

Information and Privacy Commissioner,
Ontario, Canada



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

CYFSA DECISION 10

Complaint FA21-00023

Jewish Family and Child Service of Greater Toronto

October 12, 2023

Summary: The complainant, a mother, sought access under the *Act* to her family's entire file with the Jewish Family and Child Service of Greater Toronto (JFCS). JFCS granted the complainant partial access to the responsive records, denying access to some information pursuant to sections 312(1)(a) (legal privilege) and 312(1)(d)(iii) (identification of a source) of the *Act*. The complainant asked the IPC to review JFCS's decision not to grant access to the information withheld under those sections.

In this decision, the adjudicator finds that the exemptions at sections 312(1)(a) and 312(1)(d)(iii) apply to the information for which they were claimed. She upholds JFCS's decision not to grant the complainant access to the withheld information.

Statutes Considered: *Child, Youth and Family Services Act, 2017*, S.O. 2017, C. 14, Sch. 1, 312(1)(a) and 312(d)(iii); *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched. A, sections 52(1)(e)(i) and (iii).

Decisions Considered: CYFSA Decision 7, PHIPA Decisions 34, 100, 200, and 208.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

BACKGROUND:

[1] This decision addresses a service provider's refusal to grant an individual access to portions of her family's complete file, relying on two exemptions from the right of

access under Part X of the *Child, Youth and Family Services Act, 2017* (the *CYFSA* or the *Act*).

[2] The complainant, a mother, made a request to the Jewish Family and Child Service of Greater Toronto (JFCS or the service provider)¹ for “all of the details of [her] family’s file, from beginning to the end – everything included.” JFCS issued a decision letter providing partial access to the responsive records. In its decision letter, it explained that section 312(1) of the *CYFSA* set out exemptions under that *Act*, but it did not specify whether any of those exemptions applied to the withheld information.

[3] The complainant was not satisfied with JFCS’s decision and made a complaint about it to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to assist the parties in exploring the possibility of a mediated resolution.

[4] Following discussions with the mediator about its response to the request, JFCS issued a supplemental decision letter to the complainant clarifying that it was claiming that the exemptions at sections 312(1)(a) (legal privilege) and 312(1)(d)(iii) (identification of a source) apply to the withheld information.

[5] As a mediated resolution was not reached, the complaint was moved to the adjudication stage where an adjudicator may conduct a review. I decided to conduct a review and sought and received representations from both JFCS and the complainant.

[6] In this decision, I find that the exemptions at sections 312(1)(a) and 312(1)(d)(iii) apply to the information for which they were claimed. As a result, I uphold JFCS’s decision not to grant access to that information and I dismiss the complaint.

RECORDS:

[7] All of the responsive records are located in the Child Protection Information Network (CPIN) Case file that relates to the complainant’s family. The 14 responsive records that remain at issue are:

- Two notes to file that have been withheld in their entirety (identified by JFCS as notes 1 and 3), one note to file that has been withheld in part (note 2), and one email exchange that has been withheld in its entirety (note 4), all pursuant to section 312(1)(a) of the *Act*; and,

¹ Section 312(1) in Part X of the *CYFSA* provides for a right of access to certain records in the custody or control of a “service provider”, as that term is defined in section 285(1). In this complaint, the parties do not dispute that JFCS qualifies as a “service provider” within the meaning of section 285(1) of the *CYFSA*. The definition of “service provider” in section 2(1) of the *CYFSA* includes a society that provides a service funded under the *CYFSA* and “society” is defined in section 2(1) of the *CYFSA* as an agency designated as a children’s aid society by the Minister under section 34(1).

- An intake form that has been withheld in part (note 5), eight contact logs that have been withheld in part (notes 6 to 13) and one contact log (note 14) that has been withheld in full, all pursuant to section 312(1)(d)(iii) of the *Act*.

ISSUES:

- A. Does the exemption for information subject to legal privilege at section 312(1)(a) apply to the information in the withheld case notes and email exchange?
- B. Does the exemption related to confidential sources at section 312(1)(d)(iii) apply to the withheld form and contact logs?

DISCUSSION:

Issue A: Does the exemption for information subject to legal privilege at section 312(1)(a) apply to the information in the withheld case notes and email exchange?

[8] Section 312 of the *CYFSA* sets out an individual's right of access to information under Part X. Section 312(1) provides that an individual has a right of access to a record of personal information about the individual, in the custody or control of a service provider, provided that the record "relates to the provision of service to the individual." This right of access is subject to limited and specific exemptions, which are set out in sections 312(1)(a) to (d).

[9] One of these exemptions is the legal privilege exemption at section 312(1)(a), which JFCS claims to withhold two full notes to file (notes 1 and 3), parts of one note to file (note 2), and one email exchange (note 4). JFCS submits that this withheld information is subject to solicitor-client privilege, which, JFCS argues is a legal privilege that restricts disclosure to the complainant within the meaning of section 312(1)(a). For the reasons set out below, I agree.

[10] Section 312(1)(a) deals with information that is subject to legal privilege. Section 312(1)(a) reads:

312(1) An individual has a right of access to a record of personal information about the individual that is in a service provider's custody or control and that relates to the provision of a service to the individual unless,

(a) the record or the information in the record is subject to a legal privilege that restricts its disclosure to the individual[.]

[11] The *CYFSA* does not define the term "legal privilege." Nor does it define the

terms "privilege," or "solicitor-client privilege," which appear in other sections of the *CYFSA*.

[12] Solicitor-client privilege, the only legal privilege that has been claimed by JFCS is a type of legal privilege; arguably, the foremost legal privilege at common law. Solicitor-client privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.² The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.³ The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.⁴ Solicitor-client privilege qualifies as a "legal privilege" for the purposes of section 312(1)(a) of the *CYFSA*.

[13] JFCS submits that notes 1 and 3 are discussions between counsel for JFCS and his client, JFCS staff, in which JFCS staff sought and received specific legal advice. JFCS submits that note 2 is a conversation between a JFCS manager and employee during which they discussed legal advice provided by counsel. Regarding note 4, JFCS submits that it is an email exchange between counsel for JFCS and clinical team members setting out information received through an investigation, legal advice provided by counsel regarding that information and the decisions made by JFCS regarding the legal advice that was provided.

[14] The complainant does not make any submissions that address whether or not any of the withheld information is subject to the legal privilege exemption at section 312(1)(a).

[15] I have examined the withheld information in notes 1 through 4. I confirm that the withheld information in notes 1, 2 and 3, contains direct communications of a confidential nature between JFCS and its counsel made for the purpose of seeking and obtaining legal advice. I find that this withheld information containing direct confidential communications between JFCS and its lawyer is protected by solicitor-client privilege.

[16] I also confirm that the withheld information in note 4 contains legal advice provided by JFCS counsel to their client, as well as information that passed between them in order for advice to be sought and given. I find that all of the withheld information in note 4 constitutes communications between JFCS and its counsel aimed at keeping both informed so that legal advice can be sought and given, and, thus, is protected by solicitor-client communication privilege.

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

⁴ See IPC Orders PO-2441, MO-2166 and MO-1925 for a discussion of how this principle is examined in the context of access requests under *FIPPA* and *MFIPPA*.

[17] Confidentiality is an essential component of solicitor-client privilege. Under the common law, a client may waive solicitor-client privilege. Waiver can either be expressed⁵ or implied.⁶ JFCS submits that privilege has not been waived for any of the records or information for which section 312(1)(a) has been claimed. I have no evidence before me to suggest that it has been waived. Accordingly, I find that privilege in these records and in this information has not been waived.

[18] Having found that the withheld information in notes 1, 2, 3 and 4, is protected by solicitor-client privilege, and that JFCS has not waived that privilege, I further find that it is subject to a legal privilege that restricts its disclosure to the complainant within the meaning of section 312(1)(a) of the *CYFSA*, as claimed by JFCS. Accordingly, I uphold JFCS's claim of section 312(1)(a) to withhold the case notes and email at issue.

Issue B: Does the exemption related to confidential sources at section 312(1)(d)(iii) apply to the withheld form and contact logs?

[19] Another exemption to the right of access is the confidential source exemption at section 312(1)(d)(iii). JFCS claims that section 312(1)(d)(iii) applies to portions of an intake form and eight contact logs (contact logs 1 through 8), as well as, another contact log, in its entirety (contact log 9). For the reasons set out below, I agree.

[20] Section 312(1)(d)(iii) of the *CYFSA* protects information that could reasonably be expected to identify an individual who provided information to the service provider in confidence. Section 312(1)(d)(iii) reads:

312(1) An individual has a right of access to a record of personal information about the individual that is in a service provider's custody or control and that relates to the provision of a service to the individual unless,

(d) granting the access could reasonably be expected to,

(iii) lead to the identification of an individual who provided information in the record to the service provider explicitly or implicitly in confidence if the service provider considers it appropriate in the circumstances that the identity of the individual be kept confidential.

[21] For section 312(1)(d)(iii) of the *Act* to apply, JFCS must demonstrate that granting access "could reasonably be expected to" result in the identified consequence, specifically, the identification of an individual who provided the information in the record to JFCS, in confidence, and, in the circumstances, it is appropriate that the identity of that individual be kept confidential.

⁵ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁶ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

[22] JFCS explains that the intake form contains information about an individual who provided information to it (the referral source), in confidence. JFCS submits that the information includes the referral source's name, as well as information that they provided to JFCS. JFCS claims that, if it granted the complainant access to this withheld information, the individual would be identified. JFCS submits that in all of these records, it is clear that the information was provided by the referral source explicitly in confidence. JFCS also indicates that in all of these records, the referral source also expressed concern for their own safety as a reason that their identity should be withheld from the complainant citing "historical threatening conduct" and "historic threats of harm."

[23] Section 312(1)(d)(iii) of the *CYFSA* has not yet been considered by the IPC. However, in PHIPA Decisions 200 and 208, the IPC has considered the application of section 52(1)(e)(iii) of the *Personal Health Information Protection Act (PHIPA)*, which is a substantially similar provision.⁷ Also, in *CYFSA* Decision 7, the IPC has considered section 312(1)(d)(ii) which is a similar provision that exempts from disclosure information which could reasonably be expected to lead to the identification of an individual required by law to provide information to the service provider. In my view, the treatment of these provisions by the IPC in its decisions on section 312(1)(d)(ii) of the *CYFSA* and section 52(1)(e)(iii) of *PHIPA* is informative to my determination of whether section 312(1)(d)(iii) applies here.

[24] The reasoning applied in the aforementioned PHIPA Decisions and *CYFSA* Decision 7 derives from *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,⁸ where the Supreme Court of Canada found that, in order to satisfy the burden of proof for the exemptions in *FIPPA* using the "could reasonably be expected to" language to describe a harm that might occur on disclosure, the institution must provide detailed evidence about the potential for harm; it must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. The Court also stated that how much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.

[25] In PHIPA Decision 34, which was followed by PHIPA Decision 100, among other

⁷ Section 52(1)(e)(iii) of *PHIPA* states:

Subject to this Part, an individual has a right of access to a record of personal health information that is in the custody or under the control of a health information custodian unless,

(e) granting the access could reasonably be expected to,

(iii) lead to the identification of a person who provided information in the records to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the identity of the individual be kept confidential[.]

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4 (hereinafter, *Ontario (Community Safety and Correctional Services)*).

decisions, the adjudicator determined that because of the common usage of the “could reasonably be expected” language in the provisions, the standard of proof required under section 52(1)(e)(i) of *PHIPA* is the same standard as that applied to the exemptions in *FIPPA*.⁹ This standard was subsequently applied to section 52(1)(e)(iii) of *PHIPA*, which is a substantially similar provision as section 312(1)(d)(iii) of the *CYFSA*.¹⁰

[26] For reasons similar to those expressed by the adjudicator in *PHIPA* Decision 34, and because of the language “could reasonably be expected to” used in section 312(1)(d)(iii), I find that the requisite standard of proof for section 312(1)(d)(iii) to apply is the same as that expressed by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services)*.¹¹ As a result, to establish that information is exempt under section 312(1)(d)(iii), JFCS must provide detailed evidence that disclosure of the withheld information under this section could reasonably be expected to lead to the identification of the individual who provided the information to JFCS. JFCS must demonstrate that the risk of the identification of the individual by the disclosure of the information is well beyond the merely possible or speculative although it need not prove that granting the requester access will in fact result in the identification of such individual. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹²

[27] From the language of the provision, section 312(1)(d)(iii) also requires JFCS to demonstrate that, in the circumstances, JFCS considers it appropriate to keep that individual’s identity confidential.

[28] In its representations, JFCS addressed each of the records that it claims are exempt from the complainant’s right of access because they would reveal information from a “referral source” who meets the requirements of section 312(1)(d)(iii).

[29] JFCS explains that the referral form (referred to as note 5), and nine contact logs (referred to as notes 6 through 14), record the various clinical steps taken during the investigation, some of them documenting intake calls received from the referral source including those that resulted in the opening of the investigation, as well as follow-up calls between JFCS staff and the referral source during which the information provided was confirmed and clarified.

[30] JFCS submits that the withheld portions of notes 5 through 14 contain information provided by the referral source, including their name and identity which, if disclosed, would lead to their identification. JFCS submits that the information provided by the referral source was provided explicitly in confidence, as the referral source stated clearly that they wished to remain anonymous. JFCS also submits that in its view, it is appropriate to maintain confidentiality with respect to the information provided and the

⁹ Although decided in the context of section 52(1)(e)(i), the stated standard of proof is the same.

¹⁰ *PHIPA* Decisions 200 and 208.

¹¹ *Ibid.* at paras. 52-4.

¹² *Supra*, note 5 at paras. 52-4.

referral source's identity due to the nature of the allegations made and the significance of the concerns, including significant fear, expressed by the referral source with respect to their safety should their identity be revealed. JFCS submits that the referral source's concerns are based on historical threats of harm and the referral source expressed "concern for their self and safety."

[31] The complainant submits "a strong objection" to JFCS's reliance on the referral source's concerns and fear of threatening conduct that is based on "historical threatening conduct" of the complainant's family. The complainant submits that JFCS should be required to provide evidence of such threatening conduct, stating that there are no police or other records that would confirm such allegation

[32] The complainant also submits that while they "agree with keeping the referral source anonymous", she already knows the name of at least one of JFCS's referral sources relating to the investigation into their family and neither the complainant nor anyone else in their family have made any threats to that individual.

[33] Based on my review of the evidence before me, in particular from my review of the contents of the records, it is clear that granting access to the information that has been withheld from notes 5 to 14 could reasonably be expected to lead to the identification of the referral source, who is an individual who provided information to JFCS explicitly in confidence. The information that has been withheld describes, with a certain amount of specificity, allegations that led to an investigation conducted by JFCS. I find that, given the nature of the withheld information, it is well beyond the merely possible or speculative that its disclosure would reveal the identity of the referral source who provided that information to JFCS. I also find that JFCS has established the second part of section 312(1)(d)(iii): JFCS considered and decided that, in the circumstances it is appropriate to keep the identity of that referral source confidential. In my view, recognizing the sensitive nature of the information that has been withheld, JFCS's consideration in this respect is not misplaced.

[34] I acknowledge that the complainant takes issue with JFCS's submission that the referral source has concerns for their safety due to historical threatening conduct on the part of the complainant's family. However, I note that concerns for a referral source's safety, either on the part of the service provider or the referral source themselves, is not a requirement for section 312(1)(d)(iii) to apply. Section 312(1)(d)(iii) requires that granting access could reasonably be expected to lead to the identification of an individual who provided information to a service provider, in confidence, and that the service provider considers it appropriate in the circumstances that the identity of the individual be kept confidential. In this case, where the information provided to JFCS by the referral source involves allegations that led to an investigation, I not only agree with JFCS's conclusion that granting access could reveal the identity of the referral source but also find that it is appropriate, in the circumstances, to keep their identity confidential by not granting the complainant access to information that might reveal it.

[35] Having found that granting access to the information JFCS has withheld under section 312(1)(d)(iii) could reasonably be expected to lead to the identification of an individual who provided information to JFCS explicitly in confidence, and that due to the sensitive nature of the information, which largely consists of allegations that led to an investigation, JFCS considers it appropriate, in the circumstances, to keep that individual's identity confidential, I further find that section 312(1)(d)(iii) applies to the information as claimed by JFCS.

[36] As a result, I uphold JFCS's decision not to grant access to the information at issue based on the exemptions at sections 312(1)(a) and 312(1)(d)(iii). I dismiss the complaint and issue no order.

ORDER:

I uphold JFCS's decision and issue no order.

Original signed by: _____
Catherine Corban
Adjudicator

_____ October 12, 2023