Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 113

Complaint HA19-00264

A Registered Psychotherapist

March 5, 2020

Summary: The complainant sought access to his records of personal health information from his former psychotherapist by submitting an access request under the *Personal Health Information Protection Act*. The psychotherapist denied access based on the exemption at section 52(1)(e)(i) (harm to patient or others) of the *Act*. In PHIPA Decision 100, the adjudicator upheld the psychotherapist's decision to deny access based on her finding that the exemption in section 52(1)(e)(i) applies, and the records cannot be severed for the purpose of section 52(2).

The complainant sought a reconsideration of PHIPA Decision 100. In this Reconsideration Decision, the adjudicator finds that the complainant's arguments do not provide grounds for reconsidering PHIPA Decision 100 and she dismisses the reconsideration request.

Decisions Considered: PHIPA Decisions 25 and 100.

Cases Considered: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.

BACKGROUND:

[1] This decision addresses a request for reconsideration made by the complainant in PHIPA Decision 100. The complainant is a former patient of a psychotherapist, who is a "health information custodian" for the purposes of the *Personal Health Information*

Protection Act (the *Act*). The complainant submitted a complaint to this office about the custodian's decision to deny him access to his complete record of personal health information based on section 52(1)(e)(i) (harm to patient or others) of the *Act*.

[2] During the course of my review, I received submissions and evidence from both the custodian and the complainant. The custodian explained that she was the complainant's psychotherapist for a period of approximately two years, and that she ended their therapeutic relationship as a result of the complainant's abusive and threatening behaviour toward her. The custodian maintained that because of the complainant's complex mental health condition he may be "triggered" if he reviews the records at issue. The custodian provided evidence in support of this assertion, as well as evidence demonstrating that under certain circumstances, the complainant poses a risk to both himself and others.

[3] The complainant maintained that he required access to his personal health information as part of his recovery process. He further maintained that the custodian's understanding of his mental health was outdated, because he had not been a patient of hers for more than two years at that point. The complainant also submitted that the custodian "played games" with him, by initially responding to his request in a manner that indicated that he would be provided access, only to later withhold the records in their entirety based on the exemption in section 52(1)(e)(i).

[4] After conducting a review, I issued PHIPA Decision 100, in which I upheld the custodian's decision to deny access based on section 52(1)(e)(i) of the *Act*. In reaching my conclusion, I noted that in order to rely on the exemption, the custodian is not required to prove that the harms contemplated by section 52(1)(e)(i) will, in fact, occur. Rather, the custodian only needs to establish that the risk of harm is "well beyond the merely possible or speculative."

[5] Based on the evidence before me, I was satisfied that the custodian had demonstrated that the complainant has a history of: threatening behaviour directed toward himself and others, including the custodian; misinterpreting communications as threatening and an attack on his health, safety, and well-being; and acting in harmful ways against himself and others as a result of communications relating to his past treatment with the custodian.

[6] Accordingly, I was satisfied that obtaining access to the records could reasonably be expected to result in a risk of serious bodily harm to the complainant or another individual. I found that this risk of harm was well beyond the merely possible or speculative, such that the exemption in section 52(1)(e)(i) applies. I was also satisfied that the records could not be reasonably severed to provide the complainant access to information that is not exempt under section 52(1)(e)(i).

[7] The complainant requests a reconsideration of PHIPA Decision 100, based on the grounds described in sections 27.01(a), (c), and (d) of this office's *Code of Procedure*

for Matters under the Personal Health Information Protection Act, 2004 (the *Code*).

[8] For the following reasons, I deny the complainant's reconsideration request.

DISCUSSION

Reconsideration criteria and procedure

[9] This office's reconsideration criteria and procedure are set out in section 27 of the *Code*. As mentioned above, the complainant relies on the grounds in sections 27.01(a), (c), and (d), in particular. The relevant portions of section 27 state:

> 27.01 The IPC may reconsider a Decision at the request of a person who has an interest in the Decision or on the IPC's own initiative, where it is established that:
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> (a) there is a fundamental defect in the adjudication process;
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> (c) there is a clerical error, accidental error or omission or other similar error in the Decision; or
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> (d) new facts relating to an Order come to the IPC's attention or there is a material change in circumstances relating to the Order.

The complainant's reconsideration request

[10] I have reviewed and considered all of the complainant's submissions, but will focus on the crux of the complainant's arguments as they relate to the basis for reconsideration established by section 27.01 of the *Code*.[1]

Section 27.01(a) - fundamental defect in the adjudication process

[11] In support of his position that the "fundamental defect" grounds in section 27.01(a) of the *Code* applies to warrant a reconsideration of PHIPA Decision 100, the complainant submits that the custodian did not receive training for dissociative behaviours until 2017, which is after their therapeutic relationship was terminated. He maintains that this puts the integrity of her assessments of his mental health into question. He also argues that the adjudication process was flawed because there is no evidence that I investigated the custodian's credentials during my review. He says that this office "works with blinders on by only understanding the small window as it applies to PHIPA without investigating the entire situation."

[1] The complainant's submissions also refers to additional matters before, or complaints regarding, other staff at this office. As those portions of his submissions are not directly related to his reconsideration request of PHIPA Decision 100, I have not referred to them in this decision.

[12] As evidence of another fundamental defect in the adjudication process, the complainant maintains that the custodian's outdated knowledge of his mental health should carry some weight. He reiterates the suggestion that he made during my initial review; namely, that he could obtain a new assessment for this office's consideration.

[13] Finally, the complainant submits that the custodian herself lacks integrity, as evidenced by her inconsistent responses to his access request, which are described in more detail below.

Section 27.01(c) - clerical error, accidental error or omission or other similar error in the Decision

[14] The complainant says that there was a "glaring omission" in the decision in that I failed to address the fact that the custodian made two "written commitments" to provide him with access to his file, only to later tell him, through her legal representative, that access was denied. He maintains that if providing access to his records was "such a concern for risk," then the custodian should have relied on section 52(1)(e)(i) from the very beginning. The complainant submits that the custodian's "decision to commit to delivering [his] records prior to the initiation of section [52)(1)(e)(i) makes] its application invalid," and that the custodian later relying on the exemption was a delay tactic.

[15] The complainant says that, as a result of PHIPA Decision 100, he has "lost complete confidence in [my] abilities to be thorough and comprehensive with [my] attention to detail." He also maintains that "it appears there is a bias from the IPC to protect those in positions of power." He says that it is "obvious" that I have discriminated against him, and that this office "endorses" the "unprofessional and unethical practices" that the custodian and her legal representative apply "to members of the vulnerable and marginalized mental health populations."

Section 27.01(d) - new facts relating to an Order come to the IPC's attention or there is a material change in circumstances relating to the Order

[16] In support of his position that the grounds in section 27.01(d) of the *Code* apply to require a reconsideration of PHIPA Decision 100, the complainant argues that the custodian was not trained to provide the services that she rendered during the time he was a patient. Therefore, he says that it is possible that her observations and assessments of him are not relevant or valid.

Analysis and findings

[17] In PHIPA Decision 25, Assistant Commissioner Sherry Liang analyzed the approach taken to reconsideration requests in the context of the *Freedom of Information and Protection of Privacy Act*. She concluded that the approach taken under that statute should be applied to requests for reconsideration under the *Act*. In making this finding, she stated:

> 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."

[18] Applying the approach taken by Assistant Commissioner Liang, I find that the complainant's representations largely amount to him disagreeing with my findings, re-arguing issues, or raising new issues which he could have, but did not, raise during my initial review. I am not persuaded that the complainant's submissions establish that there was a fundamental defect in the adjudication process, an error or omission in the decision, or a material change in circumstances relating to the decision. I am also not persuaded that the complainant has established a reasonable apprehension of bias on my part or on the part of this office. Accordingly, for the reasons that follow, I find that there are no grounds to reconsider PHIPA Decision 100.

Attempt to re-argue the issues considered in PHIPA Decision 100

[19] A great deal of the complainant's submissions focus on the custodian's inconsistent responses to his access request. The complainant agues that the custodian's delay in relying on the exemption in section 52(1)(e)(i) amounts to unethical and unprofessional conduct that should render the exemption claim "invalid." He says that I failed to address this issue in PHIPA Decision 100, which, he maintains, constitutes a basis for reconsidering the decision under section 27.01(a) and (c) of the *Code*.

[20] I begin by noting that in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[4] the Supreme Court of Canada reaffirmed its finding in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*[5] that an administrative decision maker is not required to explicitly address every argument raised by the parties. Moreover, the fact that a decision maker's reasons do not address all arguments will not, on its own, impugn the validity of those reasons or the result.[6]

[21] I wrote PHIPA Decision 100 with this principle in mind, as evidenced by

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[2] The original footnote in PHIPA Decision 25 reads: 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 reconsideration power set out in section 64.

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

[4] 2019 SCC 65, at paragraphs 128 and 301 [*Vavilov*].

[5] 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].

[6] *Vavilov*, *supra* note 4, at paragraph 91; *Newfoundland Nurses*, *ibid*, at paragraph 16.

paragraph 5 of the decision where I stated:

> I have reviewed all of the information that has been put before me during the course of this review. However, for the sake of succinctness, I only summarize the points that I find to be directly related to […] whether the exemption to the right of access in section 52(1)(e)(i) of *PHIPA* applies to the records and, if so, whether any information can be severed from the records for the purpose of providing access under section 52(2).

[22] Moreover, I did specifically consider the parties' submissions regarding the custodian's initial and subsequent responses to the complainant's access request. At paragraphs 41 and 45 of PHIPA Decision 100, in particular, I summarized the parties' positions on this issue as follows:

> The complainant maintains that the custodian has "played games" with him and that she has not taken into account the consequences of her actions. In support of this position, the complainant explains that the letters he received from the custodian in response to his access request led him to believe that he would be granted access to the requested records. However, despite those letters, the custodian's eventual decision letter informed him that his access request had been denied pursuant to section 52(1)(e)(i) of the *Act*. The complainant submits that this was an abuse of power and process. The complainant questions why the custodian waited until she issued her decision letter to raise the safety concern, rather than raising it in her first, or subsequent, letters prior to the decision.
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> […]
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> The custodian denies ever having "played games" with the complainant. She maintains that she acted professional[ly] and ethically in accordance with her statutory and common law obligations. The custodian explains that the various letters sent in response to the complainant's request reflect the evolution of her position once she sought legal advice.

[23] I also consider the complainant's submission about the length of time between the end of the parties' therapeutic relationship and the timing of the custodian's access decision to amount to an attempt to re-argue matters that were previously addressed in PHIPA Decision 100. The complainant says that there is a fundamental defect in my decision because, he claims, it does not address this consideration, which "surely carries some [weight] as health care practitioners cannot keep hiding behind section 52(1)(e)(i) to deny access when the knowledge they possess has no relevance in my current state or condition."

[24] This argument was addressed in PHIPA Decision 100 at paragraphs 39, 43, and

51-52, which state:

> In support of his position, the complainant maintains that it has been more than two years[7] since he last saw the custodian and she therefore has no knowledge of how he has progressed in his mental health journey during that time.
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> […]
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> Regarding the complainant’s submission that the custodian’s knowledge of his condition is outdated, the custodian submits that she has not relied solely on information obtained during the therapeutic relationship. She maintains that there is current evidence supporting her position, which includes the complainant’s communications during and regarding the various proceedings involving the parties. The custodian submits that there is no evidence that the risks referred to in her original submissions have changed or been adequately addressed, medically or legally.
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> […]
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> I acknowledge that it has been approximately three years since the custodian terminated her therapeutic relationship with the complainant. I also acknowledge that the complainant has attended therapy with a new healthcare provider since his relationship with the custodian ended. I am aware that the complainant has continued to work on his mental health, and may have made some improvement during that time.
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> However, overall, I find that the evidence establishes a risk of the harm contemplated by section 52(1)(e)(i) that is well beyond the merely possible or speculative. In particular, I am satisfied that granting access to the responsive records could reasonably be expected to result in a risk of serious bodily harm to the complainant or another individual.

[25] As mentioned above, the reconsideration process is not intended to provide a forum for re-arguing or substantiating arguments made during the review.[8] Therefore, I reject both of these arguments as grounds for reconsidering PHIPA Decision 100 under sections 27.01(a) (fundamental defect) or (c) (error or omission) of the *Code*.

Attempt to rely on arguments that could have been raised during the initial review

[26] In addition to revisiting arguments that were made during my initial review, the complainant also submits that the custodian had “no official training” for certain services that she provided during their therapeutic relationship. He argues that this

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[7] Now, three years.

[8] PHIPA Decision 25.

alleged lack of training puts the custodian's integrity, and her ability to assess his mental health, into question. The complainant maintains that this constitutes a fundamental defect in the adjudication process, a well as a new fact or a material change in circumstances, both of which constitute grounds for reconsidering PHIPA Decision 100 under section 27.01(a) and (d) of the *Code*.

[27] Without commenting on the veracity of the complainant's submissions regarding the custodian's qualifications, I find that he is attempting to raise a new argument at the reconsideration stage that he did not raise during my initial review. The information relied upon by the complainant was available during my review, and it was therefore open to him to raise this concern at that time. Nevertheless, even if the complainant had raised this concern during my initial review, it is not within the jurisdiction of this office to assess professional credentials or qualifications. Rather, my authority in conducting a review under the *Act* was limited to determining whether the onus of the section 52(1)(e)(i) exemption had been satisfied.

[28] Given the jurisdiction of this office, and the fact that reconsideration proceedings are not intended to be a forum to raise new arguments that could have been raised during a review,[9] I find that the complainant's submissions regarding the custodian's qualifications do not establish a basis for reconsidering PHIPA Decision 100 under sections 27.01(a) or (d) of the *Code*.

Perceived bias in the IPC's adjudication process and on the part of the decision maker

[29] Finally, I will address the complainant's assertion of bias in respect of the adjudication of his complaint. Any reasonable apprehension of bias would be grounds for reconsidering PHIPA Decision 100.

[30] The complainant submits that my review, and this office's processes, are biased. He maintains that this office worked "with blinders on" by failing to verify the custodian's credentials, and that PHIPA Decision 100 endorses the custodian's allegedly unethical practices toward vulnerable populations.

[31] The Ontario Divisional Court has affirmed that in assessing a claim of bias on the part of a decision maker, "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."[10] The Supreme Court of Canada has described the test for finding a reasonable apprehension of bias as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of

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[9] PHIPA Decision 25.

[10] *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para 71.

> Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[11]

[32] This test establishes that more than a mere disagreement with a decision is required in order to establish bias on behalf of the decision maker.

[33] Applying this test to the circumstances of this complaint, and considering the allegations that have been raised by the complainant, I find that a reasonable person with knowledge of the facts would not conclude that I, or this office, would not fairly decide the issues raised in the complaint.

[34] In arriving at this conclusion, I have taken into account the fact that my findings in PHIPA Decision 100 were made on a case-specific basis, having considered the arguments and evidence provided by the parties, which included reply, sur-reply, and supplementary representations, and excerpts from the records at issue. In my view, the processes employed during my review were fair.

[35] Additionally, with regard to the complainant's suggestion that this office operated "with blinders on," because it did not verify that the custodian was qualified to provide the services that she offered, I have already noted that this office's jurisdiction under the *Act* does not extend to professional regulation of custodians. Therefore, I find this allegation of bias to be without foundation.

[36] Accordingly, I am not persuaded that the complainant's reconsideration request and representations have displaced the presumption of an impartial decision making process. I find, therefore, that the complainant has not established a reasonable apprehension of bias on my part, or by this office, and I dismiss this as a ground for reconsidering PHIPA Decision 100.

Conclusion

[37] Having considered the complainant's reconsideration request and representations, I find that he has not established that there is a fundamental defect in the adjudication process, or a clerical error, accidental error, or omission or other similar error in PHIPA Decision 100. As the complainant has also not provided evidence of new facts or any material change in circumstances relating to PHIPA Decision 100, I find that he has not established a basis for reconsidering PHIPA Decision 100 under section 27.01 of the *Code*.

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[11] *Committee for Justice and Liberty et al. v. National Energy Board et al*. [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

ORDER:

For the foregoing reasons, the complainant’s request for a reconsideration is denied.

Original signed by: March 5, 2020

Jaime Cardy
Adjudicator