

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 251

Complaint HA22-00116

The Hospital for Sick Children

June 26, 2024

**Summary:** Asserting the correction rights in the *Act*, the mother of a child requested that the hospital make several corrections to her child's medical record regarding a previous diagnosis and references to other matters regarding the child and his father. The hospital granted some corrections, but denied two corrections related to a specific diagnosis.

In this decision, the adjudicator finds that the references to the diagnosis are professional opinions or observations made in good faith by a hospital 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 requester submitted a request under the *Personal Health Information Protection Act, 2004* (the *Act*), to the Hospital for Sick Children (the hospital) for corrections to the file of her young son. The requested corrections related to a specific diagnosis of her son by hospital doctors and also asked that any notes regarding a specified event related to the diagnosis be deleted from the record. Further, the requester asked that references in her son's records to his sibling's information be changed.

[2] The hospital granted some corrections regarding the specified event in the record

and also changed the wording of the information about the sibling. The hospital confirmed to the requester that a statement of disagreement she had provided had been accepted and placed in her child's chart.

[3] The requester, now the complainant, made a complaint to the Information and Privacy Commissioner of Ontario (IPC) about the hospital's decision. In her complaint, she explained that her son had been misdiagnosed, and she provided information about related events that occurred following the diagnosis. She explained that the misdiagnosis and subsequent events had harmed her and her family, and the information remaining in her child's medical record was causing this harm to continue.

[4] During mediation, the complainant explained that she believes that the diagnosis contained in her son's records is incorrect and should be removed following the results of a subsequent related legal proceeding. The complainant stated that she does not want her son's record to show a misdiagnosis as it impedes his future treatment and has resulted in social stigma. The complainant stated that her son is still being seen by medical staff at the hospital for reasons unrelated to those that led to the diagnosis at issue and it is very important that he be treated as a patient without the stigma associated with the diagnosis at issue.

[5] The hospital continued to refuse the complainant's correction request under section 55(9)(b) of the *Act*. The hospital stated that the references to the diagnosis contain professional opinions or observations that were made in good faith, and form an important part of her son's health record that cannot be removed or amended. It confirmed that it had made some of the requested corrections. It further explained that a statement of disagreement and expert reports the complainant provided were added to the record and flagged to any clinician reviewing the chart that these documents are available and should be reviewed.

[6] No further mediation was possible, and the complaint was transferred to the adjudication stage of the complaints process. I conducted a review in which I sought and received representations from both parties. Representations were shared in accordance with the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*.

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

## **RECORDS:**

[8] The sole record at issue is a clinic note prepared by a hospital doctor, specifically the parts of the note that relate to the child's medical and social history regarding the disputed diagnosis.

## **DISCUSSION:**

[9] 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 records contain the child's personal health information as defined in section 4(1) of the *Act*. It is also not disputed that the complainant is entitled under paragraph 2 of section 23(1) to exercise the rights of access and correction on behalf of her child.

[10] Accordingly, the sole issue in this complaint is if the hospital has a duty under the *Act* to correct the records in accordance with the complainant's request.

[11] 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 the child's mother, who has received access to his 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 ..."

[12] 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.

[13] 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.

[14] 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.

[15] In this case, the hospital has refused the complainant's request for correction both on the grounds that she has 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)(b) applies (that the record consists of a good faith professional opinion or observation).

[16] 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).<sup>1</sup> In this case, I begin by determining if the exception at section 55(9) applies.

[17] For the reasons that follow, I find that the exception at section 55(9)(b) applies to the complaint, and I therefore do not need to consider if the complainant has 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**

[18] 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.<sup>2</sup>

[19] 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.

[20] 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.

[21] 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."

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<sup>1</sup> PHIPA Decision 36.

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

***The personal health information qualifies as a "professional opinion or observation"***

[22] In order for section 55(9)(b) to apply, the personal health information must 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 relevant to their profession should be defined as "professional observations" or "professional opinions" within the meaning of section 55(9)(b) of the *Act*.

[23] The record in this complaint is a clinical note prepared by a hospital physician. It documents the child's visit with the physician and provides details about the child's medical and social history, which the complainant submits is inaccurate. The record also summarizes diagnostic procedures that the child underwent, and provides diagnoses, proposed treatments, and follow up plans.

*Representations*

[24] The hospital submits that following receipt of the correction request, the physician who made the notes at issue was consulted. It explains that the physician is an experienced physician with extensive education, and as such, has special knowledge, skills, qualifications, and judgment relevant to the medical profession. Referencing PHIPA Decision 193, it submits that 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.

[25] The complainant does not generally dispute that the record is a professional opinion or observation within the meaning of section 55(9)(b), but does submit that the physician who created the record was not expressing their own opinion regarding the diagnosis or the reason for the child's symptoms. The complainant submits that, rather than being the result of an independent assessment by the physician who created the record at issue, this information was copied from a diagnosis by another physician, and the record should reflect the origin of the diagnosis.

[26] In its reply representations, the hospital responded to the complainant's submissions that the portions of the records that the complainant wants corrected were copied by the physician. The hospital submits that, rather than simply copying another physician's conclusions, the physician who created the record at issue reviewed the relevant health records and used his special knowledge, skills, and qualifications as a physician to determine what was relevant to the child's clinical care and should therefore be documented.

[27] In her sur-reply representations, the complainant submits that the physician who created the record was repeatedly asked to review her child's medical imaging and to come to his own conclusions about her child's medical issues. She states that the

physician refused to do this, and instead accepted the opinion of the other doctor, which she submits is merely copying their opinion.

*Analysis and finding*

[28] 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 appreciate the complainant’s concerns about the accuracy and completeness of her child’s medical records, whether the personal health information in the record 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 complainant seeks to have corrected in her child’s record qualifies as a physician’s professional opinion or observation within the meaning of section 55(9)(b).

[29] I acknowledge the complainant’s concerns that the physician who created the record was not the physician who initially diagnosed her child, and her argument that the physician merely copied the relevant information from another physician’s diagnosis. However, I accept the hospital’s submission that the record represents the professional opinion or observation of the physician who created the record at issue.

[30] Even if I accept the complainant’s submission that the physician refused to review certain medical records to come to his own conclusion about her child’s medical issues, and instead “copied” the diagnosis of another doctor, I find that the physician’s adoption of another physician’s diagnosis would still require special knowledge, skills, qualifications, judgment, or experience relevant to the profession, and the record would therefore still be a professional opinion or observation. Whether the physician’s decision to adopt the diagnosis was reasonable or correct in the circumstances is not something that I am making a finding on. Rather, I find that determining what is relevant to a child’s health and should be documented, as well as what should be reviewed when making this determination, requires a degree of professional judgment that the physician was exercising. As such, I find that the information that the complainant requests be corrected is a professional opinion or observation within the meaning of section 55(9)(b) of the *Act*.

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

[31] 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.

[32] 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 that 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.<sup>3</sup> Accordingly, in the context of section 55(9)(b) of the *Act*, the burden rests on the individual seeking the correction, here the complainant, to establish that the physician did not make the professional opinion or observation in good faith.

### *Representations*

[33] The hospital states that the professional opinions or observations in the record were made in the context of providing healthcare to the complainant's child, and submits that the complainant bears the onus of establishing that the professional opinion or observation was not made in good faith. It submits that the complainant has not provided evidence to support this assertion.

[34] The hospital acknowledges that the complainant disagrees with her son's medical team's diagnosis, relying on the findings of a subsequent, related legal proceeding. However, it states that the burden of proof in the legal proceeding the complainant is referencing is different from the professional obligations of a physician making a diagnosis, and the findings in the legal proceeding "has no bearing on the medical diagnosis..." It submits that it would be inappropriate to make a change to a previous record based on the outcome of the related legal proceeding.

[35] The hospital also acknowledges that there may be differing opinions between healthcare practitioners regarding the child's diagnosis, and notes that the complainant provided a statement of disagreement, along with six expert reports. The hospital states that it has included these reports in the child's chart, along with a flag alerting clinicians reviewing the chart to the statement of disagreement and expert reports that should be reviewed prior to providing healthcare to the child.

[36] The complainant acknowledges that the physician did not act in bad faith when he "copied" the information from records from another hospital, but states that the doctor that the physician was copying did act in bad faith when arriving at the diagnosis. In response, the hospital states that the conduct of the other doctor is not at issue in the review, and maintains that the complainant has not provided evidence that the physician who made the record at issue acted in bad faith when coming to his professional opinion.

[37] In her sur-reply representations, the complainant admits that the physician who created the record at issue, who she says copied the diagnosis from another physician, did not necessarily act in bad faith at the time the record was created. However, she submits that since that time, with the completion of the legal proceedings and the related medical reports showing alternative diagnoses for her child's issues, the hospital and physician are acting in bad faith by refusing to correct the information at issue. The

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<sup>3</sup> *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII)

complainant further submits that the specific information at issue, having a negative connotation and carrying social stigma, highlights the importance of correcting the information. She referenced previous incidents involving other patients where misdiagnoses caused significant issues for patients and their families, and states that these cases show the importance of heightened sensitivity toward similar errors in patient records.

*Analysis and finding*

[38] I acknowledge the complainant's disagreement with the diagnosis in the record, and her belief that the information at issue carries a significant negative connotation, which would possibly be alleviated by correcting the information in a manner prescribed by the *Act*. However, at issue in this complaint is not if the information at issue is correct, or if there are valid reasons for wanting it to be corrected. Rather, it is if the information in the record constitutes a professional opinion or observation, accurate or otherwise, that was made in good faith, at the time the record was created.

[39] The complainant's main argument is that the information should be corrected because it is her view that it is incorrect, as established in the related legal proceeding and the opinions of other doctors. The hospital submits that the burden of proof in a legal proceeding is different from the obligations of a physician making a diagnosis. While a finding in a related legal proceeding may have bearing on the overall accuracy of a diagnosis, I find that an assessment of whether a professional opinion was made in good faith does not depend on the perceived accuracy of the information when future information is considered, such as the outcome of a related legal proceeding that occurred after the initial diagnosis. Considering the evidence before me, I find that the complainant has not established that the physician was acting in bad faith at the time the record was created.

[40] As the hospital points out, the complainant does not appear to be claiming that the hospital physician who created the record at issue adopted the findings of the previous physician in bad faith at the time of the initial diagnosis. Rather, in her sur-reply representations, she states that the hospital and physician are presently acting in bad faith by refusing to correct the record in light of new information, namely the results of the related legal proceeding and subsequent medical reports supporting a different diagnosis.

[41] In previous decisions, when considering if a professional opinion or observation was made in bad faith, the actions of the individual who created the opinion or observation was assessed at the time it was created, rather than assessing the custodian's response to a correction request.<sup>4</sup> I make the same finding here. On its face, the language of section 55(9)(b), "... consists of a professional opinion or observation that a custodian *has made* in good faith..." (emphasis added), requires that the actions of the custodian

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<sup>4</sup> See, for example, PHIPA Decisions 178 and 181.



be assessed at the time the record was made. As such, while I understand the complainant's desire to change the information, considering the evidence before me, it has not been established that the hospital physician made the observations or opinions the complainant wants corrected in bad faith, and the section 55(9)(b) exemption to the duty to correct therefore applies.

**Conclusion**

[42] In conclusion, I find that the personal health information that the complainant requests be corrected in her child's record consists of professional opinions or observations that were made in good faith. Therefore, the exception at section 55(9)(b) to the duty to correct at section 55(8) applies, and the hospital is not required to make the requested corrections to the record.

**NO ORDER:**

For the foregoing reasons, no order is issued.

Original signed by: \_\_\_\_\_  
Chris Anzenberger  
Adjudicator

\_\_\_\_\_ June 26, 2024