Notebook on ethics, legal issues and standards for counselllors and psychotherapists:

When Can a Client be Denied Access to Their Counselling Record? An Answer from an Adjudicated Complaint.

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Members of the Canadian Counselling and Psychotherapy Association (CCPA) know that the contents of their counselling records belong to their clients and that they must be the responsible custodians of them. Their clients' right of access to their records is stated in this clause from the **CCPA Code of Ethics (2020).**

B7. Access to Records

Counsellors understand that clients have a right of access to their counselling records, and that disclosure to others of information from these records only occurs with the written consent of the client and/or when required by law. (Page 9)

However, the right of access is not absolute and there is a specific exception to it. It is expressed as follows in the **CCPA Standards of Practice:**

There may be the following exceptions to clients' full access to their records:

- When access to the information could be harmful to the client. For example, should the client's mental status be such that there is significant doubt about the client's ability to handle the full disclosure.
- In any case, counsellors should be aware that any denial of a valid request for disclosure may be challenged and ultimately adjudicated in court and/or by an arbitrator whose authority could be established under a provincial freedom of information and privacy legislation. (P. 23-24)

This Notebook is a review of a decision based on a similar provision that was highlighted in a complaint made by a client against his psychotherapist. This complaint was first adjudicated in 2019 and it is documented in **PHIPA** Decision 100. It was conducted under the authority of the **Personal Health Information Protection (PHIPA)** of Ontario. All provinces of Canada have similar legislation that is intended to ensure all citizens have the protection of and access to their personal health information.

In this complaint the psychotherapist denied her client access to his therapy records by relying on Section 52(1)(e)(i) of the **PHIPA.** It states that access can be denied if the following condition is met: *Granting access could reasonably be expected to result in a risk of serious harm to the requester's treatment or recovery and a risk of serious bodily harm to the requester and to the custodian and to others.*

Prior to receipt of this complaint a mediator, following contact with both the complainant and the psychotherapist, determined that a mediated outcome was not possible. The Adjudicator for the complaint received both the original and unsolicited information from both parties. The records being sought by the complainant covered the two years when he was being seen by the psychotherapist.

Having satisfied himself that all conditions under the Act were met in order to hear the complaint, the adjudicator considered all the evidence presented. The psychotherapist stated that she had ended the relationship with her client because of his abusive and threatening behaviour. She disclosed that he had a complex mental health condition and that some of the information in the record was documented when he was in a dissociated state. She provided additional information to show his history of violence including threats of violence and harassment towards her and others. She expressed her view that disclosure of the record to the client was very likely to trigger a violent response by him directed towards himself and/or towards her and others.

The Adjudicator stated that in order for the exemption to a health record disclosure provided for in the PHIPA the psychotherapist had to "Provide evidence demonstrating a risk of harm that is well beyond the merely possible or speculative". After considering all the evidence made available to him in this case, he reached the following conclusion and upheld the decision of the psychotherapist to deny access to her client's record.

However, overall, I find that the evidence establishes a risk of the harm contemplated by section 52(1)(e)(i) that is well beyond the merely possible or speculative. In particular, I am satisfied that granting access to the responsive records could reasonably be expected to result in a risk of serious bodily harm to the complainant or another individual. In making this finding, I note that the Psychotherapist is not required to prove that disclosure will in fact result in such harm occurring; rather it need only establish that there is a reasonable expectation of harm. I am satisfied that the Psychotherapist had done so. (p. 8)

Subsequent to this outcome the complainant sought to have a reconsideration of the decision. In this appeal he argued that he met all three conditions stated in the Act for its review. These are as follows:

α. *There is a fundamental defect in the adjudication process;*

β. *There is a clerical error, accidental error or omission or other similar error in the Decision; or*

χ. *New facts relating to an Order come to the IPC's attention or there is a material change in circumstances relating to the Order. (p. 2)*

Having reviewed and considered the material submitted to support the request for a reconsideration, and judging it against those appeal condition, the Adjudicator rendered the following decision:

Having considered the complainant's reconsideration request and representations, I find that he has not established that there is a fundamental defect in the adjudication process, or a clerical error, accidental error, or omission or other similar error in PHIPA Decision 100. As the complainant has also not provided evidence of new facts or any material change in circumstances relating to PHIPA Decision 100, I find that he has not established a basis for reconsidering PHIPA Decision 100 under section 27.01 or Code. (P. 6)

It is worth noting that CCPA has a similar provision for the appeal of decisions taken by its Ethics Committee. They are stated in the ***CCPA Procedures for processing inquiries and complaints of an Ethical Nature in this manner.***

Please note that grounds for appeal are limited to the following:

1. *An error in fact on the face of the record that would affect the outcome.*
2. *An error in the interpretation and/or application of the CCPA Code of Ethics and/or the Standards of Practice that would affect the outcome.*
3. *Failure to provide due process**

**Due process is defined as providing fair and transparent procedures that respect the rights of all parties involved (following CCPA procedures, providing opportunity to be heard, access to material used to make determinations, and providing reasons for judgements). (p. 12)*

The Adjudicator in this case emphasized that anyone requesting an appeal or reconsideration of an ethical decision must demonstrate that it meets one or more of the established grounds that would warrant it. It cannot be solely an opportunity to re-argue the initial case because of dissatisfaction with the outcome. He states his view in this way:

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. (p. 3).

This Notebook highlights an important provision with respect to denying client access to their counselling records as expressed both in the CCPA Standards of Practice and in provincial statutes intended to protect personal health information. It also sheds light on the standard that must be met to support a denial of access as well as on the criterion for appealing any such decisions.

This case can be seen at Canlii; file numbers: HA18-2, HA19-00264