

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PHIPA DECISION 201

PHIPA Decision 141

Complaint HA17-16-2

A Hospital

January 30, 2023

**Summary:** This reconsideration decision addresses the complainant's request to reconsider PHIPA Decision 141, in which the adjudicator found that the hospital conducted a reasonable search for responsive records.

The complainant sought a reconsideration of PHIPA Decision 141 and made an allegation of bias against the adjudicator. In this reconsideration decision, the adjudicator finds that the allegation of bias is not established and that the reconsideration request fails to establish any ground for reconsideration under section 27.01 of the *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*. The reconsideration request is denied.

**Statutes Considered:** *Personal Health Information Protection Act, 2004, and the Code of Procedure for Matters under the Personal Health Information Protection Act, 2004, section 27.01.*

**Decisions Considered:** PHIPA Decisions 25 and 128.

**Cases Considered:** *Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848; Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65; and Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708.*

## **BACKGROUND:**

[1] In this reconsideration decision, I consider whether the complainant's request for reconsideration of PHIPA Decision 141 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* (the *Code*) and find that it does not. PHIPA Decision 141 addressed the complainant's 35-page access request to the hospital under the *Personal Health Information Protection Act* (*PHIPA*) and the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) for access to both general hospital records and records of her own personal health information (PHI). In response, the hospital issued a decision under both *FIPPA* and *PHIPA* and provided an index addressing the 118 parts of the complainant's request.

[2] PHIPA Decision 141 discussed previous requests made by the complainant or her lawyer to access her medical records under the headings "Background and Overview" and "Preliminary Issues" set out in the first ten pages of the decision.

[3] However, as stated in paragraph 40 of the PHIPA Decision 141, the sole issue before me was whether the hospital conducted a reasonable search for responsive records relating to the 2016 request as required by sections 53 and 54 of *PHIPA*.

[4] In PHIPA Decision 141 I found that the hospital's search for the following records was reasonable:

- A. Original surgical documentation entered into the Operation Room Scheduling Office System by nursing staff on the day of her surgery (ORSOS records of nursing staff)<sup>1</sup>;
- B. Electronic records relating to her surgery and recovery in the Post Anesthesia Care Unit and throughout her entire admission to the hospital for three days in 2007 (electronic records related to surgery and recovery)<sup>2</sup>;
- C. Audit logs or access logs for her Electronic Patient Record (audit reports)<sup>3</sup>; and
- D. Chronological listing of all documentation scanned and held on the hospital's server relating her 2007 admission to the hospital (chronological lists of all records of PHI)<sup>4</sup>.

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<sup>1</sup> Which appears to address items 12, 22, 44 and 65 identified in the chart of records remaining at issue in the mediator's Report.

<sup>2</sup> Which appears to address items 28, 95, and 97 identified in the chart of records remaining at issue in the mediator's Report.

<sup>3</sup> Which appears to address items 1, 22, 26, 59, 66 and 79 identified in the chart of records remaining at issue in the mediator's Report.

<sup>4</sup> Which appears to address items 14, 16, 18, 19, 26 and 60 identified in the chart of records remaining at issue in the mediator's report.

[5] After receiving PHIPA Decision 141, the complainant wrote to the IPC alleging bias on my part and requested that another adjudicator be assigned to her reconsideration request. In support of her position, the complainant sent in a 58-page reconsideration request. The complainant also provided an unsolicited email update on March 3, 2021 and also exchanged email communication with IPC staff throughout the reconsideration stage. For the remainder of this reconsideration, I will refer to the complainant's reconsideration materials collectively as her submissions.

[6] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,<sup>5</sup> the Supreme Court of Canada reaffirmed its finding in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*<sup>6</sup> that an administrative decision maker is not required to explicitly address every argument raised by the parties. Moreover, the fact that a decision maker's reasons do not address all arguments will not, on its own, impugn the validity of those reasons or the result.<sup>7</sup>

[7] I write this reconsideration decision with this principle in mind. I have reviewed all of the information that has been put before me. However, for the sake of succinctness, I only summarize the points that I find to be directly related to my determination of whether the complainant has established bias or reasonable apprehension of bias on my part in deciding PHIPA Decision 141 and whether the complainant's request for a reconsideration should be granted.

[8] Section 27.01 of the IPC's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* provides for three grounds for reconsideration of a decision that does not contain an order, such as PHIPA Decision 141:

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; [or]
- c) there is a clerical error, accidental error or omission or other similar error in the Decision[.]

[9] The complainant argues that a fundamental defect in the adjudication process occurred and/or that the decision contains a number of errors. The first argument raises the possible application of section 27.01(a). The second, even if established, is not a basis for reconsideration, as I explain below. For the reasons that follow, I find that the complainant's submissions fail to establish bias or reasonable apprehension of bias. I

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<sup>5</sup> 2019 SCC 65, at paragraphs 128 and 301 [*Vavilov*].

<sup>6</sup> 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].

<sup>7</sup> *Vavilov*, *supra* note 4, at paragraph 91; *Newfoundland Nurses*, *ibid*, at paragraph 16.

find that the remainder of the complainant's arguments amount to re-arguing her complaint and do not meet any grounds for reconsideration in section 27.01 of the *Code*. Accordingly, I deny the complainant's request for reconsideration of PHIPA Decision 141.

## **DISCUSSION:**

### **Is there bias, or a reasonable apprehension of bias, on my part?**

[10] The law is clear that an allegation of bias, or reasonable apprehension of bias, is to be raised before the decision-maker in question.<sup>8</sup> If the complainant establishes that there is a reasonable apprehension of bias, it would be a ground for reconsidering PHIPA Decision 141. It would also be a ground for my recusal and for the complainant's reconsideration request to be assigned to another adjudicator.

[11] The complainant alleges that I was biased in deciding PHIPA Decision 141 and requests that I remove myself from deciding her reconsideration request. The complainant alleges that I am "materially biased" towards the hospital and failed to conduct myself "in a fair and objective way." In support of her position, the complainant states:

[w]here there were different versions of information, you did not seek representations from me [or the hospital] for purposes of clarifying conflicting information, rather you acted in [a partial] and biased way by believing only the affidavit [submitted by the hospital]

...

As a complainant, I feel that you completely discounted all my relevant Submissions and failed to discuss relevant evidence in the Decision. You never questioned the integrity or reasonableness of [the hospital's affidavit] and evidence supporting it.

[12] The complainant also says that throughout the adjudication process she did not feel "respected" by me and that on several occasions I "misstated the jurisdiction and authority" of the IPC. The complainant says that she found correspondence I sent to her during the adjudication process "threatening." In support of this position, the complainant refers to a letter I sent her in November 2018 after the file was re-assigned to me. In that letter, I informed the complainant that I articulated the four issues to be determined under *PHIPA* based on her identification of her four main areas of concern at the end of the mediation process. I also provided the complainant

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<sup>8</sup> Orders PO-4128 at paragraph 40 and MO-4003-R.

information under the heading “Jurisdiction of the IPC over your complaint.”<sup>9</sup>

[13] In administrative law, there is a presumption that, in the absence of evidence to the contrary, an administrative decision-maker will act fairly and impartially.<sup>10</sup> The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.<sup>11</sup> However, actual bias need not be proven. The test is whether there exists a “reasonable apprehension of bias”.

[14] The Ontario Divisional Court has affirmed that in assessing a claim of bias on the part of a decision maker, “there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one.”<sup>12</sup> The Supreme Court of Canada has described the test for finding a reasonable apprehension of bias as follows:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.”<sup>13</sup>

[15] This test establishes that more than a mere disagreement with a decision is required in order to establish bias on behalf of the decision maker.<sup>14</sup>

[16] I agree with the approach taken above and apply it to the circumstances of the complainant’s request to reconsider.

[17] The sole issue before me in PHIPA Decision 141 was whether the hospital’s search for records responsive to the four areas of concern was reasonable. *PHIPA* does

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<sup>9</sup> On page 3 of the letter, I stated “Please note that this office’s jurisdiction is limited to dealing with complaints and access requests under the *Personal Health Information Protection Act, 2004* and provincial freedom of information legislation. Accordingly, I do not have the authority to “look beyond” *PHIPA* or *FIPPA* and determine what is required of public hospitals or the medical profession under the *Medicine Act* or other applicable statutes. In this context, some of the concerns you raise in your submissions will have to be reframed before they could proceed to a review under *PHIPA*.” The complainant, in turn, provided submissions that addressed some of these types of issues during the adjudication of the complaint that led to PHIPA Decision 141. In paragraphs 25 to 39 of PHIPA Decision 141 I identify these issues which I determined were outside the scope of my review.

<sup>10</sup> Orders MO-3513-I, MO-3642-R and MO-4003-R.

<sup>11</sup> See, for example, Blake, S., *Administrative Law in Canada*, (3<sup>rd</sup> ed.), (Butterworth’s, 2001), at page 106, cited in Order MO-1519.

<sup>12</sup> *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para 71.

<sup>13</sup> *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

<sup>14</sup> PHIPA Decision 113.

not require the hospital to prove with absolute certainty that further records do not exist. A further search is only ordered in cases where the custodian does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>15</sup>

[18] In paragraphs 77 to 88 of PHIPA Decision 141 I set out my reasons supporting my finding that the hospital's search for responsive records was reasonable.

[19] I have reviewed the complainant's submissions and am not satisfied that she has established a reasonable apprehension of bias on my part. In support of her position, the complainant alleges that I preferred the evidence of hospital, which she alleges is untruthful and unsubstantiated. The complainant says that when faced with conflicting evidence, I should have gone back to the parties for further submissions and my failure to do so should be evidence of bias. The complainant also alleges that I sent her threatening correspondence during the adjudication process though it is evident that the communication in my correspondence simply set out my opinion that some of her concerns were outside the scope of the complaint before me, which in any event had to be addressed in the decision.

[20] Essentially, the complainant disagrees with my procedural rulings during the adjudication stage. She also asserts that if I gave her evidence more consideration or sought further submissions, the outcome of her complaint would have been different. The complainant did not raise bias during my adjudication of the complaint and that alone is a basis to dismiss her argument of bias in respect of my procedural rulings. In any event, it is worth noting that procedural rulings "against" a party, or an order dismissing an appeal, are in and of themselves, not evidence of bias.<sup>16</sup>

[21] Having regard to the above, I find that the complainant's allegation of bias or a reasonable apprehension of bias on my part has not been established. Next, I will consider the other reasons given for her request to reconsider PHIPA Decision 141.

### **Has the complainant established any other grounds to reconsider PHIPA Decision 141?**

[22] 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

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<sup>15</sup> Order MO-2185.

<sup>16</sup> *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at paragraph 164, affirmed 2018 BCCA 264.

made) during the review, nor is reconsideration intended to address a party's disagreement with a decision or legal conclusion.<sup>17</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.

[23] I agree with the approach taken by the former Assistant Commissioner and apply it to the circumstances on the matter before me.<sup>18</sup> Mere disagreement with a decision is not a ground for reconsideration under section 27.01 of the Code.<sup>19</sup>

[24] In her representations, the complainant states:

I also understand that this is not the time for a complainant to reargue the case. What I would like to highlight to you is that in my Submissions I advised you that the [hospital's] external legal counsel has been, at all times, intimately involved in the [hospital's] response to my *PHIPA* requests and has had an undue influence on the [hospital's] responses, which I believe you failed to address in the Decision, which evidence you did not consider in your Decision, so I am submitting that this is evidence that you failed to consider or misconstrued.

[25] The complainant goes on to present her arguments, which include a lengthy discussion of issues that I found in PHIPA Decision 141 were beyond the scope of the complaint before me, were not within the IPC's jurisdiction or were already addressed by the IPC in 2013 (the 2012 access request).<sup>20</sup> The complainant also cites PHIPA Decision 128 in which Adjudicator Catherine Corban found that PHIPA Decision 83 should be reconsidered to address fundamental defects in the adjudication process

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<sup>17</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."

<sup>18</sup> The former Assistant Commissioner's approach has also been applied in many other reconsideration decisions under PHIPA, including PHIPA Decisions 94, 111, 113, 146, 161 and 172.

<sup>19</sup> See *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC) and PHIPA Decisions 25, 113 and 172.

<sup>20</sup> The discussion of these issues can be found at paragraphs 24 to 39.

leading to that decision. The complainant, in her submissions, references paragraph 16 of PHIPA Decision 128 where Adjudicator Corban stated “[t]his matter should be re-opened to allow reconsideration of PHIPA Decision 83 to address significant and potentially determinative issues that were raised by the complainant but not specifically addressed in the decision.” However, Decisions 83 and 128 addressed an entirely different set of facts and arguments and do not assist the complainant.

[26] I have reviewed the complainant’s reconsideration submissions and find that her submissions either repeat submissions she already made or presents arguments she could have made in support of her position that the hospital’s search was not reasonable. As stated above, paragraphs 77 to 88 of PHIPA Decision 141 set out my reasons supporting my finding that the hospital conducted a reasonable search. I disagree with the complainant’s allegation that I failed to address significant issues in PHIPA Decision 141 and refer back to the court’s pronouncement that a decision maker’s reasons need not address every argument launched by a requester.<sup>21</sup> In any event, most of the complainant’s submissions in support of that argument address issues I found were beyond the scope of the complaint before me, were not within the IPC’s jurisdiction or were previously addressed by the IPC in 2013. I identified these issues in paragraphs 25 to 39 of PHIPA Decision 141.

[27] Having regard to the above, I find that complainant’s reconsideration request amounts to a re-arguing of her complaint and does not establish that a fundamental defect in the adjudication process occurred as contemplated in section 27.01(a). I am also satisfied that the complainant’s reconsideration request does not establish that any of the other grounds for reconsideration in section 27.01 of the *Code* have been established.<sup>22</sup>

[28] Accordingly, I find that the complainant has not established any of the grounds for reconsideration of PHIPA Decision 141 and deny her request. The reconsideration request is denied.

Original Signed By: \_\_\_\_\_  
Jennifer James  
Adjudicator

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January 30, 2023

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<sup>21</sup> Supra notes 5 and 6.

<sup>22</sup> Sections 27.01(b), (c) and (d) of the Code sets out three other grounds for reconsideration: jurisdictional defect (paragraph (b)), clerical error, accidental error or omission or other similar error (paragraph (c)), and new facts or material change in circumstances (paragraph (d)).