Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 128

Complaint HA19-00070

Algoma Family Services

September 28, 2020

Summary: The complainant submitted a request under the *Personal Health Information Protection Act* (*PHIPA*) for his own information contained in his son's file with Algoma Family Services (the health information custodian or AFS). AFS denied his request and the complainant filed a complaint with the Information and Privacy Commissioner of Ontario (this office or the IPC). In PHIPA Decision 83, the adjudicator upheld AFS's decision not to provide the complainant with the requested information, finding that he did not have a right of access to that information under *PHIPA*, or under the access provisions in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) and the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*).

The complainant applied for a judicial review of PHIPA Decision 83. Upon being notified of the application for judicial review, the IPC decided to reconsider PHIPA Decision 83 on its own initiative to address matters the adjudicator failed to consider that amount to fundamental defects in the adjudication process under section 27.01(a) of the IPC *Code of Procedure from Matters under the Personal Health Information Protection Act, 2004.*

In this Reconsideration Decision, the adjudicator finds that in denying the complainant's request, AFS not only considered his right of access under *PHIPA* but also considered the potential application of the relevant discretionary disclosure provisions in *PHIPA*. The adjudicator finds that AFS's decision not to disclose the requested information was properly made. The adjudicator also finds that the complainant's arguments regarding the paramountcy of the *Divorce Act* over *PHIPA* do not provide grounds for her to reconsider PHIPA Decision 83. No order is issued.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, sections 4(1), 6(3), 29, 41(1)(d)(i), 43(1)(h) and 64(1); *Divorce Act*, RSC 1985, c 3 (2nd Supp.), section 16(5).

Decisions and Orders Considered: PHIPA Decisions 19, 21, 25, 83 and 96; Orders M-787, MO-3351, PO-2879-R and PO-3599.

Cases Considered: *Chandler v. Alberta Association of Architects,* 1989 CanLII 41 (SCC), [1989] 2 SCR 848.

INTRODUCTION:

[1] This reconsideration arises from a decision by the Information and Privacy Commissioner of Ontario (IPC or this office) to reconsider, on its own initiative, PHIPA Decision 83 issued under the *Personal Health Information Protection Act, 2004* (*PHIPA*). Pursuant to section 27.01(a) of this office's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* (*Code of Procedure*), the IPC has decided to reconsider PHIPA Decision 83 on the ground that there were fundamental defects in the adjudication process leading to that decision.

[2] First, in PHIPA Decision 83, I failed to address whether AFS considered the possible application of any of the provisions in *PHIPA* that permit disclosure. As a result, in this Reconsideration Decision, I consider whether AFS turned its mind to the possible application of sections 41(1)(d)(i) and 43(1)(h) of *PHIPA* which permit the disclosure of personal health information without the consent of the individual to whom it relates. For the reasons set out below, I find that it did and that its exercise of discretion not to disclose the requested information was properly made.

[3] Second, in PHIPA Decision 83, I failed to consider the complainant's argument that section 16(5) of the *Divorce Act* is paramount to section 43(1)(h) of *PHIPA*. For the reasons set out below, I find that the paramountcy doctrine is not applicable to this complaint. As a result, I decline to reconsider PHIPA Decision 83 on that basis.

BACKGROUND:

[4] In PHIPA Decision 83, I considered a complaint filed under *PHIPA* by the complainant, whose request for copies of his own information held by health information custodian Algoma Family Services (the health information custodian or AFS)[1] was denied in full. In its decision, AFS advised that the requested information was contained in a file related to counselling services provided to the complainant's son,

---

[1] PHIPA Decision 83 found that there was no dispute that Algoma Family Services is a health information custodian within the meaning of section 3(1) of *PHIPA*.

who expressly did not consent to his personal health information being disclosed to the complainant.

[5] The complainant then clarified that his request was only for the following information:

- 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);"
- a copy of "all 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])."

[6] In its response, AFS denied the complainant's clarified request. AFS stated that it was relying on a withdrawal of consent form signed by the complainant's son, which imposed conditions on the use and disclosure of his personal health information. The form provides that none of the son's personal health information records held by AFS are to be disclosed to any parties, including the complainant, who is specifically named. AFS also noted that the complainant had previously sought copies of the requested records during a proceeding in Superior Court under the *Family Law Act*[2] in which AFS was also involved. AFS explained that during that proceeding the complainant was made aware that his son had specifically withdrawn his consent for his personal health information to be provided to the complainant. AFS stated that the proceeding resolved without the Court issuing an order for it to release the records to the complainant. AFS advised that it is not prepared to provide the complainant with the records without the complainant's son's consent or a court order directing it to do so.

[7] The complainant filed a complaint of AFS's decision with the IPC and complaint HA16-80-2 was opened. I conducted a review into the matter and issued PHIPA Decision 83. In that decision, I upheld AFS's decision to deny the complainant's access request, finding that he has no right of access to the records of his son's personal health information under *PHIPA.* Nor does he have a right of access to the requested information under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) or the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), because AFS is not an institution within the meaning of either of those statutes.

[8] On February 13, 2019, the complainant filed a Notice of Application for Judicial Review of PHIPA Decision 83 on the grounds that I erred by failing to consider section 43(1)(h) of *PHIPA*, which permits a health information custodian to disclose personal health information if the disclosure is authorized under another Act. The complainant

---

[2] *Family Law Act*, RSO 1990, c F.3.

identifies section 16(5) of the *Divorce Act*[3] as relevant. He also argues that I erred in failing to consider the paramountcy of section 16(5) of the *Divorce Act* in relation to section 43(1)(h) of *PHIPA*. He further argues that I erred by failing to "consider or apply the contractual terms of the withdrawal of consent form" – including, that "the withdrawal of consent is not retroactive to the time before the form was signed."

[9] As I will elaborate in more detail below, access and disclosure are two distinct concepts in *PHIPA*. In PHIPA Decision 83, while I considered the complainant's right of access to the requested information, in my reasons I failed to address the appellant's arguments relating to the provisions of *PHIPA* giving health information custodians discretion to disclose personal health information.

[10] Related to this, in PHIPA Decision 83, I also failed to consider the complainant's arguments regarding paramountcy of the *Divorce Act* in relation to *PHIPA*.

[11] My failure to address the disclosure provisions and the complainant's arguments on the paramountcy of the *Divorce Act* fall within section 27.01(a) of the *Code of Procedure*, which sets out that a decision can be reconsidered if it contains a fundamental defect in the adjudication process. As a result, the IPC initiated a reconsideration of PHIPA Decision 83 to consider these issues.

[12] I sought and received representations from both the complainant and AFS. Each party's representations were shared with the other party. I then sought and received reply representations from the complainant, which I determined did not need to be shared with the AFS. In this decision, I have referred to the relevant portions of the representations submitted by the parties. I have also reviewed and considered the representations submitted during the course of my original review, which resulted in PHIPA Decision 83.

GROUNDS FOR RECONSIDERATION

[13] Under section 27 of the *Code of Procedure*, this office may reconsider a decision on certain grounds. The relevant portions of that section 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:
>
> (a) there is a fundamental defect in the adjudication process;
>
> (b) there is some other jurisdictional defect in the Decision;

---

[3] *Divorce Act*, RSC 1985, c 3 (2nd Supp).

(c) there is a clerical error, accidental error or omission or other similar error in the Decision; or,

(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.

[14] As indicated above, the IPC has decided to reconsider PHIPA Decision 83 based on the ground set out in section 27.01(a). The complainant argues that I do not have jurisdiction to reconsider PHIPA Decision 83 as, in his view, there is no "fundamental defect" in the adjudication process. He suggests that I have exhausted my jurisdiction to decide the matter. He argues that the issues that I will be addressing in this reconsideration are issues of law to be determined on judicial review. I disagree.

[15] In Order PO-2879-R, former Senior Adjudicator John Higgins summarized the authority for a tribunal to reconsider its decisions. At page 11 of that order, he noted that the *Code of Procedure*[4] provisions pertaining to reconsiderations reflect the relevant common law principles. Senior Adjudicator Higgins pointed to the leading case on the matter, *Chandler v. Alberta Association of Architects*[5], which applied the common law principle of *functus officio* to tribunals. That principle holds that once a matter has been determined by a decision-maker, he or she has no jurisdiction to further consider the issue. In *Chandler,* Sopinka J., writing for the majority stated:

> …As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changes its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. Ross Engineering Corp.*[.][6]
>
> To this extent, the principle of *functus officio* applies. It is based however, on the policy ground which favour finality of proceedings rather than the rule which was developed with respect to formal judgements of a Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of

---

[4] Note: the *Code of Procedure* that Adjudicator Higgins is referring to is this office's *Code of Procedure* for matters under *FIPPA* and *MFIPPA* and not the *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* that is applicable in this case. However, in both *Codes* the provisions setting out the grounds for reconsideration are substantially similar. In the *Code of Procedure* for matters under *FIPPA* and *MFIPPA* procedures for reconsiderations are found in section 18 while in the *Code of Procedure* for matters under *PHIPA* they are found in section 27.

[5] *Chandler v. Alberta Association of Architects,* 1989 CanLII 41 (SCC) (*Chandler*).

[6] *Paper Machinery Ltd. et. al. v. J.O. Ross Engineering Corp.* 1934 CanLII 1 (SCC), [1934] SCR 186.

> administrative proceedings in order to provide relief which would otherwise be available on appeal.

[16] Considering the principles enunciated in *Chandler*, I am of the view the current circumstances dictate that a more flexible and less formalistic approach be taken. This matter should be re-opened to allow reconsideration of PHIPA Decision 83 to address significant and potentially determinative issues that were raised by the complainant but not specifically addressed in the decision.

[17] In PHIPA Decision 83, my task was to determine whether AFS acted in accordance with *PHIPA* in refusing the complainant's request. However, I only addressed whether AFS acted in accordance with the access provisions of *PHIPA* and not whether it considered discretionary disclosure under *PHIPA*. My failure to address the disclosure provisions in PHIPA Decision 83 amounts to a "fundamental defect" in the adjudication process as it was a key matter the complainant's representations raised and which I did not decide. Similarly, my failure to address the complainant's arguments with respect to the paramountcy of the *Divorce Act* over *PHIPA*, raising an important issue about the impact of other legislation on *PHIPA,* also amounts to a fundamental defect in the adjudication process. By failing to consider these issues in PHIPA Decision 83, I have not exhausted my jurisdiction to consider them and to reach a decision with respect to them. In my view, the principle of *functus officio* does not apply in these circumstances.

[18] Accordingly, I will reconsider PHIPA Decision 83 on the ground that my failure to address these two issues, raised by the complainant in his original representations, falls under section 27.01(a) of the *Code of Procedure* as they are fundamental defects in the adjudication process.

[19] I now turn to my consideration of the two topics on which I did not make findings in PHIPA Decision 83: discretionary disclosure under *PHIPA* and whether the *Divorce Act* is paramount to *PHIPA*.

DISCUSSION

1. Discretionary Disclosure

The information at issue is the complainant's son's personal health information within the meaning of PHIPA.

[20] The complainant seeks information about himself that is found within his son's file with AFS. This file was created by AFS as a record of the counselling services that it provided to the son. It contains various information that is related to the son's care, including the notes of the AFS social worker of her interview with the complainant.

Under section 4(1) of *PHIPA,* the information sought amounts to his son's personal health information.[7] I found this to be the case in PHIPA Decision 83. In this reconsideration, the parties do not dispute this characterization. There is also no evidence to suggest that the information the complainant seeks is his own personal health information. I found this to be the case in PHIPA Decision 83 and I will not reconsider this finding here.

Requests under PHIPA can be considered under either its "access" or "disclosure" provisions, or both.

[21] *PHIPA* draws a distinction between the granting of "access" to personal health information, and the "disclosure" of personal health information by a health information custodian. Under *PHIPA,* there is no general right of access to information held by the organizations to which it applies. The only right of access established under *PHIPA* is that of individuals to records of their own personal health information in the custody or control of health information custodians, subject to limited and specific exceptions.[8] An individual's right of access is set out under section 52(1) of *PHIPA* and must be exercised by the individual about whom the records relate or (if applicable) that person's lawfully authorized substitute decision-maker (SDM) on his or her behalf.[9] The health information custodian is obliged to respond to the request for access and, if no exceptions apply, provide access to the individual or his or her SDM. I found in PHIPA Decision 83 that the complainant has no right of access to his son's personal health information at issue.

[22] However, in addition to the provisions governing access, *PHIPA* contains provisions governing when health information custodians may *disclose* records of personal health information.[10] Under *PHIPA*, disclosure is permitted with the individual's consent or the consent of the individual's SDM (where applicable). Disclosure without consent is also permitted, and in some cases required,[11] under specific provisions in *PHIPA*.[12]

---

[7] "Personal health information" is defined in part in section 4 of *PHIPA* as follows:

> In this Act,
>
> "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 the identification of a persona as a provider of health care to the individual[.]

[8] Access under *PHIPA* is set out in Part V, sections 51 through 54.1.

[9] Section 25(1) and PHIPA Decision 19.

[10] Disclosure under *PHIPA* is set out in Part IV, sections 38 through 50.

[11] None of the provisions in *PHIPA* that require disclosure apply in this case. See, for example, sections 46 to 48 where disclosure is required upon requests by a Minister of a prescribed ministry for certain kinds of information.

[12] Section 29 of *PHIPA*.

[23] In PHIPA Decision 83, I considered whether the complainant had a right of access to the information that he requested and found that he did not. In this reconsideration decision, I will not revisit my finding on his right of access under *PHIPA*. I will, however, address the potential application of *PHIPA*'s disclosure provisions to the complainant's request.

AFS considered the complainant's request as a request for disclosure under PHIPA.

Disclosure under PHIPA

[24] The sections of *PHIPA* that address the disclosure of personal health information are found in Part IV.[13]

[25] These disclosure provisions are in keeping with one of *PHIPA*'s central purposes which is that, in order to protect the confidentiality of personal health information and the privacy of individuals while facilitating the effective provision of health care, the disclosure of personal health information must occur with consent, except in specified circumstances.[14] This is set out in section 29 of *PHIPA*, which states:

> A health information custodian shall not collect, use or disclose personal health information about an individual unless,
>
> …
>
> (b) the collection, use or disclosure, as the case may be, is permitted or required by this Act.

[26] Not all requests for information will require a health information custodian to consider whether a requester without a right of access nonetheless has recourse to any of the disclosure provisions in *PHIPA*.[15] However, some circumstances will dictate that the health information custodian has a duty to turn its mind to whether any of the sections of *PHIPA* permitting disclosure might apply.

[27] This is the approach taken by Assistant Commissioner Sherry Liang in PHIPA Decision 22, where she decided that the reasons given by a requester for seeking disclosure under one section of *PHIPA* could also support a request for disclosure under another section. In those circumstances she found that the health information custodian should have considered the request under both sections, and she returned the matter

---

[13] The term "disclose" is defined at section 2 of *PHIPA* to mean, in relation to personal health information in the custody or under the control of a health information custodian or a person, "to make the information available or to release it to another health information custodian or to another person, but does not include to use the information, and "disclosure" has a corresponding meaning."
[14] See PHIPA Decision 96.
[15] PHIPA Decision 96, at para. 52.

to the health information custodian for a proper exercise of its discretionary power under those sections.[16]

[28] In the particular case at issue, when formulating and clarifying his request for information, the complainant did not specifically state that he was seeking "disclosure" of the information he sought. However, it is clear that AFS was aware that certain conditions that would permit disclosure under *PHIPA* might be present. As a result, I find that AFS had a duty to consider the request under the potentially applicable disclosure provisions in *PHIPA*.

[29] The potentially applicable provisions, based on the facts of this complaint, are sections 41(1)(d)(i) and 43(1)(h). Both disclosure provisions give the health care custodian the discretion to disclose personal health information without consent, but do not require the health care custodian to disclose it. It is important to note that refusing to disclose information, even where permitted, does not by itself bring a health care custodian in violation of *PHIPA*. The IPC cannot, therefore, order that a health information custodian disclose personal health information in its possession under either of these disclosure provisions. The IPC's authority is limited to assessing whether the health information custodian exercised its discretion under these provisions in an appropriate manner.

Disclosure without consent

[30] Section 29(b) prohibits disclosure of personal health information without the individual's consent unless specific provisions set out in *PHIPA* apply to permit a health information custodian to disclose the information. Section 6(3) of *PHIPA* provides clarification regarding provisions that permit health information custodians to disclose personal health information without the consent of the individual to whom the personal health information relates. Section 6(3) of *PHIPA* states, in part:

> 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;
>
> (b) does not relieve the custodian from a legal requirement to disclose the information[.]

[31] Section 6(3) of *PHIPA* clarifies that health information custodians considering sections of *PHIPA* that permit disclosure without consent are not *required* to disclose. Rather, the disclosure provisions set out exceptions for when health information

---

[16] *Ibid*.

custodians *may* disclose personal health information without violating their obligations under *PHIPA*. At the same time, *PHIPA* explicitly recognizes that health information custodians may be subject to mandatory legal requirements outside of *PHIPA*.[17] And while a health information custodian cannot relieve itself of other mandatory legal requirements by relying on *PHIPA*, *PHIPA* itself does not require disclosure -- that requirement comes from other sources of law.

[32] From the evidence before me it is clear that AFS was aware of a number of relevant circumstances that might give rise to the potential application of the disclosure provisions in *PHIPA.* Specifically, AFS was aware that:

- the complainant is an access parent who asserts that he is entitled to his son's personal health information based on certain legal grounds, including court orders and section 16(5) of the *Divorce Act*; and,
- in legal proceedings in the Superior Court that predate his *PHIPA* request, the complainant requested that the Court order AFS to provide him with the same information in his son's record of personal health information as that which is set out in his request.

[33] I find that these circumstances gave rise to a duty on the part of AFS to consider whether it was permitted to disclose the requested information to the complainant, without the consent of his son, under either of the disclosure provisions at section 41(1)(d)(i) or section 43(1)(h) of *PHIPA*.

AFS had a duty to consider whether disclosure is permitted under section 41(1)(d)(i) of PHIPA and it did so

[34] Although I did not ask the parties to specifically address the possible application of section 41(1)(d)(i) of *PHIPA*,[18] in his representations submitted for the purpose of this reconsideration, the complainant raised issues that gave rise to its potential application. AFS responded to them in its representations. As a result, I will consider whether the circumstances dictate that AFS was required to consider whether section 41(1)(d)(i) of *PHIPA* applies to permit AFS to disclose the son's personal health information without consent.

[35] Section 41(1)(d)(i) of *PHIPA* states:

> A health information custodian may disclose personal health information about an individual for the purpose of complying with a summons, order

---

[17] Ontario, Ministry of Health and Long-Term Care, *Personal Health Information Protection Act, 2004: An Overview for Health Information Custodians* (August 2004), at page 20; PHIPA Decision 96.

[18] It was not included in the Notice of Review by which I sought representations for the purpose of this reconsideration.

> or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information.

[36] It is clear that AFS is aware that the complainant is involved in ongoing legal matters related to the dissolution of his marriage, including access and custody of the children of the marriage. In particular, AFS has knowledge of a proceeding in Superior Court under the *Family Law Act* in which the complainant sought a Court order that AFS provide him with the same information, contained in the record of his son's personal health information, as is at issue in this complaint. Although in that specific proceeding, the Court did not issue an order for AFS to provide the records to the complainant, these circumstances dictate that when responding to the complainant's request, AFS had a duty to turn its mind to the possible existence of an order that might permit disclosure of the requested information under section 41(1)(d)(i) of *PHIPA*. From the evidence before me, I accept that AFS properly considered whether disclosure of the requested information was permitted under section 41(1)(d)(i) by reviewing the relevant evidence. There was no evidence before me that AFS considered any irrelevant evidence or refused disclosure in bad faith or for an improper purpose.

[37] The complainant submits that there are "multiple court orders for access to the children and each one of them specifies (pursuant to section 16(5) of the *Divorce Act*) that the [complainant] is to receive information." AFS reviewed the court orders and found that none of the court orders specifically addresses, or orders, that AFS provide him with the requested information, pursuant to section 16(5) of the *Divorce Act* or any other legal requirement.

[38] The complainant specifically refers to an endorsement from the Superior Court in 2016 (the 2016 order) covering the minutes of settlement of family law matters between the complainant (the Applicant) and his ex-spouse (the Respondent), as well as an earlier order issued by the Superior Court in 2005 (the 2005 order).

[39] AFS has clearly considered both of these court orders as it had previously submitted copies of them with its earlier representations for this reconsideration, taking the position that neither of them orders AFS to disclose the requested record to the complainant.

[40] The relevant portions of the 2005 order provide:

> 1. The Respondent shall:
>
> …
>
> > (b) Permit the Applicant to obtain information about the children and their progress in counselling if such access to information is permitted by the agency's mandate;

> (c) Permit all service providers and education providers to share, discuss and release with and to the Applicant any information or reports about the children which the Respondent also receives.

[41] First, section 1(b) of the 2005 order stipulates that the complainant is to be granted access to information about his children and their progress in counselling only *if such access is permitted by the agency's mandate.* AFS considered the language of 1(b) and noted that disclosure of the requested information was not permitted by its mandate. Additionally, as will be discussed in more detail later in this decision, the complainant repeatedly states that he seeks his own information as it appears in his son's records of personal health information. As a result, AFS considered the nature of the information sought in the context of section 1(b) which pertains to access to different information, namely information about the children.

[42] With respect to section 1(c) of the 2005 order, there is no evidence before me that AFS has provided the complainant's ex-spouse with the information that the complainant seeks. In fact, there is evidence to the contrary. From the terms of the withdrawal of consent form signed by the complainant's son, the son has not only explicitly withdrawn his consent for AFS to disclose his personal health information to the complainant, but also to his mother. AFS considered these facts in concluding that section 1(c) of the endorsement does not order AFS to disclose the requested information to the complainant. Related to this, in PHIPA Decision 83, I also failed to consider the complainant's

[43] With respect to the 2016 order, paragraph 1(n) states, in part:

> The Applicant shall be entitled to receive reports and information about the children from third parties involved in the children's health, education and welfare without the consent of the Applicant [sic] mother being required….

[44] AFS considered this paragraph of order 2016 and interpreted it to mean that the complainant cannot be prevented from receiving information about his children from a third party on the basis that his ex-spouse, the custodial parent, has refused to provide her consent. AFS considered the language of paragraph 1(n) and found that it does not order it to disclose the requested information to the complainant.

[45] Based on its representations, I accept that AFS fulfilled its obligation to properly consider whether the conditions for disclosure without consent set out in section 41(1)(d)(i) were present.

[46] I find that AFS properly exercised its discretion under s. 41(1)(d)(i). AFS considered relevant evidence, including the language of the particular provisions in the 2005 order and the 2016 order, the facts relevant to those provisions, and the nature of the information sought. These were all relevant to AFS's exercise of discretion. There

was no evidence submitted to me that AFS considered any irrelevant facts or refused disclosure in bad faith or for an improper purpose.

AFS had a duty to consider whether disclosure is permitted under section 43(1)(h) of PHIPA and it did so.

AFS considered section 16(5) of the Divorce Act

[47] Throughout his representations, the complainant repeatedly relies on section 16(5) of the *Divorce Act* as a basis for his entitlement to the information he seeks from AFS. That section states:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information as to the health, education and welfare of the child.

[48] The complainant's reliance on section 16(5) of the *Divorce Act* raises the possible application of the disclosure provision at section 43(1)(h) of *PHIPA*. Like section 41(1)(d)(i) discussed above, section 43(1)(h) of *PHIPA* is another provision that permits a health information custodian to disclose an individual's personal health information without their consent.

[49] Section 43(1)(h) states:

> A health information custodian may disclose personal health information about an individual subject to the requirements and restrictions, if any, that are prescribed, if permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada.

[50] If AFS is required by section 16(5) of the *Divorce Act* to disclose the requested information, disclosure of the complainant's son's personal health information without his consent may be permissible under section 43(1)(h) of *PHIPA.* While section 43(1)(h) of *PHIPA* does not impose a requirement on the health information custodian to disclose information, it recognizes that the health information custodian may be required under other legislation to do so and establishes that such a disclosure can be made without violating the health information custodian's obligations under *PHIPA*.

[51] On receipt of the complainant's request, AFS knew that the complainant is an access parent and that his son, whose personal health information is at issue, is a child of a marriage. Therefore, when considering the request, AFS was aware of the potential relevance of the *Divorce Act* and, in particular, the possible application of section 16(5) of the *Divorce Act*. As a result, the circumstances clearly dictate that AFS had a duty to consider whether section 16(5) of the *Divorce Act* permitted AFS to disclose the requested information under section 43(1)(h) of *PHIPA*, without the son's consent.

[52] Section 43(1)(h) is a permissive provision. If it applies, a health information

custodian is *permitted* to disclose personal health information without the consent of the individual to whom it relates, but *PHIPA* does not *require* it to do so.[19] A health information custodian may choose to exercise its discretion not to disclose the information. The IPC has the authority to review a health information custodian's exercise of that discretion.[20] A health information custodian must make the decision in a proper manner, based on proper considerations, in good faith and for a proper purpose. If it does not, the IPC may order the health information custodian to consider the matter again, and may provide comments and recommendations to guide the health information custodian's consideration.[21] As I discuss below, I accept that AFS properly considered whether disclosure of the requested information was permitted under section 43(1)(h) by reviewing the relevant evidence.

[53] As I also discuss below, this office cannot order disclosure of personal health information under the discretionary disclosure provisions in *PHIPA*. If the complainant is of the view that the *Divorce Act* requires the custodian to disclose the information to him, his recourse is to the courts.

[54] The complainant argues that section 16(5) of the *Divorce Act* imposes a legal requirement on AFS to disclose the requested information to him. He takes the position that as an access parent he has the right to make independent inquiries and to receive information that relates to the wellbeing of his children directly from service providers without needing to obtain the information from the custodial parent or obtain the custodial parent's consent first.

[55] In support of his argument that section 16(5) of the *Divorce Act* requires that AFS disclose the requested information to him, the complainant points to Order M-787, issued under *MFIPPA*. Order M-787 and several other orders of this office[22] considered the potential application of section 16(5) of the *Divorce Act* and the similarly worded provision in section 20(5) of the *Children's Law Reform Act* (*CLRA*)[23] to requests for information under *MFIPPA* and *FIPPA*. These orders affirm that section 16(5) of the *Divorce Act* and section 20(5) of the *CLRA* are statutory provisions on which access parents may rely in seeking information about their children under *MFIPPA* and *FIPPA*.

[56] More recent orders have recognized, however, that authorizing provisions including section 16(5) of the *Divorce Act* may not be applicable in all circumstances, particularly where they are inconsistent with other sections of the *Divorce Act* that

---

[19] See section 6(3) and the discussion related to that section, above.

[20] The IPC's authority to review a health information custodian's decision not to disclose personal health information under the relevant sections of Part IV of *PHIPA* has been discussed in PHIPA Decision 19 and PHIPA Decision 96.

[21] PHIPA Decision 19, followed by PHIPA Decision 96.

[22] Orders P-1246, P-1423 and PO-2407.

[23] *Children's Law Reform Act*, R.S.O. 1990, c C. 12. Section 20(5) states: The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

stipulate that "the best interests of the child" must be considered.[24] These orders have found that a parent is not entitled to access to information about their minor child if the purpose for which they seek access is to further their own interests rather than for a purpose that is in the best interests of the child.[25] In Order PO-3599, for example, Senior Adjudicator John Higgins took into account the best interests of the child and found that neither section 16(5) of the *Divorce Act* nor section 20(5) of the *CLRA* applied in the context of a request under *FIPPA*.[26]

[57] Also, in PHIPA Decision 96, Adjudicator Jenny Ryu considered the same argument regarding the application of these *FIPPA* and *MFIPPA* orders[27] to the disclosure provisions in *PHIPA*. The context in that complaint was similar to the one at issue here in that it involved a request from an access parent for his child's personal health information. In PHIPA Decision 96 Adjudicator Ryu stated:

> The above orders were decided under *FIPPA* and *MFIPPA*, rather than under *PHIPA*, and are not directly applicable to the circumstances before me. Among other things, those orders addressed the application of sections of those statutes that have no equivalent in *PHIPA*.[28] More generally, the access regime under *FIPPA* and *MFIPPA* is fundamentally different from *PHIPA*'s own treatment of requests for another individual's personal health information: As described above, *PHIPA* confers a right of access only in respect of one's own personal health information, and not a general right of access to information about other individuals.[29]
>
> Nevertheless, this office's finding in those orders (and others) supports the argument that the same sections of the *Divorce Act* and the *CLRA* could "permit or require" disclosure of personal health information by a custodian under section 43(1)(h) of *PHIPA*. At the same time, I agree with the approach taken by the adjudicators in Orders PO-3599 and MO-3351 that the "best interests of the child" may be a relevant consideration in applying those sections.

[58] I agree with Adjudicator Ryu's comments in PHIPA Decision 96 and find them to

---

[24] Orders PO-3599 and MO-3351.
[25] *Ibid.*.
[26] Senior Adjudicator Gillian Shaw made a similar finding in MO-3351.
[27] Orders M-787, P-1246, P-13423 and PO-2407.
[28] In PHIPA Decision 96, Adjudicator Ryu included the following footnote: "Specifically, those orders addressed identically worded exceptions at section 21(1)(d) of *FIPPA* and section 14(1)(d) of *MFIPPA* to the application of discretionary personal privacy exemptions at section 49(b) of *FIPPA* and 38(b) of *MFIPPA*.
[29] Paragraph 84. In PHIPA Decision 96, Adjudicator Ryu included the following footnote: "Even in the case of an access request made by a custodial parent who is lawfully authorized to act on behalf of a child under *FIPPA/MFIPPA* or under *PHIPA*, there are notable differences between *FIPPA/MFIPPA* and *PHIPA* concerning the information in respect of which the parent may act on the child's behalf: sections 23(1)(2) and 23(3) of *PHIPA*.

be applicable to the current complaint. In particular, while I agree that there are circumstances that could support a finding that section 16(5) of the *Divorce Act* might permit the disclosure of personal health information under section 43(1)(h) of *PHIPA*, in this case, the evidence demonstrates that AFS took the "best interests of the child" into account when it decided not to disclose the requested information under section 43(1)(h) of *PHIPA*. In the circumstances, I accept the "best interests of the child" is a relevant consideration in AFS's exercise of discretion with respect to the application of section 43(1)(h) of *PHIPA*.

[59] In considering section 16(5) of the *Divorce Act*, when exercising its discretion not to disclose the requested information under section 43(1)(h) of *PHIPA*, AFS took into account the "best interests of the child" noting that:

- the complainant seeks information about himself;
- the complainant's son signed a withdrawal of consent form; and,
- the Superior Court declined to order AFS to disclose the requested records to the complainant.

<u>The complainant seeks information about himself</u>

[60] AFS submits that section 16(5) of the *Divorce Act* does not impose a legal requirement for it to disclose the requested information to the complainant. AFS's position is based on the complainant's characterization of the information that he seeks. AFS submits that in the complainant's request, and in all his representations submitted with respect to this matter, he takes "great efforts to outline and emphasize that he is not seeking any information that relates to his child" but that "he is very clearly, and by his own admission, seeking information about himself."

[61] AFS submits that this characterization of the information reveals that the complainant is not requesting information in accordance with the meaning of section 16(5) of the *Divorce Act* as he is not seeking information relating to the "health, education and welfare" of his son. AFS argues that section 16(5) of the *Divorce Act* contemplates the provision of information to an access parent for the purpose of keeping them informed about the "health, education and welfare" of the child, not for the purpose of gathering information about themselves.

[62] In reply, the complainant states that AFS's argument that he does not seek access to the personal health information about his child is false. He argues that AFS has consistently referred to the information that he seeks as the records of personal health information of his son and that previous decisions issued by this office support this characterization.[30] He submits that as the responsive records are appropriately

[30] For example, PHIPA Decision 96.

characterized as his son's personal health information, he is entitled to this information under section 16(5) of the *Divorce Act*, which provides that he has the right to information about the health, education and welfare of his child. His argument suggests that after taking the position that the requested records consist of the complainant's son's personal health information, AFS cannot now argue that because the complainant himself identified the information he seeks as his own rather than his son's personal health information, he is not entitled to it under the *Divorce Act*.

[63] I do not read AFS's submissions as revisiting its position with respect to the nature of the information to which the complainant seeks access; it is clear that AFS considers the records at issue to be the complainant's son's personal health information. Rather, I read AFS's submissions as taking the position that the complainant's characterization of the information he seeks as his own reveals that he is requesting the information for his own purposes and therefore, his motives are clearly not in accordance with the purpose of section 16(5) of the *Divorce Act*, which is to ensure that an access parent has the right to be informed about the health, education and welfare of the child. [31]

[64] I accept that the complainant's motives for making the request are relevant to AFS's consideration of the "best interests of the child" when exercising its discretion under section 41(3)(h) of *PHIPA*. This is in keeping with Adjudicator Ryu's comments in PHIPA Decision 96, mentioned above. It also aligns with the previous orders issued by this office under *FIPPA* and *MFIPPA*, also mentioned above, which have recognized that although section 16(5) of the *Divorce Act* grants a parent who has access to a child a right to be given information about the health, education and welfare of that child, that section might not be found to be applicable if in its application the outcome is inconsistent with the guiding principle of the "best interests of the child."[32]

The withdrawal of consent form is valid and covers the information at issue

[65] When considering the "best interests of the child" in its exercise of discretion not to disclose the requested records under section 43(1)(h) of *PHIPA*, it is clear from AFS's representations that it also took into account the withdrawal of consent form signed by the complainant's son.

[66] The withdrawal of consent form explicitly states that the complainant's son does not consent for AFS to disclose his personal health information to his biological parents,

---

[31] I also note in any event that even if he complainant's information in the records could be separated from his son's personal health information, he has no right to it under *PHIPA*, as he has not suggested that his information is his personal health information and in fact, I found in PHIPA Decision 83 that it is not. *PHIPA* only applies to personal health information. Further, as I found in PHIPA Decision 83, he also has no right of access under *FIPPA* or *MFIPPA*.

[32] See Orders PO-3599 and MO-3551 discussed above. While these orders were issued under different legislation and I am not bound by them, I accept that their analysis is relevant in the circumstances in this case.

which includes the complainant. That form states, in part:

> I, [complainant's son], [complainant's son's signature]
>
> wish to place the following conditions on any further use or disclosure of my personal health information:
>
> Please <u>specify conditions below:</u>
>
> No information contained in my files at Algoma Family Services shall be disclosed to any parties, including and not limited to [named individual] & [complainant] (my biological parents).

[67] In his Notice of Application for Judicial Review and in his reconsideration representations, the complainant argues that, in PHIPA Decision 83, I failed "to consider and evaluate the contractual terms of the 'withdrawal of consent' form," despite his having raised that issue in his original representations. He submits that "there are terms [indicating] that the person signing the document withdrawing their consent understands that the withdrawal of consent is not retroactive to the time before the form was signed." In his representations for this reconsideration, he also submits that there is a question of validity regarding the withdrawal of consent form because his son was a minor at the time the form was signed and therefore did not have the legal capacity to enter into a contract withdrawing consent to disclose his own personal health information.

[68] In PHIPA Decision 83, I found that the complainant did not have a right of access to his son's personal health information under *PHIPA*. My finding was based on the fact the complainant did not establish that he had the authority under *PHIPA* to act as a substitute decision-maker on behalf of his son and, further, that there was no evidence his son had provided consent for the complainant to access the information. I commented that the son's express withdrawal of consent to disclose his personal health information to the complainant was additional evidence to support a conclusion that the son had not consented to the release of his own personal health information to his father.

[69] I would note that there is no evidence before me that the complainant's son ever consented to the disclosure of his personal health information to the complainant. Even if the son had never signed the withdrawal of consent form, this would not be a disclosure with consent as provided under section 29(a) of *PHIPA*.[33] The relevance of

---

[33] Section 29(a) states:

> A health information custodian shall not collect, use or disclose personal health information about an individual unless,
>
> (a) it has the individual's consent under this Act and the collection, use or disclosure, as the case may be, to the best of the custodian's knowledge, is necessary for a lawful purpose[.]

the withdrawal of consent form, therefore, is its relationship to the son's best interests as a consideration under the disclosure without consent provision in section 43(1)(h). And it is only one consideration and not, on its own, determinative.

(i) The complainant's son had the capacity to sign the withdrawal of consent form.

[70] The complainant argues that the withdrawal of consent form is not valid because, when it was signed, his son was a minor with no legal capacity to consent. I disagree. Under *PHIPA*, the complainant's son had the capacity to sign the withdrawal of consent form.

[71] Sections 18 through 20 of *PHIPA* discuss consent concerning personal health information. Section 18 discusses the elements of an individual's consent for the collection, use or disclosure of their personal health information by a health information custodian. Section 19(1) permits an individual, who has consented to have a health information custodian collect, use or disclose personal health information about them, to withdraw that consent. Section 20 allows for a health information custodian to assume the validity of the consent given by an individual unless it is not reasonable to do so.

[72] Based on these provisions, a capable child, regardless of age, may give consent for the collection, use or disclosure of their own personal health information under *PHIPA*.[34] As set out in section 21(1) of *PHIPA*, individuals are capable of consent if they are able to understand information relevant to deciding whether to consent to the collection, use or disclosure of their personal health information, and to appreciate the reasonably foreseeable consequences of giving, withholding or withdrawing their consent. Sections 21(4) and (5) presume that an individual is mentally capable, unless the health information custodian has reasonable grounds to believe otherwise.

[73] In the circumstances of this complaint, the withdrawal of consent form was signed when the complainant's son was 13 years old. There is no evidence to suggest that the conditions set out in section 21(1) were not met, namely, that the son was not capable of understanding the information that is relevant to deciding whether to withdraw his consent for the disclosure of his AFS file to the complainant or capable of appreciating the consequences of his withdrawal of his consent to disclose. Therefore, I find that it is reasonable, and in accordance with section 21(4) of *PHIPA*, for AFS to have presumed that the complainant's son was capable and that his withdrawal of consent was valid.

[74] There are other provisions in *PHIPA* that address situations where a child is less than 16 years old and a parent can act as SDM. However, in PHIPA Decision 83, I

---

[34] PHIPA Decision 107 and Frequently Asked Questions: *Personal Health Information Protection Act*, Information and Privacy Commissioner of Ontario, September 2015, page 23.

determined that, under *PHIPA*, the complainant is not entitled to act as SDM for his son. The complainant has not challenged this finding and I will not revisit it here.

[75] For all of the reasons set out above, I find that the son had the legal capacity to sign the withdrawal of consent form and that it is valid with legal force and effect.

(ii) The withdrawal of consent form applies to all of the son's personal health information

[76] The complainant argues that in reaching my decision in PHIPA Decision 83 I failed to take into account the effect of the terms of the withdrawal of consent form. His view appears to be that because the withdrawal of consent form is not retroactive it can only apply to the disclosure of records of personal health information that were created after February 3, 2016, the date on which the form was signed. Based on this interpretation, he appears to argue that AFS cannot rely upon the withdrawal of consent form to refuse to provide him with the requested records because all of them predate the signing of the form. He submits that all of the records at issue would have been created between 2011 and 2013 during the period of time when his son was an AFS client.

[77] While I agree with the complainant that a withdrawal of consent is not retroactive, I disagree with his interpretation that its lack of retroactive effect means that it can only apply to the disclosure of records of personal health information that were created after the date on which the form was signed.

[78] As mentioned above, section 19(1) of *PHIPA* addresses the withdrawal of consent. It provides that:

> If an individual consents to have a health information custodian collect, use or disclose personal health information about the individual, the individual may withdraw the consent, whether the consent is express or implied, by providing notice to the health information custodian, but the withdrawal of the consent shall not have retroactive effect.

[79] The language of section 19(1) expressly stipulates that the withdrawal of consent shall not have retroactive effect. Additionally, the withdrawal of consent form itself clearly states that it shall not have retroactive effect. It states:

> … I understand that withdrawal of consent does not have retroactive effect…

[80] The complainant correctly observes that the IPC has described the effect of the non-retroactivity of a withdrawal of consent to be that the withdrawal of consent applies only to new *collections* of personal health information and future *uses* for the

purpose of which the consent was initially obtained.[35] However, this submission ignores this office's interpretation of how the non-retroactivity affects the *disclosure* of personal health information.

[81] On the issue of disclosure, the IPC has stated that the non-retroactive effect of a withdrawal of consent means that the health information custodian is not required to retrieve the information that has already been disclosed; however, the health information custodian must stop disclosing the personal health information as soon as the notice of withdrawal is received.[36] Effectively, once consent has been withdrawn, a health information custodian cannot collect, use or disclose the personal health information unless the individual provides express consent, or *PHIPA* permits the collection, use or disclosure to be made without consent.[37] In my view, this means that the health information custodian is prohibited from disclosing the personal health information of an individual who has withdrawn their consent, regardless of the date of its creation.

[82] Applying these principles to the facts here, as the withdrawal of consent form was signed on February 3, 2016, it would not apply to any disclosure of information from the son's AFS file that may have occurred prior to that date. However, on receipt of the withdrawal of consent form, on February 3, 2016, AFS was immediately required to stop disclosing any of the son's personal health information in its possession. In my view, this is properly interpreted to include all of the son's personal health information, whether or not that information was created before or after the date the withdrawal of consent form was signed.

[83] I conclude that the complainant's son's withdrawal of consent form applies to the personal health information sought by the complainant.

(iii) Conclusion regarding the withdrawal of consent form.

[84] I have found that the complainant's son had the legal capacity to withdraw his consent for the disclosure of his personal health information and, more specifically, to place conditions on the disclosure of his personal health information, including that it not be disclosed to the complainant. I have also found that, despite the fact that the withdrawal of consent form does not have retroactive effect, as of the date that it was made known to AFS, it prohibits the disclosure of any of the son's personal health information, including that which was created prior to the AFS receiving the withdrawal of consent. Accordingly, I find that the son's withdrawal of consent form is valid and that it was a relevant consideration for AFS to have taken into account when exercising

---

[35] Frequently Asked Questions: *Personal Health Information Protection Act*, Information and Privacy Commissioner of Ontario, September 2015, pages 20 and 21.
[36] Frequently Asked Questions: *Personal Health Information Protection Act*, Information and Privacy Commissioner of Ontario, September 2015, pages 20 and 21.
[37] PHIPA Decision 84.

its discretion under section 43(1)(h) not to disclose the requested information to the complainant.

The Superior Court declined to order AFS to disclose the requested information to the complainant

[85] Finally, it is clear that in considering the best interests of the complainant's son when exercising its discretion not to disclose the requested information under section 43(1)(h), AFS also took into account that in a proceeding under the *Family Law Act*, the Superior Court declined to grant the complainant's request to order AFS to disclose the requested information to him, notwithstanding his rights under the *Divorce Ac*t.

[86] I accept the fact that the Superior Court declined to order AFS to disclose the requested information to the complainant in the context of a proceeding under the *Family Law Act* is a relevant factor for AFS to have considered in exercising its discretion not to disclose the information at issue to the complainant under section 43(1)(h) of *PHIPA*.

[87] In sum, in exercising its discretion not to disclose the requested information to the complainant under section 43(1)(h) of *PHIPA*, it is clear that AFS took into account:

- the complainant's motives for requesting the information were to further his own interests rather than for the purpose of keeping him informed as to the "health, education and welfare of the child" as contemplated by section 16(5) of the *Divorce Act*;
- the son expressly did not consent to his personal health information being provided to his father; and
- in a proceeding under the *Family Law Act*, the Superior Court declined to the complainant's request to order AFS to disclose the requested information to him, notwithstanding his rights under the *Divorce Act*.

[88] I accept that all of these considerations are relevant to AFS's exercise of its discretion not to disclose the complainant's son's personal health information to the complainant under section 43(1)(h) of *PHIPA*. I therefore find that AFS's exercise of its discretion under this section was appropriate. There is no evidence before me that AFS considered any irrelevant factors or refused disclosure in bad faith or for an improper purpose.

Conclusion and summary on the disclosure of the requested information.

[89] In this reconsideration decision, I find that AFS had a duty under *PHIPA* to consider the complainant's request for information contained in his son's AFS records under certain sections of *PHIPA* that permit disclosure. The circumstances surrounding the request and the evidence provided by the complainant raised the potential

application of the disclosure provisions at sections 41(1)(d)(i) (court order) and 43(1)(h) (other statute), which permit disclosure without the consent of the individual to whom the personal health information relates, in this case, the complainant's son.

[90] I find that while the complainant's circumstances established that AFS had a duty to consider whether section 41(1)(d)(i) was applicable (that is, whether disclosure was permitted or required by a court order), AFS appropriately considered the relevant factors including the evidence of the court orders in order to conclude that there was insufficient evidence of the existence of any such relevant court order.

[91] I also find that as the circumstances demonstrated that section 16(5) of the *Divorce Act* might be relevant, AFS had a duty to consider the disclosure of the requested information under section 43(1)(h) of *PHIPA*. I find that AFS demonstrated that it properly considered the evidence relevant to disclosure under section 43(1)(h) of *PHIPA.*

[92] In sum, I find that AFS considered the complainant's request as a request for disclosure[38] and that its exercise of discretion, in deciding not to disclose the complainant's son's personal health information to the complainant without the son's consent, was appropriate. There is no evidence before me that AFS considered any irrelevant factor or refused disclosure in bad faith or for an improper purpose.

[93] If the complainant believes that AFS has failed to comply with a legal requirement outside of *PHIPA* to disclose his son's personal health information, by reason of either a court order or a statutory requirement, then the courts would be the appropriate place to enforce such a requirement. As mentioned above, while the IPC can order a health information custodian to properly consider a request for disclosure of personal health information, the IPC cannot order the health information custodian to release that information.[39] It is important to note that I find that AFS's decision to not disclose the records of the son's personal health information does not amount to a contravention of *PHIPA*. Even if I had found that AFS had not appropriately exercised its discretion under *PHIPA* in coming to its decision not to provide the records at issue to the complainant, I could only send the matter back to the AFS to exercise its discretion in a manner that properly considers the relevant factors.

2. There is no issue of paramountcy in the interaction between section 16(5) of the Divorce Act and section 43(1)(h) of PHIPA

[94] The complainant takes the position that there is an "issue of paramountcy in the interaction between the *Divorce Act* [and *PHIPA*]." Specifically, he argues that section 16(5) of the *Divorce Act* is "paramount" over section 43(1)(h) of *PHIPA*.

---

[38] This is in addition to considering the request under the access provisions as discussed in PHIPA Decision 83.

[39] PHIPA Decision 96.

[95] In support of his argument, the complainant relies on Hansard excerpts of the debates regarding the language in section 43(1)(h). In the Legislature, the debate was framed as a "paramountcy" issue by a minister, but a review of the portions quoted by the complainant make clear that this was not suggesting a constitutional issue regarding the doctrine of federal paramountcy. Rather, the issue was about the need to include explicit language in section 43(1)(h) so that health information custodians would not be in violation of *PHIPA* if they disclosed personal health information in accordance with other legislation, including federal legislation.

[96] Furthermore, the complainant's representations do not set out a constitutional argument, but rather rely on some commentary made by the then Registrar of the Royal College of Dental Surgeons of Ontario, Irwin Fefergrad, in a meeting of a standing committee of the Legislature. That comment indicated that the speaker had assumed that federal legislation is generally paramount to provincial legislation.

[97] As set out above, section 16(5) of the *Divorce Act* grants an access parent the right to make inquiries, and to be given information as to the health, education and welfare of a child of the marriage. The complainant argues that he has a right to the requested information by virtue of the application of that Act. By framing this as a paramountcy argument, he appears to imply that *PHIPA* acts in conflict with the *Divorce Act* by prohibiting AFS from disclosing information to which he has a right under section 16(5) of the *Divorce Act*. I disagree with this framing of the issue and find that there is no paramountcy issue here.

[98] In essence, the complainant is arguing that if the *Divorce Act* requires disclosure, *PHIPA* cannot prevent it. There is, however, no dispute that this is the case. *PHIPA* gives a health information custodian the discretion to disclose personal health information "if permitted or required by…an Act or an Act of Canada." *PHIPA* recognizes that there may be requirements for disclosure of personal health information under both federal and other provincial legislation (such as the *CLRA*, mentioned above) and ensures that the health information custodian will not be contravening *PHIPA* if it complies with one of those other requirements. This is therefore fundamentally the same argument as the one addressed above regarding disclosure under section 43(1)(h). As discussed above, *PHIPA* does not affect or eliminate obligations that a health information custodian has under other legislation. It makes no difference whether that other legislation is federal or provincial. In particular, there is no suggestion from AFS that it understands *PHIPA* to override rights granted to the complainant under the *Divorce Act*.

[99] As noted above, however, s. 43(1)(h) is a permissive provision and does not *require* the health information custodian to disclose any personal health information. The *Divorce Act* may require the health information custodian to do so, but if the health information custodian does not disclose, it is not in contravention of *PHIPA*. To the extent that AFS may be contravening the *Divorce Act*, that is an issue to be resolved in family court. If the ultimate goal of the complainant is to compel disclosure of the

records, I reiterate that the IPC does not have the authority to make that order under *PHIPA*.

[100] For the reasons set out above, the complainant's "paramountcy" argument does not establish a basis for changing my determinations in PHIPA Decision 83.

SUMMARY CONCLUSION:

[101] In this decision, I reconsider PHIPA Decision 83 by making findings on the potential application of the provisions of *PHIPA* that permit disclosure without consent. As set out above, I find that AFS had a duty to consider the possible application of two of the disclosure provisions of *PHIPA*, that it exercised its duty to do so and, that it properly exercised its discretion to determine whether or not to disclose. Specifically, I find that AFS properly exercised its discretion under both section 41(1)(d)(i) and section 43(1)(h).

[102] In this decision I also consider whether the complainant's paramountcy argument warranted a change to PHIPA Decision 83. For the reasons set out above, I find that the complainant did not establish that PHIPA Decision 83 should be changed on the basis of that argument.

ORDER:

For the foregoing reasons, no order is issued.

Original signed by September 28, 2020
Catherine Corban
Adjudicator