

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 196

Complaint HA21-00178

PHIPA Decision 186

A Hospital

December 23, 2022

**Summary:** The complainant submitted a correction request under the *Personal Health Information Protection Act* to the hospital to correct his medical history information found in his electronic medical record. The hospital denied the complainant's request citing sections 55(8) and 55(9). In PHIPA Decision 186 the adjudicator found that the complainant did not demonstrate that the information in the record was incomplete or incorrect for the purpose the hospital uses the information as required under section 55(8). As a result, the hospital's decision to not make the requested corrections was upheld and the complaint was dismissed.

The complainant sought a reconsideration of PHIPA Decision 186 and made an allegation of bias against the adjudicator. In this reconsideration decision, the adjudicator finds that allegation of bias was not established and that the reconsideration request failed 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*, section 55(8); and the *Code of Procedure for Matters under the Personal Health Information Protection Act, 2004*, section 27.01.

**Decisions Considered:** PHIPA Decision 25.

**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 186 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.

[2] PHIPA Decision 186 addressed the hospital's denial of the complainant's request under section 55(1) of the *Personal Health Information Protection Act* (*PHIPA*) for correction of medical history information found in his electronic medical record (EMR).

[3] The complainant submitted a correction request under *PHIPA* to the hospital requesting that any notations referring to "gout", "delusional disorders", "aggressive behaviour", and "marijuana or tobacco use" be removed from the record. The hospital refused the correction request citing sections 55(8) and 55(9)(b) of *PHIPA*.

[4] The complainant filed a complaint with the Information and Privacy Commissioner of Ontario (IPC) but mediation did not resolve the complaint. The file was transferred to the adjudication stage of the complaints process in which an adjudicator *may* decide to conduct a review.

[5] After reading and considering the file, I sent a letter to the complainant advising him that my preliminary assessment was that there were no reasonable grounds for a review under section 57(3) and (4) of *PHIPA*.<sup>1</sup> The complainant was given an opportunity to provide written representations in response to my letter. In response, the complainant submitted written representations in support of his position that the hospital should make the requested corrections.

[6] After considering the complaint file along with the complainant's written representations, I issued PHIPA Decision 186 in which I found that there were no reasonable grounds for a review under section 57(3) and 57(4) because the complainant had not met the initial onus of establishing a right of correction under section 55(8). Given my finding, I also found that it was not necessary whether the

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<sup>1</sup> I have the authority under sections 57(3) and (4) of *PHIPA* to decide to conduct a review of a complaint. These provisions state, in part:

If the Commissioner does not take an action described in clause (1)(b) or (c) or if the Commissioner takes an action described in one of those clauses but no settlement is affected within the time period specified, the Commissioner may review the subject-matter of a complaint made under this Act if satisfied that there are reasonable grounds to do so.

The Commissioner may decide not to review the subject matter of the complaint for whatever reason the Commissioner considers proper.

exception at section 55(9)(b) applied to the records.

[7] After receiving PHIPA Decision 186, the complainant wrote to the IPC alleging bias on my part and requested that another adjudicator be assigned to his reconsideration request. The complainant also cites section 27.01(a) of the *Code* and takes the position that a fundamental defect in the adjudication process occurred.

[8] For the reasons that follow, I find that the complainant's evidence fails to establish bias or reasonable apprehension of bias. I find that the remainder of the complainant's arguments amount to re-arguing his 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 186.

## **DISCUSSION:**

[9] The complainant cites section 27.01(a) in his request to reconsider PHIPA Decision 186. Section 27.01(a) of the *Code* states:

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 there is a fundamental defect in the adjudication process.

[10] Mere disagreement with a decision is not a ground for reconsideration under section 27.01 of the *Code*.<sup>2</sup>

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

[11] 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>3</sup> If the complainant establishes that there is a reasonable apprehension of bias, it would be a ground for reconsidering PHIPA Decision 186. It would also be a ground for my recusal and for the complainant's reconsideration request to be assigned to another adjudicator.

[12] The complainant alleges that I was biased in deciding PHIPA Decision 186 and requests that I remove myself from deciding his reconsideration request. The complainant requests that the "reconsideration be completed by a competent, neutral and unbiased adjudicator." The complainant also says that I "already made up [my] mind prior to receiving [his] written submission which clearly demonstrate[s] that the record is incomplete and inaccurate for which the custodian used the information and that the correct information was provided to the custodian to correct the record."

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<sup>2</sup> See *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC) and PHIPA Decisions 25, 113 and 172.

<sup>3</sup> Orders PO-4128 at paragraph 40 and MO-4003-R.

[13] The complainant also alleges that I did not read his written submissions. In support of this argument, the complainant references paragraph 37 of Decision 186 in which I refer to my authority under sections 57(3) and 57(4) to decline to “review” a complaint and states:

...how can the adjudicator find that I failed to establish that the record is inaccurate of she didn't review my written submission my complaint? This is contradictory to the rest of her decision and indication that she cannot be bothered to take my complaint seriously although all information has been provided to fill all onuses.

[14] 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>4</sup> The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.<sup>5</sup> However, actual bias need not be proven. The test is whether there exists a “reasonable apprehension of bias”.

[15] 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>6</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>7</sup>

[16] 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>8</sup>

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

[18] I have reviewed the complainant's reconsideration request and am not satisfied

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<sup>4</sup> Orders MO-3513-I, MO-3642-R and MO-4003-R.

<sup>5</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>6</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>7</sup> *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

<sup>8</sup> PHIPA Decision 113.

that he has established a reasonable apprehension of bias on my part. In support of his position, the complainant alleges that I prejudged the merits of his complaint and in doing so failed to consider his written submissions. A considerable portion of the complainant's representations focusses on him recounting the submissions he already made in the complaint which led to PHIPA Decision 186. The complainant asserts that if I had only considered the evidence in his submissions, the outcome of his complaint would have been different. However, as noted above, an administrative decision made against a party, is not itself, evidence of bias.

[19] In addition, the complainant's assertion that I did not consider his written submissions is unsubstantiated. In paragraphs 27-30 of PHIPA Decision 186 I recount the complainant's evidence in support of his correction request. However, I went on to provide my reasons in deciding not to review the complaint under section 57(3) and (4) of *PHIPA* in paragraphs 31-35 of PHIPA Decision 186.

[20] Accordingly, 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 his request to reconsider PHIPA Decision 186.

### **Has the complainant established any other grounds to reconsider PHIPA Decision 186?**

[21] 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 made) during the review, nor is reconsideration intended to address a party's disagreement with a decision or legal conclusion.<sup>9</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

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<sup>9</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."

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.

[22] I agree with the approach taken by the former Assistant Commissioner and apply it to the circumstances on the matter before me.<sup>10</sup>

[23] As stated above, a considerable portion of the complainant's reconsideration request repeats the submissions he already made in response to my invitation for his written representations. The remainder of the complainant's reconsideration request amounts to a re-arguing of the 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>11</sup>

[24] Accordingly, I find that the complainant has not established any of the grounds for reconsideration of PHIPA Decision 186 and deny his request. The reconsideration request is denied.

Original signed by: \_\_\_\_\_

Jennifer James  
Adjudicator

December 23, 2022 \_\_\_\_\_

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<sup>10</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>11</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)).