Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 146

Complaint HA21-00045

Mr. Jeff Packer

June 10, 2021

Summary: This reconsideration order dismisses the complainant's request for reconsideration of PHIPA Decision 126. In that decision, the adjudicator found that the respondent is a health information custodian within the meaning of the *Personal Health Information Protection Act,* 2004 in relation to marriage counselling services he provided to the complainant and that he is not a health information custodian in relation to the co-parenting counselling services he provided to the complainant. The adjudicator also determined the respondent had conducted a reasonable search for records of the complainant's personal health information. In this reconsideration decision, the adjudicator finds that the complainant has not established grounds for reconsideration under section 27.01 of the *Code of Procedure for Matters under the Personal Health Information Protection Act,* 2004 and denies the request.

Statutes Considered: *Personal Health Information Protection Act,* 2004, SO 2004, c 3, Sch A, section 64(1); *Human Rights Code,* RSO 1990, c H.19.

Decisions Considered: PHIPA Decisions 25 and 126.

Cases Considered: *Chandler v. Alberta Association of Architects,* [1989] 2 S.C.R. 848.

BACKGROUND:

[1] This decision addresses the complainant's request for reconsideration of PHIPA Decision 126.

[2] This matter began with the complainant's request to the respondent, a social

worker, for access to records in relation to marriage and co-parenting counseling services provided to the complainant and his former spouse in 2013 and 2015, respectively. The respondent granted partial access to individual session notes from 2015 and full access to emails and forms. He denied access to records of joint counselling sessions with the complainant and his former spouse. The respondent also indicated there were no individual session notes from 2013.

[3] On September 10, 2020, I issued PHIPA Decision 126, in which I found that the respondent is a "health information custodian" within the meaning of the *Personal Health Information Protection Act, 2004* (the *Act*) in relation to the marriage counselling sessions of 2013, and not so in relation to the co-parenting counselling sessions of 2015. In my decision, I also deferred a determination on the complainant's request to access records of joint marriage counselling sessions. I gave the complainant two weeks to inform me that he still sought access to those records, in which event I would give notice of the request to the complainant's former spouse and give her an opportunity to make submissions. The complainant did not advise me that he still wishes to pursue access to the records of joint marriage counselling, and I therefore consider that matter closed.

[4] Finally, in PHIPA Decision 126, I also found that the respondent had conducted a reasonable search for records of the complainant's personal health information.

[5] Following his receipt of PHIPA Decision 126, the complainant contacted this office (or "the IPC") to advise of his intention to submit a request for reconsideration of that decision. He stated that he was requesting "accommodation under the Ontario Human Rights Code for a time extension". Referring to a disability, he stated he required "about triple the time to complete my letter of reconsideration". The complainant's extension request was granted as an accommodation to a disability. He subsequently requested two additional extensions, as accommodations, both of which were granted.

[6] Prior to the last deadline, on February 1, 2021, the complainant provided a document, 147 pages in length, as his "representations completed to date." He indicated these representations had been submitted under "duress" from this office. He also raised allegations of discrimination on my part and requested that I recuse myself. I will address the complainant's allegations and request below.

[7] Following receipt of the above document, this office informed the complainant on several occasions that he may submit another accommodation request, should he need more time to make additional representations. As no additional extension was requested nor other material submitted, I will decide this reconsideration request on the basis of the submission provided February 1, 2021. I also have before me the complainant's email of February 22, 2021. I find it unnecessary to invite the respondent's submissions on the request.

[8] For the reasons that follow, I deny the complainant's request that I recuse myself. I also deny the request to reconsider PHIPA Decision 126.

DISCUSSION:

Preliminary issue: request that I recuse myself from continuing with the adjudication of the complaint

[9] The complainant submits that I ought to recuse myself from deciding his complaint, including his request for reconsideration, as he alleges that I have discriminated against him and harassed him in the adjudication process, as described below. I will deal with the claim of discrimination as a preliminary matter as well as part of the complainant's submission that PHIPA Decision 126 should be reconsidered under section 27(1)(a) of the *Code of Procedure for Matters under the Personal Health Information Protection Act,* 2004 (the *Code*).

[10] The claim of discrimination is akin to a claim that I am biased in that, like a claim of bias, the complainant's claim of discrimination appears to rest on a contention that I cannot adjudicate his complaint fairly. In administrative law, there is a presumption, in the absence of evidence to the contrary that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias lies on the person who alleges it and mere suspicion is not enough.[1] Further, a complaint of bias by the decision-maker must be made to that individual, so that he or she may decide whether or not to disqualify himself or herself.[2]

[11] The Ontario Divisional Court has affirmed that in assessing a claim of bias on the part of a decision-maker, "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."[3] The Supreme Court of Canada has described the test for finding a reasonable apprehension of bias as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—

[1] See Blake, S., *Administrative Law in Canada,* (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.
[2] See *Mary-Helen Wright Law Corporation v British Columbia (Human Rights Tribunal),* 2018 BCSC 912 at para 15; *Envirocon Environmental Services, ULC v Suen,* 2018 BCSC 1367 at para 87; and *Arsenault-Cameron v. Prince Edward Island,* 1999 CanLII 641 (SCC).
[3] *Ontario Medical Association v. Ontario (Information and Privacy Commissioner),* 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para 71.

> conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[4]

Allegation of discrimination on the basis of disability

[12] The complainant alleged discrimination on the basis of disability based on the following passage from an email from this office dated January 12, 2021:

> The Assistant Commissioner also noted that if any additional extensions are requested, she may wish to give the respondent an opportunity to make submissions, and in connection with that, may ask for additional evidence to support the extension request.

[13] As context, on September 10, 2020, the complainant requested an extension of time to file his request for reconsideration, as described above. On September 11, this office advised him of my decision to grant him the extension sought, to December 10. On November 26, 2020, the complainant sought an additional extension of one month, which was granted on the same day. On January 6, 2021, the complainant sought an additional extension, to February 3, 2021.

[14] On January 12, 2021, this office granted the extension but, in advising him of the extension, included the passage quoted above.

[15] The complainant states, among other things, that he is a person with a disability and has communicated this to the IPC on a number of occasions since 2018. He submits that the IPC's email of January 12 amounts to a threat to invite the respondent to respond to the complainant's request for accommodation, and to inform the respondent of the health reasons for the complainant's request for accommodation. He submits that the threat to provide this information to the respondent amounts to harassment. He asserts that the IPC has discriminated against him by threatening to request additional evidence to support his request.

[16] The complainant also asserts that the IPC did not take an active role in exploring options to support his access to justice, protect his confidentiality, and treat him with respect and dignity. He submits that the IPC had an obligation to consider and offer supports to him, including appointing a litigation guardian to assist him over the past three years.

[17] As I understand the complainant's argument, he suggests that a request for documentation to support a request for a disability-related accommodation is, in itself, discriminatory. I do not accept this submission. The complainant provides no authority for such a conclusion, apart from an excerpt from the Ontario Human Rights Commission (OHRC) Policy on Ableism and Discrimination Based on Disability (the

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

Policy). The Policy does not support the complainant's submission. As discussed in the Policy, a request for such documentation is an ordinary procedural step when considering requests for accommodation. In describing the responsibilities of the individual seeking accommodation, the Policy states that the person seeking disability-related accommodation is required to, among other things "answer questions or provide information about relevant restrictions or limitations, including information from health care professionals." [5]

[18] In this case, I granted three extensions of time to the complainant to file his request for reconsideration, without asking for documentation to support his disability-related request for accommodation. In granting the third extension, I cautioned him that I may need to ask for documentation should he request further extensions. I find no basis for finding such a communication discriminatory. Nor do I find that this communication gives rise to a reasonable apprehension that I could not decide this matter impartially.

[19] Further, as I explained to the complainant in my February 24, 2021 letter addressing his allegations of discrimination, this office did not advise that it would disclose his personal health information to the respondent and invite the latter to comment on it. In the email of January 12, this office only advised the complainant that I might seek the respondent's submissions should the complainant request an additional time extension. The complainant had been given three extensions of time without giving the respondent an opportunity to comment on his request for those extensions. As a matter of procedural fairness, an additional extension request might have warranted notifying the respondent and inviting him to comment on whether he is prejudiced by additional delays in the adjudication of this complaint. Again, advising the complainant of this possibility does not amount to discrimination in the adjudication process.

[20] In sum, notifying the complainant that I may ask him to provide evidence to support a request for accommodation through additional time extensions and that I may give the respondent an opportunity to provide representations regarding whether he would be prejudiced by a further extension of time does not amount to discrimination. Nor do they establish grounds for bias or reasonable apprehension of bias.

Allegation of discrimination on the basis of marital status

[21] The complainant also alleges discrimination against him on the basis of marital status. This claim of discrimination takes issue with certain findings in PHIPA Decision 126, alleging that they are discriminatory. As such, I will deal with this allegation in

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[5] See www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/8-duty-accommodate.
See also *Fagan v. Toronto Transit Commission,* 2017 HRTO 1226, in which the Ontario Human Rights Tribunal states that its "consistent approach is to require clear and specific current medical documentation to support requests for accommodation, including adjournment requests."

discussing the merits of the complainant's request for reconsideration, below.

Other allegations of discrimination

[22] As indicated above, the complainant also made other broad allegations to the effect that the IPC should have explored options to support his access to justice, and that it has not protected his confidentiality or treated him with respect and dignity. He has provided no details of these latter claims, apart from what I have described above and I will not address them further.

[23] With respect to the complainant's assertion that the IPC should have "appointed" a litigation guardian to assist him over the past three years, subsection 25.05 of the *Code* states that the IPC may appoint a litigation guardian for a party who does not have mental capacity to make decisions about the issues arising in a file where the proposed litigation guardian provides the IPC with a declaration confirming a number of requirements. The IPC does not appoint a litigation guardian on its own initiative, nor does it maintain a list or roster of people to appoint as a litigation guardian.

[24] Further, as I advised the complainant in my February 24, 2021 letter, a litigation guardian is only appointed where an individual does not have the mental capacity to make their own decisions about issues that may arise in a file before the IPC. A party is presumed to have mental capacity to make decisions about the issues arising in a file unless there are reasonable grounds to believe that a party does not have mental capacity.[6] To date, the IPC has not had any reasonable grounds to believe that the complainant does not have mental capacity to make his own decisions regarding issues that may arise in his complaint. Not appointing a litigation guardian in these circumstances does not amount to discrimination or bias in the adjudication process.

[25] With respect to the complainant's claim that he submitted his representations to the IPC "under duress", and his suggestion he had not had opportunity to complete them, as described above, this office advised the complainant on several occasions after receiving his representations that, should he require it, he may submit a request for an additional extension of time along with supporting documentation. He has not done so. Therefore, I find no basis to support the complainant's claim that my actions in relation to the complainant's submission of his representations amount to duress.

[26] The complainant has also stated that he was humiliated and exploited by "having to provide [a copy of a psychologist's report dated January 28, 2015] to the IPC". I will address the substantive impact of the provision of this report on my determination on the complainant's request for reconsideration below. With respect to the complainant's

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[6] The test for capacity is set out at section 25.01 of the *Code of Procedure for Matters under the Personal Health Information Protection Act,* 2004: "For the purposes of this section, a Party has "mental capacity" if the Party is able to: a) understand the information that is relevant to making decisions about the issues arising in a File; and b) appreciate the reasonably foreseeable consequences of a decision or lack of decision about the issues arising in a File."

allegations that it was discriminatory that he "had" to provide the report, I note that this office neither solicited nor compelled the complainant to produce this report. He chose to provide it to this office as he presumably felt that it would be of assistance in supporting his request for reconsideration of PHIPA Decision 126. I do not find any basis to support the claim that the IPC humiliated or exploited the complainant by requiring him to provide the report.

[27] In conclusion, I dismiss the complainant's submission that I should recuse myself from continuing with the adjudication of his complaint. I also find no basis to the complainant's other allegations of discrimination nor his assertion that he submitted his representations "under duress" from this office.

Request for reconsideration

Grounds for reconsideration

[28] The grounds for reconsideration of a PHIPA decision are set out at section 27 of the *Code*, which states in part:

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

[29] In his request for reconsideration, the complainant relied on the grounds described in sections 27.01(a), (b), and (d) of the *Code*. I will address these in turn. He does not rely on section 27.01(c) and I see no basis for its application.

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

[30] The IPC's *Code of Procedure for Appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *M/FIPPA Code*) contains an equivalent provision to section 27.01(a). This office has found a fundamental defect in the adjudication process and reconsidered appeals under this provision of the *M/FIPPA Code* were there was: a failure to notify an

affected party;[7] a failure to invite representations on the issue of invasion of privacy;[8] and a failure to allow for sur-reply representations where new issues or evidence are provided in reply.[9] These orders provide examples of circumstances where a breach of the rules of natural justice protecting procedural fairness qualifies as a fundamental defect in the adjudication process.

[31] In his submissions, the complainant states that the following circumstances amount to a fundamental defect in the adjudication process:

a. Significant violations of the Ontario Human Rights Act based on discrimination of my disability and marital status

b. Errors in applying the law of contracts

c. Violations of PHIPA Code of Procedure

[32] I found above that the complainant's allegations of discrimination on the ground of disability are without merit. For the same reasons, I conclude that these allegations also do not support a finding of a fundamental defect in the adjudication process.

[33] The complainant also alleges that I discriminated against him on the basis of marital status in PHIPA Decision 126 in that I relied on a signed form, the Disclosure and Consent Statement, in determining that marriage counselling services provided in 2013 qualified as "health care" within the meaning of the *Act*, but found that the co-parenting counselling provided in 2015 was not health care. The complainant argues this is discriminatory because he and his former spouse had signed the same form in 2013 and 2015 and the only difference between the two periods of counselling was that in 2013 he and his former spouse were married and in 2015 they were separated. He maintains that both forms are valid contracts for the provision of health care services and that a change in marital status cannot alter their terms.

[34] Although framed as an allegation of discrimination, the complainant's submissions are an attempt to re-argue a finding in the decision that he disagrees with. Not only is the complainant's argument already addressed in the decision,[10] it is also not a ground for reconsideration under section 27 of the *Code*. As I noted in PHIPA Decision 25:

> …the reconsideration power is not intended to provide a forum for re-arguing or substantiating arguments made (or not made) during the review, nor is reconsideration intended to address a party's disagreement

[7] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.
[8] Orders M-774 and R-980023.
[9] Orders PO-2602-R and PO-2590.
[10] At paragraph 50 of PHIPA Decision 126, I address the complainant's argument that I erred in making a different finding with respect to the co-parenting counselling because he had signed the same form with respect to both the co-parenting and the marriage counselling.

> with a decision or legal conclusion.[11] As Justice Sopinka commented in *Chandler v. Alberta Association of Architects,*[12] "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."[13]

[35] In any event, the complainant cannot assert a claim of discrimination arising out of an adjudicated decision of the IPC. In the Policy cited by the complainant, the OHRC discusses how discrimination is established, stating:

> To establish *prima facie* discrimination (discrimination on its face) under the *Code*, a claimant must show that:
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> 1. they have a characteristic protected from discrimination
>
> 2. they have experienced an adverse impact *within a social area* protected by the *Code,* and
>
> 3. the protected characteristic was a factor in the adverse impact.[14]
>
> [emphasis added]

[36] The Human Rights Tribunal has found that the exercise of adjudicative functions by courts and tribunals, particularly the "content, reasons and result" of adjudicative decisions, do not fall within a social area covered by the *Human Rights Code*.[15] Applying this principle, I find that no claim of discrimination can be based on the reasons given by an adjudicator of the IPC.

[37] Even if such a claim could be made, I see no basis for the complainant's contention that my treatment of the Disclosure and Consent Statement and, specifically, the different effect I gave to it during the complainant's marriage and separation respectively, is in itself discriminatory. The complainant provides no support for this contention and, applying the above test of a discriminatory action, I am unable to find any discrimination. There is no evidence that the complainant suffered an adverse impact as a result of his status of being separated in 2015, and that this status was a factor in any such adverse impact.

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[11] The original footnote in PHIPA Decision 25 reads: See *Ontario (Health and Long-Term Care) (Re),* 2015 CanLII 83607 at paras 21-24. Although this decision arises in the context of the *Freedom of Information and Protection of Privacy Act,* the principles expressed in this decision, and in the other decisions quoted therein, are generally applicable to a request for reconsideration under the Act, while recognizing the different legislative context and the fact that the Act contains the reconsideration power set out in section 64.

[12] The original footnote in PHIPA Decision 25 reads: [1989] 2 S.C.R. 848, at 861.

[13] PHIPA Decision 25 at para 12.

[14] See http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/5-establishing-discrimination.

[15] *Cartier v. Nairn,* 2009 HRTO 2208 (CanLII).

[38] The complainant also submits that PHIPA Decision 126 contains errors in the application of the law of contracts, which amounts to a fundamental defect in the adjudication process. He submits a resource issued by the Ontario Justice Education Network entitled "Contract Law". He does not explain its relevance to this administrative proceeding and I find nothing in this document supporting a contention that I misapplied any doctrine of contract law, or that such misapplication, if any, amounts to a fundamental defect in the adjudication process.

[39] The complainant did not elaborate on his claim that there have been "violations of PHIPA Code of Procedure" amounting to a fundamental defect in the adjudication process and I surmise that he is referring to his arguments about the appointment of a litigation guardian. I have addressed those arguments above. For the reasons given, I also find that these arguments do not establish any fundamental defect in the adjudication process.

[40] To the extent that the complainant's submissions under section 27.01(a) express his disagreement with the outcome reached in PHIPA Decision 126, his recourse is to the courts through an application for judicial review, and not a reconsideration under the *Code.*

Section 27.01 (b) - other jurisdictional defect in the Decision

[41] The complainant submits that failing to issue a decision in consultation with the Ontario College of Social Workers and Social Service Workers (OCSWSSW), the regulatory body with jurisdiction over social workers, is evidence of a jurisdictional defect. He cites the "Social Worker and Social Service Work Act, 1998" and "Ontario Regulation 384/00: Professional Misconduct" as legislation that regulates social workers.[16]

[42] I find no jurisdictional defect in issuing my decision without consulting with the OCSWSSW. As indicated above, this office has recognized that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process. This includes a failure to notify an affected party and provide them with an opportunity to make representations.[17] The obligation to give notice of a proceeding arises only where a person is significantly or directly and necessarily affected by the decision.[18] In the case before me, however, the OCSWSSW is not an entity to which I owed an obligation of due process, as my determinations in PHIPA Decision 126 neither significantly nor directly affected its interests.

[43] The complainant has not established grounds for reconsideration under section 27.01(b) of the *Code*.

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[16] understand the complainant to be referring to the *Social Work and Social Service Work Act,* 1998, SO 1998, c 31 and *Professional Misconduct,* O Reg 384/00.
[17] See, for instance, Order PO-3062-R.
[18] *Hay v. Ontario (Human Rights Tribunal),* 2014 ONSC 2858 (CanLII) at paras 131-132.

Section 27.01(d) – new facts

[44] Section 27.01(d) mirrors the power given to this office under section 64(1) of the *Act*, which provides for reconsideration of orders made after a review:

> 64 (1) After conducting a review under section 57 or 58 *and making an order under subsection 61 (1),* the Commissioner may rescind or vary the order or may make a further order under that subsection if new facts relating to the subject-matter of the review come to the Commissioner's attention or if there is a material change in the circumstances relating to the subject-matter of the review. [emphasis added]

[45] Under section 27.01(d) of the *Code* and section 64(1) of the *Act*, reconsideration of a decision on the basis of new facts or a material change in circumstances is only available where an order made under subsection 61(1) has been issued. PHIPA Decision 126 did not make any orders under subsection 61(1). Section 27.01(d) of the *Code* and subsection 64(1) of the *Act* are therefore not applicable in this case.

[46] In any event, and even if section 27.01(d) were available in this case, I am satisfied that the complainant has not established new facts or a material change in circumstances which would warrant reconsideration of the decision.

[47] As noted above, the complainant submits a psychologist report dated January 28, 2015, which he indicates includes his information and that of his children and former spouse. The crux of his argument is that this report is a record of personal health information that informed the substance of the co-parenting counselling, and the counseling therefore amounts to "health care" under the *Act.*

[48] The complainant also submits a letter dated November 12, 2020 from the lawyer representing him in his family law matter in which the lawyer discusses the content of the Disclosure and Consent Statement signed by the parties in the context of the co-parenting counseling. The lawyer notes that it does not include a section dedicated to "coaching." Likewise, the complainant submits that the respondent's resume does not demonstrate his qualifications or training as a coach. I understand the complainant to be arguing that the respondent was acting as a health information custodian when he provided co-parenting counselling, and not as a coach. Whether the respondent was providing coaching services as opposed to health care was not a point of discussion in PHIPA Decision 126 and had no bearing on my conclusions. Furthermore, the documents the complainant submits in support of this argument do not present new facts or a material change in circumstances warranting a reconsideration.

[49] The complainant also submits an email dated January 13, 2021, from the Director of Professional Practice of the OCSWSSW. The author states that whether a social worker is providing health care depends on practice setting and client group and cites various legislation, including section 2 of the *Act*. This email from a Director with

the OCSWSSW expresses an opinion, does not contain any new facts or material change in circumstances and, indeed, contains nothing which contradicts the findings in the decision.

[50] None of the material the complainant has submitted amounts to "new facts" or a "material change in the circumstances" underlying PHIPA Decision 126. While some of the documents the complainant relies on are new in the sense that they are dated after I issued PHIPA Decision 126, they refer to documents or legislation in existence prior to that decision, including documents which were before me during the review process.

[51] The complainant has not established grounds for reconsideration under section 27.01(d) of the *Code*.

Conclusion

[52] For the reasons above, the complainant has not established any grounds to reconsider PHIPA Decision 126 on the basis of section 27.01 of the *Code*.

NO RECONSIDERATION:

The reconsideration request is dismissed.

Original Signed by: June 10, 2021

Sherry Liang
Assistant Commissioner Tribunal