

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 83

Complaint HA16-80-2

Algoma Family Services

January 24, 2019

Summary: In this decision, the adjudicator concludes that the complainant has no right of access to his information in records held by Algoma Family Services. The adjudicator finds that the records do not contain any of the complainant's personal health information and he has no right of access under the *Personal Health Information Protection Act (PHIPA)* to records containing his son's personal health information. Further, Algoma Family Services is not subject to the *Freedom of Information and Protection of Privacy Act (FIPPA)* or its municipal equivalent.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched A, as amended, sections 4(1), (2) and (3); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of "institution"); R.R.O 1990, Reg. 460, section 1(1); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "institution"); O. Reg. 372/91; and *Ministry of Government Services Act*, R.S.O. 1990, c. M.25, section 17.1.

BACKGROUND:

[1] The complainant requested access under the *Personal Health Information Protection Act (PHIPA)* to his own personal health information held by the health information custodian, Algoma Family Services (the custodian). Specifically, he sought access to the following information about himself in a specific file:

1. [Information received through] direct observation.
2. Information collected during clinical sessions.

3. Information collected in professional meetings.
4. Collateral information.
5. Information from documents and collateral documents.
6. Information gathered from the use of clinical tools (i.e. diagnostic assessment measures, rating scales, etc.).
7. Notes containing information about [the complainant] that have been communicated by you to the Office of the Children's Lawyers [sic] as well as the Children's Aid Society of Algoma.

[2] The custodian issued a decision denying the complainant access to the requested records, in full. In its decision, the custodian advised that the requested information is contained in a supervised access file relating to the complainant's son who does not consent to its disclosure to the complainant.

[3] The complainant then modified his request. First, he asked that a "notice of dispute" be attached to the supervised access file and sent to all individuals who have accessed and received the supervised access material in the past two years. Second, he requested that the custodian provide him with access to the following information:

1. A copy of all of his own personal information "that was recorded, compiled, written, and noted as part of [his] interactions with [named individual] (social worker with Algoma Family Services)," and
2. A copy of "all of the above activities relating to [his] personal information...that [named individual] (social worker) communicated or shared with other organizations (particularly, but not limited to, [the] Children's Aid Society of Algoma)."

[4] With respect to the complainant's request for a "notice of dispute," the custodian advised that the dispute had been recorded in the file but that it is not prepared to write to third parties to provide notice of such dispute.

[5] With respect to the complainant's modified request, the custodian advised:

You have requested information about yourself contained in your son's file at Algoma Family Services. Prior to requesting the information from Algoma Family Services, you sought the records during your *Family Law Act* proceeding in Superior Court. You were made aware, at that time, that your son withdrew consent and prohibited Algoma Family Services from releasing information from his file to you. Your children had independent legal counsel with respect to this matter and the *Family Law Act* proceeding was resolved without an order being issued directing Algoma Family Services to release the records you have sought, to you.

[In the absence] of a Court Order directing Algoma Family Services to release the records or your son's consent, Algoma Family Services cannot release the records to you.

[6] The complainant filed a complaint with this office about the custodian's decision.

[7] During mediation, the complainant explained that he seeks all information in the social worker's records concerning her personal views and opinions regarding her meetings and interactions with him, including all correspondence sent to the social worker about him, as well as her replies to that correspondence. He confirmed that he is seeking the social worker's views and opinions of him, made in any recorded form, including those that were communicated to individuals outside of Algoma Family Services. The complainant takes the position that he is a client of the custodian, and as a result this information is his own personal information to which he has a right of access. The complainant disputes that the information he seeks qualifies as the personal health information or the personal information of his son.

[8] The custodian took the position that as it is the complainant's son, and not the complainant, who has a file number assigned to him, the information contained in the file consists of the complainant's son's personal health information as defined in section 4(1) of *PHIPA*. The custodian stated that the complainant's son, who has the capacity to consent to the disclosure of his own personal health information, has expressly withdrawn his consent to have any of his personal health information disclosed to the complainant. The custodian provided a copy of a "Withdrawal of Consent" form signed by the complainant's son, which stipulates that no information in his file shall be disclosed to any parties, including and not limited to either of his parents.

[9] The custodian confirmed that it considers itself a health information custodian as defined in section 3(1) of *PHIPA*. The custodian also stated that it does not consider itself an institution under the *Freedom of Information and Protection of Privacy Act (FIPPA)*, or its municipal equivalent, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*.

[10] As a mediated resolution could not be reached, the complaint was moved to the adjudication stage. As the adjudicator assigned to this file, I decided to conduct a review of the complaint under section 57(3) of the *Act*. In the course of my review, I sought and received representations from the custodian and the complainant.

[11] In this decision, I find that the records contain the personal health information of the complainant's son but do not contain any of the complainant's personal health information. I find that the complainant does not have a right of access to his son's personal health information under *PHIPA*. I also find that the custodian is not subject to *FIPPA* or *MFIPPA* and accordingly, there is no right of access to records under either of those acts. I find that the custodian acted appropriately in denying the complainant's access request. I dismiss the complaint with no order.

ISSUES:

- A. Does the complainant have a right of access to the requested information under *PHIPA*?
- B. Does the complainant have a right of access to the requested information under *FIPPA* and/or *MFIPPA*?

DISCUSSION:

A. Does the complainant have a right of access to the requested information under *PHIPA*?

[12] There is no dispute that the custodian is a health information custodian within the meaning of section 3(1) of *PHIPA*.

[13] Section 52(1) of *PHIPA* grants an individual a right of access to records of his or her personal health information that are in the custody or control of a health information custodian, subject to limited exemptions. A right of access can also be exercised by a person who is authorized to do so on the individual's behalf as set out in sections 5, 23, and 25 of *PHIPA*.

[14] The first issue that must be determined is whether the records contain personal health information, and if so, to whom that information relates. Personal health information is defined in section 4(1) of *PHIPA*, in part, as follows:

“personal health information”, subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including identification of a person as a provider of health care to the individual[.]

...

[15] Subsection 4(2) defines “identifying information” as “information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.”

[16] Section 4(3) of *PHIPA* states that personal health information includes “identifying information that is not personal information ... but that is contained in a

record that contains personal health information...”

[17] The complainant argues that the information contained in the records does not solely belong to his son and that he should be granted access to any of his own information. In support of his argument for access, he points to the completed Algoma Family Services Consent/Agreement to Services – Children’s Services form that he signed, a copy of which had been previously provided to this office by the custodian. The form states, in part:

I/we [name of complainant] (PRINT Name of Client or Parent/Guardian)
consent to my participation/the participation of my/our child and family.

[18] The complainant submits that he would not have participated in the custodian’s services on his own and that by signing the form he was specifically consenting to the participation of himself and his family, including his son. He takes the position that the health care service identified on the form was a service that not only his son was receiving but that he was receiving as well.

[19] The complainant also submits that he had several meetings with one of the custodian’s employees, with no one else present, and that he is entitled his own personal information contained in the records that he communicated to the custodian’s employee during those meetings.

[20] The custodian submits that the records responsive to the complainant’s request contain the personal health information of the complainant’s son and not that of the complainant. The custodian submits that it created the records in response to a health issue relating to the complainant’s son and his participation in its Intensive Treatment Service (ITS) program which, it submits, is a “program designed to help children and youth with behavioural issues.” Although the custodian acknowledges that this program involves the collaboration of parents, caregivers, teachers, physicians and other people involved in the child’s life, it submits that it is not a family therapy program whereby all members of the family are receiving services from the custodian.

[21] From my review of the completed Consent/Agreement form, the client is clearly identified as the complainant’s son. The form is a standardized form that is worded in a manner that covers a variety of different circumstances and services. The consent form, as completed, identifies that parental consent was granted for the purpose of the complainant’s son’s participation in the ITS program.

[22] Based on the evidence before me, I find that the records responsive to the complainant’s request contain the personal health information of the complainant’s son. The records are contained in a file that was created under the complainant’s son’s name and relate to his treatment by the custodian through its ITS program. I accept the custodian’s submission that the ITS program is a program designed to assist children and youth with behavioural issues which provided therapy to the complainant’s son, not a family therapy program which also provided therapy to the complainant.

[23] The custodian further submits that the records “are no more the personal health information of the [complainant] than they would be the personal health information of a teacher (if a teacher was consulted, referenced or involved) or a grandparent (if a grandparent was consulted, referenced or involved).” I agree. Moreover, I have no evidence before me to refute this position. As set out by the custodian, none of the records contain information that relates to:

- the complainant’s physical or mental health,
- providing health care to the complainant,
- a plan of service for the complainant within the meaning of the *Home Care and Community Services Act*,
- the complainant’s payments or eligibility for health care or health care coverage,
- the complainant’s donation of any body part or bodily substance or any testing derived therefrom,
- the complainant’s health number, or
- the identification of a substitute decision maker for the complainant.¹

[24] As a result, I find that the records do not contain the personal health information of the complainant. I accept that the ITS program is not a family therapy program and it follows that the complainant’s involvement in it is ancillary to its purpose of providing a health service to his son. I accept that any information in the records that might relate to the complainant does not relate to his own physical or mental health, the provision of health care by the custodian to him, or any other information described as personal health information as that term is defined in section 4(1) of *PHIPA*.²

[25] Having determined that the records do not contain the personal health information of the complainant, the next issue to be determined is whether, even though the records do not contain his own personal health information, the complainant is entitled to exercise the right of access set out in section 52 on behalf of his son, as an authorized individual or “substitute decision-maker” as set out in sections 5 and 23(1) of *PHIPA*.

[26] Section 23(1) describes the persons who may consent on behalf of an individual

¹ These are all possible types of personal health information, as defined in section 4(1) of *PHIPA*.

² Although section 4(3) of *PHIPA* states that personal health information includes “identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information...” that section applies to identifying information about the individual whose personal health information is contained in the record, which is not the case in this complaint.

to a collection, use or disclosure by a health information custodian of personal health information about the individual. Paragraph 2 of section 23(1) permits a parent to give, withhold or withdraw consent for a child under 16 years of age except in two enumerated circumstances. Section 23(2) places a condition on the definition of parent for the purpose of paragraph 2 of section 23(1), stipulating that "parent" does not include a parent who has only a right of access to the child. Additionally, if a person is entitled to act as a substitute decision-maker under paragraph 2 of section 23(1), section 23(3) states that "a decision of the child to give, withhold or withdraw the consent or to provide the information prevails over a conflicting decision of that person."

[27] The complainant has not provided any evidence of his authority to act as a substitute decision-maker on behalf of his son under paragraph 2 section 23(1) of *PHIPA*; nor is there any evidence that he has his son's consent to do so. Rather, there is evidence before me to the contrary. As noted above, the custodian has provided this office with a copy of a Withdrawal of Consent form signed by the complainant's son that clearly states: "No information contained in my file at Algoma Family Services shall be disclosed to any parties including and not limited to [two named individuals] (my biological parents)." One of the two individuals identified on the form is the complainant. I therefore find that the complainant's son's express withdrawal of consent to disclose his personal health information to the complainant further supports the custodian's decision to deny the complainant's request for the requested records.

[28] In summary, I find that *PHIPA* applies to the requested records which contain the personal health information of the complainant's son, but that the complainant has no right of access to the records under that act. Furthermore, there is an express withdrawal of consent by the son to the disclosure of his information to the complainant. I uphold the custodian's decision not to release the records to the complainant under *PHIPA*.

B. Does the complainant have a right of access to the requested information under *FIPPA* and/or *MFIPPA*?

[29] *FIPPA* and *MFIPPA* establish a general right of access to information.³ *PHIPA* does not contain an equivalent provision. However, section 8(4) of *PHIPA* states that *PHIPA* does not limit an individual's right of access under either *FIPPA* or *MFIPPA* if all of the types of personal health information set out in section 4(1) of *PHIPA* have been reasonably severed from the record.

[30] The complainant submits that, in addition to being subject to *PHIPA*, the custodian is also subject to *FIPPA* and therefore, under section 8(4) of *PHIPA* he has a

³ Section 10(1) of *FIPPA* and section 4(1) of *MFIPPA*.

right of access to his own personal information contained in the records. For the following reasons, I find that *FIPPA* does not apply. For the same reasons, I also find that *FIPPA*'s municipal counterpart *MFIPPA* also does not apply.

[31] *FIPPA* and *MFIPPA* grant individuals a right of access to records of general information and to an individual's own personal information in the custody or under the control of an institution, subject to certain exemptions under these acts.

[32] An institution is defined in section 2(1) of *FIPPA* as:

"institution" means

(0.a) the Assembly,

(a) a ministry of the Government of Ontario,

(a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Service Act*,

(a.2) a hospital, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations[.]

[33] The complainant submits that the custodian is an institution under *FIPPA*. In support of his position, he points to the portion of the definition in *FIPPA* that states that an institution includes "a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*."

[34] Section 17.1(1) of the *Ministry of Government Services Act* states:

The Lieutenant Governor in Council may, by regulation, designate a ministry of the government of Ontario, part of such a ministry or a person or entity as an organization to provide service to members of the public on behalf of the Government or a public body. [emphasis added by complainant]

[35] The custodian submits that it is not an institution within the meaning of the definition of that term in *FIPPA*. Specifically, it disagrees that it has been designated as a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*. It states that "there is one regulation made under the *Ministry of Government Services Act*, Ontario Reg. 475/07: SERVICE PROVIDER ORGANIZATIONS – SERVICE ONTARIO." It submits that Regulation 475/07 concerns Service Ontario and does not designate the custodian to provide service to members on behalf of the Government.

[36] I agree with the custodian, and find that it is not an institution under *FIPPA*. It is

not the Assembly, a ministry of the Government of Ontario, a hospital or a body designated as an institution in the regulations to *FIPPA*, specifically, regulation 460.⁴ Having considered section 17.1 of the *Ministry of Government Services Act* and the relevant regulation made under that act, I do not accept that it is designated as a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*. As the custodian is not an institution under *FIPPA*, *FIPPA* does not apply to the records and the complainant does not have a right of access to them under that act.

[37] Although the complainant did not raise the question of whether he had a right of access under *MFIPPA*, I have considered the issue. An "institution" is defined in section 2(1) of *MFIPPA* as:

(a) a municipality,

(b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,

(c) any agency, board, commission, corporation of other body designated as an institution in the regulations[.]

[38] Based on that definition, I find that the custodian is not an institution under *MFIPPA*. Therefore, I find that *MFIPPA* does not apply and the complainant does not have a right of access to the records under that act.

CONCLUSION:

[39] Based on the above, I uphold the custodian's decision to deny the complainant's access request. Specifically, I find that the complainant has no right of access to the records under *PHIPA*, *FIPPA* or *MFIPPA*.

NO ORDER:

For the foregoing reasons, I dismiss this complaint with no order.

⁴ R.R.O. 1990 (Section 1(1) and Schedule A).

Original Signed by: _____
Catherine Corban
Adjudicator

January 24, 2019 _____