

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 160

Complaint HA20-00053

Children's Hospital of Eastern Ontario

October 4, 2021

Summary: A joint custodial parent complained about several aspects of the hospital's decisions in response to his request for access to the health records of his two children, both of whom are under the age of eight. During the adjudication stage of the complaint, the other joint custodial parent for the children (the children's mother) confirmed to the adjudicator that she does not consent to the father's access request. As a result, it is not necessary to decide the various issues raised by the father about the hospital's decisions. As one of two equally ranked substitute decision-makers for the children under the *Personal Health Information Protection Act, 2004 (PHIPA)*, the father does not have an independent right under *PHIPA* to request access to the children's health records over the objection of the children's mother. The adjudicator dismisses the complaint on this basis.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A (as amended), sections 5(1), 23, 25, 26, and 71(4)(b).

Decisions Considered: PHIPA Decision 107.

INTRODUCTION:

[1] This decision follows previous decisions of the Office of the Information and Privacy Commissioner/Ontario (the IPC) addressing situations in which joint custodial parents disagree about a request involving their children's personal health information. In PHIPA Decision 107, the IPC concluded that where joint custodial parents are equally ranked substitute decision-makers for their children under the *Personal Health*

Information Protection Act, 2004 (PHIPA), one parent cannot act independently over the objection of the other in making a request under *PHIPA* in relation to the children's personal health information. While the complainant in this instance raised a number of issues with a custodian's decision in response to his request for the children's health records, I do not need to decide those issues because the objection of the other equally ranked substitute decision-maker (the children's mother) to the request means the complainant does not have an independent right under *PHIPA* to act for the children in respect of their personal health information. I dismiss the complaint on this basis.

BACKGROUND:

[2] The complainant is the father of two children under the age of eight. The complainant shares joint custody of the children with the children's mother. The children received health care services at the Children's Hospital of Eastern Ontario (the hospital), and the complainant asked the hospital to provide him with copies of the children's health records for a specified time period.

[3] There is no dispute in this complaint that the hospital is a "health information custodian," and that the records the complainant seeks are records of the children's "personal health information," as those terms are defined in *PHIPA* (sections 3 and 4). This means that under *PHIPA*, the children, or a lawfully authorized "substitute decision-maker" acting on their behalf, have a right to request access to the children's health records held by the hospital. As discussed in more detail below, a substitute decision-maker under *PHIPA* is a person authorized to act in place of an individual in respect of the individual's personal health information (sections 5(1) and 25).

[4] In this case, the hospital's initial responses to the complainant's request demonstrate that the hospital considered the complainant to be a lawfully authorized substitute decision-maker for the children. The hospital initially refused the complainant's request on the basis of certain exemptions in section 52(1) of *PHIPA* that provide grounds for a custodian to deny an access request made under *PHIPA*.

[5] Later, the complainant provided the hospital with some information that persuaded the hospital to grant his request for the children's records. Later still, the hospital received other information that caused the hospital to change its mind, and to refuse to grant the complainant any further access to his children's records. There was also a dispute between the parties about the format of the records already released to the complainant. Given my conclusion below, it is not necessary for me to describe these issues in any detail.

[6] As the parties could not settle these matters between them, the complainant filed a complaint with the IPC about the hospital's decisions in response to his request. The dispute could not be resolved at the mediation stage of the IPC's complaint process, and it moved to the adjudication stage. At the adjudication stage, I first sought

representations from the hospital about the issues under review, since the custodian bears the burden in a complaint about a refusal of access [section 54(8)(b)]. I received representations from the custodian that suggested to me that the children's mother would not consent to the complainant's request.

[7] I asked the complainant to address the matters of the custodial arrangement between the complainant and the children's mother, and if he were aware of any objection to his request from another substitute decision-maker for the children. The complainant confirmed that he shares joint custody of the children with the children's mother, and that he believes the children's mother does not object to his request.

[8] The divergent views of the parties, and the particular facts surrounding the hospital's denial decision (which I will describe generally here as concerns about the relationship between the father and the children) raised questions about the complainant's authority to act for his children under *PHIPA*. Because this is a threshold issue under *PHIPA*, I notified the children's mother of the complaint to ascertain her position on the complainant's access request. The children's mother confirmed the joint custodial arrangement for the children, and stated that she does not consent to the complainant's request for access to the children's records. For the reasons set out below, the mother's objection means the complainant has no independent right under *PHIPA* to make a request on the children's behalf for access to their records. (He also has no right to complain to the IPC about the hospital's decisions on his request.) I dismiss the complaint.

DISCUSSION:

[9] Under *PHIPA*, the right of access to a record of an individual's personal health information belongs to the individual to whom the information relates [section 52(1)]. There is no general right of access in *PHIPA* to records of another individual's personal health information.

[10] There is no claim in this case that the records the complainant seeks are records of his own personal health information.

[11] The complainant is instead claiming that he has the authority to act on behalf of his children, in respect of their personal health information, as their "substitute decision-maker" under *PHIPA*. A substitute decision-maker under *PHIPA* is a person who may act on behalf of an individual in respect of the individual's personal health information [sections 5(1) and 25]. For example, a substitute decision-maker may make a request for access to records of an individual's personal health information, on that individual's behalf.

[12] *PHIPA* identifies persons who may act as a substitute decision-maker for an individual under various circumstances. Section 23 of *PHIPA* states, in part (emphasis

below is mine):

(1) If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure by a health information custodian of personal health information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent:

1. If the individual is capable of consenting to the collection, use or disclosure of the information,

i. the individual ...

2. **If the individual is a child who is less than 16 years of age, a parent of the child** or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent unless the information relates to,

i. treatment within the meaning of the *Health Care Consent Act, 1996*, about which the child has made a decision on his or her own in accordance with that Act, or

ii. counselling in which the child has participated on his or her own under the *Child, Youth and Family Services Act, 2017*.

3. **If the individual is incapable of consenting** to the collection, use or disclosure of the information, a person who is authorized under subsection 5 (2), (3) or (4) or section 26 to consent on behalf of the individual.

(2) In subsection (1), "parent" does not include a parent who has only a right of access to the child.

(3) If the individual is a child who is less than 16 years of age and who is capable of consenting to the collection, use or disclosure of the information and if there is a person who is entitled to act as the substitute decision-maker of the child under paragraph 2 of subsection (1), a decision of the child to give, withhold or withdraw the consent or to provide the information prevails over a conflicting decision of that person.

[13] Both children in the complaint before me are under eight years of age.

[14] In these circumstances, either section 23(1)2 or section 23(1)3 may be applicable. These sections identify who may act as a substitute decision-maker for a child under 16 years of age, depending on whether or not the child is "capable" of consenting within the meaning of *PHIPA* ("mentally capable").

[15] To be mentally capable within the meaning of *PHIPA*, an individual must be able to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure of her personal health information, and to appreciate the reasonably foreseeable consequences of that decision [section 21(1)]. An individual is presumed to be mentally capable, unless the custodian has reasonable grounds to believe that the individual is not mentally capable [sections 21(4) and (5)].

[16] There is no “age of capacity” in *PHIPA*, although the age of the child may be a factor in a custodian’s determination about the child’s mental capacity for the purposes of *PHIPA*.¹

[17] The complainant proposes that given the children’s ages, they should be treated as mentally incapable of consenting in respect of their personal health information. To my knowledge, the hospital has not made a determination about the children’s mental capacity for the purposes of *PHIPA*. However, it is not necessary to have a determination about the children’s mental capacity in order to resolve the issue before me. This is because whether or not the children are mentally capable, the complainant is not authorized in the circumstances to act as an independent substitute decision-maker for them in respect of their personal health information. My reasons follow.

[18] First, if one or both children are mentally incapable, then section 23(1)3 of *PHIPA* provides that a person who is authorized under sections 5(2), (3) or (4), or under section 26 of *PHIPA* may act as the children’s substitute decision-maker.

[19] There is no evidence that any of sections 5(2), (3) or (4) applies in these circumstances.²

[20] In that case, section 26 of *PHIPA* sets out a hierarchy for determining who may act as the incapable individual’s substitute decision-maker. A custodial parent is one of the persons listed in section 26(1) (at paragraph 5), and there is no evidence before me that there exists another person who would rank higher than a custodial parent, in the hierarchy at section 26(1), to act as a substitute decision-maker for the mentally incapable child or children.

[21] The complainant and the children’s mother both confirm they share joint custody of the children. This means that, if one or both of the children are mentally incapable, the complainant or the child’s mother could each qualify as the substitute decision-maker as a custodial parent, provided other relevant conditions are met.

[22] One of these conditions is a belief on the part of one substitute decision-maker that another equally ranked substitute decision-maker would not object [section

¹ PHIPA Decision 107.

² These sections are applicable where a mentally incapable individual already has a substitute decision-maker in relation to treatment and some other areas of decision-making under the *Health Care Consent Act, 1996* (and certain other conditions are met).

26(5)(b)]. In this case, however, the children's mother, with whom the complainant is equally ranked under section 26(1), has expressly disagreed with the complainant's making an access request on the children's behalf. Even if the complainant were unaware of the mother's objection at the time of making his request, the complainant and the hospital are now aware of the objection. In these circumstances, the complainant cannot claim a belief that the other equally ranked substitute decision-maker would not object to his request, and it would not be reasonable for the hospital to rely on any such assertion [section 71(4)(b)]. Section 26(7) further provides that where equally ranked substitute decision-makers for a mentally incapable individual disagree about a request concerning that individual's personal health information, the Public Guardian and Trustee may make the decision in their place. There is no evidence here that the Public Guardian and Trustee has made a decision in place of the disagreeing joint custodial parents.

[23] In these circumstances, the complainant would not be authorized to act as an independent substitute decision-maker for a child or children who are mentally incapable within the meaning of *PHIPA*.

[24] In addition, if one or both children are mentally capable, I would reach the same conclusion regarding the complainant's authority, for the following reasons.

[25] In the case of mentally capable children, section 23 of *PHIPA* provides that a custodial parent may act as a substitute decision-maker, except in certain circumstances that do not appear to be relevant here.³ Unlike in the above-noted provisions concerning conflict in substitute decision-making for mentally incapable individuals, *PHIPA* does not explicitly address situations where equally ranked substitute decision-makers for mentally capable children disagree.⁴

[26] However, in PHIPA Decision 107, the IPC concluded that in circumstances where a custodian is aware that equally ranked substitute decision-makers disagree on a request concerning a mentally capable child's personal health information, neither substitute decision-maker can act independently of the other in respect of the request. This is based on a purposive reading of section 23 and other sections of *PHIPA*, which would apply an analogous condition (to that set out in section 26 of *PHIPA*) on the ability of equally ranked substitute decision-makers to act independently of one another where there is conflict between them. This approach in PHIPA Decision 107 was adopted in PHIPA Decision 129 (upheld on reconsideration in PHIPA Decision 149).

³ Specifically, there is no claim that the information at issue relates to treatment or counselling in respect of which the mentally capable children have participated on their own [as described in paragraph 2 of section 23(1)], or that the mentally capable children have made their own decisions in respect of the access request that conflicts with the decision of a lawfully authorized substitute decision-maker [section 23(3)].

⁴ Other than in cases where the mentally capable children have made their own decisions: section 23(3). As noted above, there is no evidence that section 23(3) applies here.

[27] The facts before me are similar to those in the above decisions. Here, two equally ranked substitute decision-makers disagree about one substitute decision-maker's request in respect of the children's personal health information. Although the custodian initially treated the complainant as having the authority to act for his children under *PHIPA* (having denied his access request on other grounds), it is now aware that the other equally ranked substitute decision-maker does not agree to the request.

[28] The authority of the requester under *PHIPA* is a threshold issue before deciding the extent of any right of access (and is a necessary condition to having a right to complain to the IPC about a denial of access under *PHIPA*). As a result, whether or not the children are mentally capable within the meaning of *PHIPA*, the complainant is not entitled under *PHIPA* to act as an independent substitute decision-maker for them over the objection of the other custodial parent. I accordingly dismiss his complaint about the hospital's decisions on his requests under *PHIPA*.

[29] For clarity, and to underscore a statement made in PHIPA Decision 107, there is no obligation in every case for a custodian faced with a request from a substitute decision-maker to canvass the views of all equally ranked substitute decision-makers, in order to satisfy itself that they all agree to the request. Section 71(4)(b) makes clear that a custodian is generally entitled to rely on an assertion by a person claiming to be the lawfully authorized decision-maker for an individual. However, where (as in this case) there is reason to believe that another equally ranked substitute decision-maker would disagree with the request, the custodian would not be entitled to rely on such an assertion. In such a case, the custodian would be entitled to refuse the request.

NO ORDER:

For the foregoing reasons, I dismiss the complaint. No order is issued.

Original signed by: _____
Jenny Ryu
Adjudicator

October 4, 2021 _____