

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 256

Complaint HA23-00050

Dr Jane A. Upfold

July 10, 2024

Summary: An individual asked the appointed guardian of her late doctor's medical records (the custodian) for access to her complete medical records. While the custodian originally claimed he found the individual's medical records, he later said he did not find any. In this interim decision, the adjudicator finds the custodian did not conduct a reasonable search for the individual's medical records and orders him to conduct another search.

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

Decisions Considered: PHIPA Decision 18.

BACKGROUND:

[1] The complainant made a request under the *Personal Health Information Protection Act* (the *Act*) for access to her medical records with her deceased doctor, Dr. Jane A. Upfold. The request was made to the health information custodian (the custodian), who is the appointed guardian for Dr. Jane A. Upfold's medical records.

[2] The custodian responded to the complainant's request by email, stating, in part,

[Dr. Jane A. Upfold] appointed me the guardian of her medical records. Those records are highly confidential and patients are entitled to have copies of them if they wish.

I looked for the file folder that contained your records before replying to your request. The file folder is quite large. It will take some time to copy the records while maintaining confidentiality. Medical authorities have stated that physicians and/or their designated record guardians should charge for the time it takes to provide a patient record duplicates. Estimating the time involved with your request, my fee would be \$250.

[3] Over the subsequent months, the complainant and the custodian had discussions, via email, about the initial fee provided by the custodian and fees for access that have been approved in prior decisions issued by the Information and Privacy Commissioner of Ontario (the IPC).

[4] The custodian issued a revised decision stating he could not locate any of the requester's records in Dr. Upfold's files. He also advised the complainant he would not charge her for the time spent in responding to the request and searching for responsive records.

[5] The complainant filed a complaint with the IPC. In her complaint, the complainant explained she sought access to all her health records pertaining to her appointments with her now deceased physician, who she identified by name and identification number given by the College of Physicians and Surgeons of Ontario. The complainant stated she wished to be provided with her records at the "permitted IPC rate of 25 cents per page." The complainant also stated she believes the custodian is withholding her personal health records because he previously confirmed they exist and subsequently advised that none exist.

[6] The IPC attempted to mediate the dispute between the parties.

[7] The custodian explained Dr. Upfold practiced from home and patient records were kept in her former office and an adjacent room used for storage. The custodian stated that he saw a large file folder with the complainant's name on it, but when he opened it up, it was not her file, but another individual's. The custodian stated he looked through the entire filing system but did not locate any records relating to the complainant. The custodian acknowledged his duty as the appointed guardian to provide personal health records to Dr. Upfold's former patients but confirmed he did not locate any records relating to the complainant.

[8] The complainant advised she believes her records should be in her former doctor's files because the doctor was "extremely organized and fastidious." The complainant believes it is "inconceivable that there are no records" because she was a longstanding patient. She also noted that, during the COVID pandemic, she had walking appointments with the doctor who, she believes, allowed fifteen minutes between appointments during which she would write notes into patients' records.

[9] The custodian agreed to conduct another search for the complainant's records.

The custodian confirmed he conducted another search, reviewing the file of the individual whose personal health information was in the complainant's file to see if there was a filing error. The custodian confirmed he did not locate the complainant's personal health records. He advised he spent numerous hours going through a filing cabinet used to store all patient files ten years or less. The custodian states he further spent an entire day moving materials in a storage room to access a filing cabinet with older patient files but did not locate any responsive records. The custodian stated, "The records I examined seemed very thorough. Why there are no records for the complainant is a mystery to me."

[10] The complainant advised the mediator she was not satisfied with the custodian's search for responsive records. The complainant believes her personal health records should exist.

[11] A mediated solution was not reached and the complaint was moved to the adjudication stage. The adjudicator originally assigned to the complaint decided to conduct a review and invited the parties to submit representations on the searches conducted by the custodian. Both the custodian and complainant submitted representations.

[12] In the discussion that follows, I find the complainant has established that further records may exist. I also find the custodian did not provide sufficient evidence that the search for records was reasonable. I order the custodian to conduct a further search for records responsive to the complainant's request and provide a written explanation to the complainant regarding the results of the search. I remain seized of the complaint to address issues that may arise from the custodian's further search.

DISCUSSION:

[13] The sole issue in this complaint is whether the custodian conducted a reasonable search for the complainant's medical records under section 54 of the *Act*.

[14] Where a complainant claims additional records exist beyond those identified by the 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 the *Act*.¹ If the IPC is satisfied the search carried out was reasonable in the circumstances, the custodian's decision will be upheld. If the IPC is not satisfied, it may order further searches.

[15] The complainant submits the custodian should have located her personal health

¹ Section 53 of the *Act* states that an individual may exercise their right of access to their own personal health information by making a written request to the health information custodian who has custody or control of the information.

Section 54 of the *Act* sets out the steps a health information custodian must take in responding to a request for access to a record of personal health information.

records.

[16] The *Act* does not require a custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show he made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

Representations

[17] In the Notice of Review, the original adjudicator asked the custodian to provide a written summary of all steps taken in response to the request. In particular, the custodian was asked to respond to the following questions:

1. Did the custodian contact the complainant for additional clarification of the request? If so, please provide details including a summary of any further information the complainant provided.
2. If the custodian did not contact the complainant to clarify the request, did they:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the custodian outline the limits of the scope of the request to the complainant? If yes, for what reasons was the scope of the request defined this way? When and how did the custodian inform the complainant of this decision? Did the custodian explain to the complainant why they were narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the custodian's possession? Did the custodian search for those records? Please explain.

² Orders P-624 and PO-2559.

³ Order PO-2554.

[18] In his representations, the custodian confirmed the summary in the Notice of Review, which is reproduced in the Overview above, provides an accurate explanation of the searches he conducted. Specifically, the custodian states “the Notice of Review statement of facts clearly identifies that I have conducted more than the required ‘reasonable search’ as defined by sections 53 and 54 of [the *Act*.]” The custodian did not respond to any of the questions posed in the Notice of Review.

[19] The complainant submits all physicians are required to document their encounters with a patient. The complainant submits this should include where and when the encounter occurred, what was discussed, and any medications prescribed. The appellant submits Dr. Upfold practiced for decades and was a “meticulous, consummate professional.” The complainant submits she saw Dr. Upfold weekly, sometimes twice weekly, over a period of five years. Over this period, the complainant submits she met Dr. Upfold in the doctor’s downtown office, then home office, and finally outdoors during walking appointments in the COVID pandemic. The complainant submits she observed Dr. Upfold taking notes during their sessions, both during the in-office sessions and in her car after the walking appointments. The complainant also states Dr. Upfold prescribed medication for her, which the complainant submits would suggest the doctor should have some documentation reflecting that. Given these circumstances, the complainant submits it is unlikely Dr. Upfold created and maintained no records relating to her care over the five years in which she was the complainant’s doctor.

[20] The complainant states Dr. Upfold stopped practicing in June 2021 and transferred her records to the custodian in December 2021.

[21] The complainant submits it is impossible the custodian located none of her personal health records. The complainant refers to the custodian’s original response to her request, in which he advised he located a large file and quoted a search fee of \$250. She notes that, after she objected to the custodian’s fee, he advised he could not locate any records containing her personal health information. The complainant expresses her distress that the custodian has advised her that five years’ worth of treatment with Dr. Upfold resulted in no records.

Analysis and finding

[22] The IPC considered the issue of responsible search for responsive records under the *Act* in PHIPA Decision 18. In that decision, the adjudicator reviewed and applied the principles regarding the issue of reasonable search under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator found the *Act* does not require the custodian to prove with absolutely certainty that further records do not exist. However, the custodian must provide sufficient evidence to show it made a reasonable effort to identify and locate responsive records.⁴ To be responsive, a record must be “reasonably related” to the

⁴ Orders P-624 and PO-2559.

request.⁵

[23] 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.⁶ A further search will be ordered if the custodian does not provide sufficient evidence to demonstrate it made a reasonable effort to identify and locate all the responsive records within its custody or control.⁷

[24] Although a complainant will rarely be in a position to indicate precisely which records the custodian has not identified, the complainant must still provide a reasonable basis for concluding that such records exist.⁸

[25] I find the search for records responsive to the complainant's request does not meet the threshold for being "reasonable." My reasons for this finding regarding the custodian's search for records responsive to the complainant's access request are two-fold. First, I find the complainant established a reasonable basis for concluding that responsive records should exist. Specifically, I find it improbable that the custodian has no records relating to the complainant's medical history after five years of weekly treatment with Dr. Upfold. Second, I find the custodian did not provide sufficient evidence to demonstrate he made a reasonable effort to search for responsive records.

[26] I acknowledge that, during the mediation of the complaint, the custodian provided information explaining the searches he conducted. I also acknowledge the custodian conducted another search for responsive records during mediation but did not locate any responsive records. However, although the Notice of Review posed direct questions for the custodian to respond to, he did not provide any representations to the IPC answering those questions or provide any other evidence to demonstrate that he conducted reasonable searches for records. For example, the custodian did not provide any information regarding the following:

- The manner in which Dr. Upfold maintained her files and any retention procedures she may have followed, such as the medical records management policies created by the College of Physicians and Surgeons of Ontario.
- The locations the custodian searched for responsive records, beyond identifying two filing cabinets in the doctor's office and adjacent storage room.
- Whether responsive records relating to the complainant may have been destroyed, inadvertently or otherwise.

[27] It is highly implausible that Dr. Upfold maintained no records relating to her five

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

⁸ Order MO-2246.

years' of treating of the complainant. In the absence of submissions in response to the questions posed in the Notice of Review, I find there is insufficient evidence for me to conclude the custodian's search for responsive records was reasonable.

[28] In light of my finding above, I will order the custodian to conduct a further search for records and provide an explanation of the search conducted to the complainant, as set out in the order provisions, below. I acknowledge the custodian is the appointed guardian of Dr. Upfold's medical records and assumed the custody and care of them after her death. Should the custodian require further guidance regarding his responsibilities under the *Act*, it is suggested that he contact the College of Physicians and Surgeons of Ontario.

ORDER:

For the foregoing reasons, pursuant to section 61(1) of the *Act*,

1. I order that the custodian conduct a further search for records responsive to the complainant's access request within **30 days** of the date of this decision.
2. Following the search described in order provision 1, the custodian must provide me with a detailed explanation of his search efforts. This explanation should be in the form of an affidavit sworn by the individual(s) who conduct the search, and must identify, at a minimum:
 - A statement describing the custodian's knowledge and understanding of the subject matter of the request;
 - Details of any searches carried out including: by whom were they conducted, the date(s) the searches were conducted; what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches. I ask the custodian to please include details of any searches carried out to respond to the request.
 - Whether it is possible that such records existed but no longer exist. The custodian is asked to provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
 - Whether responsive records exist which are not in the custodian's possession. Whether the custodian searched for those records.

This explanation is due within **30 days** of the date of this decision. I will share the custodian's explanation with the complainant, subject to the IPC's confidentiality criteria as described in guidance provided to the custodian at the earlier stages of the review. The custodian should state his position on sharing.

3. Should further records be found as a result of the search ordered in Order Provision 1, I order the custodian to include a formal decision on access to the newly located records within **30 days** of the date of this decision.
4. I remain seized of this complaint to deal with any other outstanding issues arising from this decision.
5. I reserve the right to require the custodian to provide me with a copy of the access decision referred to in Order Provision 3.

Original signed by _____

Justine Wai
Adjudicator

July 10, 2024 _____