

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 173

Complaint HA15-37

PHIPA Decision 99

Dr. Philip Solomon

March 7, 2022

Summary: The complainant requested a reconsideration of PHIPA Decision 99, which dealt with a complaint made under the *Personal Health Information Protection Act* (the *Act*) about a physician. In that complaint, the complainant alleged that the physician did not conduct a reasonable search for records responsive to her access request and that the physician improperly refused to make requested corrections to her records of personal health information. In PHIPA Decision 99, the adjudicator upheld the physician's search for records as reasonable and upheld the physician's refusal to make the requested corrections to the records. In this reconsideration decision, the adjudicator determines that there are no grounds for reconsideration and the complainant's request for reconsideration is dismissed. The adjudicator also dismisses the complainant's allegation of a reasonable apprehension of bias.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, sections 60(20) and 64(1), *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*, section 27.01.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC).

Orders and Decisions Considered: Orders MO-4154-R, PHIPA Decisions 25 and 99.

BACKGROUND:

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

Decision 99. In PHIPA Decision 99, the issues were reasonable search under sections 53 and 54 of the *Personal Health Information Protection Act* (the *Act*) and correction to the complainant's record of personal health information under sections 55(8) and 55(9)(b) of the *Act*. I found that the health information custodian's (the physician) search for records was reasonable. I also found that the complainant did not demonstrate that the information in the records was incomplete or inaccurate for the purposes for which the physician used the information, and the physician's decision not to make the requested corrections was upheld. As a result, I dismissed the complaint.

[2] The complainant subsequently made a reconsideration request to the Information and Privacy Commissioner/Ontario (the IPC). The complainant's request states:

I'm writing you in regard to the decision recently issued by IPC HA15-37. I would like to please request a reconsideration of the decision because after carefully reading I find that there are many errors and that I could prove with my response to IPC should the adjudicator grant me the request.

I will greatly appreciate if the adjudicator will reconsider the decisions and grant me the request.

[3] I subsequently provided the complainant with the opportunity to provide representations to the IPC on the grounds for reconsideration as set out in section 27 of the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* (the *Code*). After a lengthy extension was given to the complainant at her request and after several attempts following the extension to obtain the complainant's representations, she provided representations to the IPC on which ground or grounds for reconsideration apply or on the reasons why PHIPA Decision 99 contains errors.¹ I decided it was not necessary to seek representations from the physician. For the reasons that follow, I deny the complainant's request to reconsider PHIPA Decision 99.

DISCUSSION:

Preliminary Issue – Allegation of a reasonable apprehension of bias

[4] The complainant alleges that I am biased against her in that I have abused my power in order to threaten and intimidate her throughout the reconsideration process. The complainant further alleges that throughout the complaints process, I was biased in that I was careless, negligent, dishonest, rude and unprofessional. In particular, the complainant alleges that during the reconsideration process, I misinformed her about the evidence she provided in Complaint HA15-37, which led to PHIPA Decision 99, and

¹ I have set out a list of the evidence the complainant provided to the IPC in Appendix A.

that I have since prevented her from accessing USB keys containing video recordings and sensitive information, which she states she submitted to the IPC during my review of Complaint HA15-37.

[5] At the outset, I note that the USB keys that the complainant refers to were provided to the IPC as part of her representations in a previous complaint made by her under the *Act*. That Complaint, HC15-99, resulted in PHIPA Decision 84 and PHIPA Reconsideration Decision 94, in which the complainant's request for a reconsideration was denied. Unfortunately, during the reconsideration process in relation to Complaint HA15-37 and PHIPA Decision 99, I erroneously advised the complainant that the USB keys were part of the representations she submitted to the IPC in this complaint and decision (HA15-37 and PHIPA Decision 99). In fact, the USB keys were not before me in Complaint HA15-37 and were not taken into account in rendering my decision.

[6] I subsequently advised the complainant of my error. Despite this, the complainant continues to allege that I deliberately misled her and, as a result, I am biased against her.

[7] Recently, in Reconsideration Order MO-4154-R, Adjudicator Steven Faughnan canvassed the approach to be taken when an allegation of bias or a reasonable apprehension of bias is made. In making his findings, Adjudicator Faughnan stated:

As I wrote in Order MO-4134, the Ontario Court of Appeal noted that "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."² The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.

However, actual bias need not be proven. The test is whether there exists a "reasonable apprehension of bias."

That said, bias, or any reasonable apprehension of bias, would be a ground for reconsidering Order MO-4134. It would also be a ground for my recusing myself and the reconsideration request being assigned to another adjudicator.

In Order MO-2227, Senior Adjudicator John Higgins, in addressing an allegation of bias against this office, explained the test as follows:

A recent statement of the law by the Supreme Court of Canada concerning allegations of bias against an adjudicator is found in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In that decision, the court stated:

² *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.) at paragraph 40, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at paragraph 71.

In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

...

The grounds for this apprehension must, however, be substantial, and I ... refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

...

In the proceedings before me the appellants were provided ample opportunity to argue all the matters at issue in the appeal, to provide any materials they wished to rely upon and to respond to any matter raised by the other parties.

The fact that the appellant disagrees with my findings in Order MO-4134 is not evidence of a reasonable apprehension of bias on my part. Furthermore, neither procedural rulings "against" a party, nor an order dismissing an appeal, are, in and of themselves, evidence of bias.³

[8] I agree with the approach taken above and, applying it here, I find that an informed person, viewing the matter realistically and practically, and having thought the matter through, would not conclude that it is likely that I, whether consciously or unconsciously, would decide this reconsideration request unfairly. In other words, I find that an informed person would not conclude that my error was the result of bias or a reasonable apprehension of bias against the complainant. The complainant's only argument about bias is that I incorrectly confirmed that I had USB keys before me when I did not. I understand the complainant's frustration but I have provided her with

³ *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at paragraph 164, affirmed 2018 BCCA 264.

an explanation for my error and since clarifying my error, I provided the complainant with numerous opportunities to submit her representations and evidence to support her reconsideration request. Consequently, I find that the complainant has not established either actual bias or a reasonable apprehension of bias in the reconsideration process of PHIPA Decision 99.

The request to reconsider PHIPA Decision 99 on the basis of section 27 of the Code

[9] Section 64 of the *Act*, which the complainant did not rely on in making her request for reconsideration, provides for reconsideration of orders made after a review. Section 64 states, in part:

64. (1) After conducting a review under section 57 or 58 and making an order under subsection 61(1), the Commissioner may rescind or vary the order or 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.

[10] In PHIPA Decision 25, former Assistant Commissioner Sherry Liang received a request for reconsideration from a health information custodian. Former Assistant Commissioner Liang found that section 64(1) of the *Act* did not apply to the request for reconsideration because there was no order made in the decision that was the subject matter of the reconsideration request, and the health information custodian had not submitted any new facts or material change in circumstances relating to the subject matter of the review that resulted in an order. In addition, she found that the authority under section 64(1) is discretionary.

[11] Applying the approach taken by former Assistant Commissioner Liang in PHIPA Decision 25, with which I agree, I find that section 64(1) of the *Act* does not apply to the complainant's request for reconsideration. As was the case in PHIPA Decision 25, in PHIPA Decision 99, I declined to issue an order. As set out in section 64(1), a reconsideration under that section requires that an order have been issued following a review. I reiterate that in this case, no order was issued.

[12] However, under section 27 of the *Code*, the IPC may also reconsider a decision on certain other grounds. In particular, the grounds for reconsideration are described in section 27.01 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,

- (b) there is some other jurisdictional defect in the Decision,
- (c) there is a clerical error, accidental error or omission or other similar error in the Decision, or
- (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.

[13] In this case, although no order was issued, my PHIPA Decision 99 may be reconsidered if one or more of subsections (a), (b) or (c) of section 27.01 of the *Code* apply.

[14] The complainant submits that all three subsections of section 27.01 of the *Code* apply. With respect to subsection (a), the complainant submits that there is a fundamental defect in the adjudication process due to the "breach" of my conduct in that I failed to properly investigate her complaint and failed to ensure that the evidence she provided to the IPC was in the file, as instructed. The complainant also argues that I failed to review all of the evidence in making PHIPA Decision 99 and that I (and the previous adjudicator assigned to the file before it was reassigned to me) failed to share her evidence with the physician, as she instructed the IPC to do.

[15] Turning to subsection (b), the complainant submits that I failed to provide procedural fairness, conducted a flawed "investigation," failed to provide her representations to the physician and failed to provide her with her evidence when asked to do so.

[16] Lastly, with respect subsection (c), the complainant alleges that my negligence and carelessness in handling her complaint and her evidence render PHIPA Decision 99 invalid.

[17] 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 the *Act*. 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.⁴ As Justice

⁴ 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."

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.”

[18] During the review of Complaint HA15-37, the complainant was provided with the opportunity to provide representations to the IPC. The complainant provided representations, which were written and, as previously stated, did not include any material on USB keys. I read the complainant’s representations and took them into consideration in making the decision in PHIPA Decision 99.

[19] Concerning the complainant’s position that her representations should have been shared with the physician as she instructed, section 60(20) states that the Commissioner *may* permit a person to have access to the representations of another person. The *Act* does not mandate the sharing of representations between persons, nor does it provide for a party to a complaint to order the IPC to share representations with the other party. While the common law principles of procedural fairness require sharing of one party’s arguments with the other in some cases, I decided that it was not necessary to share the complainant’s arguments made during the review of the complaint with the physician in this case. The complainant had a full opportunity to make submissions and I am not satisfied that my not sharing her representations with the physician amounted to a defect in the adjudication process.⁵

[20] Lastly, with respect to the complainant’s reference that she was prevented from receiving her evidence after requesting it, I note that during the reconsideration process, the complainant requested to receive a copy of the representations she had provided to the IPC during the review of complaint HA15-37. A copy of her written representations, which consist of the totality of the evidence she submitted to the IPC, was provided to her.

[21] For these reasons, I find that the complainant has not established that there is a fundamental defect in the adjudication process, some other jurisdictional defect in PHIPA Decision 99, or a clerical error, accidental error or omission or other similar error in PHIPA Decision 99.

RECONSIDERATION DECISION:

For the foregoing reasons, the complainant’s request for reconsideration is denied.

Original signed by: _____

Cathy Hamilton
Adjudicator

March 7, 2022 _____

⁵ I also note that the complainant’s request for corrections to her record of personal health information were provided to the physician at the time she made the request to him, and also during the mediation of the complaint.

APPENDIX A

List of Evidence Provided by the complainant to the IPC in the reconsideration of PHIPA Decision 99

1. Cover letter to the IPC dated January 5, 2022 (2 pages)
2. Representations to the IPC dated January 5, 2022 (9 pages)
3. Email to the IPC from the complainant dated October 11, 2019 (2 pages)
4. Email to the IPC from the complainant dated October 22, 2019 (2 pages)
5. Email to the IPC from the complainant dated November 4, 2019 (3 pages)
6. Email to the IPC from the complainant dated October 29, 2019 (2 pages)
7. Email to the IPC from the complainant dated November 7, 2019 (2 pages)
8. Email to the complainant from the IPC dated December 13, 2019 (1 page)
9. Email to the IPC from the complainant dated December 31, 2019 with attachment (4 pages)
10. Email to the IPC from the complainant dated July 21, 2012 (5 pages)
11. Letter to the complainant from the IPC dated July 30, 2021 (2 pages)
12. Email to the IPC from the complainant dated November 5, 2021 (1 page)
13. Letter to the complainant from the IPC dated December 8, 2021 (1 page)
14. Email to the complainant from the IPC dated January 4, 2022 (4 pages)
15. Letter to the complainant from the IPC dated December 22, 2021 (2 pages)
16. Letter to the complainant from the IPC dated November 5, 2021 (1 page)
17. Email to the complainant from the IPC dated October 26, 2016 (1 page)
18. Email to the complainant from the IPC dated November 7, 2016 (1 page)
19. Letter to the complainant from the IPC dated December 9, 2019 (1 page)
20. Letter to the IPC from the complainant received February 5, 2016 (6 pages)
21. Letter to the IPC from the complainant dated January 27, 2016 (1 page)