

Information and Privacy Commissioner,
Ontario, Canada



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

CYFSA DECISION 13

Complaint FA20-00012

Windsor-Essex Children's Aid Society

November 28, 2023

Summary: This decision concerns a complainant's request under Part X of the *Child, Youth and Family Services Act, 2017* (the *Act*) for access to records about her deceased uncle and her entire family. It considers whether there is a right of access in Part X to records of a deceased individual's personal information that relate to the provision of a service to the individual. It also considers the potential relevance of sections of Part X that permit or require the disclosure of personal information in some circumstances.

In this decision, the adjudicator finds that the complainant does not have a right of access to the personal information of her deceased uncle and of her family members under the *Act*. The records are not records of the complainant's personal information and they do not relate to the provision of a service to her. Part X of the *Act* does not contain explicit authority for an individual to act on behalf of a deceased individual in respect of the deceased individual's personal information; as a result, the complainant cannot make a request for access to her deceased uncle's records on his behalf. In addition, the complainant has not demonstrated that she is lawfully authorized under the *Act* to make a request on behalf of her other family members for access to records about them. The adjudicator also upholds the service provider's decision that none of the sections of Part X permitting or requiring disclosure of personal information applies in the circumstances. As a result, she dismisses the complaint.

Statutes Considered: *Child, Youth and Family Services Act, 2017*, sections 281, 286(a) and (b), 301(1) and (4), 303(1) and 312(1); *Personal Health Information Protection Act, 2004*, section 23(1)4.

Decisions Considered: CYFSA Decision 4.

BACKGROUND:

[1] This decision considers a request for access made by a complainant under the *Child, Youth and Family Services Act, 2017* (the *Act*) to the Windsor-Essex Children's Aid Society (WECAS) for the file of the complainant's deceased uncle. The complainant also requested access to her family's entire WECAS file.

[2] When a requester seeks personal information relating to another individual under the *Act*, it may be necessary to consider whether the requester has a right of access to that information under Part X of the *Act*. It may also be necessary to consider the potential application of sections of the *Act* that permit or require a service provider to disclose personal information in some circumstances.

[3] In this decision I determine that the complainant has no right of access to the personal information of her family members, because she is not the lawfully authorized substitute decision-maker for them for the purposes of Part X. I conclude that the *Act* does not permit the complainant to exercise a right of access to the personal information of her deceased uncle, on his behalf, because the *Act* does not explicitly address who, if anyone, may exercise substitute decision-making authority in respect of a deceased individual. Also, I uphold WECAS's decision that none of the provisions of the *Act* that permit or require disclosure of personal information is applicable in the circumstances. As a result, I dismiss the complaint.

The access request and WECAS's response

[4] The complainant made a request to WECAS, under Part X of the *Act*, for access to her deceased uncle's WECAS records and her family's entire WECAS file. In response to the complainant's request, WECAS initially denied the complainant access to any records on the basis that the complainant was not properly authorized to represent her uncle's estate. The complainant subsequently provided WECAS with documentation in support of her request: a copy of a Committeeship Order that declared her uncle "mentally incompetent" and appointed her as "Committee" of his person and estate.¹

[5] In response, WECAS issued a decision letter stating that to be granted access, the complainant had to provide a copy of a Will or Certificate of Appointment of Estate Trustee naming her as estate trustee for her uncle's estate and for the estates of her deceased grandparents whose personal information she sought. Regarding the Committeeship Order, WECAS said that it is "equivalent to a guardianship and expires at the death of the individual" to whom it pertains.

The IPC complaint and mediation

[6] The complainant was not satisfied with WECAS's decision and she filed a

¹ The Committeeship Order was issued by the District Court of Ontario under the *Mental Incompetency Act*, RSO 1990 c M9, which was repealed on April 3, 1995.

complaint about it with the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the complaint.

[7] At mediation, WECAS explained its decision to deny the complainant's access request on the basis that she had not established that she was the estate trustee for her uncle's estate.² It explained that it had referred to the substitute decision-making authority under section 301(4) of the *Act*, which states that a person who would be authorized to consent to the collection, use or disclosure of personal health information on the individual's behalf under the *Personal Health Information Protection Act, 2004, (PHIPA)* may be the individual's substitute decision-maker for the purposes of the *Act*.³ WECAS further explained that it then consulted section 23(1)4 of *PHIPA*, which states that a deceased's estate trustee may consent to the collection, use or disclosure of personal health information about the deceased individual.

[8] In response, the complainant provided WECAS with documents showing that she had assumed responsibility for the administration of her uncle's estate.⁴ At that point, WECAS issued a first revised decision partially releasing to the complainant 11 pages of records about her uncle – case notes used by WECAS for the purpose of providing services to her uncle and her family – but withholding the remaining information in the records responsive to her request.

[9] The complainant then advised WECAS that her grandparents have been deceased for over 30 years. In response, WECAS issued a second revised decision releasing additional information in the records concerning the complainant's uncle and grandparents. Information about individuals who have been deceased for more than 30 years does not qualify as "personal information" under the *Act*, and the access and disclosure provisions in Part X of the *Act* do not apply to it; accordingly, I do not address such information in this decision.⁵

[10] A mediated resolution of the complaint was not possible and the complaint proceeded to the adjudication stage of the complaint process where an adjudicator may conduct a review. The issues remaining in dispute at the conclusion of mediation were: whether the complainant has a right of access to the withheld information in the records, and whether the disclosure provisions of the *Act* apply to permit or require disclosure of the withheld information to her.

² WECAS's initial decision did not address the complainant's grandparents or other family members.

³ Section 301(4) of the *Act* and section 23(1)4 of the *PHIPA*, relied on by WECAS, are set out in page 7, below.

⁴ The complainant supplied documents including the Proof of Death, funeral service agreement, at-need cemetery purchase agreement and an affidavit sworn by her uncle's brother after her uncle's death.

⁵ "Personal information" is defined in the *Act* by reference to its definition in the *Freedom of Information and Protection of Privacy Act*, where section 2(2) states: "Personal information does not include information about an individual who has been dead for more than thirty years."

Additional information provided by WECAS at adjudication

[11] After examining the complaint file, I determined that I required additional information from WECAS about the nature of the records and information remaining at issue, and the legal basis for its refusal of the complainant's request for additional information. I sent WECAS a letter, copying the complainant, with questions about the records responsive to the complainant's request. WECAS responded to my questions and provided a copy of the records at issue along with an index.

[12] I considered WECAS's response and examined the records at issue. My preliminary assessment was that there were no reasonable grounds to review the subject-matter of this complaint under sections 317(3) and 317(4)⁶ of the *Act* because there is no provision in Part X of the *Act* that would grant the complainant a right of access to, or permit disclosure to her of, more information than what WECAS had already provided to her. I sent a letter to the complainant advising her of my preliminary assessment that there are no reasonable grounds to conduct a review because no purpose would be served by conducting a review. I invited the complainant to provide written representations in response if she disagreed with my preliminary assessment. The complainant provided a written response.

[13] After receiving the complainant's response, I examined the records at issue once again. I decided to conduct a review of the complaint based on the complainant's assertion that she is entitled to additional records of her family's (including her deceased uncle's) personal information as a lawfully authorized substitute decision-maker for them. I began my review by inviting WECAS's representations on the issues set out below. I then shared WECAS's representations with the complainant and invited her to provide representations in response, which she did.

[14] For the reasons that follow, I conclude that the complainant does not have a right of access under Part X to the personal information of her family members contained in WECAS's records for her family, and that no provision of the *Act* that permits or requires disclosure applies in the circumstances of this complaint. As a result, I dismiss the complaint.

RECORDS:

[15] The records at issue are 44 pages: 43 pages from the family file and one from the complainant's uncle's file. Considering my findings, below, there is no need for me to describe the records in further detail.

⁶ These sections of the *Act* confer discretion on the IPC Commissioner not to review a complaint if she is satisfied that there are no reasonable grounds to do so [section 317(3)], or for reasons including that the complaint has been or could be more appropriately dealt with using a procedure other than a complaint [section 317(4)(b)].

DISCUSSION:

[16] In seeking the personal information of her deceased uncle and her entire family, the complainant asserts that the access provisions at sections 312 and 313 of the *Act* provide no legal basis for WECAS to refuse her complete access to the records. In her representations, she argues that she has a right of access to the records, and that the records can and should be released to her because they relate to her uncle and her family and are of no interest to anyone else. The complainant submits that, if the records were current or recent, she would understand WECAS's reluctance to release them, but they are approximately 67 years old. The complainant's representations end there. They do not refer to any section of the *Act* that supports her position and they do not directly address the issues that were included in the Notice of Review that I sent her.

[17] In the discussion that follows, I consider the access provisions of the *Act* and explain why they do not apply in the circumstances of this complaint. I also uphold the service provider's decision not to disclose additional information to the complainant under provisions of the *Act* that permit or require disclosure of personal information in some circumstances.

[18] I begin my consideration of the issues in this complaint by confirming the following facts, which the parties do not dispute:

- WECAS is a "service provider" within the meaning of the *Act*⁷
- the records contain "personal information" within the meaning of the *Act*⁸
- the withheld "personal information" in the records belongs to the complainant's deceased uncle and/or other relatives and relates to WECAS's provision of service to those individuals, within the meaning of the *Act*
- none of the "personal information" in the records belongs to the complainant
- Part X of the *Act* applies to the complainant's request.

[19] I now turn to whether the complainant has a right of access to the records at issue.

⁷ The definition of "service provider" in section 2 includes "a licensee" and "a society, that provides a service funded under this Act."

⁸ Section 2 of the *Act* states that "personal information" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*, which defines "personal information" as "recorded information about an identifiable individual."

The complainant cannot exercise a right of access under section 312(1) of the *Act* on behalf of her deceased uncle or her other family members

[20] With limited exceptions, section 312(1) of the *Act* grants an individual a right of access to a record of her own personal information that is in the custody or control of a service provider and that relates to the provision of a service to the individual. Section 312(1) reads:

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[.]

[21] The wording of section 312(1) is clear that the right of access in Part X belongs only to the individual to whom the personal information relates. Part X does not grant a general right of access to another individual's personal information.

[22] In some circumstances, a person other than the individual to whom the personal information relates may make an access request on behalf of that individual. Such a person must be a lawfully authorized "substitute decision-maker" for the individual (sections 281 and 303).⁹ In CYFSA Decision 4, the IPC addressed the exercise of substitute decision-making authority in relation to a living individual. Although the complainant asserts that she should be given access to all of the withheld information, she provides no evidence that she is a lawfully authorized substitute decision-maker for her family members (other than her deceased uncle). On this basis, I find she cannot exercise a right of access under section 312(1) on behalf of her other family members.

The substitute decision-maker provisions of the *Act* do not apply to a request concerning the personal information of a deceased individual

[23] Regarding the complainant's attempt to exercise a right of access on behalf of her deceased uncle under section 312(1), the *Act* does not specify who may act as the substitute decision-maker for a deceased individual for the purposes of Part X. In this case, while the complainant claims, and WECAS accepts, that the complainant is the deceased individual's estate trustee, there is no provision in Part X that explicitly confers substitute decision-making authority for deceased individuals on estate trustees, or on any other person.

[24] Substitute decision-making is addressed in sections 281, 301(1) and (4), and 303 of the *Act*. The term "substitute decision-maker" is defined in section 281 of the *Act* as "a person who is authorized under [Part X] to consent, withhold or withdraw consent on behalf of an individual to the collection, use or disclosure of personal information about the individual."

[25] The substitute decision-maker provisions at sections 301(1) and (4) read:

⁹ CYFSA Decision 4.

301(1) An individual who is capable may give, withhold or withdraw consent or may, if the individual is 16 or older, authorize in writing another individual who is 16 or older and capable to be the individual's substitute decision-maker.

301(4) Where an individual is not capable of consenting to the collection, use or disclosure of personal information, a person who would be authorized to consent to the collection, use or disclosure of personal health information on the individual's behalf under the *Personal Health Information Protection Act, 2004* may be the individual's substitute decision-maker.

[26] Although *PHIPA* is referred to in section 301(4) of the *Act*, the *Act* does not read in or incorporate paragraph 23(1)4 of *PHIPA* pertaining to deceased individuals. Section 23(1)4 of *PHIPA* sets out the authority of a deceased person's estate trustee to act as a substitute decision-maker for the purposes of *PHIPA* in respect of a deceased person's personal health information. It reads:

23(1) If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure by a health information custodian of personal health information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent:

4. If the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.

[27] There is no provision in the *Act* that is similar to section 23(1)4 of *PHIPA*.

[28] The IPC has highlighted this legislative gap in its submission to the Ministry of Children, Community and Social Services, in its letter of July 13, 2023.¹⁰ Issue 4 of the IPC's submission, at pages 11 through 13, addresses "The Collection, Use and Disclosure of the Personal Information of Deceased Individuals" and includes "Recommendation 4.1: Clarify who can Act as Substitute Decision-Maker for a Deceased Individual." In Recommendation 4.1, the IPC notes the "lack of clarity within the [*Act*] regarding who may consent to the collection, use or disclosure of personal information on behalf of a deceased individual" that "limits access to and the protection of a deceased person's personal information." The IPC recommends amending Part X of the *Act* to clarify who may consent, withhold, or withdraw consent on behalf of a deceased individual in relation to the personal information of the deceased individual.

¹⁰ The IPC's complete "Written Submission to the Ministry of Children, Community and Social Services with Respect to the 2023 Review of the *Child, Youth and Family Services Act, 2017*" can be accessed here: <https://www.ipc.on.ca/wp-content/uploads/2023/07/cyfsa-5-year-review-2023-submission-en.pdf>

[29] In contrast to *PHIPA*, the substitute decision-maker provisions in the *Act* refer and apply exclusively to individuals who are alive. None of these provisions refers to a deceased individual. A deceased individual does not fit within in the *Act's* definition of a capable or incapable individual. In particular, the definition of "capable" in section 281 implies a living person who is "able to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure of personal information" and "able to appreciate the reasonably foreseeable consequences of giving, withholding or withdrawing the consent."

[30] The wording of section 303(1) also clearly implies a living individual in stating:

If this Part permits or requires an individual to make a request, give an instruction or take a step and a substitute decision-maker is authorized to consent or withhold or withdraw consent on behalf of the individual to the collection, use or disclosure of personal information about the individual, the substitute decision-maker may also make the request, give the instruction or take the step on behalf of the individual.

[31] For the reasons set out above, I find that the complainant does not have a right of access under section 312(1) of the *Act* to her deceased uncle's withheld personal information in the records at issue.

[32] I will now consider whether any disclosure provisions in Part X apply to the complainant's request for records relating to her uncle and her family.

The disclosure provisions in the *Act* do not apply to the complainant's request for records relating to her family and her deceased uncle

[33] WECAS also considered whether the disclosure provisions assist the complainant and decided that they do not. "Disclosure" is not a defined term in the *Act*. However, the IPC has noted that the term generally refers to releasing or making the information available to another person or organization.¹¹ Section 286 addresses the collection, use, and disclosure of personal information collected by a service provider for the purpose of providing a service to an individual. It states:

A service provider shall not collect personal information about an individual for the purpose of providing a service or use or disclose that information unless,

- (a) the service provider has the individual's consent under this Act and the collection, use or disclosure, to the best of the service provider's knowledge, is necessary for a lawful purpose; or

¹¹ See page 16 of "Part X of the *Child, Youth and Family Services Act: A Guide to Access and Privacy for Service Providers* (May 2019)" available online here: <https://www.ipc.on.ca/wp-content/uploads/2019/05/part-x-guide-e.pdf>.

(b) the collection, use or disclosure without the individual's consent is permitted or required by this Act.

[34] Thus, the *Act* contemplates the disclosure of personal information in some circumstances: where there is appropriate consent (and other conditions are met); and where the *Act* permits or requires the disclosure to be made without consent.¹² I will consider each scenario in turn.

Disclosure with consent

[35] Under section 286(a), a service provider may disclose personal information relating to the provision of a service to an individual with that individual's consent, where, to the best of the service provider's knowledge, that disclosure is necessary for a lawful purpose.

[36] Any consent must fulfil the requirements of consent set out in section 295 of the *Act*. These requirements include (among other things) that: the consent be the consent of the individual to whom the personal information relates; the consent be knowledgeable; and the consent relate to the information at issue.¹³

[37] Neither WECAS nor I have been provided with any consent from any of the other family members whose personal information is contained in the records. The provision of the *Act* allowing disclosure with consent at section 286(a) does not apply.

Disclosure without consent

[38] Section 286(b) contemplates disclosure where other sections of the *Act* permit or require a service provider to disclose personal information relating to the provision of a service to an individual. These disclosure without consent provisions are found at sections 292 to 294 of the *Act*. In the circumstances of this complaint, the only potentially relevant provisions are found in section 292 of the *Act*.

[39] Section 292 describes several purposes for which a service provider may disclose personal information about an individual without the consent of that individual. These purposes include: to aid a law enforcement agency in Canada with a law enforcement investigation [292(1)(a)]; to permit a litigation guardian or legal representative of the individual to act on the individual's behalf in a proceeding [292(1)(c)]; to contact the individual's family, friend or potential substitute decision-maker, if the individual is injured, incapacitated or otherwise not capable [292(1)(d)]; and to contact the individual's family member or friend of the individual if the individual is deceased [292(1)(e)]. Section 292 is discretionary.

[40] I invited the parties to address whether the complainant's request raises the

¹² CYFSA Decision 4.

¹³ CYFSA Decision 4.

potential application of any sections of the *Act* that permit or require disclosure without consent, and, if so, whether WECAS properly considered the request under those sections.

[41] The IPC has determined that discretion that is conferred on service providers under Part X of the *Act* must be exercised in a proper manner based on proper considerations, in good faith, and for a proper purpose.¹⁴ CYFSA Decision 4 also determined that the IPC has the authority to review a service provider's exercise of discretion under Part X and that, following this review, the IPC has the power to order the service provider to exercise (or to re-exercise) its discretion, and to provide comments or recommendations on the exercise of discretion.¹⁵

[42] In its representations on disclosure without consent, WECAS submits that the circumstances surrounding the complainant's access request do not fall within any of the disclosure provisions found within the *Act*. WECAS states that it considered whether the complainant's request met any of the conditions for disclosure without consent under Part X and concluded that it did not. WECAS adds that although it is sympathetic to the complainant's reason for her request – that she seeks historical records about her family to better understand the circumstances surrounding her uncle's history while in care – WECAS determined that there are no provisions within the *Act* that would allow for the disclosure of personal information of others, relating to the provision of services to them, without their consent.

[43] I agree with WECAS that no section of the *Act* permitting or requiring disclosure without consent is applicable in this complaint. Part X contains no authority for disclosure without consent based on compassionate grounds like the family circumstances the complainant has described in her representations. As for WECAS's exercise of discretion, I am satisfied that WECAS properly considered the disclosure provisions of the *Act* and decided not to disclose based on relevant considerations. There is no evidence that WECAS considered irrelevant factors, or that its exercise of discretion was otherwise improper. Accordingly, I uphold WECAS's exercise of discretion and decision not to disclose the requested information under Part X of the *Act*.

[44] Although I have no authority to address information in the records that is not subject to Part X of the *Act*, the complainant and WECAS are free to discuss the possible release of this kind of information – if any such information exists beyond the complainant's grandparents' information that WECAS has already released – to the complainant outside of the scheme of the *Act*.

[45] I acknowledge the complainant's deeply personal representations on why she seeks access to her deceased uncle's personal information. I am sympathetic to her compelling reasons for wanting to know about her uncle's and entire family's

¹⁴ CYFSA Decision 4.

¹⁵ Sections 321(1)(c) and (i) of the *Act*.

involvement with WECAS, considering the profound impact this involvement has had on her and her family. However, my sympathy does not influence the legal question of whether she has a right of access to the records at issue or whether the disclosure provisions apply in the circumstances. As noted in CYFSA Decision 4, there is no provision in the *Act* that grants access or permits disclosure on compassionate grounds.

[46] As I have found that the complainant has no right of access to the records at issue, and that the disclosure provisions of the *Act* do not apply, I dismiss the complaint.

NO ORDER:

For the foregoing reasons, I dismiss the complaint and issue no order.

Original signed by: _____
Stella Ball
Adjudicator

_____ November 28, 2023