Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 172

Complaint HA20-00155

PHIPA Decision 170

St. Thomas Elgin General Hospital

February 25, 2022

Summary: This reconsideration decision addresses the complainant's request for reconsideration of PHIPA Decision 170. In that decision, the adjudicator found that the respondent hospital was not required to correct a record of the complainant's personal health information because the exception for good faith opinion or observation under section 55(9)(b) of the *Personal Health Information Protection Act, 2004* applied. The adjudicator finds that the complainant has not established any ground 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*, S.O. 2004, c. 3, section 55(9)(b); *Regulated Health Professions Act, 1991*, SO 1991, c 18, section 36(3).

Decisions Considered: PHIPA Decisions 25, 80, 100 and 170.

Cases Considered: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at 861.

BACKGROUND:

[1] In this reconsideration decision, I consider whether the complainant's request for reconsideration of PHIPA Decision 170 fits within any of the grounds for reconsideration in section 27.01 of the *Code of Procedure for Matters under the Personal Health*

Information Protection Act, 2004 (the *Code*). I find that it does not.

[2] The background to the complaint that led to PHIPA Decision 170 involved the complainant's referral, by his general practitioner, to a consulting physician (the doctor) at St. Thomas Elgin General Hospital (the hospital) for a Holter monitor study.[1] After seeing the Holter monitor report (the report), the complainant took issue with and sought correction of, under section 55(1) of the *Personal Health Information and Protection of Privacy Act* (*PHIPA*), one of the doctor's differential diagnoses in the report, which was that he (the complainant) be "screened for anxiety/depression."

[3] The hospital refused to grant the requested correction. The doctor did prepare an addendum to the report that stated, "Please note, some of my differential [diagnosis] for palpitations listed above does not imply diagnosis." The complainant notified the hospital that he wanted the addendum "corrected" to add text indicating that he has never been a patient of the doctor and that they did not meet during the Holter monitor study. However, the doctor declined to make the requested correction because he believed that the existing report, with the addendum, accurately described his interpretation of the Holter monitor study. Consequently, the hospital maintained its decision that no correction would be made to the report based on the exception for good faith professional opinions in section 55(9)(b) of *PHIPA*.

[4] Dissatisfied with the hospital's efforts to resolve his concerns about the report, the complainant filed a complaint with the Information and Privacy Commissioner of Ontario (the IPC) and Complaint HA20-00155 was opened.

The review of Complaint HA20-00155

[5] I conducted a review of the complaint and wrote PHIPA Decision 170 based on the representations I sought and received from the complainant and the hospital. During my review, the complainant explained his reasons for objecting to the doctor's differential diagnosis and for wanting it corrected under *PHIPA*. He maintained that the report was inaccurate because the doctor had solely been tasked with interpreting the Holter monitor study, not providing a diagnosis, including the differential diagnosis he found objectionable.

[6] The complainant was particularly concerned about the absence of a doctor-patient relationship between himself and the doctor and the alleged failure of the doctor to follow the appropriate method of arriving at a (differential) diagnosis. He alleged that because the doctor did not perform the acceptable diagnostic work-up of taking of history, running tests and conducting a physical examination, the doctor's actions in recording the differential diagnosis were "contrary to standard medical practice", as well as "reckless and not in good faith." The complainant's concern was evidently heightened by his being told by hospital staff that the doctor offered similar differential

[1] As I noted in PHIPA Decision 170, a Holter monitor is used to help diagnose possible cardiac issues. It is a small, portable electrocardiogram device that measures heart rate and rhythm over a specified period.

diagnoses on Holter monitor reports for other individuals. The complainant advised that his concerns about the situation were such that he filed a complaint against the doctor with the College of Physicians and Surgeons of Ontario (the CPSO).[2]

[7] Another concern raised by the complainant in his representations was that the incomplete and "dangerously inaccurate" report about him would not only be available to the hospital, but also to other regional hospitals that are on the same EHR system, and "could lead to possible overshadowing of relevant medical issues."

[8] For its part, the hospital maintained that the doctor had included the disputed language in the report in good faith as a possible cause for palpitations the complainant had been experiencing. The hospital (and the doctor) did not challenge the complainant's claim that there was no doctor-patient relationship between the complainant and the doctor, and that they had not met before the interpretation of the Holter monitor study. The hospital's denial of the complainant's correction request rested on the assertion that the doctor had prepared the report in good faith using his clinical skill and judgment and that the exception to the duty to correct found in section 55(9)(b) of *PHIPA* therefore applied. The hospital also noted that the complainant's statement of disagreement had been placed in his permanent health record for any viewers to see.

PHIPA Decision 170

[9] In my reasons for decision in PHIPA Decision 170, I confirmed that because the hospital claimed that the exception in section 55(9)(b) applies, it bore the burden of proving that the personal health information at issue consisted of a "professional opinion or observation" about the complainant. I also stated that once it is established that the personal health information amounts to a professional opinion or observation, the onus shifts to the individual seeking the correction to establish that the professional opinion was not made in good faith.

[10] Respecting the first part of the test for the application of section 55(9)(b), I described its purpose, which is to preserve "professional opinions or observations," *accurate or otherwise*, that have been made in good faith.[3] I also stated that correction requests are not to be used to try to appeal decisions or professional opinions or observations with which a complainant disagrees and cannot be a substitution of opinion, such as a complainant's own view of a medical condition or diagnosis.[4] Based on the evidence before me, I found that the personal health information the

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[2] As I noted in PHIPA Decision 170, the fact that a CPSO complaint had been filed did not affect my decision about whether the complainant's right to correction of the report had been established under *PHIPA*.

[3] At paragraph 33 of PHIPA Decision 170.

[4] PHIPA Decisions 36, 37, 71, and 138. See also Orders M-777, MO-1438 and PO-2549 decided under *the Freedom of Information and Protection of Privacy Act* and its municipal counterpart, from which the IPC's approach to correction under *PHIPA* has been drawn, in part.

complainant seeks to correct accurately represents the professional opinion of the doctor who recorded it. I noted specifically that a differential diagnosis is intended to represent an alternate explanation for the symptoms a patient is experiencing and said I was satisfied in the circumstances that it was a professional opinion, reflecting the exercise of the doctor's clinical reasoning based on his professional knowledge, skill and judgment.

[11] Next, I reviewed the evidence before me respecting the "good faith" aspect of the exception under section 55(9)(b). Since individuals are assumed to act in good faith unless proven otherwise, I stated that the burden of proof rested on the complainant, as the person seeking to establish that the doctor had not acted in good faith, to rebut the presumption of good faith.[5] In my finding on this part of the test under section 55(9)(b), I acknowledged that some of the communication by the hospital and the doctor may not have been optimal, but I concluded that those communication issues did not assist the complainant in establishing an absence of good faith on the doctor's part in the formation of his professional opinion. I found that the complainant had not rebutted the presumption of good faith on the part of the doctor in reaching the differential diagnosis in question. As a result, I found that the exception in section 55(9)(b) of *PHIPA* applied, and I upheld the hospital's refusal to correct the record.[6]

[12] After receiving PHIPA Decision 170, the complainant requested that I reconsider the decision based on what he claimed to be fundamental defects in it. The complainant was invited to provide representations in support of his request, with reference to the grounds for reconsideration set out in section 27.01 of the *Code*. The complainant provided representations. After reviewing the complainant's representations, I decided that it was not necessary to invite responding representations from the hospital.

[13] For the following reasons, I deny the complainant's reconsideration request.

Grounds for reconsideration under section 27.01 of the *Code*

[14] Section 27.01 of the *Code* sets out the grounds for reconsideration of a decision made under *PHIPA*:

> 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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[5] *Finney v. Barreau du Québec*, [2004] 2 SCR 17, 2004 SCC 36 (CanLII).

[6] I also found the hospital had complied with its obligations under *PHIPA* in attaching the doctor's addendum and caveat to the report, representing the complainant's statement of disagreement, to the complainant's electronic health record.

> 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.

[15] Mere disagreement with a decision is not a ground for reconsideration under section 27.01 of the *Code*.[7]

The complainant's request for reconsideration

[16] The complainant does not specifically identify any parts of section 27.01 of the Code in his reconsideration request. As stated, however, he contends my analysis in the decision contains "fundamental defects" with the result being that it is wrongly decided. He also refers to new facts coming to his attention. I have taken the complainant's submissions, set out below, to be alluding to the reconsideration grounds in sections 27.01(a) and (d) of the *Code*.

[17] The complainant begins by stating that I compared "Apples and Oranges" in my decision because, he says, the examples I referred to in reaching my conclusion about section 55(9)(b) all involved patients who had been seen by a doctor, whereas he has never met the doctor or been in the doctor's care. The complainant submits that he was not referred to the doctor for a consultation on either of the different diagnoses in the report, and that the doctor ought to have notified him to give him an opportunity to address these "speculative medical opinions" and obtain his consent, "before disclosing these opinions to others in my circle of care." The complainant alleges that the doctor's actions violate various provisions of *PHIPA*,[8] the standards developed by the Cardiac Care Network of Ontario[9] and the ethical standards of the Canadian Psychiatric Association.[10] I take this latter assertion as an allegation that the doctor made a psychiatric diagnosis by suggesting that he (the complainant) be "screened for anxiety/depression."

[18] By way of new facts, the complainant refers to having "recently acquired" a copy of a statement made by the doctor to the CPSO, evidently in respect of the complainant's complaint to that body, and provides a copy of it with his representations. No other context for the statement is provided, including the date, although I take it to have been obtained by the complainant after PHIPA Decision 170 was issued. As I explain below, the statement is inadmissible in this matter.

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[7] See *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC), as discussed in PHIPA Decision 25 and other decisions, below.
[8] The complainant refers to "Sections (30) and 18(1), 18(5) and 20(3) of PHIPA."
[9] Here, the complainant refers to a document titled, "Standards for the Provision of Electrocardiography (ECG)-based Diagnostic Testing".
[10] The complainant provides a specific Health Professions Appeal and Review Board (HPARB) case reference in support of this assertion.

[19] The complainant states that my analysis overlooked the doctor's commitment to "correct some of his recommendations—to remove his differential on TSH and screening for anxiety/depression" and subsequent "retraction" of this agreement, which the complainant suggests cannot be considered an act of good faith.[11]

[20] The complainant reiterates concerns about the doctor's "disclosing" of the differential diagnosis without his (the complainant's) knowledge or consent through the EHR to other hospitals in the area. He closes by stating his expectation that I will reconsider PHIPA Decision 170 and "re-examine [his] complaint, taking into consideration the new information and supporting documentation."

[21] As stated, I did not seek representations from the hospital regarding the complainant's reconsideration request.

Analysis and findings

[22] The complainant's submissions in support of his reconsideration request clearly convey his disagreement with the conclusions reached in PHIPA Decision 170. However, the evidence he provides to me now is largely the same evidence that I considered in the review of his complaint that resulted in PHIPA Decision 170. The purportedly "new evidence" is the doctor's statement to the CPSO, which appears to have formed part of the record before the HPARB, and is inadmissible in this matter by reason of the *Regulated Health Professions Act*,[12] as I explain below.

[23] Before addressing the specific grounds for reconsideration suggested by the complainant's submissions, I start by observing that the IPC's reconsideration power is not intended to provide an opportunity for a party to reargue their position. In PHIPA Decision 25, former Assistant Commissioner Sherry Liang reviewed the IPC's approach to reconsideration requests in the context of the *Freedom of Information and Protection of Privacy Act* and concluded that it 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.[13] As Justice Sopinka commented in *Chandler v. Alberta Association of Architects*,[14]

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[11] The complainant adds to this submission about the alleged absence of "good faith" on the doctor's part, with reference to the doctor's statement to the CPSO, which I have not considered for the reasons explained below.

[12] 1991, SO 1991, c 18.

[13] The Assistant Commissioner relied on *Ontario (Health and Long-Term Care) (Re)*, 2015 CanLII 83607 at paras. 21-24, which she found to enunciate relevant principles that are generally applicable to a request for reconsideration under *PHIPA*.

[14] Cited above.

> "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."
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> 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].

[24] I agree with the approach taken by the former Assistant Commissioner and apply it in the circumstances of the matter before me.[15] The complainant's disagreement with my finding in PHIPA Decision 170 is not by itself a ground for reconsideration of the decision. For reasons I explain below, the complainant's other submissions also do not raise any ground for reconsideration under section 27.01 of the *Code*.

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

[25] The complainant's assertion that there are "fundamental defects" in PHIPA Decision 170 could be seen to suggest a claim under section 27.01(a) of the *Code*, which allows the IPC to reconsider a decision where there was a fundamental defect in the adjudication process. However, a key requirement of this reconsideration ground is that the alleged defect be in the adjudication process. In considering the identical reconsideration ground in section 18.01(a) of 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*, past IPC orders have determined that a fundamental defect in the adjudication process may include:

- failure to notify an affected party,[16]
- failure to invite representations on the issue of invasion of privacy,[17] or
- failure to allow for sur-reply representations where new issues or evidence are provided in reply.[18]

[26] All of these are examples of circumstances where a breach of the rules of natural justice protecting procedural fairness qualifies as a fundamental defect in the adjudication process.

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[15] The former Assistant Commissioner's approach has also been applied in many other reconsideration decisions under *PHIPA*, including PHIPA Decisions 94, 111, 113, 146 and 161.
[16] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.
[17] Order M-774.
[18] Orders PO-2602-R and PO-2590.

[27] The complainant has not suggested that the above scenarios, or other procedural failures similar in nature to them, occurred during the review that culminated in PHIPA Decision 170, and I am not satisfied that there were any such defects in the adjudication process leading to my decision.

[28] I find that the complainant has not established the ground for reconsideration in section 27.01(a) of the *Code*.

Section 27.01(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] The complainant argues that new facts are now available and provide the basis for a reconsideration of PHIPA Decision 170. He relies on information gleaned from the doctor's statement to the CPSO in a complaint he filed with the CPSO about the same situation. This "new evidence" does not establish any basis for reconsideration.

[30] The ground for reconsideration in section 27.01(d) mirrors the power given to the IPC under section 64(1) of *PHIPA*, which provides for reconsideration of orders made after a review.[19] Section 64(1) 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 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]

[31] Under section 27.01(d) of the *Code* and section 64(1) of *PHIPA*, reconsideration of a decision on the basis of new facts or a material change in circumstances is only available where an order has been made under section 61(1) of *PHIPA*. PHIPA Decision 170 did not make any orders under section 61(1). Therefore, section 27.01(d) of the *Code* and section 64(1) of *PHIPA* do not apply in this matter.

[32] Regardless, even if the ground in section 27.01(d) were available to the complainant, the "new evidence" provided by him involves information provided by the doctor in the CPSO complaint and an HPARB proceeding that seems to have followed. I cannot consider the doctor's statement as evidence in this matter, based on the confidentiality provision in section 36(3) of the *Regulated Health Professions Act*. This is the case in this reconsideration decision, and would have been the case if the complainant had provided it during my review leading up to PHIPA Decision 170.

[33] Section 36(3) of the *Regulated Health Professions Act* (*RHPA*) provides for a privilege over all documents prepared for proceedings under that act, including proceedings that take place before regulatory colleges, as follows:

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[19] PHIPA Decisions 146 and 161.

> No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*. [emphasis added]

[34] The courts have affirmed that the underlying purpose of section 36(3) of the *RHPA* is to prevent all participants in regulatory college proceedings, including HPARB proceedings, from using documents generated for those proceedings in civil proceedings, to keep the two proceedings separate.[20] In other words, documents relied on during *RHPA* proceedings are intended to be confidential and may not be relied upon in any other civil proceeding, including proceedings before the IPC under *PHIPA*.[21]

[35] In his reconsideration request, the complainant seeks to rely upon a document that appears to have been a part of CPSO and HPARB proceedings involving the complainant and the doctor.[22] As this statement appears to have been prepared for or given at proceedings under the *RHPA*, I find it inadmissible as evidence in this reconsideration matter, pursuant to section 36(3) of the *RHPA*, and I have not considered it in reaching my decision.

[36] I find that the complainant has not established grounds for reconsideration under section 27.01(d) of the *Code*.

[37] Finally, to the extent that the complainant's reconsideration submissions raise privacy concerns and alleged violations of specific sections of *PHIPA*, I find these to be particularizations of the same concerns about the disclosure of the objectionable differential diagnosis and related matters raised before me in PHIPA Decision 170.[23]

Conclusion

[38] Overall, I find that the complainant's reconsideration submissions seek to re-argue positions previously taken during my review of his complaint in an effort to

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[20] *M.F. v. Sutherland*, [2000] OJ 2522, at para 36.
[21] See PHIPA Decision 80, paras 67-69.
[22] Although no context for the statement is provided in the complainant's submissions, the statement is the doctor's letter to a CPSO investigator, which appears to have been reproduced as part of the record before HPARB in its review of the CPSO committee's decision. As noted, the complainant informed me that he had brought a CPSO complaint against the doctor.
[23] As I said at paragraph 31 of PHIPA Decision 170, there was no privacy complaint before me, only the complainant's access and correction complaint. After I considered the complainant's reconsideration request and submissions, which repeated and expanded upon these concerns, he was informed that he could file a privacy complaint with the IPC, but that my decision on his reconsideration request could only address the correction issue that was before me in Complaint HA20-00155.

persuade me to reach a different decision, one that is acceptable to him.

[39] I find that the complainant has not established that there is a fundamental defect in the adjudication process or that there are new facts relating to an order or a material change in circumstances relating to an order for the purpose of sections 27.01(a) or (d) of the *Code*. I also find that the complainant has not established that there was some other jurisdictional defect in the decision under section 27.01(b) or a clerical error, accidental error or omission or other similar error in the decision under section 27.01(c) of the *Code*. Consequently, I find that the complainant has not established any of the grounds for reconsideration of PHIPA Decision 170.

[40] For the foregoing reasons, I deny the complainant's request for reconsideration of PHIPA Decision 170.

NO RECONSIDERATION:

[41] The reconsideration request is denied.

Original signed by: February 25, 2022

Daphne Loukidelis
Adjudicator