

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 244

Complaint HA23-00188

A Hospital

May 30, 2024

Summary: The complainant's request for access to his son's records of personal health information was denied by the hospital under section 23(3) of the *Personal Health Information Protection Act, 2004*, because the son did not consent. In this decision, the adjudicator concludes that the hospital responded adequately, and no review of the complaint is warranted.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, sections 23(3), 57(3) and 57(4)(a).

BACKGROUND:

[1] This no review decision addresses a complaint filed with the Information and Privacy Commissioner of Ontario (the IPC) under the *Personal Health Information Protection Act, 2004* (the *Act*) about a hospital's decision to deny a request for access to the hospital's records for the complainant's son.

The access request and the hospital's decision to deny it

[2] The complainant submitted an access request under the *Act* for "all medical records" of his son. In response, the hospital issued a decision denying the access request. In its decision letter, the hospital stated that the complainant did not have a right of access to his son's medical records because his son does not consent. The letter explained:

Ontario's health information and privacy legislation (PHIPA) regulates how we collect, use, and disclose a patient's health information. Under Section 23(3) of PHIPA and in consultation with the child's physician, I am informing you that access to their health records has been denied. The patient has been deemed capable of providing consent related to their health information and we do not have his consent.

The complaint

[3] The complainant was dissatisfied with the hospital's decision and submitted an access complaint to the IPC. The IPC attempted to mediate the complaint.

[4] During mediation, the complainant explained that when he made the request, his son was ten years old. He stated that he disagreed with the hospital's assessment that his son was capable of providing consent regarding his personal health information. The complainant asserted his son was not capable of understanding the effect of refusing access to the records, and that it is in his son's best interest for the complainant to have access to his son's medical records. The complainant also stated that he was not aware of his son not wanting him to have access to the records. He noted that his son had previously asked that he not attend his son's medical appointments in order to avoid any conflict with his son's mother; the complainant suggested that the hospital may have also applied that wish to his request for access to his son's records.

[5] The IPC mediator contacted the hospital regarding this concern. The hospital stated that the decision not to grant access to the records was separate from his son's request that he not attend medical appointments and had been made in consultation with his son's physician. The hospital maintained its position that it would not provide him with access to the records at issue as it did not have his son's consent to do so.

[6] The complaint was not resolved at mediation and it was moved to the adjudication stage of the complaint process. As the adjudicator, it is my role to decide whether the circumstances of this complaint warrant a review under the *Act*. I examined the materials in the complaint file and considered the circumstances of the complaint and the relevant sections of the *Act*. These are sections 23(1)2, 23(2) and 23(3), set out below.

The applicable legislation

[7] Section 52(1) of the *Act* addresses an individual's right of access under the *Act*. It states that "an individual has a right of access to a record of personal health information about the individual...". There is no right of access under the *Act* to records of personal health information belonging to another individual. In other words, the complainant does not have a right of access under the *Act* to his son's records of personal health information. However, the *Act* allows parents to act as substitute decision-makers for their children in some circumstances, and to consent to the collection, use or disclosure

of their children's personal health information.

[8] Section 23(1) of the *Act* sets out the persons who may consent to the collection, use or disclosure by a health information custodian, like the hospital, of personal health information about the individual. The relevant parts of it state:

23(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:

...

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.

[9] Under section 23(1), a parent of a child under the age of 16 may act as their child's substitute decision-maker for the purposes of consenting to the collection, use or disclosure of their child's personal health information. However, section 23(2) confirms that a parent with "only a right of access to the child" does not qualify as a "parent" under section 23(1). Section 23(3) addresses situations where a capable child under the age of 16 withholds his consent and it confirms that the capable child's decision "prevails over a conflicting decision" of a parent authorized under section 23(1) of the *Act*.

Preliminary assessment not to conduct a review

[10] I formed a preliminary view that the complaint did not warrant a review under the *Act* because no purpose would be served by conducting a review. I sent a letter to the complainant advising him of my preliminary assessment that the complaint should not proceed to a review because it appears he is not legally authorized to access his son's records of personal health information under the *Act*.

[11] In my letter, I explained that, applying sections 23(1), (2) and (3) of the *Act* to the circumstances of his complaint, it appears he is not an authorized substitute decision-maker for his son within the meaning of section 23(1) as he is a parent with "only a right of access to the child" within the meaning of section 23(2). I added that, if my understanding is incorrect and he does, in fact, qualify as a "parent" within the meaning of section 23(1) of the *Act*, then section 23(3) applies because the hospital has deemed his son capable and his son's decision to withhold consent prevails.

[12] I advised the complainant of my preliminary assessment that, because he is not legally authorized to access his son's records under section 23(3) of the *Act*, there are no reasonable grounds to review the subject-matter of his complaint under sections 57(3) and (4)(a) because the hospital has responded adequately to his complaint and no purpose would be served by conducting a review. I explained to the complainant my authority under sections 57(3) and (4)(a) of the *Act* to exercise my discretion not to conduct a review. I invited the complainant to provide representations in response to my preliminary assessment if he disagreed with it. The complainant provided representations, which I summarize, below.

Should the complaint proceed to a review under the *Act*?

[13] Sections 57(3) and (4) of the *Act* set out the IPC's authority to review or not to review a complaint. They state:

(3) 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 effected 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.

(4) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,

(a) the person about which the complaint is made has responded adequately to the complaint[.]

[14] For the reasons that follow, I exercise my discretion not to review the subject matter of this complaint. In his representations the complainant does not directly address the consent provision in section 23(3) of the *Act*. Rather, he describes his efforts to obtain a copy of his son's records and argues it is in his son's best interests that he be given a copy. He asserts that he is a parent with shared custody of his son, and not simply a right of access. He refers to a court order confirming that he is a parent with custody, however, he does not provide a copy of such a court order.

[15] Even assuming, without deciding, that the complainant is a "parent" under section 23(1) – with custodial rights – section 23(3) applies to prevent him from exercising a right of access as a parent under section 23(1)2 of the *Act*. Section 23(3) of the *Act* confirms that the decision of the complainant's son, to withdraw consent for the complainant to exercise a right of access on the son's behalf, prevails. There is no suggestion or evidence before me that the complainant's son, who is less than 16 years old, is not capable or that the son's decision to withhold consent is not valid. As a result, I conclude that the hospital has responded adequately to the complaint in accordance with section 57(4)(a) and there are no reasonable grounds for me to conduct a review under section 57(3) of the *Act*.

NO REVIEW:

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

Original signed by: _____

Stella Ball
Adjudicator

May 30, 2024 _____