

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 129

Complaint HA16-111

St. Clair Child and Youth Services

October 2, 2020

Summary: A father filed a complaint against a counselling centre's decision to deny him access to records containing the personal health information (PHI) of his three children. In this decision, the adjudicator finds that the father does not have an independent right of access to his children's PHI under Part V of *PHIPA*, given the children's mother's objection, and dismisses his complaint. However, the adjudicator finds that the father's evidence raises the potential application of sections 41(1)(d)(i) (court order) and 43(1)(h) (other statute) under Part IV of *PHIPA* which may permit the custodian to disclose the records to the father without consent of the other parent. The adjudicator makes no order but suggests that the custodian turn its mind to the discretionary disclosure provisions under *PHIPA*.

Statutes Considered: *Personal Health Information Protection Act, 2004*, ss. 3(1), 4(1), 23, 26, 41(1)(d)(i), 43(1)(h) and 71(4)(b).

Decisions Considered: PHIPA Decisions 17, 96 and 107.

BACKGROUND:

[1] The complainant filed a request under the *Personal Health Information Protection Act (PHIPA or Act)* to St. Clair Child and Youth Services (custodian) for access to "all records" relating to his three children.

[2] The custodian issued an access decision denying the complainant access to the responsive records, relying on the exemption from the right of access in section 52(1)(e)(i) (risk of serious harm).

[3] The complainant filed a complaint with this office and a mediator was assigned to the matter. However, the parties were unable to reach a settlement and the matter was transferred to the adjudication stage of the complaint process.

[4] I decided to conduct a review and invited the representations of the custodian and the complainant. I also contacted the children's mother, who objected to the complainant being granted access to the children's PHI. The non-confidential portions of the custodian's representations were shared with the complainant, who made representations in response.

[5] During my review, I wrote to the complainant and sought additional representations regarding his right to access his children's PHI under *PHIPA*.

[6] For the reasons that follow, I find that the complainant does not have a right of access to his children's PHI under *PHIPA*. However, certain sections of *PHIPA* that permit the custodian to disclose PHI, where relevant conditions are met, may apply. *PHIPA* Decision 96 addresses the distinction in *PHIPA* between access to and disclosure of personal health information. In some cases, where a parent has no right of access to a child's PHI, the custodian may still have a duty to consider whether *PHIPA* nonetheless permits it to disclose the requested information under other parts of *PHIPA*.

[7] Given my finding that the complainant is not entitled to exercise an independent right of access to his children's PHI, and given that the complainant has raised some circumstances that may be relevant to the custodian's ability to disclose the records under the discretionary disclosure provisions in *PHIPA*, I find that the custodian should now consider the complainant's request under those provisions. In particular, the custodian should review the complainant's evidence and decide whether to disclose the records to him under sections 41(1)(d)(i) (court order) and/or 43(1)(h) (other statute).

RECORDS:

[8] The complainant provided a copy of a 2015 letter he received from the custodian which enclosed an Intake Form. The Intake Form specifies that the custodian's phone interview with the mother was its first point of contact with the complainant's children. In a separate letter, the custodian also provided the complainant with the dates each child was referred to it for counselling and assessment. The dates of their participation in joint and individual counselling are also listed. The custodian, however, refused to grant the complainant access to the remaining records, which consist of handwritten and computer-generated correspondence contained in the custodian's files for the complainant's three children.

[9] The records include information about the children in addition to other information about the children's mother and consist of clinical notes relating to home visits, phone calls, assessments and individual and joint counselling appointments. Also included are copies of reports prepared by internal and third party health practitioners along with administrative records, such as consent forms and school report cards.

[10] During my review of this complaint, the complainant confirmed that he is not

seeking access to his children's report cards or audiology reports contained in the records. Accordingly, these records have been removed from the scope of this complaint. I have also removed a 37-page court-ordered psychological report prepared by a third party psychologist who provided a copy of it to the complainant.

PRELIMINARY ISSUES:

[11] Throughout his submissions, the complainant has raised concerns about the custodian providing "unauthorized" or "illegal" treatment to his children. The complainant submits that the custodian did not make the necessary inquiries to verify that the mother had "sole custody" and as a result failed to obtain consent from both parents. The complainant also cites section 10 of the *Health Care Consent Act (HCCA)* in support of his position and asks that this office conduct an investigation for the purposes of prosecuting the custodian for not complying with the *PHIPA* and *HCCA*.

[12] My jurisdiction under *PHIPA* is limited to a review of the custodian's refusal of the complainant's request to access his children's PHI in its record holdings. I do not have the jurisdiction to consider whether the custodian obtained proper consent to treatment under the *HCCA* or any other act. I note as an aside that the *PHIPA* provisions the complainant relies on relate to consent regarding the custodian's collection, use or disclosure of personal health information, not consent to treatment.

[13] Having regard to the above, I do not have the jurisdiction to address the complainant's concerns about whether the custodian was authorized to provide treatment to his children under *PHIPA* or any other statute.

[14] The issue before me is whether the custodian's denial of access should be upheld. In making that determination, I must first decide whether the complainant can exercise an independent right of access under *PHIPA* to his children's PHI. Only if the complainant is entitled to make such a request for access must I consider whether the custodian properly applied the section 52(1)(e)(i) exemption to deny him the records.

[15] For the reasons set out below, I find that the complainant is not entitled to exercise an independent right of access to his children's PHI.

DISCUSSION:

The records contain the PHI of the complainant's children and the children's mother

[16] There is no dispute that the custodian is a "health information custodian" as defined in section 3(1) of *PHIPA*. In its representations, the custodian confirms that it is an "accredited community children's mental health agency". I have reviewed the records and find that the custodian is a "health information custodian" as defined in section 3(1)4.vii.

[17] The parties also appear to agree that the information the complainant seeks to

access constitutes the PHI of three of his children as defined in sections 4(1)(a) and (b). The custodian states that the records constitute the "clinical files pertaining to the mental health of the complainant's three children, including some health history of the children's family".

[18] I am satisfied that the records contain the PHI of the complainant's children, along with the PHI of their mother, as defined in sections 4(1)(a) and (b).

The complainant is not entitled to exercise an independent right of access to records containing his children's PHI, given the mother's objection

[19] Sections 23 and 26 set out the authority of parents to make a request under *PHIPA* for their children's PHI. *PHIPA* provides that the term "parent" does not include a parent who has only a right of access to the child.¹

[20] There is no dispute between the custodian and the complainant that he is a joint custodial parent. In addition, the children's mother does not dispute that the complainant is a joint custodial parent.

[21] The custodian submits that at the time it received the complainant's request under *PHIPA*, it was aware that he had regained custody of his children. On this basis, the custodian believed that the complainant was entitled to make a request to access records containing his children's PHI. However, the custodian was also aware that the mother would object to the release of the children's PHI to the complainant, and denied the complainant request, relying on the exemption under section 52(1)(e)(i).

[22] Though the children's mother does not dispute that the complainant is a joint custodial parent, she confirmed that she objects to him being granted access to the children's PHI in the custodian's record holdings.

Decision and analysis

[23] Section 23 of *PHIPA* identifies persons who may act as a substitute decision maker for an individual (and may thus make an access request on behalf of that individual). It states, in part:

23(1) If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure by a health information custodian of personal health information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent:

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

i. the individual, or

¹ Section 2(1).

- ii. if the individual is at least 16 years of age, any person who is capable of consenting, whom the individual has authorized in writing to act on his or her behalf and who, if a natural person, is at least 16 years of age.
2. If the individual is a child who is less than 16 years of age, a parent of the child or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent unless the information relates to,
 - i. treatment within the meaning of the Health Care Consent Act, 1996, about which the child has made a decision on his or her own in accordance with that Act, or
 - ii. counselling in which the child has participated on his or her own under the Child and Family Services Act
 3. If the individual is incapable of consenting to the collection, use or disclosure of the information, a person who is authorized under subsection 5(2), (3) or (4) or section 26 to consent on behalf of the individual.

...

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

[24] Accordingly, section 23 provides that parents who share joint custody rights may each have rights as a substitute decision maker to make a request for records under *PHIPA*, as long as the records do not relate to certain types of treatments or counselling governed by the *Health Care Consent Act (HCCA)* or *Child and Family Services Act*.

[25] Section 23(3) also provides that the complainant's children, even if they are under the age of 16, can give, withhold or withdraw consent if they are capable of consenting to the collection, use or disclosure of their PHI.

[26] Finally, section 23(3) provides that in situations where there is a conflict between the child who is less than 16 years old and a person entitled to act as the substitute decision-maker, such as a parent, the decision of the child prevails.

[27] The children in this matter are all under the age of 16 years old. Accordingly, either section 23(1)2 or section 23(1)3 may be applicable in the circumstances. These sections identify who may act as a substitute decision-maker for a child under 16 years of age, depending on whether or not the child is "capable" of consenting within the meaning of *PHIPA*.

[28] To be capable of consenting within the meaning of *PHIPA*, the complainant's children must be able to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure of their PHI, and to appreciate the reasonably foreseeable consequences of that decision (section 21(1)). For the remainder of this decision, I will refer to the complainant's children's capacity to consent under *PHIPA* as their "mental capacity."

[29] There is no "age of capacity" in *PHIPA*, although the age of the child may be a factor in a custodian's determination about the child's mental capacity for the purposes of *PHIPA*.

[30] Individuals are presumed to be mentally capable, unless the custodian has reasonable grounds to believe that the individual is not mentally capable (section 21(4)).²

[31] In addition, section 71(4)(b) provides that the custodian may rely on a requester's assertion that he or she is the substitute decision-maker for an individual, unless it is not reasonable to do so in the circumstances.³

[32] I have no information before me about the capacity of the children in this matter. However, regardless of whether the children or any of them are mentally incapable, I find that the circumstances of this complaint would make it unreasonable for the custodian to treat the complainant as an independent substitute decision-maker for his children.

If the child is mentally incapable – section 26

[33] Section 26 of *PHIPA* sets out a hierarchy for determining who may act as the mentally incapable individual's substitute decision-maker.⁴

[34] In this complaint, there is no evidence before me that there exists another person who would rank higher than a custodial parent under section 26(1) to act as substitute decision-maker for a mentally incapable child. This means that, if any or all of the children are mentally incapable, the complainant or the child's mother could each qualify as the substitute decision-maker of the child or children as a custodial parent, *provided other relevant conditions are met*.

² Section 21(4) states "[a]n individual is presumed to be capable of consenting to the collection, use or disclosure of personal health information". Section 21(5) states "[a] health information custodian may rely on the presumption described in subsection (4) unless the custodian has reasonable grounds to believe that the individual is incapable of consenting to the collection, use or disclosure of personal health information".

³ Section 71(4)(b) states "[u]nless it is not reasonable to do so in the circumstances, a person is entitled to rely on the accuracy of an assertion made by another person, in connection with a collection, use or disclosure of, or access to, the information under this Act, to the effect that the other person, is a person who is entitled under section 5 or 23 or subsection 26(1) to consent to the collection, use or disclosure of personal health information about another individual."

⁴ Section 23(1)3 provides that sections 5(2), (3) or (4) are applicable where the mentally incapable individual already has a substitute decision-maker in relation to treatment and some other areas of decision-making under the *Health Care Consent Act, 1996* (and certain other conditions are met), otherwise section 26 applies. There is no suggestion that sections 5(2), (3) or (4) apply in this matter.

[35] One of these conditions is a belief on the part of one substitute decision-maker that another equally ranked substitute decision-maker would not object (see section 26(5)(b)). Here, the children's mother, with whom the complainant is equally ranked under section 26(1), objects to him being granted access to the children's PHI. Accordingly, the complainant cannot claim a belief that the equally ranked substitute decision-maker would not object to his request.

[36] Accordingly, I find that the complainant cannot act independently of the mother as a substitute decision-maker for a mentally incapable child or children to access their PHI held by the custodian.⁵

If the child is mentally capable – section 23

[37] If a child is mentally capable, section 23 of *PHIPA* provides that a custodial parent may act as the child's substitute decision-maker, except in certain circumstances that do not appear to be relevant here.⁶

[38] Unlike the above-noted provisions in section 26 concerning conflict in substitute decision-making for mentally incapable individuals, *PHIPA* does not explicitly address situations where equally ranked substitute decision-makers for a mentally capable child disagree.⁷ In other words, no hierarchy for determining who may act as the mentally capable individual's substitute decision-maker exists in the legislation.

[39] This office recently considered the substitute decision-maker provisions in section 23 in *PHIPA* Decision 107. In that decision, Adjudicator Jenny Ryu found that in circumstances where equally ranked substitute decision-makers disagree on a request concerning a mentally capable child's personal health information, neither substitute decision-maker can act independently of the other in respect of that request.⁸

[40] During my review, I wrote to the complainant and provided him a copy of *PHIPA* Decision 107 and invited his supplemental representations. The complainant provided representations stating that *PHIPA* Decision 107 was not applicable to his complaint given the differing circumstances in that complaint. The complainant argued that, unlike his situation, the requester in *PHIPA* Decision 107 was granted access to some of the PHI at issue. The complainant also argues that the parties in *PHIPA* Decision 107 did not have a

⁵ There is no evidence in this case that the Public Guardian and Trustee has made a decision to resolve the disagreement between the equally ranked substitute decision-makers, as contemplated by section 26(7) of *PHIPA*.

⁶ Specifically, there is no claim that the information at issue relates to treatment or counselling in respect of which the mentally capable child has participated on her own [as described in paragraph 2 of section 23(1)], or that the mentally capable child has made her own decision in respect of the request that conflicts with that of a person entitled to act as her substitute decision-maker [section 23(3)].

⁷ Other than in cases where the mentally capable child has made her own decision: section 23(3). As noted above, there is no evidence that section 23(3) applies here.

⁸ Adjudicator Ryu found that section 23 of *PHIPA* should be interpreted harmoniously with section 26, and with section 71(4)(b), to enable a health information custodian to rely on a person's assertion of substitute decision-making authority for a mentally capable child under 16, except where the custodian has reason to believe that another equally ranked substitute decision-maker for the child objects.

custodial order “defining the authority of the parents”. The complainant submits that the “roles and responsibilities are spelled out in [the court order] concerning [his] children”. The complainant goes on to state:

Any request for documentation from [the custodian] under *PHIPA* is done so under the authority granted to me by the Court Order. If no order existed, then and only then can the interpretation be left to the authority of an adjudicator with the Information and Privacy Commissioner. In this instance, the removal of personal information of the mother is appropriate, however any other information concerning the well-being of my children or medical information about my children must be disclosed.

[41] The complainant submits that this office lacks the jurisdiction to review the custodian’s denial of access given the wording of the court order. The complainant contrasts this with the situation in *PHIPA* Decision 107 in which the court order “[did] not address decision-making by the joint custodial parents in respect of the child’s personal health information”.

[42] I have reviewed the various court documents and transcripts from US courts supplied by the complainant. It appears that the most recent and comprehensive court document is a 2012 Consent Judgement of Divorce (consent judgement). This document contains a clause which provides that the complainant and the children’s mother “shall have equal responsibility and decision-making authority” regarding their children’s “health care, education and religious training”. The complainant suggests that this wording nullifies my decision-making authority and requires this office to order the custodian to grant him access to the withheld records.

[43] It appears that the complainant takes the position that the decision-making clause in the consent judgment is akin to a production order. Production orders are court orders which are addressed to a specific individual or organization along with a judicial direction requiring the disclosure of specified documents. In my view, the consent judgement does not require me to order the custodian to grant the complainant access to the requested records. The court documents the complainant provided this office are not production orders. In any event, a valid production order would contain a direction to the custodian, not to this office. However, nothing in this order prevents the complainant from applying to a court of competent jurisdiction to seek an order that the custodian disclose the requested records.

[44] I also dismiss the complainant’s argument that *PHIPA* Decision 107 does not apply to the circumstances of this complaint because the requester in that complaint had already been granted access to some of his child’s PHI. Whether or not a requester has been granted prior access to the PHI at issue is not determinative of the question of whether an individual has an independent right to access the PHI of another individual under *PHIPA*.

[45] I agree and adopt the reasoning in *PHIPA* Decision 107 which found that equally ranked substitute decision-makers could exercise an independent right of access for their mentally capable child, provided there is no conflict between them.

[46] In this case, the complainant and the children's mother each qualify as equally ranked substitute decision-makers for his children under section 23 of *PHIPA*. However, the children's mother objects to the complainant's request. Given the objection of the mother, of which the custodian was aware at the time of the access request, I find that, assuming the children are capable, it would be inappropriate to treat the complainant as an independent substitute decision-maker for his capable children in respect of his access request under *PHIPA* for the records held by the custodian.⁹

Summary

[47] I find that the complainant cannot act as an independent substitute decision-maker under *PHIPA* for his children in the circumstances of this matter regardless of whether the children are mentally capable or incapable. Accordingly, I dismiss the complaint respecting access under *PHIPA*.

[48] This order does not prevent the complainant from applying to a court of competent jurisdiction for an order compelling the custodian to disclose the requested records. In addition, nothing in this order prevents another custodian from relying on the complainant's assertion that he is the substitute decision-maker for his children, unless it is not reasonable to do so in the circumstances of that request.¹⁰

[49] Notwithstanding my finding that the complainant is not entitled to exercise an independent right of access for his children's PHI, certain sections of *PHIPA* that permit the custodian to disclose the children's PHI may still apply. Accordingly, I will go on to consider whether the complainant's evidence give rise to the potential application of the discretionary disclosure provisions in other parts of *PHIPA*.

DISCLOSURE UNDER *PHIPA*:

[50] As I noted at the outset, access and disclosure are two distinct concepts under *PHIPA*. Although the complainant does not have an independent right of access to the records as a substitute decision maker, the discretionary disclosure provisions in *PHIPA* may *permit* (although not *require*) disclosure to him.

[51] As the parties were not asked to make representations on the discretionary disclosure provisions under *PHIPA*, the following discussion is for their guidance only. The

⁹ Section 23 should be interpreted harmoniously with section 26, and with section 71(4)(b). Section 71(4)(b) provides that a custodian is entitled to rely on an assertion by an individual claiming to be the lawfully authorized substitute decision-maker for a mentally capable child, unless it is not reasonable to do so in the circumstances.

¹⁰ As set out in PHIPA Decision 107, section 71(4)(b) does not require that, in every case, a custodian faced with a request from a substitute decision-maker will be obliged to canvass the views of all equally ranked substitute decision-makers to satisfy itself that they all agree to the request. However, where there is reason to believe that an equally ranked substitute decision-maker disagrees with the request, it would not be reasonable for the custodian to treat either substitute decision-maker as having independent authority in request of the request.

parties should refer to PHIPA Decision 96 for a detailed discussion of a custodian's obligations under the discretionary disclosure provisions in PHIPA.

[52] As I explain below, given the circumstances of the complainant's access request, the custodian should turn its mind to sections 41(1)(d)(i) and 43(1)(h) of *PHIPA*, which may permit it to disclose the children's PHI to the complainant, despite the mother's objection. I recommend that the custodian notify him of its decision once it has done so. If it does not, or if the complainant is not satisfied with the outcome, it is open to him to complain to this office. However, and as I note below, this office cannot order disclosure, but can only review the custodian's exercise of discretion.

[53] The complainant has provided information to the custodian that raises the possible application of sections 41(1)(d)(i) and 43(1)(h).

[54] Section 41(1)(d)(i) states:

A health information custodian may disclose personal health information about an individual, a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information

[55] 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.

[56] PHIPA Decision 96 examined whether and in what circumstances custodians may have a duty to consider a request for information under the disclosure provisions in *PHIPA*. In that decision, Adjudicator Jenny Ryu found that the custodian had a duty to consider the complainant's access request as a request for disclosure for the same information under *PHIPA*.

[57] Similarly, in the case before me, though I have found that the complainant is not entitled to exercise an independent right of access under *PHIPA* for his children's PHI, the circumstances of this complaint may give rise to the potential application of the discretionary disclosure provisions. Accordingly, it would be advisable for the custodian to now turn its mind to the potential application of sections 41(1)(d)(i) (court order) and 43(1)(h) (other statute).

[58] If the custodian finds the conditions for discretionary disclosure are not met, then *PHIPA* does not give the custodian permission to disclose. However, if the custodian decides that the conditions for discretionary disclosure under one or more of these sections

are met, then it is required go on to exercise its discretion under *PHIPA*.¹¹

[59] Since the parties did not make representations on whether the custodian has already turned its mind to discretionary disclosure, I make no finding in that regard. However, it would be advisable to the custodian to now turn its mind to it. As stated above, it is open to the complainant to ask this office to review the custodian's discretion, but the IPC cannot order release of the information.¹²

[60] Finally, if the complainant takes the position that the custodian failed to comply with a legal requirement to disclose, the complainant may wish to seek enforcement through the courts.

[61] For the foregoing reasons, no order is issued.

NO ORDER:

For all the foregoing reasons, no order is issued and the complaint is dismissed.

Original signed by _____

Jennifer James
Adjudicator

October 2, 2020

¹¹ See section 6(3) of *PHIPA*.

¹² *PHIPA* Decision 96.