

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 107

Complaint HA19-00010

Dr. Philip Squires / Consult Kids Stratford

January 24, 2020

Summary: A father who shares joint custody of a seven-year-old child with the child's mother requested that the child's doctor correct a record of the child's personal health information. The doctor refused to do so, including on the basis that the child's mother objects to the father's correction request. In this decision, the adjudicator considers whether the father is entitled under the *Personal Health Information Protection Act, 2004 (PHIPA)* to make the correction request on behalf of his daughter despite the objection of the child's mother. The adjudicator finds that: 1. as joint custodial parents, the father and the mother are equally ranked substitute decision-makers for the child under *PHIPA*; and 2. whether or not the child is mentally "capable" within the meaning of *PHIPA*, in view of the mother's objection to the father's request, the father cannot act as an independent substitute decision-maker for the child in order to request correction to the child's record. The adjudicator dismisses the father's complaint about the doctor's refusal of his request.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A (as amended), sections 4, 5, 23, 25, 26, 55, and 71(4)(b).

BACKGROUND:

[1] The complainant is the father of a seven-year-old child who is (or was) a patient of Dr. Philip Squires (the doctor) and Consult Kids Stratford, a clinic operated by a group made up of the doctor and six other paediatricians (the clinic). The complainant is separated from the child's mother, with whom he shares joint custody of the child.

[2] This complaint arises from a correction request that the complainant made to the doctor and the clinic under the *Personal Health Information Protection Act, 2004*

(*PHIPA*). The complainant requested correction to or removal of a letter drafted by the doctor about his daughter, which is contained in the child's file. The complainant alleges that this letter contains false information about him, including a diagnosis of him by the doctor, and he asserts that inaccuracies in the letter could negatively affect his daughter's future medical treatments. The complainant believes that accusations made against him in the letter would make it difficult for medical practitioners to look objectively at his daughter's future medical conditions, or to listen objectively to the complainant as the child's parent and primary caregiver.

[3] Through his legal counsel, the doctor responded by denying the complainant's request for correction on various grounds. These include claims that the record sought to be corrected is not a record of the complainant's own personal health information (and that the complainant therefore has no right to request correction); that the request is not a proper request for correction but rather a request for removal of the record; and that the request is frivolous or vexatious within the meaning of section 55(6) of *PHIPA*. In a later response, the doctor reported that the child's mother does not agree with the complainant's request for correction to the child's record, and that in the absence of evidence that the complainant's authority supersedes that of the child's mother, the doctor would be unable to grant the request.

[4] The complainant was dissatisfied with the doctor's decision and filed a complaint to the Office of the Information and Privacy Commissioner of Ontario (this office, or the IPC). During the course of the complaint, the complainant provided a copy of a court order to show that he shares joint custody of his daughter with the child's mother. The court order does not address decision-making by the joint custodial parents in respect of the child's personal health information.

[5] The complaint could not be resolved at the intake stage, and was streamed directly to the adjudication stage of the complaint process. In the circumstances, I decided to begin my review of the matter by seeking representations from the complainant on some preliminary issues having to do with the complainant's authority to act on behalf of his daughter under *PHIPA*. I also asked the complainant to confirm my understanding that the court order he provided to this office is currently valid, and that he continues to share joint custody of his daughter with the child's mother, which he did.

[6] After considering the complainant's representations, I decided that it was unnecessary to seek representations from the doctor or the clinic.

[7] In this decision, I uphold the doctor's decision to refuse the complainant's correction request on the basis the complainant lacks authority to make the request under *PHIPA*. I dismiss the complaint.

DISCUSSION:

[8] The right to request correction to a record of personal health information and the obligations of a health information custodian on receiving such a request are set out in section 55 of *PHIPA*.

[9] In particular, section 55(1) of *PHIPA* entitles an individual to request that a health information custodian correct a record of the individual's personal health information where certain conditions are met.^{1,2} As described in more detail below, this right can be exercised by a lawfully authorized substitute decision-maker for the individual (sections 5(1) and 25).

[10] This means that there is no general right in *PHIPA* for a person to request that a custodian correct a record of another individual's personal health information.

[11] I note that section 55(10) of *PHIPA* provides that where a custodian grants a request for correction, the correction is made by recording the correct information in the record and striking out the incorrect information in a manner that does not obliterate the record. There is no right in *PHIPA* to have the incorrect information in a record removed, replaced, or amended in a manner that could render the incorrect information illegible. This means that even if the complainant's correction request were to be granted, his requested remedy of removal of the letter from his daughter's file would not be available under *PHIPA*.

[12] In my Notice of Review to the complainant, I observed that this complaint raises some preliminary issues about the complainant's entitlement to request correction to the record at issue (and, consequently, his entitlement to complain to the IPC about the doctor's refusal of the correction request). At my request, the complainant provided me with representations addressing these preliminary issues. Based on the information before me, I was able to make a determination on the issues without needing to seek

¹ Among other things, section 55(1) requires that the individual first be granted access to the record by a health information custodian. In this complaint, there is some ambiguity about whether the complainant was granted "access" under *PHIPA* to the record that he seeks to have corrected. However, because of the manner in which I resolve this complaint, it is unnecessary for me to resolve this ambiguity, and I will not address it any further in this decision.

² In his decision letters to the complainant, the doctor takes the position that the clinic is not a health information custodian in respect of the record. I note that the complainant's correction request was made both to the doctor and to the clinic, and that the doctor responded to the request (by refusing the request) in any event. Because of the manner in which I resolve this complaint, I find it unnecessary to make a definitive determination of whether the clinic or the doctor is the health information custodian in relation to the record at issue. Whether the doctor responded to the request as a custodian in his own right, or as an agent of the custodian the clinic (as a person who operates a group practice of health care practitioners), I review the response given by the doctor to the complainant's correction request, and I ultimately dismiss the complaint on other grounds.

representations from the doctor or the clinic.

[13] In the discussion that follows, I explain the basis for my conclusions that: 1. in order to request correction to the record, the complainant must be a lawfully authorized substitute decision-maker for the child under *PHIPA*; and 2. in the circumstances of this complaint, the complainant is not authorized under *PHIPA* to exercise the child's right to request correction to the record. As a result, I dismiss the complaint without issuing any order.

The record at issue is a record of personal health information of the complainant's daughter, and not of the complainant

[14] In order to request correction to a record, it must first be established that the record is a record of personal health information of the individual requesting correction, or the individual on whose behalf the correction request is made.

[15] "Personal health information" is defined in section 4 of *PHIPA* to include identifying information about an individual that relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family [section 4(1)(a)], or that relates to the providing of health care to the individual, including the identification of a person as his or her health care provider [section 4(1)(b)].

[16] "Health care" is defined in *PHIPA* to mean any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that is carried out for certain specified purposes (section 2).

[17] In my Notice of Review to the complainant, I set out my preliminary view, based on the information before me (including the record itself), that the record is a record of personal health information of the complainant's daughter. There was no dispute that the child is (or was) a patient of the doctor, and it was my preliminary view that the record contains information relating to the child's physical or mental health and to the providing of health care to her within the meaning of paragraphs (a) and (b) of the definition at section 4(1). The record also contains other identifying information about the child that qualifies as her personal health information within the meaning of section 4(3) of *PHIPA*.

[18] Furthermore, despite the complainant's characterization of some of the information in the record as a "diagnosis" of him by the doctor, it was also my preliminary view that none of the information about the complainant in the record qualifies as his own personal health information within the meaning of *PHIPA*. Among other reasons, I noted that there was no claim that the complainant himself is (or ever

was) a patient of the doctor. I observed that any references to the complainant in the record appear to have been made in connection with the doctor's provision of health care to the child (his patient), and not for the purpose of diagnosing, treating or otherwise providing health care to the complainant.³

[19] The complainant does not dispute these preliminary findings, and instead focuses his representations on his entitlement as a father and joint custodial parent to request correction to his daughter's medical records.

[20] I conclude that the record at issue is a record of personal health information of the complainant's daughter. Under the next heading, I will consider the main issue of the complainant's authority under *PHIPA* to request correction to his daughter's record on her behalf.

In the circumstances, the complainant does not have authority under PHIPA to act as an independent substitute decision-maker for the child

The doctor appropriately refused the complainant's request in view of the objection of the other equally ranked substitute decision-maker

[21] Because the record is a record of personal health information of the complainant's daughter, only the daughter, or another person who is lawfully authorized to act for her under *PHIPA*, may request correction to the record. A person who is lawfully authorized to act for another individual in respect of the individual's personal health information is called a "substitute decision-maker" for that individual in *PHIPA* [sections 5(1), 25(1)].

[22] Section 23 of *PHIPA* identifies persons who may act as substitute decision-makers for individuals under various circumstances. This section states, in part [emphasis below is mine]:

(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:

³ Alternatively, even if I were to accept that the information identified by the complainant relates to his "physical or mental health," or otherwise qualifies as his personal health information under *PHIPA*, I would nonetheless conclude that the complainant has no right to request correction to his information in the record. This is because the complainant would have no right of access under *PHIPA* to (and, consequently, no right to request correction of) the record dedicated primarily to the personal health information of his daughter: O Reg 329/04, section 24(3).

1. If the individual is capable of consenting to the collection, use or disclosure of the information,

i. the individual ...

2. If the individual is a child who is less than 16 years of age, a parent of the child or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent unless the information relates to,

i. treatment within the meaning of the *Health Care Consent Act, 1996*, about which the child has made a decision on his or her own in accordance with that Act, or

ii. counselling in which the child has participated on his or her own under the *Child, Youth and Family Services Act, 2017*.

3. If the individual is incapable of consenting to the collection, use or disclosure of the information, a person who is authorized under subsection 5 (2), (3) or (4) or section 26 to consent on behalf of the individual.

(2) In subsection (1),

"parent" does not include a parent who has only a right of access to the child.

(3) If the individual is a child who is less than 16 years of age and who is capable of consenting to the collection, use or disclosure of the information and if there is a person who is entitled to act as the substitute decision-maker of the child under paragraph 2 of subsection (1), 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.

[23] The individual whose personal health information is at issue in this complaint is a seven-year-old child.

[24] In these circumstances, either section 23(1)2 or section 23(1)3 may be applicable. These sections identify who may act as a substitute decision-maker for a child under 16 years of age, depending on whether or not the child is "capable" of consenting within the meaning of *PHIPA*.

[25] To be capable of consenting within the meaning of *PHIPA*, the individual must be able to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure of her personal health information, and to appreciate the reasonably foreseeable consequences of that decision [section 21(1)]. In this decision, I will refer to an individual's capacity to consent under *PHIPA* as her "mental

capacity.”

[26] An individual is presumed to be mentally capable, unless the custodian has reasonable grounds to believe that the individual is not mentally capable [sections 21(4) and (5)].

[27] There is no “age of capacity” in *PHIPA*, although the age of the child may be a factor in a custodian’s determination about the child’s mental capacity for the purposes of *PHIPA*.

[28] In addition, a custodian may rely on another person’s assertion that he or she is the substitute decision-maker for an individual, unless it is not reasonable to do so in the circumstances [section 71(4)(b)].

[29] In this case, I have no information before me about the seven-year-old child’s mental capacity. However, for the reasons set out below, I conclude that whether or not the child is mentally capable, in these circumstances, the complainant is not authorized under *PHIPA* to act as an independent substitute decision-maker for the child. As a result, I dismiss the complaint.

If the child is mentally incapable—sections 23(1)3, 5 and 26

[30] If the child is mentally incapable, then section 23(1)3 of *PHIPA* provides that a person who is authorized under sections 5(2), (3) or (4) or under section 26 of *PHIPA* may act as the child’s substitute decision-maker.

[31] Sections 5(2), (3) or (4) of *PHIPA* are applicable where the mentally incapable individual already has a substitute decision-maker in relation to treatment and some other areas of decision-making under the *Health Care Consent Act, 1996* (and certain other conditions are met). There is no claim that any of these sections applies in these circumstances.

[32] If sections 5(2), (3) or (4) do not apply, then section 26 of *PHIPA* sets out a hierarchy for determining who may act as the mentally incapable individual’s substitute decision-maker. It states, in part [emphasis below is mine]:

26 (1) If an individual is determined to be incapable of consenting to the collection, use or disclosure of personal health information by a health information custodian, a person described in one of the following paragraphs may, on the individual’s behalf and in the place of the individual, give, withhold or withdraw the consent:

1. The individual’s guardian of the person or guardian of property, if the consent relates to the guardian’s authority to make a decision on behalf of the individual.

2. The individual's attorney for personal care or attorney for property, if the consent relates to the attorney's authority to make a decision on behalf of the individual.
3. The individual's representative appointed by the [Consent and Capacity Board] under section 27, if the representative has authority to give the consent.
4. The individual's spouse or partner.
5. A child or **parent of the individual**, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent. **This paragraph does not include a parent who has only a right of access to the individual.** If a children's aid society or other person is lawfully entitled to consent in the place of the parent, this paragraph does not include the parent.
6. A parent of the individual with only a right of access to the individual.
7. A brother or sister of the individual.
8. Any other relative of the individual.

(2) A person described in subsection (1) may consent only if the person,

- a. is capable of consenting to the collection, use or disclosure of personal health information by a health information custodian;
- b. in the case of an individual, is at least 16 years old or is the parent of the individual to whom the personal health information relates;
- c. is not prohibited by court order or separation agreement from having access to the individual to whom the personal health information relates or from giving or refusing consent on the individual's behalf;
- d. is available; and
- e. is willing to assume the responsibility of making a decision on whether or not to consent.

(4) A person described in a paragraph of subsection (1) may consent only if no person described in an earlier paragraph meets the requirements of subsection (2).

(5) Despite subsection (4), a person described in a paragraph of subsection (1) who is present or has otherwise been contacted may consent if the person believes that,

- a. no other person described in an earlier paragraph or the same paragraph exists; or
- b. although such other person exists, the other person is not a person described in paragraph 1, 2 or 3 of subsection (1) and would not object to the person who is present or has otherwise been contacted making the decision.

(7) If two or more persons who are described in the same paragraph of subsection (1) and who meet the requirements of subsection (2) disagree about whether to consent, and if their claims rank ahead of all others, the Public Guardian and Trustee may make the decision in their stead.

[33] In this complaint, there is no claim that there exists another person who would rank higher than a custodial parent under section 26(1) to act as substitute decision-maker for the mentally incapable child. There is also evidence that the complainant and the child's mother share joint custody of the child. This means that, if the child is mentally incapable, then the complainant and the child's mother could each qualify as the child's substitute decision-maker as a custodial parent of the child, provided other relevant conditions are met.

[34] One of these conditions is a belief on the part of one substitute decision-maker that another equally ranked substitute decision-maker would not object [section 26(5)(b)]. In this case, however, there is evidence that the child's mother, with whom the complainant is equally ranked under section 26(1), has expressly disagreed with the complainant's making a correction request on the child's behalf. The doctor cited the mother's objection to the complainant's request as one of the reasons for refusing the request. In these circumstances, the complainant cannot claim a belief that the equally ranked substitute decision-maker would not object to his request, and it would not be reasonable for the doctor to rely on any assertion by the complainant of such a belief. The result is that the complainant cannot act independently of the other custodial parent as a substitute decision-maker for the mentally incapable child in respect of the correction request.⁴

[35] This does not mean that, in every case, a custodian faced with a request from a mentally incapable individual's substitute decision-maker will be obliged to canvass the

⁴ There is no evidence in this case that the Public Guardian and Trustee has made a decision to resolve the disagreement between the equally ranked substitute decision-makers, as contemplated by section 26(7) of *PHIPA*.

views of all equally ranked substitute decision-makers to satisfy himself that they all agree to the request. Section 71(4)(b) makes it clear that a custodian is entitled to rely on an assertion by a person claiming to be the lawfully authorized substitute decision-maker for a mentally incapable individual, unless it is not reasonable to do so in the circumstances. In this case, however, the doctor's awareness of the other custodial parent's objection to the complainant's request makes it unreasonable for him to treat the complainant as an independent substitute decision-maker for the mentally incapable child.

[36] For the above reasons, I find that, if the child is mentally incapable, the complainant is not entitled to request the correction to her records of personal health information on her behalf.

If the child is mentally capable—sections 23(1)2, 23(2) and 23(3)

[37] If the seven-year-old child is mentally capable, section 23 of *PHIPA* provides that a custodial parent may act as her substitute decision-maker, except in certain circumstances that do not appear to be relevant here.⁵

[38] Unlike in the above-noted provisions concerning conflict in substitute decision-making for mentally incapable individuals, *PHIPA* does not explicitly address situations where equally ranked substitute decision-makers for a mentally capable child disagree.⁶ However, for the reasons given below, I conclude that it is appropriate to interpret section 23 as imposing an analogous condition on the ability of equally ranked substitute decision-makers to act independently of another. Specifically, I conclude that in circumstances where a custodian is aware that equally ranked substitute decision-makers disagree on a request concerning a mentally capable child's personal health information, neither substitute decision-maker can act independently of the other in respect of that request. Applied to the facts of this case, I conclude that in the face of the other custodial parent's explicit objection, the doctor appropriately refused the complainant's request for correction to the record of the child's personal health information.

[39] I reach this conclusion for several reasons. First, applying a purposive approach that takes into account not only the words of the section but also the whole of *PHIPA* and its objects, I conclude that section 23 should not be interpreted to enable one substitute decision-maker to override an explicit objection by another equally ranked

⁵ Specifically, there is no claim that the information at issue relates to treatment or counselling in respect of which the mentally capable child has participated on her own [as described in paragraph 2 of section 23(1)], or that the mentally capable child has made her own decision in respect of the request that conflicts with that of a person entitled to act as her substitute decision-maker [section 23(3)].

⁶ Other than in cases where the mentally capable child has made her own decision: section 23(3). As noted above, there is no evidence that section 23(3) applies here.

substitute decision-maker in decisions concerning a mentally capable child's personal health information. Among other reasons, such an interpretation could create a great deal of uncertainty for the custodian, as well as for all the other parties affected by a request involving a mentally capable child's personal health information.

[40] Section 23 of *PHIPA* should instead be interpreted harmoniously with section 26, and with section 71(4)(b), to enable a health information custodian to rely on a person's assertion of substitute decision-making authority for a mentally capable child under 16, except where the custodian has reason to believe that another equally ranked substitute decision-maker for the child objects. As above, this does not mean that, in every case, a custodian faced with a request from a mentally capable child's substitute decision-maker will be obliged to canvass the views of all equally ranked substitute decision-makers to satisfy himself that they all agree to the request. However, where (as in this case) there is reason to believe that an equally ranked substitute decision-maker disagrees with the request, it would not be reasonable for the custodian to treat either substitute decision-maker as having independent authority in respect of the request. In such cases, the custodian would be entitled to refuse the request, absent evidence that the substitute decision-makers have reached an agreement, or some other evidence about whose substitute decision-making authority prevails in the case of conflict.

[41] For example, where (as in this case) there is a court order addressing custody arrangements between the parents, the parties may wish to seek direction from the court about how to resolve disputes about the custodial parents' exercise of substitute decision-making authority for the child under *PHIPA*. Alternatively, in some circumstances, the custodian may deem it appropriate to obtain a decision under section 23(3) from the mentally capable child.

[42] The complainant does not dispute that he and the child's mother are equally ranked substitute decision-makers for their child under *PHIPA*. He focuses his arguments on his entitlement as a joint custodial parent to obtain his daughter's health care records and to make inquiries about her health. He relies, in particular, on section 20(5) of the *Children's Law Reform Act (CLRA)*⁷ and guidance published on the website of the Canadian Medical Protective Association (CMPA).⁸ Section 20(5) of the *CLRA* concerns the entitlement of an access (i.e., non-custodial) parent to certain rights and information about a child; this section does not confer an independent right of access to⁹ (or to request correction of) records of a child's personal health information under

⁷ RSO 1990, c C.12.

⁸ The complainant provided a link to a document titled "Responding to requests for children's medical records" (revised May 2008), available here: <https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2005/responding-to-requests-for-children-s-medical-records>.

⁹ However, *PHIPA* Decision 96 recognizes the potential relevance of this section of the *CLRA* in the context of an access parent's request for disclosure of a child's personal health information.

PHIPA. Similarly, the general guidance provided by the CMPA to its members does not assist the complainant in establishing an independent right under *PHIPA* to request correction to his daughter's record of personal health information over the objection of the other custodial parent.

[43] Based on all the above, I conclude that whether or not the child is mentally capable within the meaning of *PHIPA*, the complainant is not entitled to act as an independent substitute decision-maker for the child in respect of the correction request over the objection of the other custodial parent. I accordingly dismiss the complaint about the doctor's refusal to grant the complainant's request.

NO ORDER:

For the foregoing reasons, I dismiss the complaint. No order is issued.

Original signed by: _____
Jenny Ryu
Adjudicator

_____ January 24, 2020