RE: Response to Preliminary View

IPC Complaint: HC25-00366

Respondent: The Ottawa Hospital

Date: February 26, 2026

Authority: Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A

A. Introduction and Scope of Response

This response is submitted in reply to the Preliminary View issued in respect of the above-referenced complaint concerning the unauthorized disclosure and publication of personal health information ("PHI") in the Respondent's Statement of Defence. The Complainant respectfully submits that the Preliminary View does not adequately address the distinction between disclosure authorized by the *Personal Health Information Protection Act*, 2004 (the "*Act*") and the publication of fabricated diagnoses in a public court filing.

B. Disclosure Under the Act Is Not Equivalent to Publication in Court Filings

The Preliminary View appears to rely on section 41(1)(a) of the *Act*, which permits a health information custodian to disclose personal health information for the purpose of a proceeding in which the custodian is a party, provided the information relates to or is a matter in issue in that proceeding. However, authorization to disclose under the *Act* does not constitute, and must not be read as, blanket authorization to publish any health-related content in a public court filing.

Disclosure under the *Act* and publication in a Statement of Defence are legally and conceptually distinct. The *Act* governs the transmission of PHI between or among regulated custodians and parties in particular circumstances. Publication in court proceedings, by contrast, is governed by the rules of civil procedure, the law of privilege, and the overriding duty of counsel not to advance claims or make representations without evidentiary foundation. Where information is potentially harmful to a party's reputation or privacy interests, the appropriate mechanism is not public disclosure but rather a protective order, sealing order, or redaction. Courts have affirmed this approach by consistently recognizing that sensitive personal information, and particularly mental health information, should be sealed or redacted rather than placed on the public record without necessity. The inclusion of fabricated psychiatric diagnoses in a public pleading is not a form of disclosure the *Act* contemplates or permits.

C. The Information Was Neither Disclosed Nor Relevant

The Respondent has characterized the inclusion of three specific incurable psychiatric diagnoses in its Statement of Defence as a legitimate exercise of its right to defend itself in court. This characterization is factually and legally untenable. No such diagnoses appear in any of the Complainant's hospital records, physician reports, or any other clinical document held by The Ottawa Hospital. When the Complainant requested the entirety of records held by the Respondent, no source document containing the stated diagnoses was found.

The absence of any record is further compounded by the fact that no diagnosis was ever communicated to the Complainant. The AMA's Code of Medical Ethics requires that physicians inform patients of their diagnosis and its implications as a fundamental component of informed consent. Where a diagnosis was never communicated to the patient, it cannot be said to have been made in any clinically or legally cognizable sense. The Respondent cannot invoke in a public court filing diagnoses that were never formed, recorded, or disclosed through any proper clinical process.

Section 41(1)(a) of the *Act* applies only to information that "relates to or is a matter in issue in the proceeding." The provision presupposes that the information in question actually exists in the records of the custodian and is directly related to the issues being litigated. Where no such information exists in the record, the provision cannot logically apply. The *Act* defines disclosure as the act of making known that which was previously private. Information that does not exist in any record cannot be disclosed; it can only be invented. Invented medical diagnoses fall entirely outside the scope of section 41(1)(a) and therefore outside any lawful authority the *Act* could have provided.

The fabricated psychiatric diagnoses also lacked any integral connection to the Charter proceedings in issue. The Statement of Claim raised claims of Charter violations; the Statement of Defence responded with unsupported medical characterizations. No competency motion was filed. No medical evaluation was ordered by any court. No medical evidence of any kind was presented. The same diagnostic labels could have been inserted into any personal injury or civil claim regardless of its constitutional context, which illustrates that they served no legitimate defensive purpose and were not relevant to any matter in issue within the meaning of the *Act*.

The burden of proof lies with the Respondent to establish that any disclosure of the Complainant's personal health information was authorized under the Act and that the information disclosed was both accurate and relevant to the proceeding. The Respondent has not discharged, and cannot discharge, that burden. It has produced no source document evidencing the diagnoses, no clinical record communicating those diagnoses to the Complainant, and no evidentiary basis connecting the diagnoses to any matter in issue in the Charter proceedings. An

assertion in a Statement of Defence does not constitute proof, and the mere inclusion of medical characterizations in a pleading does not transform invented information into lawfully disclosable PHI. Where the Respondent is unable to point to records substantiating the diagnoses it published, the inference that the statements were fabricated is the only reasonable conclusion available.

D. Privilege Does Not Extend to Fabricated and Irrelevant Statements

Absolute privilege in court proceedings exists to protect the administration of justice and to allow parties to speak freely on matters at issue without fear of collateral defamation proceedings. It does not exist to immunize parties or their counsel from accountability for publishing false information having no relationship to the issues in dispute. Ontario courts have recognized that privilege is bounded by relevance and by the requirement that statements be made in connection with the matter being litigated.

The decisions in Salasel v. Cuthbertson, 2015 ONCA 115, 1522491 Ontario Inc. v. Stewart, Esten Professional Corp., 2010 ONSC 727, and the Supreme Court of Canada's decision in Hill v. Church of Scientology of Toronto, [1995] 2 SCR 1130 establish that the courts are not a vehicle for personal attacks on opposing parties under the guise of pleading. Privilege does not extend to statements that constitute personal attacks unrelated to the legal questions being adjudicated. No immunity logically exists for statements targeting the Complainant's mental health where those statements had no bearing on whether the Respondent violated the Complainant's Charter rights. No diagnosis appeared in the Complainant's legal filings. No diagnosis appeared in any medical document. There was no evidentiary warrant for the representations made.

The fabrication of specific psychiatric diagnoses without any medical foundation also implicates professional conduct standards and public policy considerations governing the conduct of litigation. The conduct described exceeds the bounds of legitimate advocacy and, to the extent that instructions were given or received to include such representations, raises questions about whether counsel was acting within the scope of a proper retainer.

E. Protective Non-Disclosure is the Appropriate Standard for Sensitive Health Information in Court Proceedings

Even assuming for the sake of argument that the Respondent had possessed a legitimate basis for referencing the Complainant's health status in its defence (which the Complainant denies) the appropriate course was not public disclosure but rather protective non-disclosure. Courts in Ontario and across Canada have affirmed that sensitive personal health information, and mental health information in particular, should not be placed on the public record unnecessarily. Where

such information must be referenced in a proceeding, the proper mechanism is to seek a sealing order, a confidentiality order, or redaction of the sensitive material from the public record.

The principle that harmful personal information should be shielded from unnecessary public exposure reflects both the purposes of privacy legislation and the constitutional values underlying section 8 of the Charter. To place fabricated and stigmatizing psychiatric diagnoses on the public record of a court filing without a sealing order, without redaction, without evidentiary support, and without any connection the claims being litigated is inconsistent with those principles and with the Respondent's obligations under the *Act*.

F. Potential Criminal Liability

The Complainant further submits that the publication of the impugned diagnoses may engage section 300 of the Criminal Code of Canada, which addresses the publication of defamatory libel, and section 298, which defines defamatory libel as matter published without lawful justification or excuse that is likely to injure the reputation of any person by exposing them to hatred, contempt, or ridicule. The fabricated psychiatric diagnoses satisfy that definition: they were published in a public document, they attributed specific incurable diseases to the Complainant without any evidentiary basis, and caused reputational and dignitary harm. No lawful justification existed for their publication. The absence of due diligence in verifying the diagnoses prior to inclusion in the pleading, and the complete absence of any source document from which they could have been drawn, is consistent with malicious intent and is irreconcilable with any claim of good faith.

G. Discriminatory Impact and the Integrity of Charter Protections

The reasoning underlying any determination that endorses the Respondent's conduct risks creating a discriminatory precedent that effectively denies Charter protections to individuals with mental health conditions, contrary to the equality guarantees in section 15 of the Canadian Charter of Rights and Freedoms. If fabricated psychiatric diagnoses may be introduced into a Statement of Defence without evidentiary support and without consequence, the practical effect is that a hospital or other institutional defendant may shield itself from Charter liability by labeling the claimant as mentally ill, regardless of the merits of the constitutional claim. This creates a mechanism to deny access to justice based on mental health status.

The Complainant submits that individuals with mental health conditions are entitled to the full protection of the Charter and of privacy legislation. Any interpretation of section 41(1)(a) of the *Act* that would license the publication of fabricated diagnoses in response to constitutional claims must be rejected as incompatible with the Charter values the legislation is intended to serve.

H. Correction of Records and Status of Proceedings

The Complainant has reviewed the entirety of their Ottawa Hospital records and confirms that the diagnoses included in the Statement of Defence do not appear in any hospital or clinical document. The Preliminary View's reference to the correction of PHI records is therefore inapplicable: there are no records containing the fabricated diagnoses to be corrected. The Complainant notes that the Ottawa Divisional Court is currently reviewing the matter in which the information was improperly published, as reflected in Superior Court of Justice matter DC-25-00003082, and that no final determination has been made. The Complainant respectfully requests that the Commissioner's office give full weight to the pending judicial proceedings and the legal arguments set out herein before issuing any final determination.

Respectfully Submitted,

Allan Douglas Wilson

The Complainant respectfully requests that the Preliminary View be reconsidered in light of the foregoing and that a finding be made that the Respondent violated the *Act* by publishing health information including fabricated diagnoses without lawful authority, without relevance to the proceedings, and in a manner inconsistent with the protective purposes of the legislation.