

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION PHIPA DECISION 149

Complaint HA16-111

PHIPA Decision 129

St. Clair Child and Youth Services

June 28, 2021

Summary: A father filed a complaint to the IPC against a counselling centre's decision to deny him access to records containing the personal health information (PHI) of his three children. In PHIPA Decision 129, the adjudicator found 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 dismissed his complaint.

The complainant sought a reconsideration of PHIPA Decision 129. In this reconsideration decision, the adjudicator finds that the complainant's evidence failed to establish grounds for reconsideration under the claimed grounds in sections 27.01(b) and (c) of *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*. Accordingly, the complainant's reconsideration request is denied.

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, 107 and 129.

OVERVIEW:

[1] The complainant filed a request under the *Personal Health Information Protection Act (PHIPA or Act)* to St. Clair Child and Youth Services (the 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 the Office of the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed 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. I decided to conduct a review and invited the representations of the custodian and the complainant. After consulting the complainant, I contacted the children's mother, who objected to the complainant being granted access to the children's personal health information (PHI).

[4] In PHIPA Decision 129, I found that the complainant was not entitled to exercise an independent right of access to his children's PHI and upheld the custodian's decision to deny the complainant access to his children's PHI contained in the records.

[5] However, I found that the complainant's submissions raised some circumstances that may be relevant to the custodian's authority to disclose the records under the discretionary disclosure provisions in *PHIPA*.¹ Accordingly, in PHIPA Decision 129, I directed the custodian to consider the complainant's request under the discretionary disclosure provisions in *PHIPA*. In particular, the custodian was instructed to 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).²

[6] The complainant subsequently filed a request for reconsideration of PHIPA Decision 129. The IPC's reconsideration criteria and procedure are set out in section 27 of the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004 (Code)*. The complainant requests a reconsideration based on the grounds described in sections 27.01(b) and (c) of the *Code*, which 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:

(b) there is some other jurisdictional defect in the Decision;

¹ 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 Part IV of *PHIPA*.

² The custodian has notified the complainant of its decision to not disclose the records to him after its consideration of the discretionary disclosure provisions in Part IV of *PHIPA*. As stated in PHIPA Decision 129, if the complainant is not satisfied with the custodian's decision under Part IV, it is open to him to file a new complaint to this office. However, the IPC cannot order disclosure under the discretionary disclosure provisions, but only review the custodian's exercise of discretion.

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

[7] During my review of the reconsideration request, the complainant was invited to provide supplemental representations in support of his reconsideration request, which he did. The complainant consented to sharing the information contained in his representations with the custodian.

[8] For the reasons that follow, I find that the complainant has failed to establish the claimed grounds for reconsideration in sections 27.01(b) and (c) of the *Code* and I deny the request to reconsider PHIPA Decision 129.

DISCUSSION:

[9] In PHIPA Decision 25, Assistant Commissioner Sherry Liang summarized the approach taken to reconsideration requests in the context of public sector freedom of information legislation,³ and concluded that this approach should be applied to requests for reconsideration under *PHIPA*:

It is important to note that the reconsideration power is not intended to provide a forum for re-arguing or substantiating arguments made (or not made) during the review, nor is reconsideration intended to address a party's disagreement with a decision or legal conclusion.⁴ As Justice Sopinka commented in *Chandler v. Alberta Association of Architects*,⁵ "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."

On my review of the ministry's submissions, I conclude that they amount to re-argument of issues decided in PHIPA Decision 19, including arguments that the ministry could have but did not raise in the review. I am satisfied, therefore, that there are no grounds to reconsider PHIPA Decision 19. Even if the ministry's submissions establish grounds for reconsidering PHIPA Decision 19, for the reasons below, I would still exercise my discretion to deny the ministry's request. [footnotes in original].

³ *Freedom of Information and Protection of Privacy Act (FIPPA)* and *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*.

⁴ See *Ontario (Health and Long-Term Care) (Re)*, 2015 CanLII 83607 at paras. 21-24. Although this decision arises in the context of the *Freedom Information and Protection of Privacy Act*, the principles expressed in this decision, and in the other decisions quoted therein, are generally applicable to a request for reconsideration under the *Act*, while recognizing the different legislative context and the fact that the *Act* contains the power set out in section 64.

⁵[1989] 2 S.C.R. 848, at 861.

[10] I agree with the approach taken by Assistant Commissioner Liang and apply it to the circumstances of the matter before me.

[11] In this matter, the complainant argues that PHIPA Decision 129 contains a jurisdictional and/or an accidental error (or other similar error). However, for the reasons set out below, I find that the complainant's submissions in support of his reconsideration request seek to re-argue the points he already made during my review of his complaint. As stated above, the reconsideration process is not intended to address the complainant's disagreement with my decision. The complainant's evidence falls short of establishing the claimed grounds of reconsideration under sections 27.01(b) and (c) of the *Code*.

Is there a jurisdictional defect in PHIPA Decision 129?

[12] Section 27.01(b) of the *Code* provides that the IPC may reconsider a decision at the request of a person who has an interest in the decision where it is established that the decision contains a jurisdictional defect.

[13] In his original submissions, the complainant raised concerns about the custodian providing "unauthorized" or "illegal" treatment to his children. The complainant argued that the custodian failed to make the necessary inquiries to verify that the children's mother had "sole custody" and as a result failed to obtain consent to treatment from both parents. In support of his position, the complainant cited section 10 of the *Health Care Consent Act (HCCA)* and asked that the IPC conduct an investigation for the purposes of prosecuting the custodian for not complying with the *PHIPA* and *HCCA*.

[14] In PHIPA Decision 129, I stated:

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.

[15] In his reconsideration request, the complainant argues that my finding that the IPC's jurisdiction is limited to the custodian's denial of access to records is "jurisdictionally incorrect". The complainant argues that the IPC "has jurisdiction over all aspects of [*PHIPA*] and must exercise jurisdiction over the implementation of PHIPA] in its entirety." The complainant goes on to state:

The adjudicator states that the IPC does not have jurisdiction to address [my concerns about whether] the custodian was authorized to provide treatment to [my] children under *PHIPA* or any other statute. This is an error. Section 26 of *PHIPA* governs the collection of health information by a Health Custodian. The adjudicator has failed to provide analysis in

regards to the collection of the information currently held in the care and custody of [the custodian].

[16] The complainant continues his submissions by repeating evidence provided during my review which he says demonstrates that the children's mother was not authorized to arrange for the custodian to provide services to their children, without his prior consent. The complainant provided a copy of the Consent Judgment of Divorce (consent judgment) in support of his position that he shares joint custody with the mother. The mother did not dispute during my review that the complainant is a joint custodial parent.

[17] The complainant argues that section 26(1)5 of *PHIPA* provides that in cases where there is no custodial arrangement between parents, either is entitled to "consent to the collection of [PHI]" for their children. The complainant goes on to state that in cases where there is a custodial order, section 26(2)(c) requires "the explicit consent from both parents in order to authorize treatment and the collection of [PHI]". These sections state:

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

5. A child or parent of the individual, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent. This paragraph does not include a parent who has only a right of access to the individual. If a children's aid society or other person is lawfully entitled to consent in the place of the parent, this paragraph does not include the parent.

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

(c) is not prohibited by court order or separation agreement from having access to the individual to whom the personal health information relates or from giving or refusing consent on the individual's behalf.

[18] The complainant also takes the position that:

[t]he Information Commissioner is responsible for ensuring the enforcement of *PHIPA* and maintains exclusive jurisdiction over enforcement. The adjudicator [erred] in excluding the IPC from exerting jurisdiction over the Collection of PHI Information by the [the custodian]. Absent consent, all records under the care and custody of [the custodian] exist due to the health custodian conspiring with [the mother] in violation of the act. The adjudicator further [erred] in claiming that [she does] not

have the jurisdiction to address [my] concerns about whether the custodian was authorized to provide treatment to [my] children under *PHIPA* or any other statute. The Information Commissioner has clear evidence that valid legal consent to collect records did not exist on [specified date] when [the mother] called [the custodian] and offered consent as a custodial parent. Court orders prohibited the mother from seeking services and prohibited the ability to authorize the collection of PHI with regard to [my children. The custodian] must have valid consent before providing services and before any collection of [PHI] can begin. This violation clearly falls within the jurisdiction of the IPC and must be enforced in accordance with regulation.

Decision and analysis

[19] The complainant is incorrect in his assessment that read together, sections 26(1)5 and 26(2)(c) authorize the IPC to review the custodian's decision to provide treatment to his children. These provisions form part of consent provisions in Part III of *PHIPA* which relate solely to the "collection, use or disclosure" of PHI by a custodian.

[20] The complainant asserts that *PHIPA* Decision 129 "failed to provide analysis in regards to the collection of the information." However, the issue before me was whether the complainant had a right to access to the personal health information at issue. As noted above, the complainant filed a request under the *PHIPA* to the custodian to access records relating to his three children.

[21] Even if the complainant's evidence satisfied me that 1) the custodian was not entitled, when it collected the children's PHI, to rely on the assumption of validity provision in section 20(1)⁶; and 2) the mother's consent for the custodian to collect the children's PHI was obtained through deception as contemplated in section 18(1)(d)⁷, this has no bearing on whether the complainant has a right of access to the requested records.

⁶ Section 20 (1) states:

A health information custodian who has obtained an individual's consent to a collection, use or disclosure of personal health information about the individual or who has received a copy of a document purporting to record the individual's consent to the collection, use or disclosure is entitled to assume that the consent fulfils the requirements of this Act and the individual has not withdrawn it, unless it is not reasonable to assume so.

⁷ Section 18(1) that states:

If this Act or any other Act requires the consent of an individual for the collection, use or disclosure of personal health information by a health information custodian, the consent,

- (a) must be a consent of the individual;
- (b) must be knowledgeable;
- (c) must relate to the information; and
- (d) must not be obtained through deception or coercion.

[22] Rather, *PHIPA* contemplates the disposal of records where it is found that a custodian collected, used or disclosed PHI in contravention of *PHIPA*.⁸ I stress again, however, that the custodian's collection of PHI was not an issue included in my review of this complaint.

[23] Having regard to the above, I find that the complainant's submissions demonstrate no jurisdictional defect in PHIPA Decision 129. Instead, the complainant's arguments seek to re-argue points he already made in his original representations.

Is there an accidental error or other similar error in PHIPA Decision 129?

[24] The complainant states that accidental errors occurred in PHIPA Decision 129 when I:

- decided that he did not have an independent right of access to his children's PHI; and
- failed to "observe" provisions of the 2012 Consent Judgment of Divorce (consent judgment) he provided, which stipulates that both parents have "full access to medical records."

[25] In PHIPA Decision 129, I considered the substitute decision-maker provisions in sections 23 and 26 and found that the complainant was not entitled to act as an independent substitute decision-maker under *PHIPA* for his children in the circumstances, regardless of whether the children were mentally capable or incapable. In arriving at that decision, I considered various court documents and transcripts from US courts supplied by the complainant along with the submissions of the parties.

[26] Though I found that the complainant was not entitled to act as an independent substitute decision-maker and be granted access to the records on that basis, I stated that my findings in PHIPA Decision 129 did not:

- prevent the complainant from applying to a court of competent jurisdiction for an order compelling the custodian to disclose the requested records;

⁸ Section 61(1)(e) states:

After conducting a review under section 57 or 58, the Commissioner may,
(e) make an order directing any person whose activities the Commissioner reviewed to return, transfer or dispose of records of personal health information that the Commissioner determines the person collected, used or disclosed in contravention of this Act, its regulations, or an agreement entered into under this Act but only if the return, transfer or disposal of the records is not reasonably expected to adversely affect the provision of health care to an individual.

- prevent 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 request⁹; or
- affect any rights the complainant may have to request disclosure for the same records under the discretionary disclosure provisions in other parts of *PHIPA* (which, as noted above, are distinct from the access provisions in *PHIPA*).

Decision and Analysis

[27] The complainant argues that I made an accidental error in PHIPA Decision 129 by failing to order the custodian to grant him access to his children's PHI given the terms set out in the consent judgment. I note that the complainant's reconsideration submissions did not address my analysis of the substitute decision-maker provisions under sections 23 or 26 of *PHIPA*. Nor does the complainant suggest that I failed to consider the documentary evidence he submitted in support of his position.

[28] Instead, the complainant disagrees with my finding that the consent judgment does not direct the IPC to order the custodian to grant him access to the withheld records.

[29] I have reviewed the complainant's submissions and find that they amount to re-argument of the issues already decided in paragraphs 42 and 43 of PHIPA Decision 129. The complainant's submissions outline why he disagrees with my decision and he re-argues points he already made in his original representations. I note that the complainant provided additional court documentation relating to matters not in dispute, namely that he shared joint custody with the mother.

[30] Having regard to the above, I am satisfied that none of the arguments raised by the complainant reveal an accidental or other similar error in PHIPA Decision 129.

Summary

[31] Based on the reasons above, I find that the complainant has not established that a jurisdictional defect or accidental or other similar error relating to PHIPA Decision 129 occurred. Accordingly, I find that the complainant has not established a ground for reconsideration under section 27.01(b) or (c) of the *Code* and I deny his request to reconsider PHIPA Decision 129.

⁹ 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 respect of the request.

NO RECONSIDERATION:

The complainant's reconsideration request is denied.

Original signed by: _____
Jennifer James
Adjudicator

_____ June 28, 2021