

Information and Privacy Commissioner,  
Ontario, Canada



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

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## Reconsideration PHIPA Decision 161

Appeal PA16-440

PHIPA Decision 123

Waypoint Centre for Mental Health Care

October 12, 2021

**Summary:** The complainant sought access to video footage of events leading up to, and including his restraint and placement in a seclusion room by hospital staff.

In PHIPA Decision 123, the adjudicator ordered the hospital to grant the complainant access to the portions of the video footage containing his personal health information that she determined can reasonably be severed from the exempt portions.

The hospital sought a reconsideration of PHIPA Decision 123. In this reconsideration decision, the adjudicator finds that the claimed grounds for reconsideration in sections 27.01(d) of the *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* and/or section 64(1) of the *Personal Health Information Protection Act* is established. Accordingly, the hospital's reconsideration request is granted in part, and as a result the adjudicator varies the order provisions in PHIPA Decision 123.

**Statutes Considered:** *Personal Health Information and Protection Act, 2004*, sections 2(1) (definitions), 3(1), 4(1), 4(3), 52(1)(e)(i), 52(1)(f), 52(2), 52(3) and 64(1); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, sections 2(1) (definition of "personal information"), 14(1)(k) and 49(a); *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*, section 27.01.

**Decisions Considered:** PHIPA Decisions 17, 25, 117, 120, 123 and Orders PO-3478-I and PO-3905.

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

## **BACKGROUND:**

[1] This decision addresses the hospital's request for reconsideration of PHIPA Decision 123. The hospital submits that there were procedural defects in the adjudication process leading to that decision. In the alternative, the hospital asks that I make a further order under section 64(1) on the basis that new facts or a material change in circumstances exist.

[2] By way of background, the complainant requested the video footage of events leading up to, and including, his restraint and placement in a seclusion room by staff at Waypoint Centre for Mental Health Care (the hospital). The hospital located six surveillance recordings but denied the complainant access to the responsive records under various exemptions in the *Personal Health Information and Protection Act, 2004 (PHIPA)* and the *Freedom of Information and Protection of Privacy Act (FIPPA)*. The requester filed a complaint under *PHIPA* with the Information and Privacy Commissioner of Ontario (IPC).

[3] In PHIPA Decision 123, I found that the surveillance recordings contained the complainant's personal health information (PHI). I agreed with the hospital that the surveillance recordings were not "dedicated primarily to" the complainant's PHI. As a result, I found that the complainant's right of access under *PHIPA* is limited to his PHI that can reasonably be severed from the remaining portions of the records. I also found that some portions of the records containing the complainant's PHI qualify for exemption under section 52(1)(f) of *PHIPA*, with reference to sections 49(a) and 14(1)(k) of *FIPPA* (security of a centre of lawful detention). The information I found exempt comprised of the background images of the facility in the records, which included the layout of the corridors and rooms.

[4] As a result of my findings, I ordered the hospital to grant the complainant access to the portions of four surveillance videos containing his PHI that can reasonably be severed from the exempt information. However, I found that two records could not reasonably be severed and upheld the hospital's decision to deny the complainant access to those records. PHIPA Decision 123 contained the following order provisions:

1. I order the hospital to provide the complainant with access to videos 2, 3, 4, and part 1 of video 5, obscuring the layout of the hospital corridors or rooms I found exempt under section 52(1)(f), in conjunction with section 14(1)(k) of *FIPPA*, as follows:
  - West corridor of the North Zone – 28:09 to 28:32 minutes (2nd video on disc);

- Seclusion room/ Seclusion rooms corridor – 47 seconds to 4 minutes (3rd video on disc);
  - East corridor of the North Zone – 1:15 to 4:25 minutes (4th video on disc); and
  - North corridor of the North Zone/ South end of the north corridor of the north zone – 43 seconds to 1:11 minutes (part 1 of 5th video on disc).
2. If the hospital decides to charge a fee for access, it is to give the complainant an estimate of the fee in accordance with section 54(10).

[5] This office'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 (the Code).

[6] The hospital requests a reconsideration of PHIPA Decision 123, based on the grounds described in sections 27.01(a) and (d) 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:

(a) there is a fundamental defect in the adjudication process;

(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.

[7] The hospital argues that new facts or a material change in circumstance exists in this matter and asks that I rescind, vary or make a further order as contemplated under section 64(1), which states:

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 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.

[8] Upon receipt of the hospital's reconsideration request, I granted an interim stay of order provisions 1 and 2 of PHIPA Decision 123 until I had an opportunity to review and address the issues raised in the reconsideration request. The hospital provided written representations in support of its reconsideration request. The hospital's representations were shared with the complainant in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. The complainant provided brief submissions in response taking the position that my original findings in PHIPA Decision 123 should not

be disturbed.

[9] For the reasons that follow, I find that the hospital has failed to establish the claimed ground for reconsideration in section 27.01(a) of the *Code*. However, I accept the hospital's argument that new facts exist in the circumstances of this matter and find that the hospital established grounds for reconsideration under section 27.01(d) of the *Code* and/or section 64(1) of *PHIPA*. Accordingly, I have decided to vary the order provisions in PHIPA Decision 123 to shorten the length of three of the four videos I ordered the hospital to release to the complainant.

## **ISSUES:**

- A. Was there a fundamental defect in the adjudication process under section 27.01(a) of the *Code*?
- B. Are there new facts or a material change in circumstances relating to PHIPA Decision 123? If so, should I rescind, vary or make a further order as contemplated in section 64(1) of *PHIPA* and section 27.01(d) of the *Code*?

## **DISCUSSION:**

### **A. Was there a fundamental defect in the adjudication process under section 27.01(a) of the *Code*?**

[10] Section 27.01(a) of the *Code* provides that the IPC may reconsider a decision at the request of a person who has an interest in the decision or at the IPC's own initiative, where it is established that there is a fundamental defect in the adjudication process.

[11] In its reconsideration request, the hospital submits:

[T]here has been a fundamental defect in the adjudication process in the failure of the Adjudicator to invite representations on the scope of the proposed redactions using obscuring technology to sever the exempted information from the records for that purpose. As part of its "record-by-record" review, the Adjudicator ought to have provided [the hospital] with the opportunity to consider the redactions in their full context and adduce evidence by those with in-depth knowledge of the facility, security systems and camera locations.

[12] The hospital also argues that I should have:

... invited submissions from [the hospital] in light of new developments in the case law, including several PHIPA decisions that were released

following receipt of [the hospital's] final submissions and which have direct application to this matter. The IPC's approach to decisions involving both *FIPPA* and *PHIPA* and the use of obscuring technologies generally has evolved through the course of the adjudication process.

[13] The hospital does not claim that it was not afforded an opportunity to make representations on the issue of whether or not exempt information can reasonably be severed from non-exempt information. Instead, I understand the hospital's argument to be that it should have been given an opportunity to update its representations in light of decisions issued by the IPC following its representations but before I issued the decision. In support of this position, the hospital states:

At paragraph 95 of [PHIPA Decision 123], the Adjudicator references previous decisions where the IPC has ordered institutions to use obscuring technology to sever exempt information from the portions of videos that contain identifiable images of the requester. The two decisions that involve public hospitals, PHIPA Decision 117 and PHIPA Decision 120 were not released until April 17, 2020 and May 21, 2020 respectively. These decisions were released after [the hospital] delivered its final submissions in this matter. [The hospital] did not have the benefit of these decisions in making its representations, nor did it have the opportunity to comment on the application of these decision to the current circumstances.

Given that the IPC relied on decisions that were released after [the hospital's] submissions had been provided and relying on the use of obscuring technologies that had not been contemplated during this process, the IPC ought to have provided [the hospital] an opportunity to provide submissions on the scope of redactions and whether the use of obscuring technology to black out the hallways and layout of the facility, as contemplated, would achieve the objectives set out in the Order. The failure to do so amounts to a fundamental defect in the adjudication process.

[14] In summary, the hospital's argument that a fundamental defect occurred is three- fold:

1. that it should have been given an opportunity to update its submissions regarding whether exempt information can reasonably be severed from non-exempt information given the passage of time;
2. that I should have sought the hospital's submissions on the potential application of PHIPA Decisions 117 and 120; and
3. that I should have previewed order provisions 1 and 2 with the hospital and provided it an opportunity to make further representations.

***i. Should the hospital been given an opportunity to update its submissions regarding whether exempt information can reasonably be severed given the passage of time?***

[15] The original notice sent to the hospital inviting its representations stated:

Even where a record contains information exempted by section 52(1) of *PHIPA*, section 52(2) may apply to give the individual a right of access to part of the record. Section 52(2) states:

Despite subsection (1), an individual has a right of access to that part of a record of personal health information about the individual that can reasonably be severed from the part of the record to which the individual does not have a right of access as a result of clauses (1) (a) to (f).

[16] The hospital was then invited to respond to the following question:

If the record contains excluded information, can part of the record reasonably be severed from the part containing the excluded information?

[17] In response, the hospital provided representations in which it stated that it:

... cannot provide access to any portion of the Records. The exempted information cannot be severed from the [complainant's] PHI under section 52(2) of *PHIPA*, since it is imbedded in the images themselves.

Even if it were possible, [the hospital] does not have the tools or capability to sever (i.e. redact, blur or otherwise alter or manipulate the images) the exempted information from the Records. [The hospital] has consulted with its systems vendor which has similarly advised that it is unable to edit or redact the Records.

[18] The hospital also provided an affidavit from its Privacy Officer which stated:

Based on my review of the Records, there is no way to redact personal health information of the [complainant] from the video surveillance recordings. The issues of concern cannot be addressed by way of alteration or modification of the Records.

Even if this could be done, I have consulted with [the hospital's Audio-Visual Technician] who has advised me that [the hospital] does not have the tools or capability to blur or otherwise redact information contained in the Records.

I have also consulted with [the third party vendor] and she has confirmed that [the video surveillance system] does not have the required commercial editing software and/or licence to redact the Records.

[19] The hospital also made submissions on the issue of severability in its supplemental representations<sup>1</sup> which were filed three months before the issuance of PHIPA Decision 123. The hospital's supplemental representations referred me to its previous submissions regarding the severability of exempt information in response to my question as to whether any portions of the records found exempt under section 52(1)(e)(i) of *PHIPA* could reasonably be severed from non-exempt portions and stated:

... the Records in their entirety are exempt from access under section 52(1)(e)(i) of PHIPA. [The hospital] cannot provide access to any portion of the Records. None of the exempted information can be severed from the [complainant's] PHI under section 52(2) of PHIPA, since it is imbedded in the images themselves.

Even if it were possible, [the hospital] does not have the tools or capability to sever (i.e. redact, blur or otherwise alter or manipulate the images) the exempted information from the Records. [The hospital] has consulted with its systems vendor which has similarly advised that it is unable to edit or redact the Records.<sup>2</sup>

[20] With respect to the hospital's contention that the IPC's approach of whether *FIPPA* or *PHIPA* governs a patient's request for their own information has "evolved", I note that the IPC's key decision on this question is PHIPA Decision 17, issued in November 2015, well before the hospital submitted its representations in this review. Furthermore, it was clear from the first Notice of Review sent to the hospital in this complaint that the question of whether *FIPPA* or *PHIPA* applies to the request was an issue, as were the questions of the extent of the complainant's right of access and the severability of the records.

[21] I have considered the hospital's evidence along with the circumstances of this matter, and find that the hospital's evidence that it was not afforded an opportunity to provide updated evidence regarding the severability issue to be without merit. When given the opportunity to provide supplementary representations on this issue, the

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<sup>1</sup> The Hospital's Supplemental Representations, dated March 26, 2020 were submitted in response to my invitation for further submissions which asked the hospital to respond to the following questions: Does the exemption at section 52(1)(e)(i) apply? If so, to what portions of the video footage at issue does it apply? Can the exempt portions be severed in order to disclose the non-exempt portions to the complainant?

<sup>2</sup> The hospital also refers to Interim Order PO-3478-I, apparently in support of its contention that it could not have anticipated the manner in which I ordered it to sever the footage at issue. In Order PO-3478-I, the adjudicator upheld a hospital's withholding of video footage in its entirety. I note, however, that Order PO-3478-I was issued before PHIPA Decision 17. PHIPA Decision 17 was issued well before my review in this matter and I referred to it in the Notice of Review I sent to the parties.

hospital repeated its original arguments submitted earlier in the process. Accordingly, I find that the hospital's evidence falls short of establishing a fundamental defect in the adjudication process under section 27.01(a) of the *Code*.

***ii. Should I have invited the hospital's submissions on the potential application of PHIPA Decisions 117 and 120?***

[22] My reference to PHIPA Decisions 117 and 120 in PHIPA 123 was made in a footnote in paragraph 45 of PHIPA Decision 123. My reasons for ordering the hospital to use obscuring technology to grant the complainant access to the non-exempt portions of the records stated:

I have reviewed the records and am not persuaded by the hospital's submission. In making my decision, I note that the portions of the video recordings that contain the complainant's PHI, which he is entitled to access under *PHIPA*, show him leaving his room and staff standing by in a corridor. The complainant can also be seen walking away from staff and, subsequently, being restrained by staff and moved into a seclusion room.

In my view, most of the video footage containing the complainant's image can reasonably be severed by using obscuring technology to withhold the portions that are exempt under section 52(1)(f) while disclosing the portions of the videos containing images of the complainant, and the images of staff members that are included in his PHI. I note that previous decisions from this office have ordered institutions to use obscuring technology to sever exempt information from the portions of videos that contain identifiable images of the requester.<sup>3</sup>

Having regard to the above, I am satisfied that the hospital, or a third party provider if necessary, can use obscuring technology to obscure the background, which would reveal information relating to the facility's physical layout or video surveillance system. I also am satisfied that the hospital can use editing software to sever and provide the portions of the record in which the complainant appears in the frame in a manner that is conducive to obscuring background images. In my view, the combination of shortening the frames in videos 2, 3, 4, and part 1 of video 5 to only those segments in which the complainant appears, along with obscuring the background in those videos, would provide the complainant with portions of the video which relate to him, while protecting the information qualifying for exemption under section 52(1)(f).

However, I find that the entire footage of the initial restraint of the complainant in part 2 of video 5 and the side view of him being

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<sup>3</sup> The original footnote in PHIPA Decision 123 stated: "See for example, Order PO-3905 and PHIPA Decisions 117 and 120.



transported to the seclusion room in video 1 cannot reasonably be severed in a manner that does not disclose the information I found qualifies for exemption under section 52(1)(f).

In arriving at my decision, I considered the hospital's submission that it cannot reasonably sever the records because neither it nor its vendor currently owns the required technology or software to allow for the required severance and obscuring of portions of the records. However, the required redaction and obscuring technology is commonplace and is routinely used by police and other agencies throughout Ontario. The hospital has the option of retaining the services of a third party.

[23] As part of the reconsideration process, I invited the hospital to provide submissions on the impact of PHIPA Decisions 117 and 120. The hospital responded that PHIPA Decision 117 and 120:

... are the first decisions of the IPC that address the application of [*PHIPA* and *FIPPA*] to video surveillance footage held by hospitals and the interaction between the statutes. PHIPA Decisions 117 and 120 set out the IPC's analysis in determining whether *PHIPA* and/or *FIPPA* is applicable to the records and whether they are records "dedicated primarily to" the complainants' personal health information. They also address the use of obscuring technologies (in both cases, executed by third party providers) as a method of severing the complainants' personal health information for the purposes of providing access under *PHIPA*.

[24] The hospital went on to argue that the findings in PHIPA Decisions 117 and 120 are not applicable to the circumstances of PHIPA Decision 123.

#### *PHIPA Decisions 117 and 120*

[25] In PHIPA Decision 117, Senior Adjudicator Gillian Shaw ordered Humber River Hospital (the custodian) to provide a patient access to footage depicting his exit from the hospital, with the images of other individuals obscured.<sup>4</sup> There was no dispute between the parties that the requester was entitled to access his PHI contained in the footage. In addition, Senior Adjudicator Shaw determined that the requester's PHI included the background in "all of the footage (hospital hallway, furniture, exit area, and so on)."<sup>5</sup>

[26] The custodian had denied the requester access to the footage on the basis that using blurring technology to redact the images of individuals other than the requester

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<sup>4</sup> The requester in PHIPA Decision 117 did not seek access to anyone's image other than his own. Therefore, the adjudicator did not need to consider whether the images of others, including the nurse who escorted him out of the hospital were included in his personal health information.

<sup>5</sup> See paragraph 28 of PHIPA Decision 117.

would not be sufficient to withhold this information from the requester. The custodian argued that instructions on how to reverse or remove facial blurring are readily available online. The custodian also argued that if it was ordered to grant the requester access to a blurred video, the requester should be required to sign an undertaking agreeing not to attempt to unblur the images of other individuals or disseminate the video.

[27] The key issue to be decided by Senior Adjudicator Shaw was whether the requester's PHI could reasonably be severed from the remainder of the information. In PHIPA Decision 117, Senior Adjudicator Shaw stated:

First, I note that the [custodian's] consultant repeatedly refers to using blurring technology to sever the images of the individuals other than the appellant. However, there are other types of obscuring technologies, such as blacking out, that are less susceptible to attempts at reversing [footnote in original].<sup>6</sup>

Second, even assuming that the technology used is blurring technology, the consultant states that unblurring the edited video would be very difficult and resource intensive. In my view, it is highly unlikely that the complainant would attempt this, given his statement that the blurring the hospital proposes to do is already prohibitively expensive for him. It also seems highly unlikely that the complainant or any other individual would succeed even if they were to attempt it.

Finally, I note the complainant's statement, through his counsel, that he does not intend to attempt to unblur the video in order to identify any individuals in it.

I understand the hospital's concern for confidentiality and its desire to ensure that the privacy of its patients is not compromised. In my view, however, the risk that the obscuring technology the hospital chooses to apply to the video will be reversed is far too remote to justify withholding the entirety of the footage from the complainant. As the hospital itself acknowledges, this office routinely makes orders for the release of severed video footage. This has been ordered in cases where the information to be withheld is highly sensitive.<sup>7</sup> The standard for severing cannot be perfection. In my view, it would be too high of a bar to require that severing be 100% foolproof.

[28] In PHIPA Decision 120, Adjudicator Stella Ball ordered Sault Area Hospital (the custodian) to provide a patient access to video footage taken of him during his stay at

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<sup>6</sup> The senior adjudicator's original footnote stated: "Blacking out is a conventional method of obscuring video that is known to be more secure than blurring."

<sup>7</sup> The senior adjudicator's original footnote referred to the reader to Orders MO-3796 and PO-3671.

the custodian's mental health unit, along with the images of police officers and hospital staff that qualify as the patient's PHI. However, the custodian was ordered to withhold the images of other patients interacting with hospital staff, and police or firefighters who were not interacting with the patient, by obscuring their images in the footage to be provided to the patient. Adjudicator Ball agreed with the custodian's submission that the patient's PHI could reasonably be severed from the video for the purpose of providing him access.

*The hospital's submissions re: impact of PHIPA Decisions 117 and 120*

[29] The hospital in this matter argues that the key difference between PHIPA Decisions 117 and 120 and the matter before me is the nature of the facility and the patient population. The hospital argues that the complainant:

... is a detainee at one of the [hospital's] high secure programs and has been detained for a number of years. The complainant has unique knowledge of the premises, cameras, layout and other features due to his long-term detention at [the hospital] and if the Records were released, he could use that information to exploit the security of [the hospital].

[30] The hospital also made the following arguments:

- The custodians in PHIPA Decisions 117 and 120 did not challenge whether the requester's PHI could reasonably be severed using obscuring technology. Instead, the issue in PHIPA Decision 117 was whether there was a risk that blurred individuals could be identified by unblurring the footage; and in PHIPA Decision 120, the custodian did not challenge whether the requester's PHI could reasonably be severed using obscuring technology;
- The patients in PHIPA Decisions 117 and 120 sought general care whereas the complainant in the matter before me is an individual detained at a high security forensic correctional facility which gives rise to "significant safety considerations" not applicable in other public hospital settings;
- The footage in PHIPA Decision 120 includes information about the interior spaces, hospital corridors and rooms whereas in PHIPA 117 the exit area of the hospital was in the background; and
- The custodians in PHIPA Decisions 117 and 120 did not raise concerns about background images or identify any safety or security exemptions or concerns.

[31] The hospital argues that videos 2, 3, 4, and part 1 of video 5 cannot reasonably be severed and states:

From a practical perspective, with the complainant's knowledge of the facility relative to his location and the events depicted on the video, the

complainant will have access to parts of the Records that are subject to the exemption under section 52(1)(f) of *PHIPA*, in conjunction with section 14(1)(k) of *FIPPA*, and to which he does not have a right of access, even with the redactions.

With obscuring technology, it would still be possible for the complainant to access information that is subject to the exemption and which would jeopardize the security of [the hospital]. The redacted information would itself provide information to the complainant and would provide information about the deleted portions of the video. Even if it were possible to redact the Records, the information remaining would be minimal and not reasonably proportionate to the quality of access it would provide.

[The hospital's] primary concern is that the disclosure of the Records, even using obscuring technology, would jeopardize [its] security, giving rise to a risk of serious bodily harm to the complainant or others. This risk is detailed in the [affidavits submitted during the inquiry and reconsideration of this matter]. Based on the evidence presented, granting the complainant access to the Records could reasonably jeopardize the security of [the hospital] and endanger patients, staff and others.

*My reconsideration findings re: whether I should have invited the hospital's submissions on the potential application of PHIPA Decisions 117 and 120*

[32] The hospital takes the position that my failure to invite its representations on the potential application of PHIPA Decisions 117 and 120 amounts to a fundamental defect in the adjudication process.

[33] However, when given the opportunity to make representations on those decisions during the reconsideration process, the hospital repeats the same arguments it made during the review stage; that its facility and patient population give rise to special security considerations.

[34] The hospital argues that the reasoning in PHIPA Decisions 117 and 120 should not be adopted and applied to the circumstances of this matter because in those cases the requesters were not also inmates. The hospital submits that unlike the complainant in this matter, the requesters in PHIPA Decision 117 and 120 attended the hospital for general medical care and lacked any unique knowledge of the premise, cameras, layout and other features as a result of a long-term detention.

[35] However, in PHIPA Decision 123, I agreed with the hospital that disclosure of the layout of the facility to the complainant could reasonably be expected to expose security vulnerabilities which would give rise to the harm contemplated in section 52(1)(f) of *PHIPA*, with reference to sections 49(a) and 14(1)(k) of *FIPPA*. In addition to

taking into consideration the hospital's evidence about its facility and patient population, I also took into account its evidence regarding the complainant's criminal and psychiatric history.

[36] However, I found that the exemption in section 52(1)(f) of *PHIPA* with reference to sections 49(a) and 14(1)(k) of *FIPPA*, did not apply to the images of the complainant and staff who appeared in *close proximity* to him in the video. In arriving at that conclusion, I stated:

I find that the hospital's submissions fail to establish a connection between the contemplated harm and the portions of the records which contain the complainant's image, along with staff, without the background layout. In my view, the general concerns the hospital raises about the harms resulting by reason of the criminal and psychiatric history of the complainant (and broader patient population) are speculative in nature.

[37] In addition, the hospital argues that the circumstances in this matter differ from those in PHIPA Decision 117 and 120 because the custodians in those decisions did not challenge whether obscuring technology could reasonably sever exempt information. However, the hospital has failed to explain how this fact impacts my finding that obscuring technology can be used to provide the non-exempt portions of the videos to the complainant. Though the use of obscuring technology has only been recently discussed in PHIPA decisions, there is a long line of orders from this office in *FIPPA* and *MFIPPA* appeals in which institutions have been ordered to grant access to video surveillance records using obscuring technology to withhold access to exempt information. One of these orders was discussed in PHIPA Decision 123. In Order PO-3905, Adjudicator Marian Sami ordered the Ministry of Community Safety and Correctional Services<sup>8</sup> (the ministry) to sever and disclose non-exempt portions of video footage capturing an inmate requester's restraint and placement in a cell. The ministry was ordered to sever the video footage using obscuring technology to disclose only the portions of the footage containing images of the requester and correctional officers.

[38] Finally, the hospital argues that PHIPA Decisions 117 and 120 should not be applied to the circumstances in this matter as the type of background images in the footage in those cases differs from what was captured in the footage in this matter. However, the hospital's submissions fail to explain the significance to my findings of any distinction between interior as opposed to semi-outdoor spaces and the use of obscuring technology to sever exempt information. The relevant issue is whether the footage contains exempt information and the hospital had several opportunities to make submissions that the information at issue qualified for exemption.

[39] Having regard to the above, I find that the hospital's evidence falls short of establishing a fundamental defect in the adjudication process under section 27.01(a) of

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<sup>8</sup> As it was then known. The ministry is now known as the Ministry of the Solicitor General.

the *Code* on the basis that I did not provide it with the opportunity to make submissions on PHIPA Decisions 117 and 120.

***iii. Should I have previewed order provisions 1 and 2 with the hospital and invited further representations?***

[40] The hospital made brief submissions in support of its position that I should have previewed the redactions set out in order provisions 1 and 2 before I issued PHIPA Decision 123 and invited its further representations on my proposed order. The hospital submits that this extra step would have enabled it to “adduce evidence by those with in- depth knowledge of the facility, security systems and camera locations.”

[41] I am not persuaded by the hospital’s submission. The hospital was aware from the beginning of this matter that severance was a live issue, and it could have made detailed representations on appropriate severances as an alternative to its position that no information could be released. It chose not to do so. I see no error in my not previewing the order provisions in these circumstances.

[42] Accordingly, I find that the hospital’s evidence fails to establish a fundamental defect in the adjudication process under section 27.01(a) of the Code on the basis that I should have previewed my findings in PHIPA Decision 123 and invite its further representations before the issuance of that order.

[43] In any event, during the reconsideration stage, the hospital had an opportunity to gather further evidence and consulted a third party digital consulting company (the third party company). The hospital subsequently made further written submissions and submitted two updated affidavits from its Director of Provincial Forensic Programs Division (Director) and Privacy Manager with respect to the severances I ordered in PHIPA Decision 123. The hospital’s further submissions and the new evidence it asserts are contained in them, are addressed next.

**B. Are there new facts or a material change in circumstances relating to PHIPA Decision 123? If so, should I rescind, vary or make a further order as contemplated in section 64(1) of PHIPA and section 27.01(d) of the *Code*?**

[44] Section 27.01(d) of the *Code* provides that 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 new facts relating to an order come to the IPC’s attention or there is a material change in circumstances relating to the order.

[45] Section 27.01(d) reflects section 64(1) of *PHIPA*, which states:

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 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.

[46] The hospital argues that “additional factual information has come to light that will impact the scope of [PHIPA Decision 123].” The hospital submitted this evidence during the reconsideration stage of this matter by way of further representations and updated affidavits from its Director and Privacy Manager. Portions of these additional representations are confidential according to IPC’s *Code of Procedure and Practice Direction 7*.

***Non-confidential submissions***

[47] The hospital confirms that at the time it made its original submissions, it “submitted evidence that redactions to the video recording were not possible.” The hospital explains that its original position was based on evidence it had available at the time. Though the hospital confirms that it still does not have the internal capacity to redact or obscure video footage, it indicates that it has now gathered information that is relevant to the determination of this matter that amounts to new facts or a material change in circumstances.

[48] The hospital says that upon its receipt of PHIPA Decision 123, it contacted a third party digital consulting company (consultant) to obtain a quote for the redactions ordered. The hospital says that the consultant recommended the use of a redaction circle and complete blacking out or obscuring of the layout of the hospital corridors and rooms. Though the hospital no longer takes the position that the records cannot be severed, it argues that non-exempt information cannot reasonably be severed in the circumstances of this complaint.

[49] The hospital submits that it asked the consultant to edit one of the videos (part 1 of the 5<sup>th</sup> video on disc) “to give effect to the Order”. For the remainder of this decision, I will refer to the severed version of this video as the sample video.

[50] The hospital argues in its representations that:

...obscuring the layout of the hospital corridors or rooms as contemplated in the Order will not have the desired effect. From a practical perspective, even with redactions, with the complainant’s knowledge of the facility relative to his location and the events depicted on the video, the complainant will have access to parts of the record that are subject to the exemption under section 52(1)(f) of *PHIPA*, in conjunction with section 14(1)(k) of *FIPPA*, and to which he does not have a right of access.

[51] In support of its position, the hospital submitted an updated affidavit from its Director who states:

[The consultant] tried several different methods to redact the video; one was to "blur" the background, while leaving visible any PHI of the complainant and the second was to "black out" everything aside from the images/PHI of the complainant. Given my knowledge of the general layout of the patient areas within the high secure Provincial Forensic Programs I was asked to review the redacted video. I have also reviewed the other Records that are the subject of the Order. This includes video of the corridors and hallways as well as video of the seclusion area.

The second method which "blacked out" the layout of the hospital corridors and rooms was more effective, however, it did not achieve the objective of the Order. Even with the use of obscuring technology, it is still possible for the complainant to access information that is subject to the exemption and which jeopardizes the security of [the hospital].

It could reasonably be expected that the complainant will use the Records in a manner that compromises the security of [the hospital], threatens the safety of others or otherwise for an unlawful purpose. Having reviewed the Records, it is my belief that there is no way to reasonably sever or obscure the Records in a manner that addresses the safety concerns which I have highlighted throughout this appeal. Even if not technically exempt, any non- exempt information will identify the content of the deleted portions.

### ***Confidential submissions***

[52] The confidential portion of the hospital's submissions contained evidence about the complainant's incarceration, security incidents, and information about its video surveillance system along with a specific security concern in addition to issues relating to the facility's layout. The confidential evidence submitted by the hospital's Director provided examples as to why he believes that redacting the video footage in the corridors and seclusion room as ordered in PHIPA Decision 123 would not have the desired effect.

### ***My reconsideration findings re: new facts or material change in circumstances***

[53] As set out above, the hospital takes the position that granting the complainant access to the records as contemplated in PHIPA Decision 123 would, notwithstanding the use of obscuring technology, grant the complainant access to information that I have found exempt under section 52(1)(f) of *PHIPA*, with reference to sections 49(a) and 14(1)(k) of *FIPPA*.

[54] The hospital asks that I rescind my order and find that it is not required to provide the complainant with access to any portions of the responsive video surveillance



recordings. In the alternative, the hospital asks that I vary or make a further order narrowing the scope of order provision 1 to ensure that the complainant does not have access to information that would jeopardize the security of the hospital. The hospital also argues “[e]ven if it was possible to redact the Records, the information remaining would be minimal and not reasonably proportionate to the quality of access it would provide.”

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

It is important to note that the reconsideration power is not intended to provide a forum for re-arguing or substantiating arguments made (or not made) during the review, nor is reconsideration intended to address a party’s disagreement with a decision or legal conclusion.<sup>9</sup> As Justice Sopinka commented in *Chandler v. Alberta Association of Architects*, [[1989] 2 S.C.R. 848, at 861] “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.

[56] I agree with the approach taken by the former Assistant Commissioner and find that the hospital must establish that *new facts exist* or that there has been a *material change of circumstances* to establish a ground for reconsideration under section 27.01(d) of the *Code* or section 64(1) of *PHIPA*.

[57] Most of the evidence presented by the hospital repeats arguments it already made during the review stage about the patient population, the complainant’s knowledge of the facility and his criminal and psychiatric history.

[58] The notable difference in the evidence the hospital adduced during the

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<sup>9</sup> The former assistant commissioner’s original footnote stated: “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.”

reconsideration process is that it went through the exercise of creating a sample video and its Director now asserts that after viewing the sample video he remains of the view that the records cannot reasonably be severed. The Director also asserts that compliance with the order provision would produce the unintended effect of granting the complainant access to exempt information.

[59] I have considered the hospital's submissions and am satisfied that it has established that new facts exist in the circumstances of this complainant, thus establishing a ground for reconsideration under section 27.01(d) of the *Code* or section 64(1) of *PHIPA*. The new facts here are that the hospital created the sample video in question following the release of PHIPA Decision 123. In the circumstances of this matter, including the nature of its facility, I am satisfied that it was reasonable of the hospital to see whether the severances I ordered would have the desired effect of withholding exempt information.

[60] In PHIPA Decision 123, I ordered the hospital to grant the complainant access to four of the six responsive videos. I ordered the hospital to provide the complainant access to the portions of videos 2, 3, 4 and part 1 of video 5 that contained his PHI but obscure the layout of the hospital corridors or rooms. I did not order the hospital to grant the complainant access to any portions of the videos 1 or part 2 of 5 as I found that the complainant's PHI could not be reasonably severed from the remaining exempt information.

[61] I have now re-reviewed the video footage along with the hospital's new evidence and find that the redactions I ordered are not sufficient to protect information that I found to qualify for an exemption. However, I do not accept the hospital's submission that no portions of the footage can be released without releasing exempt information.

[62] In my view, shortening the length of the videos 2, 4 and part 1 of 5 depicting the complainant in the hospital's corridors as ordered in PHIPA Decision 123, along with obscuring or blacking out the background in those videos would provide the complainant with portions of the video that relate to him, while protecting the information qualifying for exemption under section 52(1)(f) of *PHIPA*, with reference to sections 49(a) and 14(1)(k) of *FIPPA*.<sup>10</sup>

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<sup>10</sup> At paragraph 62 of PHIPA Decision 123 I stated:

I adopt and apply the reasoning in Orders PO-2332, PO-2911 and PO-3905 to this matter and find that disclosing some of the information in the videos, specifically, the layout and security features of the facility, could reasonably be expected to result in the harms contemplated by section 14(1)(k) of *FIPPA*. I also am satisfied that the hospital's submissions were sufficiently detailed to demonstrate that the potential of harm is well beyond the merely possible or speculative. The circumstances of this complaint are similar to those in the decisions set out above because the video recordings at issue contain information about the specific layout of a maximum security institution which houses inmates who pose a high risk to the community, other inmates and staff. In addition, I am persuaded by the hospital's confidential submissions that disclosure of the records could reasonably be expected to jeopardize another aspect of its video surveillance system. Having regard to the records

[63] These portions of the videos depict:<sup>11</sup>

- Staff calling the complainant out of his room to observe a search and the complainant and staff walking down the north corridor towards a specified location (part 1 of video 5);
- the complainant observing the search of his possessions from a corridor and after a few moments walking away to another location (video 4); and
- staff carrying the complainant face down through the corridor towards the seclusion rooms (video 2).

[64] I have decided to vary my original findings in PHIPA Decision 123 with respect to these videos only. I am satisfied that ordering the hospital to shorten the frames it was originally ordered to provide the complainant, along with obscuring or blacking out the background images of the facility in the records, which includes the layout of the corridors and rooms will not result in the complainant being granted access to the information I found exempt under section 52(1)(f) of *PHIPA*, with reference to sections 49(a) and 14(1)(k) of *FIPPA*.

[65] However, I decline to vary my original finding regarding the complainant's request for video footage of him in the seclusion room (video 3). I am satisfied that editing the seclusion room footage with a redaction circle as recommended to the hospital by a third party company, along with blacking out the background, will provide the complainant with only non-exempt information and would result in the desired effect of PHIPA Decision 123. I find the hospital's evidence calling for the variance of the order provisions relating to this video too speculative and not supported by the video itself having regard to the portions of the video to which I found the complainant is entitled to access. In addition, I am satisfied that the existing order provision does not limit the hospital from ensuring that the redaction circle used around the complainant's image excludes exempt information from the frame.

[66] In arriving at my decision, I considered the hospital's argument that any redaction of the records would result in granting the complainant access to a negligible amount of information that is not reasonably proportionate to the quality of access it would provide. I disagree and take the view that the non-exempt portions of the videos containing the complainant's personal health information, even where they amount to only seconds, can reasonably be severed from exempt portions. I am not satisfied, for example, that releasing the non-exempt information would result in the release of

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themselves and the submissions of the parties, I find that disclosure of the layout of the facility to the complainant could reasonably be expected to expose security vulnerabilities which would give rise to the harms in section 14(1)(k) of *FIPPA*.

<sup>11</sup> The narrative summary of the responsive videos was provided by the hospital in its decision letter to the complainant and are reproduced at paragraph 10 of PHIPA Decision 123.

meaningless or disconnected snippets of information.<sup>12</sup>

[67] For the reasons stated above, I have decided to vary order provision 1 in PHIPA Decision 123 regarding the redactions I ordered for videos 2, 4 and part 1 of 5. As a result, I will now order the hospital to grant the complainant access to:

- 10 seconds of video 2 instead of the 23 seconds ordered in PHIPA Decision 123,<sup>13</sup>
- approximately 25 seconds less of video 4 than was ordered in PHIPA Decision 123,<sup>14</sup> and
- 7 seconds of part 1 of video 5 instead of the 28 seconds ordered in PHIPA Decision 123.<sup>15</sup>

## SUMMARY

[68] The hospital has not established that there was a fundamental defect in the adjudication process under section 27.01(a) of the *Code*. However, I accept the hospital's argument that new facts exist in the circumstances of this complaint and find that the hospital has established grounds for reconsideration under section 27.01(d) of the *Code* and/or section 64(1) of *PHIPA*. Accordingly, I have decided to vary the order provisions in PHIPA Decision 123 to shorten the length of footage of three of the four videos I ordered the hospital to release to the complainant. My decision regarding the portions ordered to be severed in the video 4 remains unchanged.

## RECONSIDERATION DECISION:

1. I allow the hospital's reconsideration request, in part.
2. I lift the interim stay of PHIPA Decision 123 and order the hospital to grant the complainant access to videos 2, 3, 4, and part 1 of video 5, obscuring the layout of the hospital corridors or rooms I found exempt under section 52(1)(f), with reference to sections 49(a) and 14(1)(k) of *FIPPA*, as follows:

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<sup>12</sup> See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

<sup>13</sup> Video 2 depicts staff carrying the complainant face down through a corridor towards the seclusion room. The entire video is 60 minutes long and the complainant appears at approximately 28:09 to 28:32 for about 23 seconds.

<sup>14</sup> Video 4 depicts the complainant observing the search of his possessions and subsequently walking away. The entire video is 15:49 minutes and the complainant appears at approximately 1:15 to 4:25 for about 3 minutes.

<sup>15</sup> Part 1 of video 5 depicts staff calling the complainant out of his room to observe a search. Staff and the complainant subsequently walk down the corridor. The entire video is 16 minutes long and the complainant appears at approximately 43 seconds to 1:11 minute for about 28 seconds.

- West corridor of the North Zone – 28:18 to 28:29 minutes (2<sup>nd</sup> video on disc);
  - Seclusion room/ Seclusion room corridor – 47 seconds to 4 minutes (3<sup>rd</sup> video on disc);
  - East corridor of the North Zone – 1:32 to 4:15 minutes (4<sup>th</sup> video on disc); and
  - North corridor of the North Zone/ South end of the north corridor of the north zone – 43 seconds to 50 seconds (part 1 of 5<sup>th</sup> video on disc).
3. If the hospital decides to charge a fee for access, it is to give the complainant an estimate of the fee in accordance with section 54(10).
  4. For the purposes of order provision 2, the date of this decision should be treated as the date of the access request.
  5. In order to verify compliance with order provision 2, I reserve the right to require the hospital to provide this office with a copy of the records it provides to the complainant.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

October 12, 2021 \_\_\_\_\_