note. They explained the importance of the information in the death note being accurate as it is, as explained by the hospital in its representations, used by the Ministry of Health to make decisions about funding. They emphasized the importance of properly documenting deaths where mental health was involved in order to improve healthcare generally.

[25] They submit that the death note lists physical health factors that were not of concern in their mother’s death, which they state is supported by her health records and commentary of attending physicians and staff who cared for her during her stay at the hospital. They further state that the death note does not list mental health factors which were of continuing concern from their mother’s initial admission at the hospital, until her death. They submit that this is supported by their mother’s medical records from her stay at the hospital, records of her family physician, and records of family communications that recount the nature and timing of the decline of their mother’s health during her stay at the hospital. They provided medical records to the IPC during the complaint that they submit support this.

Analysis and finding

[26] As explained above, 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. Therefore, while I understand the representatives’ concerns about what was included in the death note and what was not, whether the personal health information in the death note is objectively accurate or complete is not something that I can consider in determining if the exception applies. Rather, I am limited to determining if the information qualifies as a “professional opinion or observation,” made “in good faith.” In this case, I find that the information that the representatives seek to have corrected in the death note qualifies as the physician’s professional opinion or observation within the meaning of section 55(9)(b).

[27] In my view, the specific information that should be included in the death note is, on its face, an application of the professional judgement and experience of the physician. I am satisfied that the physician’s investigation and documentation of the circumstances leading up to and surrounding the mother’s death are an exercise of their professional knowledge and skill. While I acknowledge the representatives’ concerns about the inclusion of certain physical factors and the exclusion of mental health factors, this does not mean that the physician’s decision regarding what should be included in the death note was not professional in nature. Whether or not the documentation is accurate does not affect its classification as professional opinions or observations within the meaning of section 55(9)(b).³

The professional opinions or observations were made “in good faith.”

[28] Even if the information at issue is a “professional opinion or observation,” if there are reasonable grounds to conclude that the professional opinions or observations made by the physician were not made “in good faith” within the meaning of section 55(9)(b), the section 55(9)(b) exception to the duty to correct does not apply.

[29] Courts have stated that a finding that someone has not acted in good faith can be based on evidence of malice or intent to harm another individual, as well as serious carelessness or recklessness. The courts have also stated persons are assumed to act in good faith unless proven otherwise. Therefore, the burden of proof rests on the individual seeking to establish that a person has acted in the absence of good faith to rebut the presumption of good faith.⁴ Accordingly, in the context of section 55(9)(b) of the *Act*, the burden rests on the individual seeking the correction, here the representatives, to establish that the physician did not make the professional opinion or observation in good faith.

³ PHIPA Decisions 36, 37 and 193.

⁴ *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII)

Representations

[30] The hospital submits that the observations in the death note were made in good faith, and explains that professional observations and opinions are assumed to be made in good faith unless it is proven otherwise. It states that the representatives have not provided any evidence of malice, intent to harm another, serious carelessness, or recklessness, and submits that none of these exist in this case. Referring to the first two parts of the representatives' correction request, it notes that the physician was willing to acknowledge and correct other errors once they were demonstrated. It submits that this willingness suggests that the death note was created in good faith and indicates an absence of malice, intent to harm, recklessness, or serious carelessness.

[31] The representatives, generally stating that the death note was inaccurate and emphasizing the importance of it being accurate for the broader medical system, did not provide specific representations on whether the observations were made in good faith.

Analysis and finding

[32] I agree with the hospital's submission that the physician was willing to correct other errors in the death note and find that, while not necessarily determinative, this indicates that the physician created the death note in good faith. Having considered the parties' overall representations, I find that there is insufficient evidence to conclude that the physician acted with malice or an intent to harm another individual, or that they acted with serious carelessness or recklessness when they made the specific professional opinions or observations that the representatives wish to have corrected.

[33] While I understand why the representatives believe the death note to be inaccurate and the importance of it being accurate, in my view they have not met the onus of establishing that the professional opinions or observations recorded in the death note were not made in good faith. Therefore, I find that the physician's professional opinions or observations in the mother's death note were made in good faith.

Conclusion

[34] In conclusion, I find that the personal health information that the representatives request be corrected in the death note consists of professional opinions or observations that were made in good faith. Therefore, the exception at section 55(9)(b), to the duty correct at section 55(8), applies and the hospital is not required to make the requested corrections to the death note.

NO ORDER:

For the foregoing reasons, no order is issued.

Original signed by: _____

April 26, 2024 _____

Chris Anzenberger
Adjudicator