Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 187

Complaint HA20-00141

A Registered Psychotherapist

August 19, 2022

Summary: Under the *Personal Health Information Protection Act, 2004* (*PHIPA*), the complainant made several requests to his former psychotherapist for records of his personal health information in unredacted and electronic format. In PHIPA Decision 100, the IPC upheld the psychotherapist's decision to deny access to the records, in full, under section 52(1)(e)(i) of *PHIPA*, a discretionary exemption from the right of access in *PHIPA* that applies where granting access "could reasonably be expected to result in a risk of" certain serious harms. The complainant's request for reconsideration of PHIPA Decision 100 was denied in PHIPA Decision 113.

Four days after the release of PHIPA Decision 113, and again a few weeks later, the complainant requested the same records from the psychotherapist. In response to the new requests, the psychotherapist again denied access, on the same ground in *PHIPA*. The complainant complained to the IPC about the psychotherapist's refusal of access.

In this decision, the adjudicator finds that the common law doctrine of issue estoppel applies in the circumstances. The complainant's new access requests to the psychotherapist, made only days after the IPC's decisions dismissing his previous complaint in respect of the same records and on the same issue, were not accompanied by any new information to support a different decision by the psychotherapist. On the facts before her, the adjudicator concludes that the complainant's current and previous complaints to the IPC concern the same question and the same parties, and that the IPC decisions disposing of this question are final decisions. She also finds there would be no unfairness in exercising her discretion to apply issue estoppel in the circumstances. She declines to conduct a review under *PHIPA*, and she dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, sections 52(1)(e)(i), 57(3) and (4); *Regulated Health Professions Act, 1991*, SO 1991, c 18, section 36(3).

Decisions Considered: PHIPA Decisions 100 and 113.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460; *Penner v. Niagara* (*Regional Police Services Board*), 2013 SCC 19.

OVERVIEW:

[1] This decision addresses a complaint made to the Information and Privacy Commissioner of Ontario (IPC) about a registered psychotherapist's denial of access to records of a complainant's personal health information under the *Personal Health Information Protection Act, 2004* (*PHIPA*). As I explain below, the access requests giving rise to the current complaint were made almost immediately after the IPC's decisions to uphold the same psychotherapist's previous denial of access to the same records, based on the same exemption claim in *PHIPA*, in response to a previous request made by the complainant. The new access requests were not accompanied by any new information from the complainant to support a different decision by the psychotherapist.

[2] After the current complaint moved to the adjudication stage and was assigned to me, I formed the preliminary view that this complaint raises the same question, based on the same facts, and involves the same parties and records as the previous complaint filed by the complainant against the psychotherapist. I sent the complainant a letter setting out my preliminary assessment that no review ought to be conducted of his new complaint because issue estoppel applies in these circumstances. As I explain below, issue estoppel is a common law doctrine whose purpose is to prevent abuse of the decision-making process. I invited the complainant to provide representations in the event he disagreed with my preliminary assessment. The complainant provided representations, which I have considered in arriving at my decision.

[3] In the discussion that follows, I explain why I have decided this matter does not warrant a review under sections 57(3) and (4) of *PHIPA*. On this basis, I dismiss the complaint.

[4] I will begin by setting out the relevant background informing my decision. Then I will explain my reasons for finding that issue estoppel applies in the circumstances.

BACKGROUND:

The current complaint (Complaint HA20-00141)

[5] The current complaint arises from the complainant's March 9 and April 7, 2020 requests under *PHIPA* for access to his "entire health records from [a named centre] unredacted and in electronic format." The complainant sent these requests to counsel for a registered psychotherapist who had previously provided health care services to the complainant in connection with the named centre. I will refer to the psychotherapist and the centre interchangeably as the respondent in this matter.[1]

[6] In a letter to the complainant in response to these requests, counsel for the respondent described the records sought by the complainant as records of the complainant's former psychotherapist that cover the period from a specified date in October 2014 to a specified date in October 2016. The respondent denied access to these records under section 52(1)(e)(i) of *PHIPA*, which is an exemption in *PHIPA* from an individual's right of access to records of the individual's personal health information. The exemption applies where granting access "could reasonably be expected to result in a risk of" certain serious harms.

[7] The complainant disagreed with the respondent's decision, and filed the current complaint with the IPC (Complaint HA20-00141). After an attempt at mediation, the complaint was moved to the adjudication stage of the IPC process, and assigned to an IPC adjudicator.

[8] At this stage, the previous adjudicator noted that the complainant had not provided consent to the IPC's obtaining a copy of the complainant's records of personal health information from the respondent. In a letter to the complainant, the previous adjudicator set out his preliminary view that he could not review the subject-matter of the complaint and properly adjudicate the complaint without having before him a copy of the records at issue. The previous adjudicator asked the complainant to provide his consent to the IPC's obtaining a copy of his records of personal health information from the respondent, or to explain why the complainant did not consent, and to indicate whether and how the complainant believed the IPC could review the subject-matter of his complaint and properly adjudicate this matter without having his records of personal health information.

[9] The complainant advised the previous adjudicator that he maintained his refusal

[1] It is not in dispute that the registered psychotherapist is a health information custodian within the meaning of *PHIPA* in respect of the records at issue in this complaint and in the previous complaint discussed in this decision. Specifically, in the language of *PHIPA*, she is a "health care practitioner or person who operates a group practice of health care practitioners," and/or is the person who, at the relevant time, operated a centre, program or service for community health or mental health whose primary purpose was the provision of health care (paragraphs 1 and/or 4.vii of the definition at section 3(1) of *PHIPA*).

of consent, and he provided reasons for his refusal.

[10] Some time later, the previous adjudicator wrote to the complainant again to seek the complainant's consent with respect to his personal health information.

[11] In response, the complainant stated:

> I will ONLY give consent if this letter [a letter attached to the complainant's email submission] will be used in the decision process with evidence that it was used in consideration to release my records.

[12] The complainant described the letter attached to his submission as a "recent letter of advocacy" from a current therapist with whom he had been working since 2016. I will address the relevance of this letter further below.

[13] This complaint file was later transferred to me. I confirm that while the complainant has now consented (conditionally) to the IPC's obtaining his records of personal health information from the respondent, the IPC did not request or obtain the records from the respondent. Nor, in light of my findings below, is it necessary to do so.

The complainant's previous complaint (Complaint HA18-2), and PHIPA Decisions 100 and 113

[14] The complainant had filed a previous complaint with the IPC regarding the same respondent's denial of a *PHIPA* request he made to the respondent in December 2017. That request was for all the complainant's records from his former psychotherapist (the respondent in this complaint), who had treated the complainant between October 2014 and October 2016.

[15] At that time, the respondent denied access to responsive records under section 52(1)(e)(i) of *PHIPA*, the same exemption that is at issue in the current complaint. The complainant complained to the IPC about that decision, and IPC Complaint HA18-2 was opened to address this matter.

[16] After conducting a review under *PHIPA*, the IPC issued PHIPA Decision 100 on October 8, 2019. In that decision, the IPC upheld the respondent's reliance on section 52(1)(e)(i) of *PHIPA* to deny the complainant's request for access to the responsive records.

[17] The complainant was dissatisfied with that decision and requested a reconsideration by the IPC.

[18] On March 5, 2020, the IPC issued PHIPA Decision 113, denying the complainant's request for reconsideration of PHIPA Decision 100.

[19] The effect of PHIPA Decisions 110 and 113 was to dismiss the previous

complaint (Complaint HA18-2) about the respondent's reliance on section 52(1)(e)(i) of *PHIPA* to deny access to the responsive records.

[20] On March 9, 2020 (four days after the release of PHIPA Decision 113), and again on April 7, 2020, the complainant made the access requests at issue in the current complaint.

Overlap between the complainant's previous complaint and the current complaint

[21] The current complaint arises from the complainant's access requests made to the respondent shortly after the release of PHIPA Decision 113, denying his request for reconsideration of PHIPA Decision 100.

[22] Specifically, his March 9, 2020 request to the respondent, on which he copied the IPC, was made four days after the release of PHIPA Decision 113. The complainant's April 7, 2020 request, which he also copied to the IPC, was made a little over a month after the release of PHIPA Decision 113.

[23] In both access requests, the complainant states that he will continue to make access requests to the respondent until he receives his health records. Based on the correspondence on which the complainant copied the IPC, there is no indication that the complainant provided the respondent with any new information to support the respondent's reaching a different decision in response to his new access requests.

[24] Because it appeared that both complaints concern the same parties, records, and basis for denial, I wrote to counsel for the respondent to ask whether the records and issues in the current complaint are similar, or identical, to the records and issues in the complainant's previous complaint.

[25] Counsel for the respondent confirmed that the parties, records, and issues in the two complaints are identical.

The complainant's submissions to the previous adjudicator in the current complaint

[26] As noted above, in response to the previous adjudicator's correspondence, the complainant stated that he will give his consent in respect of his personal health information only on the conditions that: 1. the IPC use in its decision-making a "letter of advocacy" that the complainant provided from a person he describes as one of his current therapists; and 2. the IPC demonstrate "with evidence" that it has done so. In this submission to the previous adjudicator, the complainant also provided other information to support his position that he ought to be provided with the records he seeks.

[27] I have considered what impact, if any, the complainant's submission to the

previous adjudicator (including the letter from a current therapist) ought to have on the processing of the current complaint.

[28] First, I considered whether the complainant provided the information in his submission in support of a request for reconsideration of PHIPA Decisions 100 and 113. One of the grounds under which the IPC may reconsider a matter under *PHIPA* is the establishment of new facts or a material change in circumstances relating to an order issued by the IPC [section 64(1) of *PHIPA*; *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*, section 27.01(d)].

[29] No order was issued by the adjudicator in either PHIPA Decision 100 or PHIPA Decision 113, so this ground of reconsideration cannot apply. The complainant's submission does not raise any other ground for reconsideration of those decisions.

[30] Next, I considered the impact of the complainant's submission on this current complaint. I note that even if I were to proceed with a review of this complaint, I would have to assess whether the letter submitted to the IPC (the letter from a current therapist) would be admissible in this IPC proceeding, or would be inadmissible because of the operation of section 36(3) of the *Regulated Health Professions Act, 1991* (*RHPA*).[2] Section 36(3) of the *RHPA* makes inadmissible in IPC proceedings certain materials from proceedings under the *RHPA* (such as proceedings of some health regulatory colleges).[3]

[31] However, it is unnecessary for me to address this question here, because I conclude that no review of the complaint is warranted in the circumstances. As I explain below, there is no evidence that the complainant provided this letter, or any other new information, to the respondent in support of his new requests for access to the same records that were at issue in his previous IPC complaint. I conclude that issue estoppel applies in the circumstances. My reasons follow.

DISCUSSION:

Should this complaint proceed to a review under *PHIPA*?

[32] As the adjudicator, I have the authority to decide whether this complaint should proceed to a review under *PHIPA*. This power is set out in sections 57(3) and (4) of *PHIPA*, which state, in part:

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[2] SO 1991, c 18.

[3] PHIPA Decision 80, cited in PHIPA Decision 100. The letter attached to the complainant's submission is from an individual who says he has provided counselling services to the complainant since November 2016. The letter is nearly identical in content and format to a letter the complainant provided at an earlier stage of the current complaint (Complaint HA20-00141), written by the same individual and addressed to tribunal members for the College of Registered Psychotherapists of Ontario, "in support of [the complainant] and his appeal" with that college.

> (3) If the Commissioner does not take an action described in [section 57(1) (b) or (c), which concern attempts at settlement] or if the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified, the Commissioner may review the subject-matter of a complaint made under [*PHIPA*] if satisfied that there are reasonable grounds to do so.
>
> (4) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper […]

[33] After considering the circumstances surrounding this complaint, including the background summarized above and the complainant's submissions on my preliminary assessment (which I describe further below), I conclude that this matter does not warrant a review under *PHIPA*. Specifically, because this complaint concerns the same parties, records, and issues that were the subject of previous final decisions of the IPC, I find that the doctrine of issue estoppel applies, and I dismiss the complaint on this basis.

[34] Issue estoppel is a common law doctrine whose purpose is to prevent abuse of the decision-making process. In *Danyluk v. Ainsworth Technologies Inc.*, the Supreme Court of Canada explained that this doctrine reflects the idea that a dispute once judged with finality is not subject to re-litigation.[4] The Court explained why finality in litigation is important:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. […] An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
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> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal.[5]

[35] In the same case, the Supreme Court confirmed that the doctrine of issue estoppel applies to the prior final decisions of administrative tribunals.[6]

[36] The IPC has adopted the Court's approach in *Danyluk* in applying the doctrine of

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[4] 2001 SCC 44 (CanLII), [2001] 2 SCR 460 (*Danyluk*), at para 20, citing *Farwell v. The Queen* (1894), 1894 CanLII 72 (SCC) and others.
[5] *Danyluk*, cited above, at paras 18 and 19.
[6] *Danyluk*, cited above, at para 22.

issue estoppel in appeals filed with the IPC under the *Freedom of Information and Protection of Privacy Act* and its municipal equivalent.[7] The IPC has also applied the considerations under issue estoppel in the *PHIPA* context, in declining to review under *PHIPA* complaints whose subject-matter had already been appropriately dealt with through other, non-IPC, proceedings.[8]

[37] In this case, to determine whether issue estoppel applies to this complaint under *PHIPA*, I adopt the two-step analysis set out by the Supreme Court in *Danyluk*.

[38] First, I must decide whether the conditions for the operation of issue estoppel have been met. They are:

1. that the same question has been decided;

2. that the prior judicial decision which is said to create the estoppel was final;[9] and

3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[39] Second, assuming these three conditions are met, I must determine "whether, as a matter of discretion, issue estoppel *ought* to be applied" (emphasis in original).[10] This step requires consideration of whether, taking into account the entirety of the circumstances, applying issue estoppel in a particular case would work an injustice. If so, I may decline to apply it.[11] (I discuss this aspect of the test for issue estoppel in more detail, further below.)

Issue estoppel applies in the circumstances, and I exercise my discretion to apply it here

[40] I am satisfied that the three conditions for the operation of issue estoppel are met in this case.

[41] First, I am satisfied that the current complaint and the previous complaint concern the same question: the complainant's right of access under *PHIPA* to the same records to which the respondent denied access, in both cases, under the same section of *PHIPA*, based on the same facts before it. In his response to my preliminary assessment letter, the complainant does not refute my preliminary view, based on my examination of his new access requests, that the new requests were unaccompanied by

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[7] Among others, see Orders MO-1907, MO-3960, PO-3946, PO-4045, and PO-4235.
[8] PHIPA Decisions 80 and 176. These decisions involved consideration of whether the complaints before the IPC had been appropriately dealt with by means of other procedures, within the meaning of section 57(4)(b) of *PHIPA*.
[9] As noted above, *Danyluk* confirmed that a prior judicial decision includes a prior decision of an administrative tribunal. See footnote 6.
[10] *Danyluk*, cited above, at para 33.
[11] *Danyluk*, cited above, at para 80.

any information to support a different decision by the respondent. New information from a requester will not always support a new or different access decision by a custodian, and the determination of whether issue estoppel applies in a given case will depend on the particular facts. In this case, the complainant provided the respondent with no new information in his access requests made almost immediately after the release of an IPC decision confirming a previous denial of access based on the same facts. In these circumstances, I am satisfied that the respondent's new decision (namely, to deny the complainant's new access requests on the same ground as its previous denial) raises no new issues distinct from those the IPC addressed in PHIPA Decisions 100 and 113.

[42] Second, PHIPA Decisions 100 and 113, which were issued in October 2019 and March 2020, have not to my knowledge been subject to any judicial review application. I am thus satisfied that the prior IPC decisions concerning this question are final decisions.

[43] Finally, the parties to the prior decisions are the same parties now before me in the current complaint.

[44] I find, therefore, that the three preconditions to the application of issue estoppel have been met.

[45] I must now consider whether applying issue estoppel in these circumstances would "work an injustice." If so, I may exercise my discretion not to dismiss the complaint on this basis. The Supreme Court confirmed this discretion in *Danyluk* and in decisions issued after *Danyluk*, including in *Penner v. Niagara (Regional Police Services Board)*,[12] which, like *Danyluk*, considered the application of issue estoppel in the context of prior administrative (as opposed to court) proceedings. In *Penner*, the majority of the Court found that even where the preconditions for issue estoppel were met, other fairness factors should inform the exercise of discretion:

> Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.[13]

[46] There is no evidence to suggest the prior proceedings before the IPC were procedurally unfair to the complainant. The complainant does not deny that he participated in the review leading up to PHIPA Decision 100, and in the separate IPC process that addressed his request for reconsideration of that decision, which resulted

[12] 2013 SCC 19 (*Penner*).
[13] *Penner*, cited above, at para 39.

in PHIPA Decision 113.

[47] I have considered whether using the results of the prior IPC proceedings to preclude the current complaint would be unfair to the complainant in some other way.

[48] In *Penner*, the majority of the Court identified some ways in which using the results of prior proceedings to preclude a new proceeding could be unfair:

> This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context.[14]

[49] In this case, there are no significant differences between the previous proceedings before the IPC and the current proceeding, which is before the same body and conducted under the same statute.

[50] I have considered the complainant's submissions in response to my preliminary assessment of his complaint. The complainant objects to any implication he is abusing the processes of the IPC. He maintains that it is necessary to file new complaints to the IPC because the respondent continues to deny access to the records he seeks, without providing supporting clinical documentation about his current mental capacity. (As I note below, the complainant is no longer in a clinical relationship with the respondent.) The complainant says that a lot has changed in the time since the respondent's first denial decision (which I take to mean the access decision that was considered in PHIPA Decision 100); however, he says, the respondent and the IPC lack wisdom and insight into his current state. He repeats that he will continue filing access requests until his rights have been acknowledged and fulfilled.

[51] I agree with the complainant that information about a requester's current mental capacity, or current state, may be relevant to a custodian's decision about the application of the harms-based exemption in section 52(1)(e)(i), because the assessment of the risk of harm may change over time, based on the information before the custodian when it makes its access decision. For example, a custodian could deny access to records on the basis of section 52(1)(e)(i) at one point in time, and then revise its decision at a later time, based on changed circumstances. There may be appropriate cases for the IPC to review a complaint about a denial of access to records that were the subject of a previous complaint. This could be the case, for example, where a custodian fails to take into account relevant changed circumstances in making

[14] *Penner*, cited above, at para 42.

a new access decision about the application of the harms-based exemption. But this is not the situation before me.

[52] As I have noted above, the access requests giving rise to this complaint were made almost immediately after the IPC's decisions upholding the respondent's previous denial of access to the same records, on the same ground, based on the same information before it. I do not agree with the complainant that the respondent was required to provide clinical documentation about his current mental capacity to support its decision on his new requests for the same records in these circumstances. The respondent and the complainant do not have a current health care relationship, and I would not expect the respondent to maintain current clinical documentation about the complainant for health care purposes.[15] And in this case, as I have stated above, the complainant provided no information in his new access requests to support a different assessment by the respondent of the risk of harm of granting access to the requested records. While the complainant says that a lot has changed, he has provided no evidence of this to the respondent, which is the body that makes the initial access decision. The IPC does not make an access decision in place of the custodian with custody or control of the requested records, and I have explained above why the complainant's new complaint does not raise a ground for reconsideration of the previous IPC decisions on this matter.

[53] I conclude that there is no unfairness in my relying on the prior IPC decisions to preclude the current complaint from proceeding to a review.

[54] I exercise my discretion to apply issue estoppel in the circumstances. On this basis, I decline to review this matter under *PHIPA*, and I dismiss the complaint.

NO REVIEW:

For the foregoing reasons, no review of this matter will be conducted under Part VI of *PHIPA.*

Original Signed by: August 19, 2022

Jenny Ryu
Adjudicator

[15] While it has been unnecessary for me to consider it in this decision, I note that the respondent has provided other evidence in this complaint to support its continuing reliance on section 52(1)(e)(i) to deny the complainant's new access requests.