

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 215

Complaint HA21-00238

Jeffery Mark Kelland

July 17, 2023

**Summary:** This reconsideration decision addresses the complainant's request for reconsideration of PHIPA Decision 206. In that decision, the adjudicator upheld a physician's refusal to make corrections to the complainant's medical record based on section 55(9)(b) (professional opinion or observations made in good faith). In this reconsideration decision, the adjudicator finds that the reconsideration request failed to establish any ground for reconsideration of PHIPA Decision 206 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*, sections 55(1) and 55(9)(b); and the *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*, section 27.01.

**Decisions Considered:** PHIPA Decisions 25 and 206.

**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 206 fits within any of the grounds set out 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] PHIPA Decision 206 addressed a physician's denial of the complainant's request to have corrections made to a progress note contained in her medical record under section 55(1) of the *Personal Health Information Protection Act* (the *Act* of PHIPA). In that decision, I upheld the physician's refusal to correct the progress note, based on the exception at section 55(9)(b) of the *Act* which permits a custodian to refuse to correct professional opinions or observations made in good faith.

[3] During my review into the complaint that led to PHIPA Decision 206, in her representations, the complainant made arguments about the correction of a referral form that was the subject of the visit document in the progress note that was the record at issue in that complaint. In PHIPA Decision 206 I noted that the referral was not before me. I noted that during mediation, the parties had agreed to remove it from the scope of the complaint. I therefore did not make a finding on whether the physician had a duty to correct the referral form.

[4] After receiving PHIPA Decision 206, the complainant requested that I reconsider the decision stating that the referral form contains the information that she wishes to have corrected and that it was not considered as evidence in the appeal. She submitted that the physician should have a copy of the original referral and she wants it to be corrected as the information that it contains is not true and should never have been put in her records. Subsequently, the complainant advised that the physician identified the referral form as being in his custody or under his control. The complainant requests that the correction of the referral be considered in the reconsideration of PHIPA Decision 206.

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

## **DISCUSSION:**

### **Grounds for reconsideration under section 27.01 of the *Code***

[6] 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:

- 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.

[7] Mere disagreement with a decision is not a ground for reconsideration under section 27.01 of the *Code*.<sup>1</sup>

### **The complainant's request for reconsideration**

[8] As indicated above, the complainant submits that I reconsider PHIPA Decision 206 because a referral form, which contains the information that she wishes to have corrected by the physician, was not considered as a record at issue in the review. The complainant submits that the physician recently advised her that he has the referral form in his custody or under his control. She requests that the correction of the referral form be considered in this reconsideration. She submits that, as with the information in the progress note considered in the complaint, the information in the referral form is not true and should never have been included in her records.

[9] In her request for reconsideration, the complainant neither specifically identifies any of the grounds for reconsideration under section 27.01 of the *Code* as relevant, nor does she indicate that she is seeking reconsideration of my findings in PHIPA Decision 206 with respect to the correction of the progress note, which was the record before me in the complaint that lead to that decision.

### **Analysis and finding**

[10] 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.<sup>2</sup> As Justice Sopinka commented in *Chandler v. Alberta Association of Architects*,<sup>3</sup>

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<sup>1</sup> See *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC), as discussed in PHIPA Decision 25 and other decisions, below.

<sup>2</sup> 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*.

<sup>3</sup> Cited above.

“there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals.”

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

[11] I agree with the approach taken by the former Assistant Commissioner and apply it in the circumstances of the matter before me.<sup>4</sup> The complainant’s disagreement with the fact that I did not consider the referral form in PHIPA Decision 206 is not by itself a ground for reconsideration of the decision. For reasons I explain below, the complainant’s submissions in this respect 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***

[12] The complainant’s assertion that I did not consider the referral form in my review can be seen to suggest that it is her view that my failure to consider that record amounts to a “fundamental defect” in the adjudication process of PHIPA Decision 206. Section 27.01 of the *Code* allows IPC to reconsider a decision where there was a fundamental defect in the adjudication process.

[13] 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,<sup>5</sup>
- failure to invite representations on the issue of invasion of privacy,<sup>6</sup> or
- failure to allow for sur-reply representations where new issues or evidence are provided in reply.<sup>7</sup>

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<sup>4</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 and 161.

<sup>5</sup> Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

<sup>6</sup> Order M-774.

<sup>7</sup> Orders PO-2602-R and PO-2590.

[14] 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.

[15] 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 206, and I am not satisfied that there were any such defects in the adjudication process leading to my decision.

[16] Additionally, in my view, my failure to consider the referral form in PHIPA Decision 206 does not amount to a fundamental defect in the adjudication process because it was removed from the scope of the request during mediation and it was not a record that was before me in the complainant.

[17] I explained in PHIPA Decision 206 that the referral form was addressed in mediation and was removed from the scope of complaint. The Mediator's Report, which summarizes the issues remaining in dispute at the conclusion of mediation, did not include the referral form as a record at issue. The Mediator's Report also did not contain either of the issues of reasonable search or scope of the request, both issues that are raised in circumstances where a complainant confirms that they believe that a record that has not been identified as responsive to a request should exist.<sup>8</sup>

[18] The cover letter to the Mediator's Report that was sent to the complainant, clearly indicates that it reflects the issues that remain in dispute. It states:

The purpose of the [Mediator's] Report is to provide the parties to a complaint with a record of the result of mediation and to provide the Adjudicator with information regarding records and issues that remain to be adjudicated.

[19] The cover letter also requests that the complainant review the Mediator's Report and advise the mediator, by a specific date, if there are any errors or omissions, in which case, the mediator will determine whether the Mediator's Report should be revised. The Mediator's Report further advises that the complaint will be transferred to the adjudication stage of the complaint process after the date by which the complainant is to advise the mediator or any errors or omissions. The Mediator's Report clearly identified the progress note as the sole record at issue in the complaint and its correction as the sole issue to be addressed in the review. The complainant did not advise the mediator that the Mediator's Report contained any errors or omissions.

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

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<sup>8</sup> In mediation, the custodian took the position that he did not have custody or control of the referral form because it was not located during his search for responsive records.

***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***

[21] The complainant submits that because the physician has now confirmed that he has custody or control of the referral form, something that he denied during the mediation of the complaint, I should reconsider PHIPA Decision 206 to address the issue of the physician’s duty to correct the referral form. The complainant’s submissions in this request suggest that she argues that new facts are now available and provide the basis for a reconsideration of PHIPA Decision 206 on the ground set out in section 27.01(d). Although I agree that this is “new evidence” that was not before me during my review which led to PHIPA Decision 206, as the referral form itself was not a record that was before me in that complaint, this new evidence is not material to my finding in PHIPA Decision 206 and does not establish a basis for its reconsideration.

[22] 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.<sup>9</sup> 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]

[23] 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 206 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.

**Conclusion**

[24] Overall, I find that through her reconsideration request, the complainant seeks to change or re-argue positions previously taken during the complaint in an effort to persuade me to reach a different decision, namely one that deals with an issue that was not before me in the review.

[25] 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

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<sup>9</sup> PHIPA Decisions 146 and 161.

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 206.

[26] For the foregoing reasons, I deny the complainant's request for reconsideration of PHIPA Decision 206.

**NO RECONSIDERATION:**

The reconsideration request is denied.

Original Signed By: \_\_\_\_\_  
Catherine Corban  
Adjudicator

July 17, 2023 \_\_\_\_\_