



Order P21-01

**DOCTOR J.B.**

Laylí Antinuk  
Adjudicator

February 4, 2021

CanLII Cite: 2021 BCIPC 06

Quicklaw Cite: [2021] B.C.I.P.C.D. No. 06

**Summary:** A father requested his daughter’s psychological therapy session information from a psychologist pursuant to s. 2(2)(a) of the *Personal Information Protection Act Regulations* and s. 23(1)(a) of the *Personal Information Protection Act*. The psychologist refused to provide access, determining that the daughter was a mature minor, capable of exercising her own rights under PIPA. The adjudicator confirmed the psychologist’s decision to withhold the information in dispute from the father.

**Statutes Considered:** *Personal Information Protection Act*, ss. 1 and 23(1)(a); *Personal Information Protection Act Regulations*, s. 2(2)(a); *Interpretation Act*, s. 29; *Age of Majority Act*, s. 1(1)(a).

## INTRODUCTION

[1] Section 23(1)(a) of the *Personal Information Protection Act* (PIPA or the Act) gives individuals the right to access their personal information under the control of organizations, subject to certain exceptions. If a minor is incapable of exercising this right, their guardian may do so.

[2] In this case, the applicant made a request for access to personal information about his daughter (the patient) held by a psychologist. More specifically, he requested the patient’s therapy records and notes containing specific details about her psychological treatment.

[3] The psychologist refused to provide access to the disputed records under s. 2(2)(a) of PIPA’s regulations (the Regulation).<sup>1</sup>

---

<sup>1</sup> *Personal Information Protection Act Regulations*, B.C. Reg. 473/2003.

[4] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the psychologist's decision. Mediation did not resolve the matter and it proceeded to inquiry.

[5] Both parties provided inquiry submissions.

## **ISSUE**

[6] In this inquiry, I will decide whether the applicant is authorized under s. 2(2)(a) of the Regulation to access personal information about the patient under s. 23(1)(a) of PIPA.

[7] PIPA is silent with regard to which party has the burden of proof in a case such as this, leaving each party responsible for submitting arguments and evidence to support their positions.

[8] I have carefully read all of the parties' evidence and submissions. In these reasons, I will address the parties' evidence and arguments only to the extent necessary to explain my decision respecting the inquiry issue.

## **DISCUSSION**

### ***Background***

[9] The applicant and the patient's mother are legally separated.<sup>2</sup> In 2011, a joint custody order provided that both the applicant and the patient's mother would:

- have joint guardianship and joint custody of the patient; and
- have the right to obtain information regarding the patient directly from third parties including, but not limited to counsellors, medical professionals, and third-party caregivers.

[10] In 2016, the psychologist began providing psychological counselling services to the patient, who was then 11 years old.

[11] Under a consent order between the applicant and the Ministry of Children and Family Development (Ministry), the Ministry supervised the patient's therapy and the applicant agreed to have no contact with the psychologist. After the consent order terminated, the applicant sought information about the patient's care from the psychologist. The psychologist refused, saying the patient was a

---

<sup>2</sup> The information summarized in the Background section comes from the psychologist's initial submission at paras. 1 and 5-7; and the applicant's response submission, summary of facts at paras. 1, 3-4 and 6.

mature minor capable of making her own informed decisions respecting her health care.

[12] At the time the applicant made the access request at issue, the patient was 13 years old. She is now 16.

### ***Records in dispute***

[13] The requested records total 82 pages and comprise:

- counselling notes;
- email correspondence;
- new client intake and consent forms;
- letters between the psychologist and the Ministry or the Crime Victim Assistance Program; and
- miscellaneous documents related to the patient's therapy.

[14] The psychologist provided the records for my review in this inquiry.

### ***Legislative framework***

[15] PIPA applies to organizations. Under PIPA, an organization includes a person.<sup>3</sup> I find that the psychologist fits within the meaning of organization under PIPA.

[16] As noted, PIPA gives individuals the right to request access to their own personal information from organizations that have control of that information. When an individual makes this type of request to an organization, s. 23(1)(a) of PIPA obliges the organization to provide access, subject to certain exceptions.

[17] If an individual is a minor and is incapable of exercising their right of access under s. 23(1)(a) of PIPA, their guardian may exercise their right of access instead. The relevant part of the Regulation states:

2 (2) Subject to subsection (3)<sup>4</sup> the guardian of a minor may

- (a) exercise the rights of the minor under section 23 of the Act, if the minor is incapable of exercising his or her rights under that section,

---

<sup>3</sup> Section 1 of PIPA contains its definitions.

<sup>4</sup> Subsection (3) is not applicable here. It applies if an individual has a "representative" as that term is defined in s. 2(1) of the Regulation.

## **Analysis**

[18] Given the language of s. 2(2)(a) of the Regulation, I will apply a three-part test for determining whether the applicant is authorized to access the information in dispute.

1. First, I will decide if the patient is a minor.
2. If so, I will decide if she is incapable of exercising her PIPA right to request access to her own personal information.
3. If so, I will decide if the applicant is her guardian.

[19] All three of these elements must be established in order for the applicant to be authorized to request the patient's personal information.

### *Is the patient a minor?*

[20] PIPA does not define the term "minor". However, taking other applicable provincial legislation into account, I find that a minor means a person under the age of 19.<sup>5</sup> As mentioned previously, the evidence shows that the patient is under the age of 19. Therefore, I find that she is a minor.

### *Is the patient incapable of exercising her PIPA right of access?*

[21] The applicant says the patient suffers from a "learning disability in language".<sup>6</sup> He says he believes the psychologist did not take this disability into account when asking the patient for permission to provide counselling. The applicant also says the patient did not give informed consent, noting that the patient's treatment was court ordered. He says the patient does not have the authority or understanding to deny him access to the information he requested from the psychologist. The applicant says that, given her "psych reports, medical reports and school reports", the patient was not a mature minor "at the time".<sup>7</sup>

[22] The psychologist submits that the patient is a mature minor who is fully capable of independently exercising her own rights under PIPA.<sup>8</sup> The psychologist also says that the patient has expressly refused to consent to the disclosure of the disputed records to the applicant.

---

<sup>5</sup> *Interpretation Act*, RSBC 1996, c. 238, s. 29; *Age of Majority Act*, RSBC 1996, c. 7, s. 1(1)(a).

<sup>6</sup> The information summarized in this paragraph comes from the applicant's response submission, summary of facts at paras. 8-11 (renumbered for correction) and conclusion at para. 3.

<sup>7</sup> Applicant sur-reply at para. 4 (August 6, 2020 email). It is not clear whether the applicant means at the time of her treatment or at the time he made his access request.

<sup>8</sup> The information summarized in this paragraph and the one that follows comes from the psychologist's initial submission at paras. 4, 34, 58, 63-64 and 73; and the psychologist's further reply submission at paras. 11-12.

[23] The psychologist submits that capacity (in the health care context) is determined by an assessment of the extent to which a person's physical, mental, and emotional development allow for a full appreciation of the nature and consequences of the proposed treatment, including the refusal of that treatment. The psychologist says that she assessed the patient's capacity and determined that the patient was a mature minor capable of making her own decisions about her health care. In coming to this conclusion, the psychologist says she was aware, and took careful consideration, of the patient's previously diagnosed language processing and other learning difficulties.

[24] The psychologist also submits that as therapy sessions continued, it remained clear to her that the patient was fully capable of making her own independent health care decisions. The psychologist says this is a hallmark of capacity. In addition, the psychologist says that at the time she was treating the patient, the Ministry determined that the patient was mature enough to make her own decisions regarding the degree of contact she wished to have with the applicant.

[25] For the reasons that follow, I am not satisfied that the patient is incapable of exercising her PIPA right to request access to her own personal information.

[26] Nothing in the evidence before me demonstrates that the patient is incapable. While the parties agree that the patient has a language processing disability, there is nothing to show that this disability or any other diagnosis means she is incapable of requesting her own records.

[27] On the contrary, having carefully reviewed the evidence, including the records, I find it clear that the patient had the capacity to understand and communicate her feelings, needs and goals at the time of her treatment. Furthermore, the evidence shows that trained professionals, including the psychologist and individuals working at the Ministry, decided that the patient had the capacity to make extremely important decisions about her life, such as whether to have contact with the applicant and, if so, in what form. Given this, I have no hesitation in concluding that the patient is capable of exercising her PIPA right of access for herself under s. 23(1)(a) of the Act.

[28] In coming to this conclusion, I have kept in mind the fact that the patient was 13 at the time the applicant made the access request and is now 16 years old. This situation involves a teenager, not a baby or a very young child. Moreover, the uncontested evidence shows that the teenaged patient explicitly refuses to consent to the release of the disputed records to the applicant. In my view, this supports a finding of capability in the PIPA context. As I see it, the patient's decision to refuse consent in the circumstances evinces an

understanding of the nature and consequences of her rights under PIPA.<sup>9</sup> It shows that she understands the concepts of: (i) personal information; (ii) disclosure; and (iii) consenting to disclosure; and that she has the ability to communicate her choice to refuse consent. Clearly, she is not “incapable” in the PIPA context.

[29] The fact that a court order gives the applicant the ability to request and obtain information about the patient from third parties is irrelevant when it comes to the question of capability. Under PIPA, a guardian may only exercise a minor’s right of access *if that minor is incapable* of doing it for themselves. Nothing in the evidence shows that the patient is incapable of requesting her own personal information from the psychologist. Indeed, quite the opposite. Therefore, I find that s. 2(2)(a) of the Regulation does not apply.

[30] Given my conclusion respecting the second part of the s. 2(2)(a) test, I do not need to decide whether the applicant is the patient’s guardian.

## CONCLUSION

[31] For the reasons given above, under s. 52 of PIPA, I confirm the psychologist’s decision to refuse the applicant access to the information in dispute.

February 4, 2021

## ORIGINAL SIGNED BY

---

Laylí Antinuk, Adjudicator

OIPC File No.: P18-77845

---

<sup>9</sup> *Obtaining Meaningful Consent*, OIPC Guidance Document May 2018 at p. 10. Available online at <https://www.oipc.bc.ca/guidance-documents/2255>.