Information and Privacy Commissioner,
Ontario, Canada

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

# PHIPA DECISION 25

HA14-63

Ministry of Health and Long-Term Care

March 11, 2016

**Summary:** The Ministry of Health and Long-Term Care requested that the Information and Privacy Commissioner of Ontario (IPC) reconsider PHIPA Decision 19, relating to the IPC's jurisdiction over complaints about the refusal to disclose personal health information of deceased family members. The adjudicator determines that there are no grounds for reconsideration and affirms the IPC's jurisdiction to receive complaints about the wrongful exercise of the discretionary power to disclose.

**Statutes considered:** *Personal Health Information Protection Act, 2004*, sections 38(4)(c), 56(1) and 64(1).

**Cases considered:** *Gabriel v. Canada*, [1984] F.C.J. No. 442, (FCA), *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

**Decisions considered:** PHIPA Decision 19.

## INTRODUCTION:

[1] On January 8, 2016, I issued four decisions relating to disclosure under section 38(4) of the *Personal Health Information Protection Act* (the *Act).* One of these decisions, PHIPA Decision 19, related to a request made to the Ministry of Health and Long-term Care (the ministry) by an individual for the personal health information of a deceased family member. The ministry now requests that I reconsider PHIPA Decision 19.

[2] For the reasons set out below, I deny the ministry's request to reconsider PHIPA Decision 19.

## BACKGROUND:

[3] In PHIPA Decision 19, I addressed a submission by the ministry that the IPC's jurisdiction to review that complaint was "unclear," and found that I had jurisdiction to review the complaint at issue. The ministry had submitted that its decision regarding disclosure pursuant to section 38(4) of the *Act* is discretionary, cannot be characterized as a "contravention" of the *Act,* and therefore cannot be the subject of a complaint to the Office of the Information and Privacy Commissioner of Ontario (the IPC) under section 56(1) of the *Act.* The ministry had requested that I "clarify" this issue in my decision.

[4] I addressed this submission at paragraphs 28 to 38 of PHIPA Decision 19 and concluded that a breach of the duty to exercise discretion based on proper considerations, in good faith or for a proper purpose amounted to a contravention of the *Act* at paragraph 33 (quoted below with the applicable footnotes):

> … while the disclosure permitted by section 38(4)(c) is discretionary, as a general principle, discretion must be exercised for the purposes underlying its grant.[7] This has been described as an "implied public statutory duty"[8] and is congruent with the ministry's own submission that it is permitted not to disclose personal health information pursuant to section 38(4)(c), as long as the exercise of this discretion is based on proper considerations, is not in bad faith or for an improper purpose. In submitting that the IPC does not have jurisdiction, the ministry is apparently relying on a distinction between the improper exercise of discretion and a "contravention" of the Act within the meaning of section 56(1). In the context of the broader purposes of the Act, I see no reason to accept such a distinction.
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> 7 See *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)*, 2010 SCC 23 para 46, quoting *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) at paras 53, 56 and 65. The Criminal Lawyer's Assn. case related to this office's review of a discretionary decision under FIPPA. See also *British Columbia (Education) (Re), 2010 BCIPC 32*[1] (Canlii) at para. 45, where the British Columbia Information and Privacy Commissioner was faced with a similar argument regarding its jurisdiction to review a discretionary decision and determined that the refusal to exercise, or the unreasonable exercise, of discretion constituted non-

[1] In reviewing PHIPA Decision 19 in response to this request for reconsideration, I noted an error in the neutral citation for this decision of the British Columbia Information and Privacy Commissioner. The correct citation is 2010 BCIPC 42. This error will be corrected in PHIPA Decision 19.

compliance with the *Freedom of Information and Protection of Privacy Act*, RSBS 1996, c 165.

8 As Rand J. noted in *Roncarelli v. Duplessis*, [1959] SCR 121 at p. 141.

[5] Ultimately, PHIPA Decision 19 did not turn on the issue of jurisdiction as, in any event, I agreed with the ministry's assessment that the conditions for disclosure under section 38(4)(c) were not present. I issued no order in PHIPA Decision 19.

[6] The ministry now requests that I reconsider PHIPA Decision 19, and submits that there were four fundamental defects in the adjudication process in that decision:

- The IPC failed to correctly define the term "contravention" in concluding that an exercise of discretion under Part IV could give rise to a complaint under section 56(1).
- The IPC failed to consider the nature of a permissive power and the context of Part IV, when concluding that an exercise of discretion under section 38(4)(c) could give rise to a complaint under section 56(1).
- The IPC erred in treating an exercise of discretion under Part IV as a response to an access request under FIPPA.
- The IPC failed to address the absence of specific language authorizing the IPC to review an exercise of discretion under Part IV, and failed to consider the availability of judicial review as a remedy for an alleged improper exercise of discretion if and when required.

# DISCUSSION

## Grounds for reconsideration

[7] In making this request for reconsideration, the ministry did not rely on section 64 of the *Act*, which provides for reconsideration of orders made after a review:

> 64. (1) After conducting a review under section 57 or 58 and making an order under subsection 61 (1), the Commissioner may rescind or vary the order or may make a further order under that subsection if new facts relating to the subject-matter of the review come to the Commissioner's attention or if there is a material change in the circumstances relating to the subject-matter of the review.

[8] Section 64(1) of the *Act* does not apply to the ministry's request for reconsideration. First, no order was made in PHIPA Decision 19 under section 61(1) of the *Act*. As such, section 64(1) of the *Act* has no application because the ministry is

challenging the reasons for decision and the finding of jurisdiction, but not any order issued. Second, the ministry has not submitted any new facts or a material change in circumstances relating to the subject matter of the review. In any event, the power available under section 64(1) is discretionary, and for the reasons set out below, I would not grant the ministry's request for reconsideration even if section 64(1) were applicable to this request.

[9] In its request for reconsideration, the ministry states that it is relying on section 18 of the IPC's "*Code of Procedure*." The IPC has two "Codes of Procedure" and it would appear that the ministry is relying on the reconsideration provision of the *Code of Procedure for Appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *FIPPA/MFIPPA Code*). This code is not applicable to a request for reconsideration under the *Act.* In considering the ministry's request for reconsideration, I have been guided by the reconsideration provisions of the IPC's *Code of Procedure for Access Correction Complaints under the Personal Health Information Protection Act, 2004* (the *PHIPA Access/Correction Code),* while recognizing that this review related to disclosure and not access under the *Act.* I note that the grounds for reconsideration in the *PHIPA Access/Correction Code* are in any event identical to those in the *FIPPA/MFIPPA Code,* with the exception that the *PHIPA Access/Correction Code* includes a ground reflecting section 64(1) of the *Act,* which I have addressed above.

[10] Section 14 of the *PHIPA Access/Correction Code* provides as follows:

> 14.01 The IPC may reconsider an order or other decision where it is established that:
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> (a) there is a fundamental defect in the adjudication process;
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> (b) there is some other jurisdictional defect in the decision;
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> (c) there is a clerical error, accidental error or omission or other similar error in the decision;
>
> (d) new facts relating to the complaint come to the IPC's attention or there is a material change in circumstances relating to the complaint

[11] In this case, the ministry has not submitted that there was any breach of procedural fairness in the adjudication process nor, as noted above, has the ministry referred to any new facts or a material change in circumstances. The ministry has also not submitted that there was any clerical error or accidental error or omission in PHIPA Decision 19. The ministry submits that there has been a fundamental defect in the adjudication process. Although it does not submit that there has been a jurisdictional

defect in the decision, its submissions refer to jurisdictional concerns. I will therefore consider whether there are grounds for reconsideration under both sections 14.01(a) and (b).

[12] It is important to note that the reconsideration power is not intended to provide a forum for re-arguing or substantiating arguments made (or not made) during the review, nor is reconsideration intended to address a party's disagreement with a decision or legal conclusion.[2] As Justice Sopinka commented in *Chandler v. Alberta Association of Architects*,[3] "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."

[13] On my review of the ministry's submissions, I conclude that they amount to re-argument of issues decided in PHIPA Decision 19, including arguments that the ministry could have but did not raise in the review. I am satisfied, therefore, that there are no grounds to reconsider PHIPA Decision 19. Even if the ministry's submissions establish grounds for reconsidering PHIPA Decision 19, for the reasons below, I would still exercise my discretion to deny the ministry's request.

[14] I will address each of the four "fundamental defects" put forward by the ministry, below.

### *1. The ministry states that "The IPC failed to correctly define the term "contravention" in concluding that an exercise of discretion under Part IV could give rise to a complaint under section 56(1)."*

[15] In its request for reconsideration, the ministry states that PHIPA Decision 19 did not address the grammatical and ordinary sense of the word "contravene," and that this amounted to a fundamental defect. The ministry provides the following dictionary definitions:

> 1. Failure to comply. 2. Non-compliance. 3. " ... [S]omething done in violation of a provision of [a statute] ... [The Dictionary of Canadian Law, 4th edition, 2011]
>
> Infringe, violate [a law, standards, guidelines, etc. [Canadian Oxford Dictionary, 2nd edition, 2004]

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[2] See *Ontario (Health and Long-Term Care) (Re)*, 2015 CanLII 83607 at paras. 21-24. Although this decision arises in the context of the *Freedom Information and Protection of Privacy Act*, the principles expressed in this decision, and in the other decisions quoted therein, are generally applicable to a request for reconsideration under the *Act,* while recognizing the different legislative context and the fact that the *Act* contains the power set out in section 64.

[3] [1989] 2 S.C.R. 848, at 861.

> An act violating a legal condition or obligation [Black's Law Dictionary, 10th edition, 1999]

[16] In support of its position, the ministry quotes from a decision of the Federal Court of Appeal in *Gabriel v. Canada:*[4]

> Even accepting Counsel's definition of "contravene" as requiring a positive act, I think that the omission to do something *which a person is required to do* is the commission of a positive act. It is an active failure *to do something required to done and, accordingly, "contravenes".* [emphasis added by ministry]

[17] I find that, rather than casting doubt on the reasons in PHIPA Decision 19, the definitions and case law referred to by the ministry support the conclusion that a failure to comply with an implied duty to exercise discretion based upon proper considerations, in good faith and for a proper purpose could amount to a "contravention" within the meaning of section 56(1) of the *Act*. The ministry does not challenge (and, indeed, accepted in its original submissions during the review) that it is subject to this implied duty regarding the exercise of discretion. If the ministry is *required* to exercise discretion based upon proper considerations, in good faith and for a proper purpose, a failure to comply with this legal requirement, in turn, could be a "contravention."

[18] The ministry also refers to section 6(3)(a) of the *Act,* which provides:

> 6…(3) A provision of this Act that permits a health information custodian to disclose personal health information about an individual without the consent of the individual,
>
> > (a) does not require the custodian to disclose it unless required to do so by law;
>
> …

[19] The ministry submits that "[t]he IPC has failed to explain how a provision (such as section 38(4)(c)) that does not require disclosure absent a legal requirement can be 'contravened' by a custodian's non-disclosure." The ministry further submits that discretionary decisions "cannot be determined to be right or wrong in any objective way."

[20] I found in PHIPA Decision 19 that a discretionary provision may be contravened where the discretion is exercised based on improper considerations, in bad faith or for an improper purpose. PHIPA Decision 19 also determined that the IPC can accept a

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[4] [1984] F.C.J. No. 442, (FCA).

complaint about a decision to refuse disclosure of information under section 38(4)(c). It does not conclude that, in reviewing such a complaint, the IPC will decide on the correctness of the result of a discretionary decision, and will order a health information custodian to disclose personal health information. PHIPA Decision 19 stated (at paragraph 37) that the remedies available to the IPC where the implied duty is found to have been breached would be an order that the health information custodian review the matter again and/or provision of comments and recommendations.

[21] The ministry suggests that certain "absurd results" would flow from PHIPA Decision 19:

- Under section 60(1)(b), the IPC could inspect a premises for the purpose of determining, whether a custodian had exercised its discretion improperly;

- Under section 61(1)(e), the IPC could direct a custodian to dispose of records if the IPC determined the phi was collected or used based on an improper exercise of discretion;

- An offence under section 72(1)(a) of PHIPA would include a wilful collection, use or disclosure of phi based on an improper exercise of discretion.

[22] The ministry has not explained why these results would be "absurd." In any event, the grant of powers to the IPC does not signify that they will be used, individually or in combination, without justification.

[23] The ministry has not established any fundamental defect or jurisdictional defect based on this argument.

***2. The ministry states that "The IPC failed to consider the nature of a permissive power and the context of Part IV, when concluding that an exercise of discretion under section 38(4)(c) could give rise to a complaint under section 56(1)".***

[24] The ministry submits that the conclusion in PHIPA Decision 19 could lead to the following results not contemplated by the legislature:

- An individual whose phi is disclosed - or not - under ss. 39(1)(a) and whose eligibility for benefits is affected as a result, could make a complaint with the IPC, alleging that the custodian's disclosure/non-disclosure decision was based on an improper exercise of discretion, even though the decision itself was authorized;

- An individual whose phi is used under ss. 37(1)(c) to educate a custodian's agents could make a complaint with the IPC alleging that the custodian's discretionary decision re: such a use was based on an improper exercise of

discretion; similarly, an agent who wants to use phi to educate herself could complain about her employer/custodian's discretionary decision not to use (and therefore not permit its agents to use) the information for educational purposes;

- An individual whose phi is disclosed under section 45 to a prescribed entity could make a complaint with the IPC alleging that the custodian's discretionary disclosure decision was based on an improper exercise of discretion.

[25] First, it is important to note that PHIPA Decision 19 does not decide the scope of the IPC's authority in relation to the above examples. The IPC may be required, in another case, to make those determinations. Second, the ministry has not addressed how these results would be beyond the contemplation of the legislature if the discretionary decision at issue in each example was made in bad faith, for an improper purpose, or based on improper considerations.

[26] The ministry has not established any fundamental defect or jurisdictional defect based on this argument.

### *3. The Ministry states that "The IPC erred in treating an exercise of discretion under Part IV as a response to an access request under FIPPA."*

[27] The ministry argues that the analysis in PHIPA Decision 19 conflates the discretionary disclosure framework under the *Act* with an "access regime".

[28] I do not accept this submission, as it is based on a selective reading of particular passages from PHIPA Decision 19 taken out of their context. PHIPA Decision 19 recognizes the discretionary nature of the disclosure permitted by section 38(4)(c), and distinguishes discretionary disclosure decisions under the *Act* from access provisions under the *Act* and the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), as stated in the following paragraphs:

> [8] Unlike the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) and its municipal equivalent, PHIPA does not provide a general right of access to information held by the organizations to which it applies. The only right of access established under PHIPA is the right, under section 52(1), of individuals to obtain access to their own personal health information.
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> [9] PHIPA draws a distinction between the provision of "access" to personal health information, and the "disclosure" of personal health information by a health information custodian…
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> [11] In addition to the provisions of PHIPA governing "access" to records of personal health information, PHIPA contains provisions governing when health information custodians may "disclose" personal health information

> [13] This case raises issues about the obligations of a health information custodian when deciding whether or not to disclose information under section 38(4)(c), the rights of individuals to complain to the IPC about a custodian's decision to not disclose information to them under this section, and the extent of the IPC's authority to inquire into such a complaint.
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> [28]… The custodian may disclose information under section 38(4) verbally, or in a record. Where an individual claims to qualify for disclosure under section 38(4)(c), the health information custodian must consider whether the individual meets the conditions for disclosure. The ministry states, and I agree, that since the provision is discretionary, it is also permitted not to disclose that personal health information, as long as the exercise of this discretion is based on proper considerations, is not in bad faith or for an improper purpose.

[29] The ministry has not established any fundamental defect or jurisdictional defect based on this argument.

***4. The ministry submits that "The IPC failed to address the absence of specific language authorizing the IPC to review an exercise of discretion under Part IV, and failed to consider the availability of judicial review as a remedy for an alleged improper exercise of discretion if and when required."***

[30] I also do not accept the ministry's submissions on this point. First, PHIPA Decision 19 recognizes the absence of specific language relating to the exercise of discretion. This is clear from the analysis in PHIPA Decision 19 of the ministry's implied duty to exercise its discretion in good faith, for proper purposes, and based on proper considerations.

[31] Second, with regard to the availability of judicial review, I find that this submission supports the conclusion in PHIPA Decision 19. I stated, in paragraph 31 of the decision:

> [31] Two stated purposes of the *Act* are "to provide for independent review and resolution of complaints with respect to personal health information" and "to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care." The *Act* should be interpreted purposively to provide independent review of complaints regarding the disclosure of personal health information, particularly where the health care of an individual may be at stake. Facilitating the effective provision of health care is, it goes without saying, of fundamental importance to the individuals whose health

> care may be affected by discretionary decisions affecting personal health information. Given the purposes of the *Act*, I do not accept the proposition that this office would not have the jurisdiction to accept a complaint, even if a family member listed in section 38(4)(c) were able to plainly demonstrate that they reasonably required the information to make decisions about their own health care or their children's health care….[Footnotes omitted]

[32] Where the IPC has been designated as the tribunal with expertise to review and resolve disputes under the *Act,* the statutory purposes would not be served by requiring individuals with complaints about discretionary decisions made under the *Act* to bring time consuming and expensive judicial review applications. Further, the finding that the IPC has jurisdiction does not preclude court oversight, as an order of the IPC under the *Act* may be appealed under section 62 (where applicable) or otherwise may be the subject of a judicial review.

[33] I also conclude that the ministry has not established any fundamental defect or jurisdictional defect based on this argument.

## NO RECONSIDERATION:

For the foregoing reasons, the ministry's request for reconsideration is denied.

Original Signed by: March 11, 2016

Sherry Liang
Assistant Commissioner