Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 121

Complaint HA20-00055

Allevio Pain Management Clinic

June 9, 2020

Summary: In this Reconsideration Decision, the adjudicator denies the complainant's request to reconsider PHIPA Decision 119. In PHIPA Decision 119, the adjudicator considered whether a pain management clinic had conducted a reasonable search for records responsive to the complainant's request for access to his complete medical file. The adjudicator determined that the clinic had conducted a reasonable search, in accordance with its obligation under the *Personal Health Information Protection Act*, and dismissed the complaint. In this reconsideration decision, the adjudicator finds that the claimed grounds for reconsideration in sections 27.01(a) and (c) of the *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* are not established.

Decisions Considered: PHIPA Decisions 25 and 119.

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] This decision addresses a request for reconsideration made by the complainant in PHIPA Decision 119. The complainant has been a patient of the Allevio Pain

Management Clinic (the clinic), which is a "health information custodian" for the purposes of the *Personal Health Information Protection Act* (the *Act*). The complainant requested access to records relating to his care at the clinic. In response,[1] the clinic provided the complainant with access to what it described as his "complete medical record." After reviewing the records that he received from the clinic, the complainant filed a complaint with this office alleging that additional records should exist.

[2] Complaint HA19-00009 was opened to address the issue raised by the complainant. During the mediation stage of the complaint process, a mediator had conversations with both the complainant and the clinic with a view to settling the issue raised by the complaint. A mediated resolution was not achieved and the complaint was transferred to the adjudication stage.

The review of Complaint HA19-00009

[3] I decided to conduct a review under the *Act* to determine whether the clinic had satisfied its statutory obligation to conduct a reasonable search in response to the complainant's request. During my review, I sought and received submissions from both the clinic and the complainant.

[4] The complainant's submissions relating to the reasonableness of the clinic's search were two-fold. He explained that he had reason to believe that additional responsive records exist because he had medical imaging conducted during one of his clinic visits, but he was not provided access to those images. He also said that he was not provided any discharge reports relating to another one of his appointments. In addition to his submissions regarding the reasonableness of the clinic's search, the complainant raised a number of questions about the clinic's record-keeping and communication practices, among other things.

[5] The clinic provided affidavit evidence describing the steps involved in its search for records responsive to the complainant's request. The clinic's evidence explained how and when the clinic's staff discovered that, as a result of a machine malfunction, the images taken during the complainant's first visit had not been saved and could not be recovered. The clinic offered this as an explanation for why it did not provide the complainant with any images from his first visit.

[6] The clinic's evidence also addressed a reference in a doctor's report to an imaging procedure being used during the complainant's second clinic visit, and those images being saved for future reference. The clinic explained that the doctor's report was prepared in advance of the scheduled visit; therefore, those particular notations in

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[1] The clinic's access decision followed this office's consideration of a "deemed refusal" complaint involving the parties (Complaint HA18-111).

the report in question did not reflect the fact that the scheduled procedure was aborted, and no medical imaging was conducted, as a result of a medical emergency that arose during the complainant's second visit. Furthermore, the clinic maintained that because the complainant was transferred to the hospital by ambulance on an emergency basis, no discharge report was prepared for that visit.

[7] Lastly, the clinic submitted that it conducted a second search during the mediation stage of the complaint process, which did not locate any additional responsive records.

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[8] Based on the totality of the evidence that was before me, I found that there was no reasonable basis upon which to conclude that the particular records sought by the complainant (the medical images and discharge report) exist, but have yet to be located by the clinic. Given that the complainant had not suggested that any additional records exist beyond the medical images and discharge report, I found that there was no reasonable basis for concluding that additional responsive records exist, which have not yet been identified and located by the clinic.

[9] I was also satisfied that experienced employees who were knowledgeable in the subject matter of the complainant's request conducted the clinic's searches. Accordingly, I found that the clinic had met its obligation to conduct a reasonable search as required by the *Act*, and I dismissed the complaint.

[10] After receiving PHIPA Decision 119, the complainant requested that I reconsider the decision based on what he claimed to be a "number of anomalies, biased and skewed conclusions." I invited the complainant to provide representations in support of his request, with reference to the grounds for reconsideration set out in section 27.01 of this office's *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004* (the *Code*). The complainant provided representations explaining that his reconsideration request is based on the grounds in sections 27.01(a) and (c) of the *Code*, in particular.[2]

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

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[2] After reviewing the complainant's representations, I determined that it was not necessary to invite the clinic to provide representations in response.

DISCUSSION:

Reconsideration criteria and procedure

[12] The IPC's reconsideration criteria and procedure are set out in section 27 of the *Code*. As mentioned above, the complainant relies on the grounds in sections 27.01(a) and (c), in particular. The relevant portions of section 27 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;
> >
> > (c) there is a clerical error, accidental error or omission or other similar error in the Decision.

The complainant's reconsideration request

[13] In support of his position that there was a fundamental defect in the adjudication process and a clerical error, accidental error, or omission in PHIPA Decision 119, the complainant first takes issue with how the decision was written. He maintains that the "Background" section of the decision only addresses a portion of the complaint's two-year history. As evidence of this, he refers to a list of correspondence, including emails from him to the Commissioner, and emails between him and the mediator, which he maintains are "missing" from the decision. The complainant also says that he found the decision difficult to follow because it was written using "the paraphrasing method," in which I summarized the course of the complaint without referring to specific sources, such as emails and dates. The complainant says that he would like to see the decision rewritten using the "citation format."

[14] The complainant also refers to chapter 12 of a freedom of information manual published by the Ministry of Government and Consumer Services, which he says states, "[t]he IPC has the authority to investigate matters related to an institution's use […] of personal information […]."[3]The complainant maintains that he wrote to the Commissioner requesting that this office initiate a "Chapter 12 Privacy Complaint" in April 2019,[4] but that this request was "ignored." As a result, he claims that this office has contravened Chapter 12 and violated his rights. The complainant maintains that this

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[3] The complainant is referring to "Chapter 12: Privacy Complaints, Breaches and Investigations" of the Ministry of Government and Consumer Service's *Freedom of Information and Protection of Privacy Act Manual*, which is available online: <https://www.ontario.ca/document/freedom-information-and-protection-privacy-manual/chapter-12-privacy-complaints-breaches-and-investigations>.

[4] During the mediation stage of the complaint process.

office's failure to explain why it "did not enforce Chapter 12" amounts to an omission, presumably under section 27.01(c) of the *Code*.

[15] The complainant goes on to submit that, during my review, the clinic only provided hearsay evidence regarding the medical images that were, according to the clinic, not captured as a result of a machine malfunction. He notes the clinic's delay in discovering the malfunction, and maintains that the clinic failed to inform him of the machine error and resulting loss of images. He questions whether the attending physician was informed of the malfunction, and wonders how the physician was able to administer a particular treatment at a subsequent visit without the images from his first visit. He suggests that the physician should have provided affidavit evidence during my review, attesting to whether he was informed of the "image problem." The complainant also submits that "the clinic contravened [the College of Physicians and Surgeons' of Ontario (the CPSO)] regulations."

[16] Finally, the complainant states that because the decision is filled with "anomalies, biased and skewed conclusions," he concludes that it is "flawed and […] not reasonable."

Analysis and findings

[17] In dismissing the complainant's reconsideration request, I have considered his arguments in light of the reconsideration grounds enumerated in sections 27.01(a) and (c) of the *Code*.

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

[18] Section 27.01(a) of the *Code* allows this office to reconsider a decision where there was a fundamental defect 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 orders of this office have determined that a fundamental defect in the adjudication process may include:

- failure to notify an affected party,[5]
- failure to invite representations on the issue of invasion of privacy,[6] or
- failure to allow for sur-reply representations where new issues or evidence are provided in reply.[7]

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[5] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.
[6] Order M-774.

[19] 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 119, and I am not satisfied that there were any such defects in the process.

[20] I understand the complainant's arguments regarding my alleged reliance on hearsay evidence and this office's failure to initiate a "Chapter 12 Privacy Complaint" as his submissions in support of there having been a fundamental defect in the adjudication process.

[21] With respect to the complainant's arguments regarding hearsay evidence, I note that the IPC as a tribunal is not bound by the traditional rules of evidence. Rather, it is open to adjudicators to rely on unsworn evidence, hearsay evidence, and opinions.[8] In fact, it is well established that hearsay evidence is generally admissible in tribunal proceedings,[9] so long as the adjudicator is alive to the "inherent unreliability"[10] of such evidence and accords it the appropriate weight.[11] Accordingly, I am not satisfied that my reliance on any unsworn evidence that the clinic provided amounts to a fundamental defect in the adjudication process for the purpose of section 27.01(a) of the *Code*.

[22] The complainant's arguments regarding a "Section 12 Privacy Complaint" are made with reference to a *Freedom of Information and Protection of Privacy Manual* (the manual) published by the Ministry of Government and Consumer Services.[12] This manual is intended to provide guidance for institutions' Freedom of Information and Privacy Coordinators and their staff, as well as the general public, regarding the administration of the provincial and municipal freedom of information statutes (*FIPPA* and *MFIPPA*). Chapter 12 is a chapter dealing with privacy complaints under *FIPPA/MIPPA*.

[23] As I have mentioned previously, the issue before me in Complaint HA19-00009 was whether the clinic conducted a reasonable search for records responsive to the complainant's request. Given that the complaint before me was not a privacy complaint, I did not consider the complainant's privacy concerns during the course of my review. Moreover, the manual that the complainant relies on, and the guidance provided in

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[7] Orders PO-2602-R and PO-2590.
[8] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 at p. 894.
[9] Orders PO-2242 and MO-3404.
[10] *Dayday v. MacEwan*, (1987) 62 O.R. (2d) 588 (Dist. Ct.).
[11] *Krabi et al. v. Ministry of Housing* (1982), 39 O.R. (2d) 691 (Div. Ct.).
[12] Ministry of Government and Consumer Services, "Chapter 12: Privacy Complaints, Breaches and Investigations" updated April 9, 2010, available online: <https://www.ontario.ca/document/freedom-information-and-protection-privacy-manual/chapter-12-privacy-complaints-breaches-and-investigations>

Chapter 12 in particular, relate to the administration of *FIPPA* and *MFIPPA*,[13] and had no bearing on my findings regarding the reasonableness of the clinic's search under *PHIPA*. Accordingly, I find that the complainant's submissions in this regard do not establish the existence of a fundamental defect in the adjudication process leading to PHIPA Decision 119.

[24] For these reasons, I find that the complainant has not established that the ground in section 27.01(a) applies for reconsidering PHIPA Decision 119.

Section 27.01(c): clerical error, accidental error or omission

[25] Section 27.01(c) of the *Code* allows this office to reconsider a decision where there is a clerical error, accidental error or omission or other similar error in the decision. Based on my consideration of the information before me, and PHIPA Decision 119, I find that there were no such errors in my decision.

[26] To begin, I observe that the matters the complainant raises are not what would typically be considered a clerical error, accidental error or omission. A clerical error, accidental error or omission, or other similar error would commonly be a typographical error or a misplaced word, such as "not", in the decision. It is an error that generally originates with this office rather than with a party, and is usually obvious to the reader. However, for completeness, I will address the complainant's arguments under this head, and I will also consider whether they support a reconsideration under any of the other grounds listed in section 27.01 of the *Code.*

[27] The complainant provides arguments regarding various omissions or other similar errors that he maintains support his reconsideration request. To begin, the complainant maintains that PHIPA Decision 119 should be reconsidered on the basis that it does not, according to him, provide a complete history of the complaint process. He points to the fact that the decision does not specifically refer to or cite correspondence between him and this office, such as emails that he sent to or received from various IPC employees[14] during the mediation stage of his complaint. The complainant also argues that the writing style is difficult to follow, and that my analysis omits the same key correspondence missing from the description of the history of the complaint.

[28] These arguments largely amount to the complainant taking issue with the way that PHIPA Decision 119 was written. In reaching my findings in PHIPA Decision 119, I considered all of the evidence before me, as provided by both the complainant and the clinic. In the interest of succinctness, however, I did not summarize or refer to every piece of evidence that was submitted. The background, summary of the parties'

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[13] I note that the "Purpose" section of the manual states, "[t]his manual does not provide guidance on the application of the Personal Health Information Protection Act."

[14] Including the mediator and the Commissioner.

representations, and analysis in the decision focused on the crux of the parties' arguments as they related to the sole issue before me in Complaint HA19-00009, being the reasonableness of the clinic's search for records.

[29] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[15] the Supreme Court of Canada reaffirmed its finding in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*[16] 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.[17] Relying on those decisions, I find that the complainant's criticisms of the decision, and the manner in which it was written, do not satisfy the grounds in section 27.01(c) of the *Code*.

[30] The complainant also argues that I based my decision on hearsay and incomplete evidence. I have already addressed the complainant's arguments regarding hearsay evidence, above. Here, I will address the complainant's suggestion that it was an error or omission for me not to have required his physician at the clinic to provide an affidavit attesting to his knowledge of the machine malfunction and resulting loss of medical images.

[31] As part of my review, I asked the clinic to provide affidavit evidence describing its effort to search for records that would be responsive to the complainant's request. The clinic elected to have its Patient Access Coordinator (the coordinator) swear the requested affidavit. The coordinator was involved in responding to the complainant's request, was aware of the steps taken as part of the clinic's search effort, and could explain, based on her own knowledge and belief, why certain records were not provided to the complainant. I accepted then, as I do now, that the clinic was in the best position to choose the appropriate person to provide evidence regarding its search. Accordingly, I am not persuaded that my reliance on the coordinator's affidavit as evidence of the clinic's search, rather than requiring an affidavit from the physician, amounts to an omission for the purpose of section 27.01(c) of the *Code*. I dismiss this as a ground for reconsidering PHIPA Decision 119.

[32] Another omission that was raised by the complainant was this office's alleged failure to initiate a "Chapter 12 Privacy Complaint."[18] As I have already mentioned,[19] the complainant's privacy concerns were not before me in the adjudication of Complaint

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[15] 2019 SCC 65, at paragraphs 128 and 301 [*Vavilov*].
[16] 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].
[17] *Vavilov*, *supra* note 13, at paragraph 91; *Newfoundland Nurses*, *ibid*, at paragraph 14.
[18] Again, the complainant is referring to "Chapter 12: Privacy Breaches, Complaints and Investigations" of the Ministry of Government and Consumer Service's *Freedom of Information and Protection of Privacy Manual*, cited above.
[19] See paragraphs 22-23.

HA19-00009. Therefore, I find that this argument does not support a finding that PHIPA Decision 119 contained an omission that warrants reconsidering under section 27.01(c) of the *Code*. I am also not satisfied that any of what the complainant terms "omissions" are grounds for reconsideration under any of the other paragraphs of section 27.01.

[33] Finally, the complainant raised a number of questions regarding the clinic's record- keeping and communication practices, which he maintains were not addressed in my review or in PHIPA Decision 119. In response to these submissions, I note that the reconsideration process is not intended to provide a forum for parties to re-argue their cases. In PHIPA Decision 25, Assistant Commissioner Sherry Liang analyzed 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 statute 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.[20] As Justice Sopinka commented in *Chandler v. Alberta Association of Architects*,[21] "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."

[34] This approach has since been adopted in subsequent decisions under the *Act*.[22]

[35] The complainant's remaining arguments were all raised during my initial review of his complaint. In my view, he raises them again now in an attempt to re-argue his case. The complainant's concerns regarding the quality of the clinic's record keeping, the clinic's delay in realizing that his images had not been saved, and its alleged failure to comply with the CPSO's record-keeping requirements, were all argued and addressed in PHIPA Decision 119.[23] Making the same arguments again does not constitute grounds for reconsidering PHIPA Decision 119 under section 27.01(c) of the *Code.*

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[20] The original footnote in PHIPA Decision 25 reads: 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 of 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 reconsideration power set out in section 64.
[21] [1989] 2 S.C.R. 848, at 861.
[22] PHIPA Decision 113.
[23] See, in particular, paragraph 35 of PHIPA Decision 119, where I say that these concerns do not have a bearing on whether the clinic conducted a reasonable search (i.e. they would not aid in deciding whether there are additional responsive records that have not yet been identified and located by the clinic).

[36] In conclusion, having reviewed the complainant's reconsideration request and representations, I find that there was no fundamental defect in the adjudication process, or clerical error, accidental error or omission in PHIPA Decision 119. Therefore, I find that the complainant's request does not meet the grounds in sections 27.01(a) or (c) of the *Code*, upon which this office may reconsider a decision.

ORDER:

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

Original signed by	June 9, 2020
Jaime Cardy	
Adjudicator	