

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 16

Complaint HC13-37

September 14, 2015

Summary: In this decision the IPC refuses a request by a doctor to defer a review of a collection, use and disclosure complaint, pending the completion of related proceedings before the College of Physicians and Surgeons of Ontario.

Statutes considered: *Personal Health Information Protection Act, 2004*, sections 57(4) and 60(16); *Regulated Health Professions Act, 1991*, section 36(3).

Cases Considered: *Farris v. Staubach Ontario Inc.*, 2004 CanLII 11325 (ON SC); *Hollinger International Inc. v. Hollinger Inc.*, 2004 CanLII 7352 (ON SC) aff'd 2004 CanLII 48063 (ON CA); *Cork v. Cork*, 2014 ONSC 2488 (CanLII)

INTRODUCTION

[1] In this complaint under the *Personal Health Information Protection Act, 2004* (*PHIPA* or the *Act*), a former patient of a medical clinic alleges that her ex-spouse obtained her medical records from the clinic and from a hospital without her consent. The complainant's ex-spouse, who is a physician, worked at the clinic for a period of time. The complainant alleges that her ex-spouse was not her health care provider, that he gained access to her medical records through deception, and that he subsequently wrongfully disclosed her personal health information in a court proceeding.

[2] I decided to initiate a review of the complaint under section 57(3) of *PHIPA*, and sent a Notice of Review to the complainant's ex-spouse (who I will refer to here as "the respondent"). Counsel for the respondent requested that I defer my review of the complaint pending the completion of related proceedings before the College of

Physicians and Surgeons of Ontario (the CPSO). I sought and received submissions from the respondent and the complainant on this request and, for the following reasons, decline to postpone this review.

BACKGROUND

[3] Complaint HC13-37 was made in August 2013, alleging unauthorized collection, use and disclosure of the complainant's personal health information by the respondent in the period from November 2012 to January 2013.

[4] The complainant also made a complaint against her former doctor at the clinic, in Complaint HC13-28, in which she alleges that the doctor used and disclosed her personal health information without her consent when, among other things, she gave records of the complainant's personal health information to the respondent. A further complaint (Complaint HC15-17) was made against a pharmacy that is alleged to have disclosed the complainant's personal health information to the respondent.

[5] In addition to making the complaint against the respondent to this office (the Information and Privacy Commissioner of Ontario, or the IPC), the complainant contacted the police. As a consequence, the respondent was charged with fraud, in connection with the allegation that he had forged the complainant's signature on a consent form for release of medical records. This office decided to place Complaint HC13-37 on hold pending the disposition of the criminal proceeding.

[6] The respondent is also the subject of complaints before the CPSO, about the same matters.

[7] In April 2014, the respondent's counsel informed the IPC that the fraud charge had been withdrawn, and the IPC assigned a mediator/investigator to the complaint. A mediated settlement of this complaint was not possible.

[8] I then decided to initiate a review of the complaint against the respondent. It is apparent that the complaint raises serious allegations and issues of fact and law that require further inquiry in order for me to determine whether there has been a contravention of the *Act* and whether I should issue orders or make recommendations.

[9] I began my review in Complaint HC13-37 by sending a Notice of Review to the respondent. As indicated, the respondent requested that I place this complaint in abeyance pending the completion of the proceedings before the CPSO. In support of this request, he submits that the complaints at the CPSO are about identical issues to those in the complaint before me. He states that there are two complaints before the CPSO. In the first, the clinic alleges that the respondent fraudulently obtained the complainant's medical records from the clinic and also forged the complainant's signature on a medical release form in order to obtain her records from a hospital. As well, the clinic alleges that the respondent forged the signature of a clinic doctor on a

medical document that he then used in a family law proceeding. The second complaint¹ makes allegations of misconduct against the respondent that include obtaining the complainant's medical records without her consent.

[10] The CPSO is gathering information on the complaints against the respondent. Under the CPSO's processes, the Inquiries, Complaints and Reports Committee will review this information and may, among other things, take no further action, advise or caution the physician, or refer the matter to a disciplinary hearing. According to the respondent's counsel, neither complaint against the respondent has yet been placed before this Committee. Most decisions of this Committee can be appealed to the Health Professions Appeal and Review Board. If this Committee refers the matter to a disciplinary hearing, the complaint is heard by the CPSO's Discipline Committee. Decisions of the Discipline Committee can in turn be reviewed by the Divisional Court.

[11] I wrote to the CPSO investigator inquiring about the status of the complaints before it. The CPSO's response was that, given statutory confidentiality provisions, it was not in a position to provide that information.

[12] Counsel for the respondent submits that the respondent should not be required to proceed before the IPC while the CPSO proceeding is ongoing. He expresses a concern that the respondent's defense against identical allegations before the CPSO will be prejudiced if the respondent is required to provide information to me in the course of this review. He submits that there is no prohibition in *PHIPA* on the use of evidence provided to the IPC in connection with a review, in other matters such as the CPSO proceedings. He submits that the consequences the respondent faces before the CPSO are potentially devastating to his ability to practice medicine.

[13] The respondent also refers to section 57(4)(b) of *PHIPA*, which provides me with the discretion not to review the subject-matter of a complaint where I am satisfied that it could more appropriately be dealt with initially by means of another procedure.

[14] The respondent also points out that the complainant did not file this complaint with the IPC until seven months after she became aware of the facts. He submits that deferral of the IPC's review would not prejudice any subsequent decision to conduct the review. There are, in his submission, no evidentiary consequences in deferring the review, nor any prejudice to the complainant.

[15] The complainant objects to the request to defer the review. Among other things, she states that although the proceedings before the CPSO relate to the same facts as those in her complaint, the CPSO's authority is with respect to professional conduct and discipline of physicians, whereas the IPC is concerned with issues of health privacy. She

¹ There is conflicting information before me on whether the clinic or the complainant filed the second complaint. It is not necessary for me to resolve this conflicting information for the purposes of this decision.

also states that the matters before the CPSO are much broader than those encompassed by this complaint. She also objects to deferral on the basis that her complaint has been with the IPC for almost two years and she has the right to have the matter proceed. The complainant also states that the complaints to the CPSO were not made by her; rather, they were made by the clinic and she has participated by assisting in the investigation.²

DISCUSSION

[16] It is not uncommon for different decision-making bodies, such as courts and tribunals, to have overlapping jurisdiction or receive complaints based on overlapping facts. Where there are parallel proceedings before different forums, one forum may be asked to defer (stay) consideration of its own matter until the other is completed. The principles applied by the courts when faced with such a request have been described in various ways,³ but it is clear that the granting of a temporary stay is discretionary. In exercising this discretion, courts have taken into account factors such as:

- the degree of overlap of issues and facts in the two proceedings;
- the likelihood and effect of the two matters proceeding in tandem in two different forums;
- whether granting a stay will prevent unnecessary and costly duplication of judicial and legal resources;
- the potential prejudice or injustice to either party in granting or denying a stay, including the potential for double recovery and the effect of possible delay.⁴

[17] I am guided by these principles in the case before me. In deciding whether to grant the respondent's request, I have considered the relative prejudice to both parties, and the potential impact of the CPSO proceedings on my review. The complainant has made serious allegations which merit a review by this office without further delay. The respondent also has an interest in the speedy disposition of the allegations, which he vigorously denies, although there is undoubted inconvenience to him in having to participate in dual proceedings at the same time.

² As indicated above, other information before me suggests that she filed one of the complaints; it is not necessary to resolve this difference.

³ In one line of reasoning, courts have indicated that a temporary stay should only be ordered in the clearest of cases, where continuing the action would cause substantial prejudice or injustice to the party seeking the stay, and cause no injustice to the other party: see *Farris v. Staubach Ontario Inc.*, 2004 CanLII 11325 (ON SC). But see *Hollinger International Inc. v. Hollinger Inc.*, 2004 CanLII 7352 (ON SC) aff'd 2004 CanLII 48063 (ON CA), in relation to a stay pending the resolution of a foreign proceeding.

⁴ See *Farris v. Staubach Ontario Inc.*, above, at paras 15-22 and *Cork v. Cork*, 2014 ONSC 2488 (CanLII) at paras. 89-91.

[18] In this case, factors that favour putting my review on hold include:

- the CPSO is investigating the same allegations and circumstances as those before me, relating to the alleged improper use and disclosure of the complainant's personal health information by her ex-spouse;
- there is inconvenience to the respondent in having to respond to two sets of proceedings at the same time;
- the CPSO may discipline the respondent if the allegations before it are substantiated, thereby providing the complainant with a form of resolution for her complaints;
- there is a risk that the CSPO proceedings and my review may result in different findings on the same facts, which should generally be avoided.

[19] Factors weighing against placing my review on hold include:

- although the CPSO is currently investigating the complaints before it, I have no indication that the complaints will be resolved soon;
- the evidence does not establish a prejudice to the respondent beyond the inconvenience of responding to two proceedings in tandem;
- I am not convinced that his right to fully defend against all the allegations would be jeopardized by continuing with this review;
- any orders or recommendations I may make would be very different from the outcome of the CPSO proceedings and serve a different purpose;
- there is no issue or prospect of "double recovery" by the complainant;
- the CPSO has the authority to determine the relevance of findings made by this office, to its own proceedings;
- it is uncertain whether the outcome of the CPSO proceeding would have the benefit of narrowing the issues in my review;
- having filed a complaint raising serious allegations about the breach of her health privacy, the complainant has a right to have those allegations dealt with.

[20] I am not convinced the respondent has demonstrated any prejudice, beyond the inconvenience of having to respond to two proceedings at the same time. First, the respondent has not pointed to any specific actual or potential prejudice to his ability to respond to the CPSO, by being required to respond to this review.

[21] Second, the respondent has not cited any authority for his argument that he has

no protection against the use of evidence given in my review, in other proceedings, and the merits of this argument are by no means clear. I note that section 60(16) of *PHIPA* provides:

Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of a review by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

[22] It is at least arguable that section 60(16) provides protection against the use of evidence given in my review in other proceedings. I also note that it is unclear what benefit, if any, waiting for the conclusion of the CPSO complaints would have on my review. I agree with the respondent that I have the discretion not to conduct a review, or to place my review on hold, if I am satisfied that the CPSO could more appropriately deal with this complaint. However, there is much uncertainty about the time frame within which the CPSO will reach a disposition. There are also important issues raised in this complaint which the allegations before the CPSO may not address, for example: whether the respondent was acting as an agent of the clinic within the meaning of *PHIPA* and if he was not, what obligations apply to his use and disclosure of the complainant's personal health information.

[23] Further, while there may be a benefit to waiting for the outcome of the CPSO proceedings if they resulted in narrowing the issues before me, I am not convinced this would be available. The respondent has referred to section 36(3) of the *Regulated Health Professions Act, 1991*, which states:

No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

[24] Given this provision, and without conclusively deciding this issue, it is possible that findings made in the course of the CPSO proceedings may not be relied on in my review.

[25] Finally, the complainant has the right to have her complaints about a breach of her health privacy dealt with. It would not be in the interests of fairness to place this matter on hold for an indefinite period, pending proceedings in which she has little or no say in the timing of their resolution, and where there may be several stages before any resolution.

[26] I therefore conclude that fairness favours proceeding with this review. I decline the respondent's request to defer this review pending completion of the proceedings currently before the CPSO. I will be proceeding with the review of this complaint and will be writing to the complainant and the respondent in the next few weeks to explain the procedures to be followed in this review and to advise on whether this review will be consolidated with the review of other complaints, currently at different stages in the IPC's processes, that raise overlapping facts and issues.

Original Signed by: _____

Sherry Liang
Assistant Commissioner

September 14, 2015 _____