

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 265

Complaint HA23-00164

Mahesh Prajapat

November 15, 2024

Summary: A father filed a complaint under the *Personal Health Information Protection Act (PHIPA)* regarding a social worker's decision to deny him access for notes and documents relating to the social worker's preparation of a custody and access assessment report. The social worker had already provided copies from his file to the complainant's family lawyer. The social worker takes the position that he was not a "health information custodian" for the purposes of preparing the report. In this decision, the adjudicator finds that the social worker is not a "health information custodian" within the meaning of that term under section 3(1) of *PHIPA* for the purpose of preparing the report. Accordingly, the adjudicator finds that the complainant does not have a right under *PHIPA* to request access to the requested records or complain about any fee requested or already paid. The adjudicator exercises her discretion not to conduct a review under sections 57(4)(a) and (b) of *PHIPA*.

Statutes Considered: *Personal Health Information Protection Act, 2004*, sections 3(1), 57(3), 57(4)(a) and 57(4)(b).

Decisions Considered: PHIPA Decision 15

BACKGROUND:

[1] This decision determines that the complainant does not have a right of access to a social worker's notes relating to a custody and access assessment report and as a result the adjudicator exercises her discretion to not conduct a review under sections 57(4)(a) and (b) of the *Personal Health Information Protection Act (PHIPA)*.

[2] The complainant, through his lawyer, sent an email to a social worker (the respondent) for records relating to a custody and access assessment report (custody and access report or section 30 assessment) under section 30 of the *Children Law Reform Act*.¹ The lawyer's email stated:

On behalf of my client, I am requesting for you to disclose all of your notes and records in relation to this matter.

[3] The lawyer did not make the request for the respondent's notes and records under *PHIPA*. Instead, it appears that the lawyer requested the notes and records as part of the ongoing family court matter in which he represented the complainant.

[4] The lawyer and the respondent exchanged emails with the result of the social worker providing copies of documents to the lawyer in exchange for a requested fee. The respondent sent a response requesting a \$1,000.00 fee for the delivery of the requested documents. The respondent subsequently lowered his fee to \$600.00 and sent documents to the complainant's lawyer.

[5] The lawyer subsequently sent a letter by email to the respondent acknowledging his receipt of a "copy of the file." He also inquired whether further documents, such as educational, medical, or treatment records existed. The lawyer also asked whether the respondent had any notes or lists of questions used in his interviews. Specifically, the lawyer asked whether any communication notes prepared by the respondent existed regarding his interviews with the complainant's children and their doctor.

[6] In response, the respondent sent an email to the lawyer providing a copy of his notes regarding his interview with the children's doctor. The respondent informed the lawyer that any outstanding matters set out in the lawyer's letter can be answered at a scheduled upcoming trial. The respondent also requested an additional retainer if further ongoing communication was required.

[7] Subsequently, the complainant filed a complaint under *PHIPA* to the Information and Privacy Commission of Ontario (IPC) stating that:

I have contacted [the respondent] through my lawyer to request access to records/notes under his custody and control. This individual has charged me \$600 already for access to notes and records which I feel is excessive and unreasonable. I only paid the amount just to gain access because I had no choice. Through my lawyer I contacted the individual to request access to notes/records that I believe have not been disclosed to us and now is

¹ Section 30(1) of the *Children's Law Reform Act* is titled "Assessment of needs of child" and reads: The court before which an application is brought for a parenting order or contact order with respect to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

requesting that I pay him \$1500 for communication. I am seeking the help of the IPC to intervene and have him disclose this within 7 business days as I have gone through a legitimate and fair process to resolve this matter.

I would like the IPC to order that the individual sends me back money owed to me from the \$600 that I have paid him and ask that he provide missing notes/records requested and answer the questions in regards to the service he provided me. I am willing to pay the rate charged by health care providers (\$30 for first 20 pages and 0.20 cents for each page after). Also, I would like the IPC to order that he immediately disclose all notes/records and answer the questions as set out in our letter to him dated May 16, 2023.

[8] The file was assigned to a mediator but mediation did not resolve the complaint.

[9] As a mediated solution was not possible, the file was transferred to the adjudication stage of the complaint process in which an adjudicator may conduct a review.

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

[10] I am the adjudicator assigned to the complaint. I examined the complaint file including the written documentation provided by the complainant and the respondent's written response to the mediator. I subsequently sent a letter to the complainant advising him that my preliminary assessment was that there were no reasonable grounds for a review citing sections 57(3) and (4) of *PHIPA*. The complainant was given an opportunity to provide written representations in response to my letter.

[11] In response, the complainant submitted written representations in support of his position. After considering the complainant's further written representations and re-examining the file contents, I find that there are no reasonable grounds for a review under section 57(4)(a). In addition, I am satisfied that the complaint has been or could be more appropriately dealt with by means of another procedure, other than a complaint under *PHIPA* as contemplated under section 57(4)(b).

[12] For the reasons that follow, I exercise my discretion not to review the subject-matter of this complaint and find that the complaint does not warrant a review under *PHIPA*.

DISCUSSION:

The relevant legislation and issues in dispute

[13] At the end of mediation, the mediator identified the following issues remaining in dispute:

- Is the respondent a “health information custodian” as defined in section 3(1) for the purposes of preparing the report?
- Does the complainant have a right of access to the requested records under *PHIPA*?
- Is the respondent’s fee for providing access to the requested records under *PHIPA* reasonable?

[14] However, given my finding, the only issue addressed in this decision is whether the respondent, in preparing the custody and access report, provided “health care.”² If the services the respondent provided in preparing the custody and access report was not “health care”, then the records relating to that service are not in connection of the performance of duties as a health care practitioner and the respondent cannot be said to be a health information custodian in respect of those records.³ Accordingly, the complainant does not have a right of access to the requested records under *PHIPA* if the respondent cannot be said to be acting as a “health information custodian” in the performance of work relating to the report.

[15] During mediation, the respondent took the position that he is not a “health information custodian” as defined in section 3(1) of *PHIPA* for the purposes of preparing the custody and access report.⁴

[16] “Health care” is defined at section 2 of *PHIPA*, in part, as follows:

“health care” means any observation, examination, assessment, care, service or procedure that is done for a **health-related purpose and that,**

(a) is carried out or provided to diagnose, treat or maintain an individual’s physical or mental condition,

(b) is carried out or provided to prevent disease or injury or to promote health, or

(c) is carried out or provided as part of palliative care, and includes,

² Because of my finding that the respondent is not acting as “health information custodian” for the purposes of preparing the custody and access report, the complainant does not have a right of access to the requested documents under *PHIPA* as they are not in the custody or control of a “health information custodian.” Consequently, the fee provisions in *PHIPA* (sections 54(10), (11) or (12)) do not apply to any documents the complainant or his lawyer has requested from the respondent relating to services provided relating to the report.

³ See para. 15 of *PHIPA* Decision 126.

⁴ The respondent set out his position to the mediator in an email, dated July 18, 2023.

....⁵

[emphasis added]

[17] *PHIPA* provides individuals with a right of access to records of their “personal health information”⁶ that are in the custody or under the control of a “health information custodian.”⁷ In order for *PHIPA*’s access provisions to apply, it must first be established that the records of personal health information are in the custody or under the control of a “health information custodian.”⁸

[18] The term “health information custodian” is defined at section 3(1), in part, as:

“health information custodian”, subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person’s or organization’s powers or duties or the work described in the paragraph, if any:

3 (1) A health care practitioner or a person who operates a group practice of health care practitioners.

“Health care practitioner” is defined at section 2 of the *Act* to mean:

a person who is a member within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care,

b. [repealed]

c. a person who is a member of the Ontario College of Social Workers and Social Service Workers and **who provides health care**, or

d. any other person whose primary function is to provide health care for payment;

[emphasis added]

[19] There does not appear to be a dispute that the respondent is a member of the Ontario College of Social Workers and Social Service Workers and therefore falls into one of the categories of persons who **could be** health information custodians under section 2 of *PHIPA*.

⁵ Paragraphs (d), (e) and (f) of the definition of “Health Care” set out three types of services that might be carried out or provided as part of palliative care.

⁶ The term “personal health information” is defined in section 4(1) of *PHIPA*.

⁷ Section 52(1).

⁸ *PHIPA* Decision 126.

[20] Sections 57(3) and (4) of the *Act* set out this office's authority to review or not to review a complaint. These sections state, in part:

(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;

(b) the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under this Act [.]

The parties' representations

[21] As noted above, the respondent takes the position that he is not a "health information custodian" as defined in section 3(1) of *PHIPA*. The respondent says that he did not provide "health care" as defined in section 2 in the preparation of the custody and access report.

[22] The complainant says that he agreed to have the report completed in response to his children's mother and her lawyer asserting that his children "had serious mental health issues." The complainant says that the respondent subsequently "accepted the job to conduct the report and confirmed that he would act in the capacity as a clinical assessor." The complainant also says that the fact that the report was not court-ordered supports his position that the respondent provided "health care" services in preparing the report.

[23] In support of this position, the complainant provided a copy of the consent order signed by the parents and their lawyers. The complainant also provided a copy of an email exchanged between the parents' lawyers and the respondent. In this email exchange, the respondent thanks the lawyers for "agreeing to use my clinical services." The complainant says that the respondent use of the term "clinical services" in the email demonstrates that the respondent was retained to provide "health care".

[24] In my preliminary assessment, I told the complainant that it was my view that that the circumstances of his complaint are similar to those in *PHIPA* Decision 15, in which the IPC found that a psychologist in preparing a custody and access report was not a "health information custodian" as defined in section 3(1). In that decision, the adjudicator stated:

The definition of "health care practitioner" in section 3(1) is premised on the fact that the health care practitioner must be providing health care. Further, "health care" as defined in section 2 of *PHIPA* must be for a "health-related purpose." In my view, on the facts of this particular case, the service provided by [named psychologist] was not provided for a health-related purpose, but rather for the purpose of assisting the parents, and possibly the courts, to develop a parenting plan which would function in the best interests of the child. Therefore, and for the further reasons set out below, I find that [named psychologist] was not providing health care when he provided a service in this capacity. Consequently, I find that [named psychologist] was not a "health information custodian" as defined in section 3(1) for the purpose preparing the Custody and Access Assessment Report. As set out below, this interpretation of *PHIPA* is consistent with the decision of this office in complaint number HC-050014-1, with the policy behind subsection 20(2) of *PHIPA*⁹, with the decision of the Federal Court of Appeal in *Wyndowe v. Rousseau*,¹⁰ and with public guidance provided by the Ministry of Health and Long-Term Care in relation to the definition of "health care."¹¹

[25] In his representations, the complainant submits that the facts of his complaint can be distinguished from those in PHIPA Decision 15. The complainant says that in PHIPA Decision 15, the psychologist produced a copy of a written retainer contract to the IPC which was signed by both parents. The complainant says that in PHIPA Decision 15 "... there was a contract which stipulated the role of [the psychologist] and was made clear that the focus was not on any health issues. It should be of note that in my case that no contract exists and the email from the [respondent] upon accepting the job clearly states that he will be [providing clinical services]."

⁹ See paragraph 25 of PHIPA Decision 15 where the IPC found that a broad interpretation of "health care" would affect the scope of personal health information that may be collected, used, or disclosed without express consent in other circumstances. For example, if the writer of a custody and access report was found to be providing "health care" within the meaning of section 2 of *PHIPA* may permit other health information custodians to disclose personal health information to the writer, and also permit the writer to disclose the report to other health information custodians, on the basis of assumed implied consent (if the other elements of subsection 20(2) were met) without requiring the express consent of the individual. The adjudicator in PHIPA Decision 15 concluded that "it would not be reasonable to assume an individual's implied consent [to be disclosed for the purpose of providing continuing health care] when the report was created for the purpose of assisting the parents, and possibly the courts, to develop a parenting plan which would function in the best interests of the child."

¹⁰ Original footnote number 3 in PHIPA Decision 15 providing the citation "2008 FCA 39 (*Wyndowe*)." The Federal Court of Appeal in *Wyndowe* found that *PHIPA* did not apply to physicians performing independent medical examinations.

¹¹ See para 27 of PHIPA Decision 15 where the adjudicator highlights the example set out in the Ministry of Health and Long-Term Care's document entitled *Personal Health Information Protection Act, 2004: An Overview for Health Information Custodians*. The ministry states in that document that "a nurse advising an employer with respect to back to work requirements" is not a health information custodian given, when acting in such a capacity, the nurse is not providing health care as defined in *PHIPA*.

[26] The complainant states:

I would like to reiterate that [the respondent] is indeed a Health Information Custodian and to my knowledge so far in the process, the individual has failed to produce any credible evidence to support his position other than his claims which cannot be given any weight, Unlike [the psychologist in PHIPA Decision 15 who produced] a contract/retainer agreement to stipulate his role as a custody and access assessor and identify the areas of focus for his assessment. One of the most fundamental and basic steps prior to starting a Section 30 Assessment is [the] professional as customary practice and requirement in the trade must have a retainer agreement which sets out roles, responsibilities, focus, and other pertinent contractual details.

[27] The complainant also states:

There is a notable difference between a clinical assessor and a custody-access assessor in that the clinical assessor in their role provides health care and the other does not. [The respondent] was hired to serve in a clinical role and he has admitted to this. Again, [the psychologist] in IPC Decision 15 never referred to himself as a clinician nor presented himself in that role as it was made clear in his contract what his role and the areas of focus which did not include a health focus. If [the respondent] disputes this then he should be required to submit proof/evidence like what is needed in a court of law. I have provided credible and sufficient evidence.

[28] The complainant also says that he has already been in contact with the respondent's regulator regarding his concerns that the respondent did not prepare a contract for service or retainer agreement for his signature.

Decision and findings

[29] I find that the respondent is not a "health information custodian" as defined under section 3(1) of *PHIPA* because he did not provide "health care" as defined in section 2 in the preparation of the custody and access report. Accordingly, any documents in his possession as a result of preparing the report cannot be said to be related to providing "health-care" or for a "health-related purpose."

[30] I accept the complainant's evidence that the report was not court-ordered. I examined the consent order provided by the complainant in which the parents agree to "retain the services of an assessor for the purpose of conducting a section 30 assessment within 20 days." However, whether or not the report was court ordered has no bearing on whether the respondent is a "health information custodian" in the circumstances of this complaint. What is relevant is whether the respondent provided "health care" in preparing the report.

[31] I also examined the email provided by the complainant which he says demonstrates that the respondent was retained to also provide "clinical services." In my view, the emails exchanged between the lawyers and respondent provided by the complainant clearly document that the respondent was being hired to prepare a custody and access report. I note that the respondent confirmed in the email exchange that he was available to prepare a custody and access report, that he had completed many such reports in the past and was offering his "services as an assessor" upon the payment of his requested fee. Once the lawyers confirmed that his services would be used, the respondent told the lawyers that most assessments required 30-40 hours and would take him approximately 3 months to complete his work. The respondent also asked the lawyers to provide him copies of any court documents and keep him abreast of any upcoming court dates.

[32] Based on my examination of the file materials and the complainant's written representations, I am satisfied that the respondent's work did not include any diagnosis or treatments to address physical or mental conditions of the subjects of the report. The respondent's use of his social work skills to observe the complainant's children and assess what might be in their best interests concerning a custodial and parenting plan, does not in my view, amount to providing "health-care" as defined in section 2. I find that the content and context of the email provided by the complainant makes clear that the respondent was being retained to complete a custody and access report despite the use of the term "clinical services." In addition, I note that the lawyers undertook on their client's behalf to retain the services of an assessor for the purpose of conducting a custody and access report within 20 days of the signing of the consent order.

[33] I acknowledge that the IPC has previously found that a social worker has qualified as a "health information custodian." However, the context of those complaints differ from the circumstances in this complaint.¹² Here, the respondent was retained for the specific purpose of preparing a comprehensive custody and access assessment. In addition, the appellant did not provide evidence establishing that the respondent diagnosed or treated the physical or mental states of the subject-matters of the report.

[34] In my view, the circumstances of this complaint are *not* distinguishable from PHIPA Decision 15, in which the IPC found that a psychologist in preparing a custody and access report was not a "health information custodian" as defined in section 3(1).

[35] Accordingly, I adopt and apply the reasoning in PHIPA Decision 15 and find that the services provided by the respondent in preparing the custody and access report does not meet the definition of "health care" in section 2 nor was prepared for a "health-related purpose." Based on the information before me I am satisfied that the services

¹² For instance in PHIPA Decision 126, the IPC found that a social worker provided health care services relating to marriage counselling sessions in the particular circumstances of that complaint. However, in the same matter the IPC rejected the argument that the social worker was providing health care services in providing co-parenting counselling to the same parties who were now co-parents as there was no evidence that the social worker diagnosed or treated the parties' physical or mental states.

provided by the respondent were for the purpose of assisting the complainant, the children's mother and possibly the courts to develop a parenting and custodian plan which would benefit the best interests of the children.

[36] Accordingly, the respondent in the circumstances of this complaint does not meet the definition of "health care practitioner" in section 3(1) and cannot be described as a "health information custodian" also defined in section 3(1).

[37] This conclusion is consistent with the IPC's interpretation of the term "health care" in *PHIPA*, in the context of analogous activities that are not undertaken to maintain or to improve the health of an individual.¹³

[38] As a result, I find that the complainant does not have a right of access to the documents requested under *PHIPA* as they are not in the custody or control of a "health information custodian."¹⁴ Accordingly, I find that there are no reasonable grounds for a review under section 57(4)(a).

[39] Consequently, the fee provisions under *PHIPA* do not apply to the circumstances of this complaint as the fees the complainant seeks to challenge were not incurred as a result of access being granted under *PHIPA*. As a result, I decline making any comments in response to the complainant's assertions that the respondent's fee was not reasonable.

[40] In addition, I make no comment regarding the complainant's concerns outlined in his representations about the respondent's storage and handling of personal health information. The complainant raised this issue in support of his position that I order the respondent to confirm or deny the questions that his lawyer had already asked and were answered by the respondent. As noted above, the respondent directed the respondent's

¹³ See *PHIPA* Decision 232 in which the adjudicator states in paras. 46 and 47:

[46] [T]he IPC has found that the following activities do not qualify as "health care" within the meaning of *PHIPA*, because they are not done for a "health-related purpose":

- the preparation of a custody and access assessment report for family law proceedings (*PHIPA* Decision 15);
- counselling to manage parenting issues (*PHIPA* Decision 126, upheld on reconsideration in *PHIPA* Decision 146);
- services to coordinate individuals' access to third-party programs (*PHIPA* Decision 134); and
- an independent medical assessment of an employee conducted for the purpose of accommodating return-to-work needs (*PHIPA* Decision 154).

[47] I further note that in *PHIPA* Decision 35, the IPC found that the definition of "health care" in *PHIPA* does not include actions taken after an individual's death, because it would not be reasonable to treat such actions as being done for the "health-related purpose" of providing a deceased individual with "health care."

¹⁴ Given my finding, it is not necessary that I also determine whether:

- the responsive records contain "personal health information" as defined in section 4(1) and if so, whose, personal health information is contained in the records, and
- the complainant is entitled to exercise an independent right of access to any personal health information records not containing his own personal health information (see sections 23 and 26 of *PHIPA* along with *PHIPA* Decisions 17, 96, 107 and 129).

lawyer to address his questions during a scheduled family court hearing. In my view, the complainant's own evidence demonstrates that his concerns have already been addressed by means of a procedure (negotiation on the part of his lawyer and the upcoming court hearing) other than a complaint under *PHIPA* (section 57(4)(b)).

Decision

[41] As set out above, sections 57(3) and (4) set out my authority to decline to review a complaint. For the reasons stated above, I have decided not to conduct a review of this complaint on the basis that there are no reasonable grounds to do so (section 57(4)(a) and that the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under *PHIPA* (section 57(4)(b)).

[42] I issue this decision in satisfaction of the notice requirement in section 57(5).

NO REVIEW:

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

Original Signed by: _____
Jennifer James
Adjudicator

_____ November 15, 2024