

Personal Health Information Protection Act, 2004: An Overview

Note: This overview is presented for the convenience of reference only. Nothing in this overview should be construed as legal advice. You should consult the Act and your own solicitors for all purposes of interpretation.

November 2004



BACKGROUND

- ? As of January 1, 2004, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to all organizations that collect, use or disclose personal information in the course of commercial activities, unless provinces have enacted legislation deemed to be substantially similar
- > Stakeholders expressed concerns about impact of PIPEDA
- > Health care providers requested made-in-Ontario legislation

PAST ONTARIO CONSULTATIONS

- > June 1996 - a consultation paper, a *Legal Framework for Health Information* released, followed by regional roundtable sessions
- > November 1997 - a draft *Personal Health Information Protection Act* released, followed by regional roundtable sessions
- > October 2000 - a consultation paper, *Ontario's Proposed Personal Health Information Privacy Legislation for the Health Sector (Health Sector Privacy Rules)* distributed to 5000 organizations and individuals
- > December 2000 - *Personal Health Information Privacy Act, 2000* (Bill 159) was introduced
- > 2002 - MCBS with MOHLTC developed and conducted public consultation on a draft *Privacy of Personal Information Act, 2002*

TIMELINE

- > December 17, 2003 - The *Health Information Protection Act* (Bill 31) was introduced, addressing the issues raised by stakeholders, members of the public, and elected representatives during consultations on previous initiatives
- > Public hearings at Standing Committee on General Government held the week of January 26, 2004 in Toronto and the week of February 2, 2004 in Sault Ste. Marie, Kingston and London
- > February 9, 2004 and April 28, 2004 - Clause-by-clause consideration of the Bill
- > Clause-by-clause consideration resulted in amendments to Bill
- > May 17, 2004 - Bill 31 passed third and final reading with unanimous support in the legislature
- > May 20, 2004 - Bill 31 received Royal Assent
- > July 3 - September 3, 2004 - Public consultation on regulations

BILL 31 SCHEDULES

- > Schedule A - *The Personal Health Information Protection Act, 2004* (PHIPA)
- > Schedule B - *The Quality of Care Information Protection Act, 2004* (QCIPA)*
- > Both Schedules came into force on November 1, 2004

UNDERLYING PRINCIPLES

> PHIPA is informed by the 10 principles set out in the *Canadian Standards Association Model Code for the Protection of Personal Information*

- Accountability
- Identifying Purposes
- Consent
- Limiting Collection
- Limiting Use, Disclosure and Retention
- Accuracy
- Safeguards
- Openness
- Access
- Challenging Compliance

ORGANIZATION OF PHIPA

Part I	Interpretation and Application
Part II	Practices to Protect Personal Health Information
Part III	Consent, Capacity and Substitute Decision Making
Part IV	Collection, Use and Disclosure
Part V	Access and Correction
Part VI	Administration and Enforcement
Part VII	General (Immunity, Offences, Regulations)
Part VIII	Complementary Amendments
Part IX	Commencement and Short Title

SCOPE OF PHIPA

- > Health information custodians (HICs) that collect, use and disclose personal health information (PHI)
- > Non-health information custodians where they receive personal health information from a HIC
- > In the event of a conflict, PHIPA and its regulations prevail over any other Act unless PHIPA, its regulations or the other Act specifically provide otherwise (s. 7(2), p.15)
- > There is no conflict if can comply with both Acts. Regulations clarify when “it is not possible to comply with both” (s.7(3), p.15)

WHO IS A HEALTH INFORMATION CUSTODIAN (s.3, p.8)?

- > Health care practitioners, including
 - a member defined under *Regulated Health Professions Act*
 - a drugless practitioner under *Drugless Practitioners Act*
 - a member of Ontario College of Social Workers and Social Service Workers who provides health care
 - a person whose primary function is to provide health care for payment
- > a service provider within the meaning of the *Long-Term Care Act, 1994* (s.2, p.6)
- > Minister (together with Ministry) of Health and Long-Term Care
- > Medical officers of health or boards of health
- > A person who operates a:
 - hospital or independent health facility
 - approved charitable home for the aged, home for the aged, nursing home
 - pharmacy
 - laboratory
 - ambulance service
 - home for special care
 - a centre, program or service for community health or mental health whose primary purpose is the provision of health care
 - community care access centre
- > Any other prescribed person or class of persons

WHO IS AN AGENT?

- > “**Agent**”, in relation to a HIC, means a person that, with the authorization of the HIC, acts for or on behalf of the HIC in respect of PHI for the purposes of the HIC, and not the agent’s own purposes, whether or not the agent has authority to bind the HIC, whether or not the agent is employed by the HIC and whether or not the agent is being remunerated
- > Except as permitted or required by law, or as prescribed, an agent shall not collect, use or disclose PHI, unless permitted by the HIC (s.17, p.21)
- > Provision of PHI by a HIC to an agent is a use by the HIC, not a collection by nor a disclosure to an agent

WHAT IS “HEALTH CARE”?

> “**Health care**” means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that is carried out or provided:

- to treat or maintain an individual’s physical or mental condition
- prevent disease or injury or to promote health
- as part of palliative care

and includes

- the compounding, dispensing or selling of a drug, a device or equipment
- a community service that is described in the *Long-Term Care Act, 1994* (s.2, p.6)

WHAT IS PERSONAL HEALTH INFORMATION?

- > PHI (s.4, p.12) includes identifying information about an individual in oral or recorded form that:
 - relates to his or her physical or mental health
 - relates to providing health care, including identifying a provider of health care
 - is a plan of service within the meaning of the *Long-Term Care Act*
 - relates to the donation of a body part or bodily substance
 - relates to payments or eligibility for health care in respect of the individual
 - is a health number
 - identifies a substitute decision-maker of that individual
 - is in a record held by a HIC where the record contains any of the above information

- > PHI does not include a record of information about an employee or other agent of the HIC, unless the record is primarily related to the provision health care to the employee/agent

INTERPLAY BETWEEN PHIPA AND FIPPA/MFIPPA

- > HICs covered under PHIPA include some FIPPA/MFIPPA institutions, such as
 - ! MOHLTC (under FIPPA)
 - ! Boards of Health (under MFIPPA)
 - ! Municipal Homes for the Aged (under MFIPPA)
 - ! Municipal ambulance services (under MFIPPA)

- > These institutions are subject to
 - ! PHIPA with respect to PHI (including mixed records)
 - ! FIPPA/MFIPPA with respect to Personal Information (PI) that is not PHI
 - ! Selected provisions of FIPPA/MFIPPA with respect to all PI (including PHI) (s.8, p.15)

PRACTICES TO PROTECT INFORMATION

- > Must have information practices in place that comply with the Act (s.2, p.7; s.10, p.17)
- > Must take reasonable steps to ensure accuracy (s.11, p.17)
- > Must maintain the security of PHI in its custody or control (s.12, p.17)

“Information Practices” means the policy of the HIC for actions in relation to PHI, including,

- (a) when, how and the purposes for which the HIC routinely collects, uses, modifies, discloses, retains or disposes of PHI, and
- (b) the administrative, technical and physical safeguards and practices that the HIC maintains with respect to the information

PRACTICES TO PROTECT INFORMATION (cont'd)

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ACCOUNTABILITY AND OPENNESS

- > Must have a contact person to ensure compliance with Act, respond to access requests, inquiries and complaints from public (s.15, p.19)
- > Must make available to the public a written statement describing the HIC's information practices, how to make a complaint, etc. (s.16, p.19)
- > Must be responsible for its PHI and for actions of agents (s.17, p.20)

GENERAL LIMITATIONS AND REQUIREMENTS

- > HIC shall not collect, use or disclose PHI if other information will serve the purpose (s.30(1), p.32)
- > HIC shall not collect, use or disclose more PHI than is reasonably necessary to meet the purpose (s.30(2))
- > HIC shall not charge fees for collection or use unless authorized by regulations. For disclosure or for access requests, a HIC shall not charge fees that exceed the prescribed amount, if any, or reasonable cost recovery if no fees prescribed (s.35, p.35; s.54(11), p.58)

DEFINITIONS - COLLECT, USE AND DISCLOSE

“**Collect**”, means to gather, acquire, receive or obtain phi by any means from any source

“**Use**”, in relation to PHI in the custody or under the control of HIC or a person, means to handle or deal with the information, but does not include to disclose the information. Transferring PHI between an agent of the HIC and the HIC is a use and not a disclosure

“**Disclose**”, in relation to PHI in the custody or under the control of a HIC or a person, means to make the information available or to release it to another HIC or to another person, but does not include to use the information

CONSENT

- > Consent is required for the collection, use, disclosure of PHI subject to specific exceptions (s.29, p.32)

- > Consent must
 - be a consent of the individual
 - be knowledgeable (s.18(5), p.22)
 - relate to the information
 - not be obtained through deception or coercion (s.18(1), p.21)

- > Consent may be express or implied except where it must be express (s.18(2), 18(3), p.21)

- > Consent is knowledgeable if it is reasonable in the circumstances to believe that the individual knows the purposes of the collection, use or disclosure and that the individual may give or withhold consent (s. 18(5), p. 22)

CONSENT (cont'd)

- > HIC may rely on notice of purposes (posted or made readily available) as reasonable belief of the individual's knowledge of the purposes, where reasonable in the circumstance (s.18 (6), p.22)
- > HIC who has obtained an individual's consent or who receives a document purporting to record the individual's consent is entitled to assume that the consent fulfils the requirements of the Act and the individual has not withdrawn it, unless it is not reasonable to assume so (s.20(1), p.22)
- > Consent may be assumed to be implied between HICs for health care purposes, unless HIC is aware the individual has expressly stated otherwise (s.18(3), s.20(2), p.23)
[Applies only to listed HICs, whose core function is provision of health care.]
- > Express consent is required for disclosure to non-HICs (e.g. to an employer/insurer) or to HICs for non-health care purposes (s.18(3), p.21)
- > Express consent is required for the collection, use and disclosure of PHI for marketing, subject to the prescribed requirements and restrictions, if any (s.33, p.33)

HEALTH CARE

- Individuals may expressly instruct that their PHI not be used or disclosed for the purpose of health care (s.37(1)(a), p.37; s.38(1)(a), p.38; or s.50(1)(e), p.52)
- Hospitals are not required to comply with an express instruction for one year (November 1, 2005)
- However, nothing prevents a hospital from complying (s.31, p.33)
- Other uses and disclosures authorised by the Act without consent are not affected by such an express instruction

RELIGIOUS AFFILIATION

- > Where a patient provides to a facility, such as a hospital or nursing home, information about their religious or other organizational affiliation, the facility may assume implied consent to provide information about their name and location, to representatives of the religion/organization unless requested otherwise
- > HIC must offer the patient an opportunity to withhold or withdraw consent (s.20(4), p.23)

FUNDRAISING

- > A HIC may collect, use or disclose PHI about an individual for the purpose of fundraising activities only where,
 - (a) the individual expressly consents; or
 - (b) the individual consents by way of an implied consent and the information consists only of the individual's name and mailing address, or the name and mailing address of the individual's substitute decision-maker, where applicable (s.32, p.33; Reg., s. 10(3))

- > Collection, use and disclosure of phi for fundraising purposes subject to additional requirements set out in regulations

COLLECTION

- > Collection of PHI directly from individual requires consent, which will usually be implied by the fact that the individual is giving the information
- > Individual may consent to an indirect collection (s.36, p.35)
- > Indirect collection without consent is permitted where specified, such as (s. 36(1), p. 35)
 - the information is reasonably necessary for providing health care and it is not reasonably possible to collect PHI
 - that can reasonably be relied on as accurate directly from the individual; or
 - directly from the individual in a timely manner
 - collection is by a FIPPA/MFIPPA HIC for the purpose of a proceeding, investigation of breach or related to its statutory function
 - the Information and Privacy Commissioner authorizes another manner of collection
 - collection is from a person who is permitted or required by law to disclose it to the HIC
 - a HIC is permitted or required by law to collect indirectly, subject to prescribed requirements or restrictions

USE

- > Consent is required for the use of PHI subject to specific exceptions, including where the use is (s.37, p.36)
- for purpose for which it was collected or created and for all functions reasonably necessary (unless collected with consent or under s.36(1)(b) and individual expressly instructs otherwise)
 - for planning or delivering programs or services of the HIC
 - for the purpose of obtaining payment, processing, monitoring, verifying or reimbursing claims for payment
 - for risk management, for error management, in order to improve or maintain quality of services (s.37(1)(d))
 - for research (with REB approval)
 - if permitted or required by law, subject to prescribed requirements and restrictions

DISCLOSURE

- > Consent is required for disclosure of PHI subject to specific exceptions such as where the disclosure is
- reasonably necessary for the provision of health care to the individual and it is not possible to get consent in a timely manner, unless the individual has expressly instructed otherwise (s.38(1)(a), p.38)
 - in order for the Minister or another HIC to determine or provide funding or payment to the HIC for the provision of health care (s.39(1)(a), p.39))
 - for determining or verifying statutory eligibility for health care or related benefits or services (s.39(1)(a), p.39)
 - upon the request of the Minister, a disclosure to the Minister for the purpose of monitoring or verifying claims for payment for health care funded by the Ministry (directed disclosure) (s.46, p.47)
 - to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or under an Act (s.43(1)(g), p.42)

DISCLOSURE (cont'd)

> Exceptions to consent for disclosure continued:

- A HIC may disclose personal health information about an individual,
 - (a) to the Chief Medical Officer of Health or a medical officer of health within the meaning of the *Health Protection and Promotion Act* if the disclosure is made for a purpose of that Act; or
 - (b) to a public health authority that is similar to the persons described in clause (a) and that is established under the laws of Canada, another province or a territory of Canada or other jurisdiction, if the disclosure is made for a purpose that is substantially similar to a purpose of the *Health Protection and Promotion Act*. (s.39(2), p.39)

DISCLOSURE (cont'd)

- > Exceptions to consent for disclosure continued:
- for contacting a relative, friend or substitute decision maker of an individual who is incapacitated, injured, or ill and unable to consent (s.38(1)(c), p.38)
 - to a prescribed person who compiles and maintains a PHI registry (s.39(1)(c), p.39)
 - necessary to eliminate or reduce a significant risk of serious bodily harm to a person or group (s.40, p.40)
 - permitted or required by law, subject to prescribed requirements and restrictions (s.43(1)(h), s.43(2), p.42)

DISCLOSURE FOR PROCEEDINGS

HIC may disclose PHI about an individual in the context of a proceeding:

- Subject to the requirements and restrictions, if any, that are prescribed, for the purpose of a proceeding or contemplated proceeding in which the HIC or the agent or former agent of the HIC is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding (s.41(1)(a), p.41)

- For the purpose of complying with,
 - (i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or
 - (ii) a procedural rule that relates to the production of information in a proceeding (s.41(1)(d))

DISCLOSURE FOR RESEARCH

- > Disclosure of PHI for research requires approval of researcher's research plan by a research ethics board (REB)

- > A researcher shall (s.44, p.43)
 - ∇ comply with the conditions imposed by the REB
 - ∇ use PHI only for purpose set out in the research plan
 - ∇ not publish information in a form that could identify individual
 - ∇ not disclose information unless required by law and subject to prescribed exceptions and additional requirements
 - ∇ not make contact or attempt to make contact with the individual unless the HIC first obtains consent
 - ∇ notify HIC of any breach
 - ∇ comply with the agreement entered into with HIC

DISCLOSURE FOR PLANNING AND MANAGEMENT OF HEALTH SYSTEM

- > HIC may disclose to a prescribed entity PHI for the purpose of analysis or compiling statistical information with respect to the management of, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system, including the delivery of services (s.45, p.46)
- > The prescribed entity must have in place practices and procedures to protect the privacy of the individuals whose PHI it receives and to maintain the confidentiality of the information
- > The Information and Privacy Commissioner must approve those practices and procedures (has one year to do so from November 1, 2004)
- > Where a HIC may disclose PHI to a prescribed entity, that entity is authorized to collect it

DIRECTED DISCLOSURE TO HEALTH DATA INSTITUTE

- > PHIPA authorizes the Minister to direct a HIC to disclose PHI to an approved health data institute for analysis of the management of, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system (s.47, p.47, s.48, p.50)
- > Before requiring information from a HIC, the Minister must provide to the IPC a proposal for review and comment
- > Data institute must have practices and procedures approved by the Information and Privacy Commissioner
- > Data institute may release only non-identifying information to the Minister or another person as approved by the Minister, unless specifically approved by IPC as in the public interest

RECIPIENT RULE

- > Non-HICs that receive PHI from a HIC shall not use or disclose it for any purpose other than the purpose for which the HIC was authorized to disclose the PHI under this Act, or for the purpose of carrying out a statutory or legal duty, subject to the regulations or any other law (s.49(1), p.51)
- > Regulations set out specific exceptions
- > A non-HIC shall not use or disclose more PHI than is reasonably necessary to meet the purpose of the use or disclosure, as the case may be (exceptions may be prescribed)
- > Recipient rules do not apply to FIPPA/MFIPPA institutions

PERSONS WHO MAY CONSENT

- > A capable individual, regardless of age, can consent to collection, use or disclosure of own PHI. Capacity is presumed. (s. 21(4), p.24)

- > Where a consent is required of an individual, the following may consent on that individual's behalf ("substitute decision-makers")
 - if the individual is capable and 16 or over, anyone who is 16 or over who the individual has authorized to act on his or her behalf
 - if the individual is less than 16 years of age, a parent of the child, with some exceptions
 - if the individual is incapable of consenting, a person authorized to consent on behalf of the individual under this Act
 - if the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the estate
 - a person whom an Act of Ontario or Canada authorizes or requires to act on behalf of the individual (s.23, p.25)

- > Where this Act permits or requires an individual to make a request, express an instruction or take a step, a substitute decision-maker may make the request, express an instruction or take the step (s.25, p.27)

CAPACITY

- > Capacity is the ability to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure and ability to appreciate the reasonably foreseeable consequences of giving, not giving, or withholding or withdrawing consent (s.21, p.23)
- > Incapacity determination is reviewable by Consent and Capacity Board (s.22, p.24)

CAPACITY (cont'd)

- > Substitute decision makers authorized to consent on behalf of an incapable individual in PHIPA, in order of priority (s.26(1), p.28)
 - guardian of the person or guardian of property (with authority)
 - attorney for personal care or attorney for property (with authority)
 - the representative appointed by the Consent and Capacity Board
 - the spouse or partner
 - a child's parent
 - a parent with only a right of access
 - a brother or sister
 - any other relative
 - Public Guardian and Trustee (as last resort)

- > A substitute decision maker who makes decisions for an incapable person under the *Health Care Consent Act* has priority over the persons in the list above with respect to information decisions necessary for, or ancillary to, a decision about treatment, a long term care admission or a personal assistance service in a LTC facility, as the case may be (s.26(11), p.30)

ACCESS

- > Every individual has a right to access his/her record of PHI, subject to limited exceptions (s.52, p.53)
- > Where a restriction on access applies, an individual has a right of access to that part of the record that can be severed
- > A HIC must respond as soon as possible to a written access request, but no later than 30 days after receiving the request, subject to a 30-day extension
- > An individual can request that the HIC expedite the request where necessary (s.54(5), p.57)
- > Nothing prevents a HIC from granting an individual access to a record based on an oral request or without an access request

CORRECTION

- > An individual may request a HIC to make a correction to his/her record (s.55, p.58)
- > A HIC must correct the record where the individual demonstrates that the record is incomplete or inaccurate for the purposes for which the HIC uses the record unless an exception applies in the circumstances
- > A HIC is not required to correct a professional opinion or observation made in good faith or a record that was not originally created by the HIC where the HIC has insufficient knowledge or authority to make the correction
- > Where a HIC refuses to make a correction, HIC must inform individual of refusal, provide reasons and inform of right to appeal the refusal or the right to attach a statement of disagreement

ADMINISTRATION AND ENFORCEMENT

- > Information and Privacy Commissioner, established under the *Freedom of Information and Protection of Privacy Act*, is the oversight body for the Act
- > The IPC may appoint an Assistant Commissioner for Personal Health Information
- > IPC may investigate a complaint or investigate on own motion where there are reasonable grounds to believe that a person has contravened or is about to contravene the Act or the regulations (s.56, p.60; s.58, p.62)
- > Provides IPC with powers to enter and inspect premises (without warrant, unless a dwelling), require access to PHI and compel testimony (by summons) (s.60, p.63)

ADMINISTRATION AND ENFORCEMENT (cont'd)

- > The IPC shall not inspect a record of PHI, require evidence or inquire into PHI without the consent of the individual to whom it relates, unless the IPC
 - determines it is reasonably necessary to do so and the public interest justifies dispensing with obtaining the individual's consent; and
 - provides a statement to the HIC setting out the IPC's determination, together with brief reasons and any restrictions and conditions the IPC has specified

- > IPC may make orders resulting from a complaint or own motion investigation (s.61, p.66)

- > IPC orders, other than for access or correction, may be appealed on questions of law (s.62, p.68)

ACTION FOR DAMAGES

- > An individual affected by an IPC's order may bring an action in the Superior Court of Justice for damages for actual harm suffered as a result of a contravention of the Act or regulations (s.65, p.70)
- > Where the harm suffered was caused by a breach that the defendant engaged in willfully or recklessly, the compensation may include an award not exceeding \$10,000 for mental anguish
- > No action or other proceeding for damages may be instituted against a HIC or any other person for anything done, in good faith and reasonably in the circumstances, in the exercise of any powers or duties under the Act or any alleged neglect or default that was reasonable in the circumstances (s.71, p.73)

OFFENCES AND PENALTIES

- > Creates offences for contravention of the legislation, including:
 - wilfully collecting, using or disclosing PHI in contravention of the Act
 - once access request made, disposing of a record of personal information in an attempt to evade the request
 - wilfully failing to comply with an order made by the IPC (s.72, p.74)

- > Maximum penalty of \$50,000 for an individual and \$250,000 for a corporation

- > A person who complains to the IPC about a contravention of the Act is protected from retaliation (s.70, p.72)

REGULATIONS

- > The Lieutenant Governor in Council may make regulations, such as
 - exempting or adding persons or classes of persons under the definition of HIC
 - specifying that certain types of information shall or shall not be included in the definition of PHI
 - setting requirements for information practices including specifying the requirements for using electronic means to collect, use, modify, disclose, retain or dispose of PHI
 - defining any word or expression used in the Act and not otherwise defined
 - exempting any Act from the general rule that PHIPA prevails (s.73, p.75)

- > PHIPA includes a public consultation process for regulation-making that requires
 - publishing a notice of proposed regulation
 - giving the public information on where to review written information about proposed regulation
 - giving the public at least 60 days to submit written comments (s.74, p.77)

COMPLEMENTARY AMENDMENTS

- > PHIPA makes complementary amendments to other Acts, including:
 - *Mental Health Act*
 - *Public Hospitals Act*
 - *Health Protection and Promotion Act*
 - *Long-Term Care Act, 1994*
 - *Occupational Health and Safety Act*
 - *Child and Family Services Act*

- > The *Health Cards and Numbers Control Act, 1991* is repealed

MORE INFORMATION?

- Text of the *Personal Health Information Protection Act, 2004* and regulations:
<http://www.e-laws.gov.on.ca>
- Related Ministry of Health and Long-Term Care documents:
<http://www.health.gov.on.ca>
- Related Information and Privacy Commissioner / Ontario documents:
<http://www.ipc.on.ca>

PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004:

AN OVERVIEW FOR HEALTH INFORMATION CUSTODIANS

Note: This document provides a general overview of the *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3. It does not include references to the regulations, since currently there are no regulations under the Act. (See the end of this document for a link to draft proposed regulations which are currently the subject of public consultation, and are subject to change.) As such, this document does not address all aspects of the Act and is made available for convenience of reference only. This document should be read in conjunction with the Act and any regulations made under the Act, and in case of any conflict the terms of the Act and regulations are authoritative. Nothing in this overview should be construed as legal advice. You should consult your own solicitors for all purposes of interpretation.

**Ministry of Health and Long-Term Care
August 2004**

Health Information Privacy in our Facility



PERSONAL HEALTH INFORMATION AND PRIVACY

Ontario has a law that protects your personal health information, including information about you at this facility. We are required to keep your personal health information safe and secure. You have the right to know how we may use and give it out and how you can get access to it.
Please ask to see our Brochure or Privacy Statement for more details on our privacy practices.

WHO CAN USE AND SEE YOUR PERSONAL HEALTH INFORMATION

Your personal health information must be kept private and secure.
You or a person who can legally make decisions for you about your personal health information can use and see it.
Your personal health information is shared among your doctors, nurses, care givers, and all other team members who provide care and assistance to you.

We may collect, use and give out your personal health information to others, as reasonably necessary to:

- provide you with health care and assistance, both within and outside our care facility;
- communicate or consult about your health care with your doctor(s) and other health care providers;
- get payment for your health care, including from OHIP and private insurance;
- do health system planning and research; and
- report as required or permitted by law.

There are certain other circumstances where we may be required to give out some of your personal health information. If you want to know more, please see our Brochure.

YOUR RIGHTS AND CHOICES

You or a person who can make decisions for you about your personal health information have the right:

- to see and get a copy of your personal health information;
- to ask us to make corrections to inaccurate or incomplete personal health information;
- to ask us not to give out your personal health information to other health care providers – we will not give out this information unless permitted or required by law to do so; and
- to be told if your personal health information is stolen, lost or improperly accessed.

There are certain exceptions to these rights; please see our Brochure for more information.

WHO YOU CAN TALK TO ABOUT YOUR DECISIONS

When you give us permission to use or give out your information, you may change your mind at any time.
However, sometimes the law permits or requires us to share your information without your permission. For more information please see our Brochure.
To make your choices, please speak to our Contact Person below.

FAMILY, FRIENDS AND CLERGY

Your family and friends can be told general information about you, such as your location in the facility and your health condition, unless you tell us not to give out this information.
If you give us information about your religion, we may give your name and location in the facility to a member of the clergy, unless you tell us not to do so.

FUNDRAISING AND MARKETING

Our facility relies on patient and community support for a part of our funding. **Unless you tell us not to do so, we or others such as our Foundation may use your name and address to contact you to ask for your support.**
Sometimes, because of your condition or the treatment you have received, we or others may contact you about special projects, or products or services that may help you. **We will ask you before using your personal health information for this purpose, and you have the right to tell us not to contact you.**

RESEARCH, EDUCATION AND PLANNING

We may be asked to give your personal health information to a research project. We will get your permission before we use or give out your personal health information for these projects. (There are also other types of research projects which do not require your consent; these must have safeguards in place to protect your privacy.)
We may use your personal health information without your consent for our own education, planning and management. We may also give out your personal health information to certain listed organizations for use in the planning and management of the health care system. Please see our Brochure for more details.

HOW TO REACH US

If you have questions or concerns about our privacy practices, please speak to our Contact Person:

Name: _____ Phone Number: _____



Information and Privacy
Commissioner/Ontario



OBA • ABO
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PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004:

AN OVERVIEW FOR HEALTH INFORMATION CUSTODIANS

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BACKGROUND

Bill 31 (the *Health Information Protection Act, 2004*), consisting of the *Personal Health Information Protection Act, 2004* (Schedule A) and the *Quality of Care Information Protection Act, 2004* (Schedule B), received first reading on December 17, 2003. Hearings before the Standing Committee on General Government were held in January and February 2004 in four Ontario cities. Based on presentations made before the Committee, the Committee reported the Bill back to the Legislature with many amendments. The Committee met again following second reading of the Bill in April 2004, and presented additional amendments to the Bill in its second report to the Legislature. The motion for third reading of Bill 31 passed with unanimous consent on May 17, 2004. The Bill received Royal Assent on May 20, 2004. The two Acts contained in the two schedules will come into force on November 1, 2004.

The *Personal Health Information Protection Act, 2004* is the culmination of ongoing efforts over a number of years to develop appropriate legislative provisions for Ontario to ensure the privacy of personal health information in a manner that would be consistent with the effective provision of health care. In June 1996, the Ministry of Health and Long Term Care released a consultation paper, *A Legal Framework for Health Information*. Then, in November 1997 the draft *Personal Health Information Protection Act, 1997* was released for public consultation. On December 7, 2000, Bill 159, the *Personal Health Information Privacy Act, 2000*, received first reading. After Standing Committee public hearings, the Legislature prorogued in March 2001 and the Bill died on the order paper. More recently, in February 2002, the Ministry of Consumer and Business Services released draft legislation, the *Privacy of Personal Information Act*, for consultation. That draft legislation, prepared in consultation with the Ministry of Health and Long-Term Care, was drafted so as to apply to both the health sector and business and not-for-profit sectors outside the health sector, with separate rules for personal health information in the health sector.

Many jurisdictions have enacted or are developing legislation to protect the privacy of personal information, and personal health information in particular, and the confidentiality and security of such information. On January 1, 2004, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) began to apply throughout Canada to organizations when they collect, use or disclose personal information in the course of “commercial activities”, except in areas in which provinces have enacted legislation deemed by the federal Cabinet to be “substantially similar.” This includes commercial activities in the business, health and not-for-profit sectors. PIPEDA has been identified by health sector stakeholders as especially problematic for organizations that collect, use or disclose personal health information for health care purposes, since it was not developed with the special needs of health care in mind.

The *Personal Health Information Protection Act, 2004* (“PHIPA”) is designed to address these concerns and to achieve the purposes set out in the Act.

THE PURPOSES OF PHIPA

The purposes of PHIPA are set out in section 1 of the Act as follows:

- (a) to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care;

- (b) to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions;
- (c) to provide individuals with a right to require the correction or amendment of personal health information about themselves, subject to limited and specific exceptions;
- (d) to provide for independent review and resolution of complaints with respect to personal health information;
- (e) to provide effective remedies for contraventions of the Act.

INTERACTION OF PHIPA WITH OTHER LAW

As a general rule, where there is a conflict between PHIPA and any other legislation, PHIPA prevails: s. 7(2). If it is possible to comply with both provisions however, there is no conflict. For example, if a regulation under another Act requires that a health information custodian ensure that records be kept accurate and up to date at all times (e.g., s. 93 of Reg. 832 made under *Nursing Homes Act*) and PHIPA requires steps to be taken that are reasonable in the circumstances to maintain accuracy, it is possible to comply with both provisions by complying with the higher standard: s. 7(3). Regulations may provide further guidance as to the interpretation of the conflicts provision in s.7(2).

PHIPA does not prevail, however:

- over any conflicting provision in the *Quality of Care Information Protection Act, 2004*, or its regulations: s. 7(4)
- where another Act specifically provides that it prevails over PHIPA: s. 7(2)
- where a regulation under PHIPA specifies otherwise

Furthermore PHIPA provides, in s. 9(2), that it does not interfere with:

- any legal privilege, such as solicitor-client privilege or mediation privilege
- the law of evidence
- the power of a court or tribunal to compel testimony or the production of a document
- any law or court order prohibiting the publication of information
- the regulatory activities of a regulating body of a health profession or social workers, so as not to impact the regulatory body's ability to carry out its role in governing its members

Many statutes have been amended to reflect PHIPA as the prevailing statute. For example:

- the access and corrections provisions in the *Mental Health Act* and the *Long Term Care Act, 1994* have been repealed and the disclosure provisions in those two Acts have been significantly altered to harmonize with PHIPA
- the reference to a "medical record" in the *Public Hospitals Act* has been changed to a "record of personal health information".
- the *Freedom of Information and Protection of Privacy Act* was amended to make reference to the Assistant Commissioner for Personal Health Information, and to require the reporting of certain matters in respect of PHIPA by institutions under that Act or under the *Municipal Freedom of*

Information and Protection of Privacy Act that are also health information custodians under PHIPA.

- the *Ambulance Act* was changed to provide a set of rules concerning the disclosures of personal health information among such persons as operators of ambulance services and the municipalities that are responsible for providing these services.
- other Acts were amended to ensure that the provisions found in those Acts apply despite the provisions of PHIPA (e.g., the *Occupational Health and Safety Act* was amended to preserve the restriction on the employer's access to an employee's medical record found in s. 63 of that Act).

APPLICATION OF PHIPA

PHIPA applies primarily to personal health information in the hands of health information custodians.

As part of this, it applies to agents of health information custodians (which includes employees). See "Who is a Health Information Custodian?" below for details.

It also applies to those who receive personal health information from a health information custodian (i.e. "recipients"). See "Disclosure of Personal Health Information" below for details.

It also applies to everyone with respect to the collection, use or disclosure of the health number. See "Rules Respecting the Collection, Use and Disclosure of Personal Health Information" below for details.

Furthermore, regulations may be made under subsection 10(4) that would apply to any person who provides goods or services to a health information custodian for the purpose of enabling the custodian to use electronic means to handle personal health information, whether or not the person is acting as an agent of the custodian.

WHO IS A HEALTH INFORMATION CUSTODIAN?

Anyone described in the following list is a health information custodian under PHIPA, (unless one of the exclusions discussed further below applies):

- health care practitioners (see below for more details) or a group practice of health care practitioners
- persons or organizations providing a community service under the *Long-Term Care Act, 1994*
- a community care access centre (in the capacity both as provider of community services and as placement coordinator for long-term care facilities)
- public or private hospitals
- psychiatric facilities under the *Mental Health Act*
- an institution under the *Mental Hospitals Act*
- an independent health facility under the *Independent Health Facilities Act*

- a long-term care facility under the *Nursing Homes Act, Charitable Institutions Act, or Homes for the Aged and Rest Homes Act*
- a “care home” within the meaning of the *Tenant Protection Act, 1997*, which may be, for example, a retirement home
- a pharmacy
- a laboratory or a specimen collection centre under the *Laboratory and Specimen Collection Centre Licensing Act*
- an ambulance service
- a home for special care under the *Homes for Special Care Act*
- an evaluator under the *Health Care Consent Act, 1996* or an assessor under the *Substitute Decisions Act, 1992*
- a board of health together with its medical officer of health under the *Health Protection and Promotion Act*
- the Ministry of Health and Long-Term Care
- any other person prescribed by the regulations as a health information custodian

πα centre, program or service for community health or mental health whose primary purpose is the provision of health care

The latter category is intended to be a general category, but it is important to apply it in accordance with its specific terms and limitations. It is important to have regard for the definition of “health care” in the Act when applying this provision. This category would include community mental health centres, and addiction treatment programs, for example, since they are primarily engaged in providing health care. An example of a service that would not be a health information custodian under this category is an organization that provides transportation to persons to receive medical care where the organization is usually not providing any health care to the individual while transporting him or her. Of course if the organization is a health information custodian under another provision, e.g. as a community service provider under the *Long Term Care Act, 1994*, this analysis does not apply. Many social service agencies, e.g. Children’s Aid Societies, would *not* fall under this definition, except if the *main* purpose of the organization is to provide health care to its clients.

As noted above “health care practitioners” are considered to be health information custodians, unless subject to the exclusions discussed further below (e.g., if the health care practitioner is acting as the agent/employee of another health information custodian). The term “health care practitioner” includes the following persons when they are providing health care:

- a member of a regulated health profession under the *Regulated Health Professions Act, 1991* (e.g. a physician, dentist or nurse)
- a registered drugless practitioner under the *Drugless Practitioners Act* (e.g. a naturopath)
- a member of the Ontario College of Social Workers and Social Service Workers
- any other person whose *primary* function is to provide health care for payment (e.g., an acupuncturist psycho therapy)

The latter category would not include faith healers or traditional aboriginal healers or midwives, who are specifically excluded. It would also not include, for example, a foster parent, even if the parent is remunerated in part for providing health care to the foster child, since the primary purpose of the foster parent is to provide safe custody for the child.

A health information custodian that operates more than one facility of the type referred to in paragraph 3(1)[4] of PHIPA (e.g., long-term care facility, retirement home, pharmacy, lab etc.) will be deemed to be a separate health information custodian with respect to each such facility, unless

- one of the facilities is a public hospital,
- a regulation under PHIPA deems separate custodians to be a single custodian, or
- the Minister orders otherwise on an application under s. 3(7)

The Minister can also order that two or more separate health information custodians are permitted to act as a single health information custodian, subject to such terms and conditions that the Minister imposes: s. 3(8) and (9).

The Minister will be approving a form for applications for such orders. It should be noted that such applications can be processed before November 1, 2004.

+ **Who is Not a Health Information Custodian?**

The following persons who may otherwise be considered health information custodians under the list set out above are not considered health information custodians for the purposes of PHIPA:

- faith healers or traditional aboriginal healers or midwives
- a person who would otherwise be a health information custodian who is an agent/employee of another health information custodian. For example, a physician with privileges in a hospital acts as the hospital's agent when entering information into hospital records
- a person who would otherwise be a health information custodian who is an agent/employee of an organization that is not a health information custodian, but this exception applies only where the agent/employee is *not* providing health care. If the agent/employee *is* providing health care (e.g. a nurse employed by a school board to provide health care to students, or a physician retained by a private company to provide health care to company employees) then the agent/employee is a health information custodian
- a person who the regulations say is not a health information custodian

+ **Who are agents of a health information custodian?**

An "agent" of a health information custodian includes anyone who is authorized by the health information custodian to do anything on behalf of the custodian with respect to personal health information.

A person can be an agent of a health information custodian:

- whether or not they are being paid

- whether or not they are employed by the health information custodian or are an independent contractor
- whether or not they have the power to enter into agreements on behalf of the health information custodian

Agents of a health information custodian include, for example:

- employees of the health information custodian
- persons contracted to provide services to the health information custodian where the person has access to personal health information (e.g. copying or shredding service, records management service)
- volunteers or students who have any access to personal health information

See “Duties of Health Information Custodians with Respect to Personal Health Information” below for more details about the responsibility of a health information custodian for its agents, and the responsibility of agents.

WHAT IS “PERSONAL HEALTH INFORMATION”?

"Personal health information" is defined as identifying information about an individual whether oral or recorded, if the information

- relates to the physical or mental health of the individual, including information that consists of the individual’s family health history,
- relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual
- is a plan of service within the meaning of the *Long-Term Care Act, 1994* of the individual,
- relates to payments or eligibility for health care in respect of the individual,
- relates to the donation by the individual of any body part or bodily substance, or is derived from testing of such body part or substance,
- is the individual’s health number, or
- identifies the individual’s substitute decision-maker: s. 4(1).

Information is “identifying” when it identifies an individual or when it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify the individual: s. 4(2). It is not necessary for the individual to be actually named for the information to be considered personal health information.

“Personal health information” also includes other identifying information that is contained in the same record with the information described above: s. 4(3). This is referred to as a “mixed record”.

Generally, “personal health information” does not include identifying information held by health information custodians as employers, i.e. personal health information relating to an employee maintained primarily for a purpose other than the provision of health care to the employee: s. 4(4). For example, information contained in the hospital human resources file of a nurse employed by the hospital would not

be considered personal health information, even if it contained identifying health information about the nurse or anyone else (e.g., for the purposes of accommodating a disability, providing sick leave, or monitoring the employee's performance in delivering health care to patients). If that employee/nurse was treated as a patient in the hospital however, information in the employee's medical file would be considered personal health information.

It should be noted that PHIPA does not apply to personal health information about an individual after the earlier of 120 years after the record was created, or 50 years after the death of the individual: s. 9(1).

WHEN DO I HAVE TO START COMPLYING WITH THE ACT?

PHIPA comes into force on November 1, 2004, and everyone subject to the Act will be expected to comply from that time, unless a specific provision of the Act extends that time with respect to a particular obligation.

The Act will apply to the collection of personal health information by health information custodians after the Act comes into force, and to the use and disclosure of personal health information, even if it was collected before the Act comes into force: s. 7(1). This means that where a health information custodian collected information before November 1, 2004, it would not have an obligation under PHIPA to seek consent for that collection, however it would need to seek consent (assuming no exception to the consent requirement applies) for any use or disclosure it wishes to make with the information *after* that date. A consent provided prior to that date can continue to be relied on however, assuming that it meets the general requirements for consents discussed below: s. 18(7).

The Act (i.e., s. 49) also applies to the use and disclosure of personal health information after the Act comes into force by a person who is not a health information custodian and to whom a health information custodian disclosed the information (i.e., a recipient) even if the information was received by the recipient from the custodian before November 1, 2004.

FIPPA/MFIPPA INSTITUTIONS

The overall aim of PHIPA is to provide consistent and comprehensive rules for the collection, use or disclosure of personal health information across the entire health sector, which covers both private and public sector organizations.

Some health information custodians are also institutions, or parts of institutions, under the *Freedom of Information and Protection of Privacy Act* (FIPPA) or the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). Examples are the Ministry of Health and Long-Term Care, boards of health, municipal homes for the aged, and municipal ambulance services.

These health information custodians are subject to

- PHIPA with respect to personal health information (including mixed records)
- FIPPA/MFIPPA with respect to personal information that is not personal health information
- Selected provisions of FIPPA/MFIPPA with respect to all personal information (including personal health information): s. 8

A number of special provisions in PHIPA help ensure harmony and consistency for health information custodians that are also subject to FIPPA/MFIPPA, but this overview does not address these provisions.

Members of the public continue to have the right to make requests to FIPPA/MFIPPA institutions, even those that will now also be health information custodians, for general records where the personal health information of any other individual in such a record is severed out where applicable.

DUTIES OF HEALTH INFORMATION CUSTODIANS WITH RESPECT TO PERSONAL HEALTH INFORMATION

Under PHIPA, the health information custodian is responsible for the personal health information in its custody or control, and must take certain steps to fulfil that responsibility.

+ A health information custodian and its agents

A health information custodian may permit its agents to collect, use, disclose, retain or dispose of personal health information on the custodian's behalf only if the custodian is authorized by PHIPA to so handle the personal health information, and the collection, use, disclosure, retention or disposition of the information, as the case may be, is in the course of the agent's duties with the custodian and not contrary to the limits imposed by the custodian, PHIPA or any other law: s.17(1).

An agent may collect, use, disclose, retain or dispose of personal health information as permitted by the health information custodian, or as may be permitted in the regulations under PHIPA. If another law permits or requires the agent to collect, use, disclose, retain or dispose of personal health information, as the case may be, the agent does not need the authorization of the custodian to comply with the law. For example, a health practitioner who is the employee or other agent of a health information custodian and who is required to report certain events under Acts such as the *Highway Traffic Act*, the *Child and Family Services Act*, the *Regulated Health Professions Act, 1991*, or the *Workplace Safety and Insurance Act, 1997*, continues to be required to report, whether or not the practitioner is authorized to do so by the custodian.

A prudent custodian will review whether confidentiality pledges are in place with its employees and other agents, who within the organization may be authorized to collect, use, disclose, retain, or dispose of personal health information on behalf of the custodian and whether more detailed agreements should be entered into with certain of its agents. A written agreement or written confidentiality pledge is not required by PHIPA, although regulations under PHIPA may provide otherwise in some instances, but may sometimes be advisable with some employees or other agents.

+ Contact person

A health information custodian that is not an individual person must designate a contact person to facilitate the custodian's compliance with the Act and respond to access or correction requests, inquiries and complaints from the public: s. 15. If the custodian is an individual person and does not designate a contact person, the custodian must personally perform the functions of the contact person. If the custodian is a sole health care practitioner, the contact person can be that practitioner or his or her secretary, for example. The contact person has the responsibility of ensuring that all agents of the custodian are appropriately informed of their duties under the Act.

The contact person is also responsible for the performance of the other duties set out in s. 15(3), but with proper oversight and accountability may use the assistance of others in performing these duties. For example, it is not expected that the contact person, in a large organization, would personally respond to all inquiries, access requests or complaints without the assistance of others.

+ **Information practices**

PHIPA requires that a health information custodian have in place information practices that comply with the Act and its regulations: s. 10(1)

A health information custodian and its agents must comply with the custodian's information practices: s. 10(2).

This means that the health information custodian must have in place a policy that sets out:

- when, how and the purposes for which the custodian routinely collects, uses, modifies, discloses, retains or disposes of personal health information; and
- the administrative, technical and physical safeguards and practices that the custodian maintains with respect to the information.

If the use or disclosure of personal health information is outside of the scope of the custodian's description of its information practices, the custodian must:

- inform the individual of the uses and disclosures (unless the individual would not have a right of access to such information – see “An Individual's Right of Access to Personal Health Information” below)
- make a note of the uses and disclosure
- keep the note of the uses and disclosures in a form that is linked to the individual's record: s. 16(2).

+ **Written public statement**

A custodian must, in a manner that is practical in the circumstances, make available to the public a written statement that sets out:

- a general description of the custodian's information practices
- how to contact the contact person
- how an individual may obtain access to his or her own record or request correction of that record
- how to make a complaint to the custodian or to the Information and Privacy Commissioner: s. 16(1)

+ **Use of Electronic means**

A health information custodian who uses electronic means to collect, use, modify, disclose, retain or dispose of personal health information must in doing so comply with any related requirements that may be set out in the regulations under the Act: s. 10(3). A person who provides goods or services to the custodian for this purpose must also comply with any applicable regulations: s. 10(4).

+ **Accuracy**

A health information custodian who uses personal health information must take reasonable steps to ensure that the information is as accurate, complete and up-to-date as is necessary for the purposes for which the custodian uses the information.

A health information custodian who discloses personal health information about the individual must also take such reasonable steps to ensure the information is accurate, complete and up-to-date for the

purposes that are known to the custodian at the time of the disclosure; otherwise, the custodian must clearly set out for the recipient of the disclosure the limitation if any on the accuracy, completeness or up-to-date character of the information: s. 11.

+ **Security**

A health information custodian must take steps that are reasonable in the circumstances to ensure that personal health information in the custodian's custody or control is protected against theft, loss and unauthorized use or disclosure.

Further, a custodian must take similar steps to ensure that the records containing the information are protected against unauthorized copying, modification or disposal.

If personal health information is stolen, lost or accessed by unauthorized persons, the health information custodian who has custody or control of the personal health information must inform the individual of this occurrence. Some exceptions apply. For example, when the custodian is a researcher, then that researcher is not required to inform the individual; rather the obligation is on the custodian who allowed the researcher access to the information either to notify the individual or to authorize the researcher to contact the individual: s.12.

An agent is required to notify the health information custodian at the first reasonable opportunity if personal health information handled by the agent on behalf of the custodian is stolen, lost or accessed by unauthorized persons: s.17(3).

+ **Handling of Records**

A custodian must ensure that the records of personal health information that it has in its custody or under its control are retained, transferred or disposed of in a secure manner.

In many health care settings, regulations or guidelines set out retention periods that are specific to the setting. For example, the *Public Hospitals Act* and the *Nursing Homes Act* regulations specify how long records must be kept. In the absence of regulations in PHIPA, those regulations continue to apply in those settings. Custodians must be mindful, however, of the obligation under PHIPA that provides that where an access request has been made, a custodian must keep the information for as long as necessary to allow the individual to exhaust any recourse that he or she may have under the Act with respect to the request: s. 13. If the required retention period under a particular Act has expired, but an individual's recourse under PHIPA with respect to an access request has not yet finished, the custodian is required to keep the record until the recourse has been exhausted, irrespective of any retention period.

+ **Places where records can be kept**

PHIPA allows a health information custodian to keep a record of personal health information about an individual in the individual's home in any reasonable manner to which the individual consents, subject to any restrictions that may be set out in a regulation, by-law or published guidelines under a statute that pertains to the governing body of the profession: s. 14(1). Such a record can also be kept in a place other than an individual's home if certain conditions of the Act are met. For example, this would enable a travelling dentist who practices in Northern Ontario to keep his or her records in a nursing station in the patient's location, if the patient consented and any applicable professional standards were observed.

+ **A health care practitioner’s record keeping obligations**

PHIPA provides that nothing in that Act shall be construed to interfere with the regulatory activities of a College under the *Regulated Health Professions Act, 1991*, the College under the *Social Work and Social Service Work Act* or the Board under the *Drugless Practitioners Act*. While PHIPA sets out obligations with respect to information practices, accuracy of records, security of records, handling of records, access to and correction of records, regulations made under the *Regulated Health Professions Act, 1991* or a specific health profession Act or the by-laws or published guidelines of a College may set out a higher standard for record keeping. A health care practitioner must comply with the provisions of both PHIPA and its regulations and the legislation governing the profession, including regulations, by-laws or published guidelines, unless it is not possible to comply with both. A health care practitioner must read PHIPA in conjunction with individual College regulations, by-laws or guidelines on record keeping that the practitioner is obliged to follow and should comply with the highest standard.

CONSENT CONCERNING PERSONAL HEALTH INFORMATION

+ **Elements of Consent**

Where an individual’s consent is required under the Act (or any other Act to which the custodian is subject) for collecting, using or disclosing personal health information, such a consent must:

- be from the individual or an authorized substitute decision-maker of the individual
- be knowledgeable
- relate to the information
- not be obtained through deception or coercion.

A consent is “knowledgeable” if it is reasonable for the custodian to believe in the circumstances that the individual knows the purposes of the collection, use or disclosure, as the case may be, and that the individual may give or withhold the consent: ss. 18(1), (5).

+ **Express and Implied Consent**

Consent may be express or implied. However, a consent to the disclosure of personal health information about an individual by a health information custodian to a person who is not a health information custodian (e.g., an employer or insurer) must be an express consent. Similarly, consent must be express where information is disclosed by one health information custodian to another, if this is done for a purpose other than providing health care or assisting in providing health care: ss. 8(2), (3), (4).

PHIPA does not require a specific form of “express” consent. Express consent may, for example:

- be given orally or in writing
- take the form of a letter or directions from a patient to a health information custodian

be given over the telephone or by other electronic means where the health information custodian is able to sufficiently identify the person

If the health information custodian has a posted or made readily available a notice describing the custodian’s purposes for collection, use or disclosure of personal health information, the custodian may rely on such a notice to conclude that the individual has “knowledge” of the purposes. A notice is one way of creating the conditions for an implied consent. This notice must be posted or made available in such a way that it is likely to come to the attention of the individual or the custodian must provide the individual with such a notice. The custodian may rely on such a notice only if it is reasonable in the circumstances to do so: s. 18(6).

+ **Withdrawal of Consent**

A consent may be withdrawn by the individual who gave it at any time by providing notice to the health information custodian. This applies to an implied as well as an express consent. The withdrawal, however, cannot have retroactive effect, meaning that where a disclosure of personal health information has been made on the basis of a consent, the withdrawal of the consent does not require the custodian to retrieve the information that has already been disclosed pursuant to the consent – it only means that the custodian must stop disclosing information as soon as the custodian receives notice of the withdrawal: s. 19(1). If the individual places a condition on his or her consent, the condition is not effective to the extent that it prohibits or restricts any recording of personal health information by a health information custodian who is required by law or by established standards of professional practice or institutional practice: s. 19(2).

+ **Assumption of validity of consent**

A health information custodian who has obtained an individual's consent to a collection, use or disclosure of personal health information about an individual, or has received a copy of a document purporting to record the individual's consent, is entitled to assume that the consent fulfills the requirements set out in the Act unless it is not reasonable to assume so: s. 20(1).

A health information custodian who is listed in paragraphs 1 through 4 of the definition of "health information custodian" in subsection 3(1) of the Act, who receives personal health information about an individual from the individual, the individual's substitute decision-maker, or another health information custodian for the purposes of providing health care or assisting in the provision of care to the individual can assume that the individual implies consent to collect, use and disclose the information as necessary for that purpose, unless that custodian is aware that the individual has expressly withheld or withdrawn the consent: s. 20(2).

If a health information custodian discloses, with the consent of an individual, personal health information about the individual to another health information custodian for the purpose of providing or assisting in providing health care and the disclosing custodian does not have the consent of an individual to disclose all the personal health information about the individual that the disclosing custodian considers reasonably necessary for that purpose, the disclosing custodian must notify the receiving custodian of that fact: s. 20(3).

+ **Fundraising and marketing**

Health information custodians may collect, use or disclose personal health information about an individual for the purpose of fundraising activities with the express consent of the individual or if the individual consents by way of an implied consent and the information consists only of the individual's name and limited types of contact information, as described in the regulations: s. 31. It will be especially important to anyone involved in fundraising for health care institutions and using any personal health information about patients to check how the regulations apply.

Health information custodians can only collect, use and disclose personal health information about an individual for the purpose of marketing with the individual's express consent and in accordance with any prescribed requirements and restrictions: s. 32.

+ **Religious or other organizational affiliation**

Where a patient provides to a facility, such as a hospital or nursing home, information about his or her religious or other organizational affiliation, the facility may assume implied consent to provide

information about their name and location, to representatives of the religion or organization unless requested otherwise. The custodian must offer the patient an opportunity to withhold or withdraw consent: s. 20(4).

+ **Capacity and Substitute Decision-Making**

A health information custodian is entitled to presume that an individual is capable of consenting to the collection, use and disclosure of their personal health information, unless it is unreasonable to do so: ss. 21(4), (5).

A capable individual, regardless of age, can consent to the collection, use or disclosure of their personal health information. An individual is capable of consenting to the collection, use or disclosure of personal health information if the individual is:

- able to understand the information that is relevant to the decision of whether to consent to the collection, use or disclosure, as the case may be, and
- able to appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent: s. 21(1).

Part III of the Act sets out a framework for making decisions about the collection, use and disclosure of personal health information on behalf of people who are not mentally capable of making their own decisions and for people who have died. In addition, the Act allows a capable person to authorize an individual in writing to make information decisions on his or her behalf: s. 21(1). Specifically, where a consent is required of an individual, the following substitute decision-makers may give, withhold or withdraw consent on that individual's behalf:

- if the individual is capable and 16 or over, anyone who is 16 or over (and capable) who the individual has authorized to act on his or her behalf
- if the individual is a child less than 16 years of age, a parent of the child, with some exceptions (see below)
- if the individual is incapable of consenting, a person authorized to consent on behalf of the individual under PHIPA
- if the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the estate
- a person whom an Act of Ontario or Canada authorizes or requires to act on behalf of the individual: s. 23.

Where a child is less than 16 years of age, a parent of the child or another person who is lawfully entitled to give or refuse consent in place of the parent (such as the children's aid society) may give, withhold or withdraw consent or provide information on the child's behalf except where the information relates to treatment about which the child has made a decision on his or her own behalf or to counselling in which the child has participated on his or her own under the *Child and Family Services Act* : s. 23(1)[2]. In addition, PHIPA provides that where there is a conflict between a capable child and the parent, the child's consent prevails: s. 23(3).

Under PHIPA it is the custodian who determines capacity, and the custodian may rely on its agents for advice, or to make such determinations on behalf of the custodian, but the custodian is ultimately responsible for the determination. In addition, a health information custodian is permitted to disclose personal health information without consent where necessary for the purpose of determining, assessing or confirming capacity. This provision would be important, for example, in a situation where a health information custodian (like a person who operates a nursing home) would want to request some confirmation of incapacity from a health care practitioner that is not an agent of the custodian (like a family physician). Where the custodian makes a determination of incapacity, the custodian is required to

provide information to the incapable individual about the consequences of the determination, such as that the individual has a right to a review of the finding and that someone else will be making information decisions on his or her behalf. The custodian is not obliged to provide such information if it is not reasonable to do so in the circumstances: s. 22(2). The Act allows a person who is determined to be mentally incapable of making decisions about his or her personal health information to apply to the Consent and Capacity Board, a board established under the *Health Care Consent Act, 1996*, for a review of the determination: s. 22(2). The Board also has the authority to appoint a representative to make decisions about an incapable person's personal health information on his or her behalf. An application can be made either by the incapable individual or the person wishing to become the representative: ss. 27(1),(2).

Where an individual is not capable of making decisions with respect to personal health information, PHIPA provides a list of substitute decision-makers, who are ranked in order of priority, to which the custodian may turn to when the custodian requires consent to a collection, use and disclosure of personal health information on behalf of that individual. This list, in order of priority, is the following:

- the guardian of the person or the guardian of property (where the consent relates to the guardian's authority to make a decision for the individual)
- the attorney for personal care or the attorney for property (where the consent relates to the attorney's authority to make a decision for the individual)
- the representative appointed by the Consent and Capacity Board
- the spouse or partner
- a child or parent (which includes a children's aid society, for example)
- a parent with only a right of access
- a brother or sister
- any other relative
- the Public Guardian and Trustee (as last resort): ss. 26(1), 26(6)

Furthermore, in order for a person to be qualified as a substitute decision-maker from this list, the person must be *all* of the following:

- capable
- at least 16 years of age or a parent of the individual
- not prohibited by a court order or a separation agreement from having access to the individual
- available
- willing to assume responsibility of making a decision or whether or not to consent: s. 26(2).

The Public Guardian and Trustee may make a decision to consent where two or more persons who are equally ranked disagree or where no other person on the list is available and willing and able to consider giving the consent.

A substitute decision-maker who is making decisions on behalf of an incapable individual under the *Health Care Consent Act, 1996* is deemed to be a substitute decision-maker of the individual in respect of the collection, use and disclosure of personal health information about the individual if the purpose of the collection, use or disclosure is necessary for, or ancillary to, a decision under that Act. Such a substitute decision-maker has priority over the persons in the list, above, with respect to such decisions: ss. 5, 26(11).

A substitute decision-maker who is authorized to make decisions about the collection, use and disclosure of personal health information on behalf of an incapable individual is also authorized to make a request, give an instruction or take a step on behalf of the individual where the Act permits or requires an individual to take a step, for example requesting access to a record of personal health information on behalf of the individual: s. 25.

In making decisions on behalf of an incapable individual, a substitute decision-maker must take into consideration a number of factors set out in PHIPA, including, for example, the wishes, values and beliefs that the substitute knows the incapable individual held when capable and believes the individual would have wanted reflected in decisions made concerning the individual's personal health information: s. 24(1).

The Act enables the health information custodian to make an application to the Consent and Capacity Board to give the substitute decision-maker directions to comply with the Act or to remove the substitute where there is continued non-compliance: ss. 24(2)-(9).

RULES RESPECTING THE COLLECTION, USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION

+ General Principles

Certain general principles set out primarily in the beginning of Part IV of PHIPA apply to all collections, uses and disclosures of personal health information under the Act. These rules can be summarized as follows.

A health information custodian is prohibited from collecting or using personal health information about an individual unless

- it has the individual's consent under the Act and the collection or use, as the case may be, is for a lawful purpose, or
- the Act permits or requires the collection or use.

A health information custodian is prohibited from disclosing personal health information about an individual unless:

- it has the consent of the individual, or
- the disclosure is permitted or required under the Act: s. 29.

A health information custodian is not permitted to collect, use or disclose personal health information if other information will serve the purpose: s. 30(1).

A custodian is not permitted to collect, use or disclose *more* personal health information than is reasonably necessary to meet the purpose: s. 30(2).

However, these general limits on collection, use or disclosure of personal health information do not apply where the health information custodian is actually required by law to collect, use or disclose the information: s. 30(3).

Where the Act permits a health information custodian to disclose personal health information about an individual without consent, this does *not* mean that the custodian:

- must disclose the information
- is relieved of a legal obligation to disclose the information where required to disclose at law
- cannot seek the consent of the individual: s. 6(3)

+ **Special Rules for the Collection, Use and Disclosure of Health Numbers**

For the purposes of PHIPA, the health number is a particular kind of personal health information: s. 4(1)(f). The Act repeals the *Health Cards and Numbers Control Act, 1991*, but includes special rules concerning health numbers, similar to the rules currently found in that Act: s. 34.

The collection, use and disclosure of health numbers by health information custodians is not restricted in a manner that differs from the collection, use and disclosure of personal health information generally.

The collection, use and disclosure of health numbers by persons who are *not* health information custodians, however, is restricted to specified purposes and circumstances: ss. 34(2), (3). Persons who are not health information custodians may, for example, collect and use another person's health number for purposes related to the provision of provincially funded health resources to that other person and for the purposes for which a health information custodian has disclosed the number to the person. Otherwise, persons who are not health information custodians are prohibited from disclosing a health number except as required by law and as set out in the regulations under PHIPA.

It is an offence to require the production of another person's health card, except if it is required by someone who provides provincially funded health resources to the person: s. 34(3).

COLLECTION OF PERSONAL HEALTH INFORMATION

When the health information custodian collects directly from the individual, this requires consent, which will usually be implied from the fact that the individual is providing the information.

“Collect” is defined in section 2 of the Act to mean, in relation to personal health information, “to gather, acquire, receive or obtain the information by any means from any source.” “Collection” has a corresponding meaning.

The Act includes various provisions that permit health information custodians to collect information indirectly, i.e. from a person other than the individual to whom the information relates. Custodians, for example, are able to collect information indirectly with the consent of the individual to whom the information relates: s. 36(1)(a). A custodian is also able to collect information indirectly without the individual's consent if the custodian collects the information from a person who is permitted by law to disclose it to the custodian: s. 36(1)(g). In the context of the provision of health care, a health information custodian is permitted to collect personal health information indirectly without consent where the collection is reasonably necessary for the provision of health care and it is not reasonably possible to collect directly from the individual (a) personal health information that can reasonably be relied on as accurate; or (b) personal health information in a timely manner: s. 36(1)(b).

USE OF PERSONAL HEALTH INFORMATION

“Use” is a defined term in PHIPA. According to the definition, “use”, in relation to personal health information in the custody or under the control of health information custodian or a person, means to handle or deal with the information, but does not include to disclose the information. The Act provides further that transferring personal health information between an agent of the health information custodian and the custodian is considered to be a use and not a disclosure: s. 6(1). So the internal transfers of information within a health information custodian, involving employees and other agents of the custodian, are considered uses and not disclosures

Consent is required for the use of personal health information subject to specific exceptions. These exceptions include where the use is (s. 37):

- for the purpose for which it was collected or created and for all functions reasonably necessary for that purpose (unless collected with consent or under s.36(1)(b) and the individual expressly instructs otherwise, although public hospitals are not obligated to give effect to such instructions until November 1, 2005 under s. 31(2).)
- for planning or delivering programs or services of the health information custodian
- for the purpose of obtaining payment, processing, monitoring, verifying or reimbursing claims for payment, or preventing any unauthorized receipt of related services or benefits (which includes debt collection for health care or related goods or services)
- for risk management, for error management, or in order to improve or maintain the quality of services
- for research (as long as the requirements of the Act are met, e.g., research ethics board approval)
- permitted or required by law, subject to prescribed requirements and restrictions
- for a purpose for which another person is permitted or required to disclose this information to the custodian
- for the purpose of a proceeding in which the custodian or its agent is a party or witness, where the information relates to a matter in issue in the proceeding (and similarly for a contemplated proceeding)
- for the purpose of educating agents to provide health care
- for the purpose of modifying the information in order to conceal the identity of the individual to whom the information relates.

Where a health information custodian is authorized to use the information, the custodian may provide the information to an employee or other agent of the custodian to use it for that purpose on behalf of the custodian, subject to meeting the requirements set out in s. 17, discussed above.

DISCLOSURE OF PERSONAL HEALTH INFORMATION

+ Generally

As mentioned above, generally, a health information custodian requires consent to disclose personal health information. However, the Act includes various provisions that permit a health information custodian to disclose personal health information without the consent of the individual to whom the information relates. These provisions are found in Part IV of the Act: ss. 38-50.

The term “disclose” is defined in the Act in section 2 to mean to make the information available or to release it to another health information custodian or person, but does not include to “use” the information. (See discussion of the meaning of “use” above.)

It is important to note that the provisions of the Act that permit health information custodians to disclose personal health information without the consent of the individual to whom it relates do not *require* custodians to disclose the information; that is, custodians may exercise their discretion and are not mandated to disclose in these circumstances: s. 6(3). For greater certainty, PHIPA explicitly clarifies that the fact that a disclosure power is stated in permissive terms does not relieve a health information custodian from any legal requirement to disclose personal health information. Existing mandatory disclosure of personal health information, as set out in other Acts, therefore, continue to apply: s.

43(1)(h), s. 6(3). For example, the *Highway Traffic Act* includes a provision that requires physicians and optometrists to report information to the Registrar of Motor Vehicles concerning persons whose condition may make it dangerous for them to drive. That requirement will continue to apply to those providers.

One category of such provisions that permits the disclosure of personal health information without consent relates to disclosures of personal health information in the provision of health care: s. 38. A custodian may disclose personal health information without consent to certain health information custodians, such as physicians, nurses and other health care practitioners, hospitals, nursing homes, and laboratories, if the disclosure is reasonably necessary for the provision of health care and it is not reasonably possible to obtain the individual's consent in a timely manner. However, a custodian is not able to rely on this provision if the individual has expressly instructed the custodian not to make the disclosure: s. 38(1)(a). Public hospitals are not obligated to give effect to such instructions until November 1, 2005: s. 31(2). Health information custodians who disclose incomplete information to another custodian due to such an instruction must flag this fact where the disclosing custodian believes the withheld information is reasonably necessary for the health care purposes of the disclosure: s. 38(2).

Other disclosures permitted without consent that relate to the provision of health care include the disclosure of personal health information in order for the Minister of Health and Long Term Care to provide payment to the custodian: s. 38(1)(b).

Custodians are also able to disclose personal health information without consent for the purpose of contacting a friend, relative or potential substitute decision-maker of the individual to whom the information relates, if the individual is incapacitated or ill and unable to give consent personally: s. 38(1)(c).

Facilities that provide health care can disclose limited information about their patients' and residents' location and health status, but the custodian must first provide the individual with the opportunity, at the first reasonable opportunity after admission, to opt out of such disclosures: s. 38(3).

Custodians are also permitted to disclose personal health information about an individual who is, or is reasonably suspected of being deceased, for purposes such as identifying the individual, or to certain relatives of the deceased who require the information to make decisions about their own health care: s. 38(4).

Custodians are able to disclose personal health information for the purpose of verifying the eligibility of the individual for coverage to receive health care or related goods, services or benefits where they are funded by the Government of Ontario or Canada or by a municipality: s. 39(1)(a).

Health information custodians are able to disclose personal health information without consent to registries that are identified in the regulation that handle personal health information for the purpose of facilitating or improving the provision of health care or for a purpose that relates to the storage or donation of body parts or bodily substances: s. 39(1)(c).

A custodian's disclosure of personal health information for public health purposes is also addressed in the Act. A custodian may disclose personal health information about an individual to the Chief Medical Officer of Health or a medical officer of health if the disclosure is made for a purpose of the *Health Protection and Promotion Act*. The purpose of that Act, as set out in section 2 of that Act, is "to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario." Under this provision a custodian may provide personal health information to the Chief Medical Officer of Health or a medical

officer of health even in the absence of a request or requirement for information. Custodians may make similar disclosures to public health authorities in other jurisdictions: s. 39(2). Other information sharing provisions and requirements that are set out in the *Health Protection and Promotion Act* continue to apply.

The Act provides health information custodians with the discretion to disclose personal health information without the consent of the individual to whom the information relates where the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk or serious bodily harm to a person or group of persons: s. 40(1). The Act also recognizes the importance of the disclosure of personal health information in the context of penal and other custodial institutions. Custodians may disclose personal health information about an individual to the head of such an institution in which the individual is being lawfully detained for the purposes of determining appropriate placement, or making arrangements for the appropriate health care to be available to the individual: ss. 40(2), (3).

The Act addresses a health information custodian's ability to disclose personal health information without consent in the context of a proceeding: s. 41. The term "proceeding" is a defined term, and includes a proceeding held in, before or under the rules of a court, a tribunal, a commission, a justice of the peace, a coroner, a committee of a regulating body of a health profession, such as a College within the meaning of the *Regulated Health Professions Act, 1991*, an arbitrator or a mediator: s. 2. Health information custodians may disclose personal health information, for example, for the purpose of complying with a summons or order issued in a proceeding by a person having jurisdiction to compel the production of information: s. 41(1)(d). Custodians may also disclose personal health information for the purpose of a proceeding in which the custodian is a party or witness if the information relates to a matter in issue in the proceeding: s. 41(1)(a).

Further, the Act recognizes the existence of provisions in other legislation concerning the disclosure of personal health information by health information custodians without consent, which reflect important policy considerations developed over time. Custodians are thus permitted to disclose personal health information about an individual for such purposes as determining capacity under the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992* or PHIPA: s. 43(1)(a). Under s. 43(1)(b) of the Act, custodians may disclose personal health information to a College within the meaning of the *Regulated Health Professions Act, 1991* for the purpose of the administration or enforcement of that Act, a health profession Act and the *Drug and Pharmacies Regulation Act*: s. 43(1)(b). A similar provision exists for disclosures to the Ontario College of Social Workers and Social Service Workers: s. 43(1)(d). These provisions permit for example, would have the effect of authorizing the current practice of a custodian entering into an agreement with a regulatory college to allow a College to review a member's practice and patient records. Custodians may disclose personal health information to a person carrying out an inspection or investigation that is authorized by a warrant or by an Act of Ontario or Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection or investigation: s. 43(1)(g). Personal health information can also be disclosed without consent if permitted or required by law: s. 43(1)(h). This provision continues to allow, for example, required reporting of information to the Workplace Safety and Insurance Board under the *Workplace Safety and Insurance Act, 1997* or any permissible disclosure set out in another Act, such as in s. 32 of the *Long Term Care Act, 1994*, which allows a service provider to disclose a record of personal health information to the Minister of Health and Long-Term Care to enable the Minister to exercise a power under s. 64 of that Act.

In certain limited cases, a health information custodian is *required* in PHIPA to disclose information. A health information custodian is required, for example, upon the request of the Minister of Health and Long-Term Care, to disclose to the Minister personal health information about an individual for the

purpose of monitoring or verifying claims for payment for health care funded in whole or in part by the Ministry of Health and Long-Term Care or for goods used for that health care: s. 46.

+ **Research**

The term “research” is defined to mean a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research: s. 2. Personal health information may be disclosed to a researcher for the purpose of research if certain conditions are met. Generally, a health information custodian may disclose personal health information to a researcher if a research ethics board has approved the researcher’s research plan. The requirements for research plans are set out in the Act, and include the nature and objectives of the research and the public or scientific benefit of the research. Additional requirements may be set out in the regulations. It will be important for anyone with an interest in research-related disclosures and uses of personal health information to check the regulations for relevant provisions.

The phrase “research ethics board” is defined to mean a board of persons that is established for the purpose of approving research plans under section 44 and that meets the prescribed requirements: s. 2. Therefore, the regulations may set out additional requirements for research ethics boards. The research ethics board determines, among other issues, whether adequate safeguards will be in place to protect the privacy of the individuals whose information is being disclosed and whether the objectives of the research can be accomplished without using the personal health information that is to be disclosed: s. 44(3).

The custodian and researcher must enter into an agreement prior to the disclosure of the personal health information in which the researcher agrees to comply with the conditions that the custodian imposes relating to the use, security, and disposal of the information: s. 44(5). Researchers are also required to comply with the agreement, in addition to several other requirements set out in the Act, including to use the information only for the purposes set out in the approved research plan: s. 44(6).

Certain provisions apply in the research context to permit an effective transition to these rules. First, health information custodians who have disclosed personal health information to a researcher since November 1, 2001, may continue to do so without complying with s. 44 of PHIPA until November 1, 2007: s. 44(12). Secondly, researchers receiving information from a health information custodian under a research agreement under *Freedom of Information and Protection of Privacy Act* or *Municipal Freedom of Information and Protection of Privacy Act* may continue to receive disclosures under the agreement until it expires: s. 44(8).

+ **Disclosure for Planning and Management of the Health System**

A health information custodian may disclose personal health information to entities prescribed by the regulations for the purpose of analysis or compiling statistical information with respect to the management of, evaluation or monitoring of, the allocation of resources to or planning for the health system: s. 45(1). The prescribed entities must have in place practices and procedures to protect the privacy of individuals whose personal health information they receive and to maintain the confidentiality of the information: s. 43(3)(a). In addition, the Information and Privacy Commissioner must have approved the practices and procedures, if the information is disclosed after October 31, 2005: s. 45(3)(b). The Act and the regulations restrict such entities’ use and disclosure of the information that they receive: s. 45(6). They may use the information for the purpose for which they received the information. They may disclose the information as required by law.

+ **Disclosure for Analysis of the Health System**

The Act also includes rules with which the Minister of Health and Long-Term Care must comply when requesting health information custodians to disclose personal health information to a health data institute for the purposes of analysis with respect to the management, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system. The Act provides that health information custodians must comply with such a request: s. 47(2). Before requiring a custodian to make such a disclosure, the Minister must provide a comprehensive proposal for review and comment to the Information and Privacy Commissioner: ss. 47(4)-(7).

The health data institute is permitted to release only de-identified information to the Ministry, in the form and manner specified by the Minister, unless a disclosure of personal health information is specifically approved by the Information and Privacy Commissioner as a disclosure in the public interest: ss. 47(15); 48. The term “de-identify” is defined in the Act to mean “to remove any information that identifies the individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify the individual”: s. 47(1). In other words, no personal health information can be released to the Ministry, or anyone else outside the health data institute, through this process without specific approval of the Information and Privacy Commissioner.

The Minister may approve a health data institute for the purposes of such disclosures if it fulfils certain requirements, including if the corporate objects of the institute include performing data analysis of personal health information, linking the information with other information and de-identifying the information for the Minister:. A health data institute must have in place practices and procedures approved by the Information and Privacy Commissioner to protect the privacy of individuals whose personal health information it receives: s. 47(9).

It is important to note that these provisions pertaining to disclosures to the health data institute under section 47 do not replace any other existing requirements or obligations on the part of health information custodians to disclose personal health information to the Minister or others found in or under other statutes such as the *Health Insurance Act*, the *Independent Health Facilities Act* or the *Public Hospitals Act*.

+ **Disclosures to persons outside Ontario**

The Act includes rules concerning the disclosure of personal health information by custodians to persons outside Ontario. A health information custodian who has collected personal health information in Ontario may disclose the information to a person outside Ontario where reasonably necessary for the purpose of the provision of health care, subject to the individual’s instructions otherwise, although public hospitals are not obligated to give effect to such instructions until November 1, 2005 under s. 31(2). A health information custodian may also disclose personal health information to a person outside Ontario where permitted by a provision of the Act or for certain other purposes analogous to certain disclosures permitted under the Act within Ontario, e.g. for child protection: s. 50.

+ **Restrictions on Recipients**

The Act sets out restrictions on the ability of persons who are not health information custodians but who receive personal health information from health information custodians to use and disclose that information. Except as permitted or required by law, such persons cannot use or disclose that information for any purpose other than the purpose for which the custodian disclosed the information under the Act, or for the purpose of carrying out a statutory or legal duty. A health information custodian receiving health

information about its employee from another custodian for a purpose other than the provision of health care to the employee is bound by this same restriction: s. 49(3).

This restriction does not apply to certain persons. Institutions within the meaning of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* may continue to use and disclose information as permitted by the applicable one of those Acts: s. 49(5). The regulations may make additional exceptions.

AN INDIVIDUAL'S RIGHT OF ACCESS TO PERSONAL HEALTH INFORMATION

The access provisions of PHIPA codify a common law right of patient access to his or her own health records. The provisions of PHIPA apply across the health sector, and replace somewhat different access provisions that previously applied to specific parts of the health sector, e.g. service providers under the *Long-Term Care Act, 1994* and psychiatric facilities under the *Mental Health Act*.

Certain special considerations apply where a request for access involves an "institution" that is subject to provincial public sector privacy legislation. These institutions are generally provincial or municipal governmental bodies. The most important points to be aware of are:

- where a record is being held by a health information custodian in the course of acting as an agent/employee of an institution under *Freedom of Information and Protection of Privacy Act* (FIPPA) or *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), where the institution itself is *not* a health information custodian (for example a registered nurse employed by a school board to provide health care), PHIPA does not apply to records, and access is instead provided by the institution subject to the terms of the applicable one of those public sector privacy acts: s. 51(3).
- Individual's wishing to request a record of personal health information from a health information custodian that is an institution under FIPPA or MFIPPA, e.g. a municipal home for the aged or the Ministry of Health and Long-Term Care, may do so under PHIPA. FIPPA and MFIPPA still apply, however, to records held by such an institution that do not contain any personal health information (including both records containing no personal information, and records including only non-health related personal information) and such records may be accessed by a request under the applicable one of those Acts.

Under PHIPA, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless one of the exclusions or exceptions set out in the Act apply.

Part V of the Act which contains the Access and Correction provisions does not apply at all to records containing the following types of information (except those parts of the record that can reasonably be severed) under s. 51(1):

- quality of care information as defined in the *Quality of Care Information Protection Act, 2004*
- personal health information collected or created for the purpose of complying with the requirements of a quality assurance program within the meaning of the Health Professions Procedural Code under the *Regulated Health Professions Act, 1991*
- raw data from standardized psychological tests or assessments

- personal health information of a type set out in the regulations, subject to the terms and conditions set out in the regulations.

An individual requester also does not have a right of access to a record, in accordance with s. 52(1), where the information in the record:

is subject to a legal privilege, e.g. solicitor-client privilege or settlement privilege, that prohibits the disclosure

- is prohibited by law from being disclosed to the requester
- was collected or created primarily in anticipation of or use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded
- the information was collected or created in the course of an inspection, investigation or similar procedure authorized by law, until that process and all resulting proceedings have been concluded
- the information was collected or created in the course of an inspection, investigation or similar procedure undertaken for the purpose of detecting or preventing the unauthorized receipt of services or benefits under Ministry programs, until that process and all resulting proceedings have been concluded
- is such that granting the access could reasonably be expected to
 - result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person (and the health information custodian may consult with a physician or psychologist in order to help assess the risk of harm under this provision: s. 52(5));
 - lead to the identification of a person who was required by law to provide information in the record to the custodian; or
 - lead to the identification of a person who provided information in the record to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the name of the person be kept confidential; or
- is of a type set out in the regulations, subject to the terms and conditions set out in the regulations.

Where an individual's record contains information of a type listed above, the health information custodian is not required to give the individual access to that part of the record that contains such information. However, the custodian is still obliged to provide access to any part of the record which can reasonably be severed from the part containing the information set out above.

It should be noted that there are two kinds of records, with somewhat different access rules with respect to third party information contained in the record.

- Where the record in question is "a record dedicated primarily to personal health information about the individual requesting access", such as a patient chart, the individual has a right of access to the entire record, subject to the exceptions set out above, including personal health information about third persons. The rationale is that if it is the individual's file, the individual should be able to see everything in it, unless one of the above exceptions apply.
- On the other hand, where the record is not "a record dedicated primarily to personal health information about the individual requesting access", the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably

be severed from the record for the purpose of providing access: s. 52(3) For example, a patient may request access to a physician's appointment book, but only to those entries that document the patient's appointments. It should be noted, however, that a person does *not* have a right of access to any information in the patient file of *another* individual (apart from under the substitute decision-making provisions, where applicable) even if the person is referred to in that file, for example as part of the individual's family medical history, or in counselling notes.

A health information custodian can refuse to grant access if the health information custodian believes the request is frivolous and vexatious, or made in bad faith: s. 53(6).

+ **Access Request Process**

A health information custodian should not let the formal access provisions in PHIPA become a barrier to normal provider-patient relations communications and collaboration, since the Act provides that:

- a health information custodian can communicate with a requester and provide access to requested personal health information even when the individual does not make a formal access request, and can also communicate with the individual's authorized substitute decision-maker about a record, if the individual has a right of access to the record
- nothing in the access provisions of PHIPA relieves a health information custodian from a legal duty to provide personal health information in an appropriate manner as necessary for the provision of health care to the individual.

In order to engage the formal access request process under the Act, with its attendant timeframes and rights of complaint and appeal, however, an access request must be made in writing to the health information custodian, and contain sufficient detail to enable the custodian to identify and locate the record "with reasonable efforts". If the request is not sufficiently detailed, the health information custodian must offer assistance to the requester in reformulating the request.

An access request may be made by an individual whether or not the individual is capable. A substitute decision-maker of the individual under PHIPA is also authorized to make an access request on behalf of the individual: s. 25.

The health information custodian must take "reasonable steps" to satisfy itself of the requester's identity before providing access: s. 54(9). The Act also provides that unless it is not reasonable in the circumstances, the custodian is entitled to rely on the accuracy of an assertion made by a person that he or she is authorized to request access to a record of personal health information, or is a substitute decision-maker of the individual: s. 71(4)(a) and (b).

The health information custodian has the following response options:

- (1) Make the record available to the individual for examination and, upon request, provide a copy of the record and an explanation of any codes/terms it contains;
- (2) Give the requester written notice that "after a reasonable search", the custodian has concluded that the record either does not exist or cannot be found.
- (3) If the request is being refused on the basis of an exemption other than the "ongoing proceedings", "ongoing investigation", or "risk of harm" exemptions in s. 52(1)(c), (d) or (e), provide a written response containing:

- a statement that the request is being refused in whole or part;
- reasons for the refusal; and
- a statement that the requester is entitled to make a complaint to the Commissioner about the refusal.

(4) If the request is being refused on the basis of the “ongoing proceedings”, “ongoing investigation”, or “risk of harm” exemptions in s. 52(1)(c), (d) or (e), provide a written response containing:

- a statement that the health information custodian is refusing to confirm or deny the existence of the record; and
- a statement that the requester is entitled to make a complaint to the Information and Privacy Commissioner about the refusal.

+ **Response Time for Access Requests: ss. 54(2)-(5)**

The health information custodian must respond to an access request no later than 30 days after receiving the request, but can extend the time limit for up to a maximum of an additional 30 days, as long as it is done within the initial 30-day time limit. The health information custodian must give the requester written notice of the extension, setting out its length and the reasons for it. Extensions are possible only if one of the following conditions applies:

- Meeting the time limit would “unreasonably interfere” with the health information custodian’s operations because the records are numerous or a lengthy search is required to locate them; or
- Consultations are necessary and make the 30-day time limit “not reasonably practical”.

The requester can specify a shorter response time, and the health information custodian is required to comply with it if:

- the requester provides the health information custodian with “evidence satisfactory to the custodian” that the requester needs the record on an “urgent basis” within that shorter time period; and
- the “custodian is reasonably able” to provide the response within that time.

If the health information custodian fails to respond within the 30-day limit, or before the extension expires, the health information custodian is deemed to have refused the request.

The health information custodian can charge a fee for making the record available, or providing a copy to the requester, but must first give the requester a fee estimate. The amount of the fee cannot exceed the amount of “reasonable cost recovery”, or the amount prescribed by regulation, if any. The health information custodian can waive the fee if, in its opinion, it is “fair and equitable to do so”.

RIGHT OF CORRECTION

An individual may request that the health information custodian correct a record of the individual’s personal health information if the individual believes that the record is “inaccurate or incomplete for the purposes” for which the custodian uses the information. Though a custodian can respond to an oral request for correction, only a request in writing invokes the procedures and remedies set out in the Act.

The right to formally request a correction only applies, however, to records to which the health information custodian has provided the individual access. Where the custodian refuses to provide access to a record based on one of the exceptions noted above, the individual has no right to request that the record be corrected: s. 55(1).

The time permitted for responding to a correction request is generally the same as that allowed for responding to an access request. The health information custodian has 30 days, or the expiry of extended time limit for responding to the request. Failure to respond in time is considered a “deemed refusal”.

The health information custodian cannot charge a fee for processing a correction request, whether or not it grants or refuses the request.

The health information custodian has no duty to correct a record if:

- the record was not originally created by the custodian, and the custodian does not have “sufficient knowledge, expertise and authority” to correct it (i.e., must have all three in order to have a duty to correct the record); or
- the information requested to be corrected is a “professional opinion or observation” (e.g., a medical diagnosis) that the custodian or any other custodian has made in good faith about the individual.

Apart from these exceptions, if the individual demonstrates to the health information custodian’s satisfaction that the record is “incomplete or inaccurate for the purposes for which the custodian uses the information”, and gives the custodian the information it needs to correct the record, the custodian must make the correction request.

Where possible, the health information custodian should make the correction by recording the correct information in the record, and striking out the incorrect information without obliterating it. Where it is not possible to do so, s. 55(10) provides the custodian with other alternatives. The custodian must give the individual a notice of what it has done to correct the record. Depending on the circumstances, where the individual requests the custodian to do so, the custodian may also have to give written notice of the requested correction to persons to whom the custodian has, in the past, disclosed the incorrect information: s. 55(1)(c).

If a health information custodian refuses to correct a record, it must provide a notice to the requester giving reasons for the refusal, and informing the requester that he or she is entitled to:

- prepare a statement of disagreement setting out the correction the health information custodian has refused to make;
- require the custodian to attach the statement of disagreement to the records
- that it holds of the requester’s personal health information, and disclose the statement whenever the health information custodian discloses phi to which the disagreement relates;
- require the custodian to make reasonable efforts to disclose the statement to
- any person who would have been notified had the correction request been granted under s. 55(1); and
- make a complaint about the refusal to the Commissioner.

If the health information custodian refuses a correction request, or is deemed to have done so, the individual is entitled to take the actions listed above.

The health information custodian may also refuse to grant a correction request where it believes that the request is frivolous or vexatious, or is made in bad faith. In that case, the custodian must provide the

requester with a notice setting out its reasons for the refusal, and stating that the requester is entitled to make a complaint about the refusal to the Commissioner.

COMPLAINTS AND ENFORCEMENT

+ Complaints, Reviews and Inspections

Any person who has reasonable grounds to believe that another person has contravened or is about to contravene a provision of the Act may make a complaint, under Part VI of the Act, to the Information and Privacy Commissioner (“IPC”), which is the oversight body for the Act. A complaint may be, for example, about an information practice of the health information custodian, or an unauthorized collection, use or disclosure of personal health information. The complaint must be in writing and may be made by a person other than the individual who is the subject of the personal health information. The complaint must be filed with the IPC within one year after the person became (or should reasonably have become) aware of the issue, or a longer period of time as permitted by the IPC: s. 56.

In addition, an individual who has been refused a request for access to or correction of his or her personal health information under Part V of the Act can make a complaint to the IPC. This type of complaint must be made in writing by the individual who is the subject of the personal health information or his or her substitute decision-maker within six months from the date of refusal.

The IPC is a person whose office has been established under the *Freedom of Information and Protection of Privacy Act*. Under PHIPA, the IPC may delegate his or her powers and duties to the Assistant Commissioner for Personal Health Information or to an officer or employee of the Commissioner: s. 65.

Upon receiving a complaint, the IPC may take various preliminary steps, including inquiring as to what other means were used by the complainant to resolve the complaint or authorizing a mediator to review the complaint to try to effect a settlement between the complainant and the person about whom the complaint is made.

The IPC may then decide to review the subject matter of the complaint if satisfied that there are reasonable grounds to do so: s. 57. Even if there may be reasonable grounds for the complaint, however, the IPC has discretion to decide not to review the complaint for whatever reason the IPC considers proper, including if satisfied that:

- an adequate response has been provided to the complainant
- the complaint could have been or could be dealt with through another procedure
- the delay between the date when the subject-matter of the complaint arose and the date the complaint was made would likely cause undue prejudice were the review to be conducted
- the complainant does not have sufficient personal interest in the subject-matter of the complaint
- the complaint is frivolous, vexatious or made in bad faith.

The IPC must give the complainant notice of his or her decision not to review the complaint, specifying the reason. Similarly, if the IPC decides to review the complaint, the IPC must give notice of the decision to the person about whom the complaint is made.

The IPC may also, on his or her own initiative, review any matter if the IPC has reasonable grounds to believe that a person has contravened or is about to contravene a provision of the Act or its regulations. The IPC must give notice of its decision to engage in a review to every person whose activities are being reviewed: s. 58.

When conducting either a self-initiated review, or one in response to a complaint, the IPC may make the rules of procedure it considers necessary for the review and the *Statutory Powers Procedure Act* does not apply to the review. The IPC can receive and accept any evidence and information it sees fit, by oath, affidavit or otherwise, whether or not it would be admissible in court.

Under PHIPA, in conducting a review in which the IPC believes that entry to premises is necessary in connection with the review of the complaint, and the IPC does not have reasonable grounds to believe an offence has been committed, the IPC has the power, without warrant or court order, enter and inspect the premises: s. 60. Before entering a dwelling, the IPC requires the consent of the occupier or a search warrant: s. 60(3).

In addition, in conducting a review, the IPC can:

- demand the production or copies of books, records or other documents
- inquire into, and demand the production for inspection, of all information, records, information practices and other matters relevant to the review
- use any data storage, processing or retrieval device or system belonging to the person being investigated in order to produce a record in readable form
- on any premises that the IPC has entered, review or copy any books, records or documents of the person being reviewed
- summon any person to appear, and compel them to give oral or written evidence on oath or affirmation

The IPC's demand for books, record or documents, or copies of these, must be in writing and must include a statement of the nature of the things that are produced. The person having custody of the things demanded must cooperate and must provide whatever assistance is reasonably necessary. Other than those needed for the current health care of any person, the IPC may remove books, records and other documents if the IPC is not able to review and copy them on the premises.

There is a limitation on the IPC's access to personal health information without the consent of the individual to whom the information relates. Before inquiring into records containing such information, the IPC (or the Assistant Commissioner for Personal Health Information) is required to determine that it is reasonably necessary to do so in order to carry out the review and that the public interest in carrying out the review justifies dispensing with obtaining the individual's consent in the circumstances, subject to any conditions and restrictions that the IPC specifies. In addition, the IPC is required to provide a statement to that effect to the person who has custody or control of the record together with short written reasons: s. 60(13).

The IPC must give an opportunity to make representations to the IPC about the complaint to the complainant, the person about whom the complaint was made and any other affected person. A person who is given such an opportunity may be represented by counsel or another person: s. 60(18),(19).

+ **Orders**

After conducting either a complaint-driven or self-initiated review, the IPC can make a number of different kinds of orders to require compliance with the Act: s. 61(1). For example, the IPC may make an Order directing:

- any person whose activities the IPC has reviewed to perform a duty imposed by the Act
- that such a person stop collecting, using or disclosing personal health information

- that such a person dispose of records of personal health information that the IPC determined were collected, used or disclosed in contravention of the Act, regulations or agreement under the Act (if such a disposal is not reasonably expected to adversely affect the provision of health care to an individual)
- the health information custodian to grant an individual access to a requested record, or to make the requested correction
- a health information custodian to implement an information practice specified by the IPC.

Where the IPC makes an Order directing a health information custodian to do, or refrain from doing, something the IPC can make another Order directing one or more agents or employees of the custodian to do or refrain from doing it, to ensure that the custodian complies with its own Order: s. 61(1)(h).

In addition, or alternatively, the IPC can make comments and recommendations on the privacy implications of any matter that is the subject of the review.

Orders may contain any terms the IPC considers appropriate. The IPC also has the power to vary, rescind, or make a further Order if new facts come to the attention of the IPC or if there is a material change in circumstances relating to the subject matter of the review: s. 64.

The IPC must provide a copy of the Order, comment or recommendations, and the reasons for it, to the complainant, if any, the person whose activities the IPC reviewed, all other persons to whom the Order is directed and any other person the IPC considers appropriate. In addition, the Act specifies that the IPC must notify the body or bodies that are legally entitled to regulate or review the activities of a health information custodian directed in the order or to whom the comments or recommendations relate; for example, a College of a regulated health professional, or the Ministry in the case of an independent health facility.

When the IPC makes an order, apart from an Order relating to complaints under Part V (Access and Correction), a person affected by the Order may appeal to the Divisional Court on a question of law within 30 days: s. 62(1). There is no appeal from an Order relating to complaints under Part V, though such Order may be challenged by way of judicial review where necessary.

An IPC's final Order, that which can be appealed no further, may be filed with the Superior Court of Justice. Upon filing, that Order is enforceable to the same extent as a judgment or order of that Court: s. 63. When the Order has become final, an individual affected by the order may bring an action in the Superior Court for damages for actual harm suffered as a result of a contravention of the Act or regulations: s. 65(1). Similarly, a person affected by the conduct of a person who has been convicted of an offence under the Act may commence a proceeding in the Superior Court for actual harm that the person suffered as a result of the conduct. The Court may award a maximum of \$10,000 in damages for mental anguish, if it determines that the harm suffered by the plaintiff was caused by the willful or reckless contravention or offence of the defendant.

+ Information and Privacy Commissioner - General Powers

In addition to the power to make orders, the IPC has some more general powers. The IPC, for example, has the power to conduct public education programs, and offer comment on the actual or proposed information practices of custodians: s. 66.

+ Disciplinary Measures

The Act provides that no person shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person, such as an employee, who makes a complaint to the IPC, refuses to do something

in order to comply with the Act, or does something to prevent another person from contravening the Act. In all cases, the protection applies only where the employee is acting in good faith on the basis of a reasonable belief: s. 70.

+ **Immunity**

The Act provides protection from liability to health information custodians and their agents, and for substitute decision-makers, for acts done and omissions made in good faith and reasonably in the circumstances in the exercise of powers or duties under the Act: s. 71.

+ **Offences**

It is an offence to contravene certain specified provisions of the Act: s. 72(1). Only the Attorney General, or a counsel or agent acting on the Attorney General's behalf, may commence a prosecution for an offence. Offences under the Act include:

- willfully collecting, using or disclosing personal health information in contravention of the Act
- disposing of a record of personal health information with an intent to evade a request which has been made for access to the record
- willfully obstructing the IPC or a person acting under the authority of the IPC in the performance of his or her functions
- willfully making false statements to the IPC
- willfully failing to comply with an order of the IPC
- making a request for access to or correction of a record under false pretences.

Offences can result in fines of up to \$50,000 for individuals and up to \$250,000 for corporations: s. 72(2).

QUESTIONS AND ANSWERS ON SELECT PHIPA ISSUES

- Q1.** I am not a “health information custodian” according to the definition of “health information custodian” in the Act. However, health information custodians, like physicians, disclose personal health information to me, with the consent of the individuals to whom the information relates. Do I then become a “health information custodian”?
- A1.** No. Only those persons listed in the Act or the regulations made under the Act are “health information custodians”. The ability of persons who receive personal health information from health information custodians to use and disclose that information, however, is restricted. Generally, except as permitted or required by law, such persons cannot use or disclose that information for any purpose other than the purpose for which the custodian disclosed the information to them under the Act, or for the purpose of carrying out a statutory or legal duty. A health information custodian receiving health information about its employee from another custodian for a purpose other than the provision of health care to the employee is bound by this same restriction: s. 49(3).
- Q2.** I am not a “health information custodian” within the meaning of the Act. Do I have to worry about the Act?
- A2.** Persons who are not health information custodians should consider the application of the Act to them in a few contexts. First, all persons are required to comply with the provisions in the Act concerning health numbers: s. 34. Secondly, as noted above, the ability of persons who receive personal health information from health information custodians to use and disclose that information is restricted: s. 49. Thirdly, persons who are not health information custodians may be agents of custodians. In those cases, such persons would be required to meet the obligations of agents under the Act.
- Q3.** I provide services to developmentally challenged persons and other individuals who need assistance with their care. I am not a regulated health professional or social worker, or social service worker. How do I know if I am a health information custodian?
- A3.** The term “health information custodian” is defined in the Act: s. 3. It is clear from the definition that persons who operate public hospitals, nursing homes and pharmacies are captured by the definition, along with several other enumerated persons. “Health care practitioners” are also “health information custodians”. The definition of “health care practitioner” includes “a person whose primary function is to provide health care for payment”. The definition of “health care” refers to an examination, procedure, etc. “that is done for a health-related purpose”. The inclusion of this language, “health-related purpose”, limits the scope of the definition of “health care” so as to exclude many activities, etc. from “health care”.

If the sole way in which a person would be captured by the definition of “health information custodian” would be through the language “a person whose primary function is to provide health care for payment” in the definition of “health care practitioner”, it is necessary to consider whether the services that you provide are performed for a “health-related purpose”. Transportation services, for example, are generally not provided “for a health-related purpose”. Similarly, assessments of potential parents performed to assist an adoption opening to decide whether to place a child with the potential parents are not provided “for a health-related purpose”. Therefore, the services of the

person in question and the services to be provided must be considered to determine whether he or she is a “health information custodian”.

- Q4.** How will the approval of the health data institute under section 47 of the Act affect me as a health information custodian?
- A4.** The role of the health data institute is a limited and technical one. Basically, the health data institute is responsible for ensuring that personal health information disclosed to it by health information custodians pursuant to section 47 (that is, on the direction of the Minister of Health and Long-Term Care) is analyzed as requested by the Ministry of Health and Long-Term Care and de-identified before it is provided to the Ministry. The health data institute is not responsible for managing the Ministry’s disclosures of information. Similarly, the health data institute is not responsible for setting the Province’s research agenda.
- Q5.** I am a health information custodian, and I would like to provide aggregate information to a company that compiles such information for its own purposes. Does the Act prohibit me from doing so without the consent of the individual to whom the information relates?
- A5.** The Act regulates a health information custodian’s ability to collect, use and disclose information that is captured by the definition of “personal health information” in section 4 of the Act. The term “personal health information” is defined in s. 4 to mean, subject to subsections (3) and (4), *identifying information* about an individual in oral or recorded form, if the information, relates to the health-related matters described in that section. The term “identifying information” is defined in the Act to mean information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify the individual: s. 4(2). Therefore, there will be information that is health information that is not “personal health information” because it is not “identifying information”. The Act does not regulate a custodian’s ability to collect, use and disclose such information. In addition, a custodian may hold personal health information but then rely on clause 37(1)(f) of the Act to use the information without the consent of the individual to whom the information relates for the purpose of modifying the information in order to conceal the identity of the individual. The custodian may then disclose that information without consent if it no longer constitutes “identifying information”. It should also be noted that information that identifies a health care provider in a professional capacity, but does not directly or indirectly identify an individual as a patient of the provider, is not considered personal health information since it is not “identifying information about an individual”, i.e. a patient, under s. 4(1). Thus, for instance, information about the prescribing records of a particular identified physician are not considered personal health information where they do not directly or indirectly identify any patient.
- Q6.** What is the “circle of care”?
- A6.** Although the phrase "circle of care" is not a defined term under the Act, this phrase is sometimes used to refer to a subset of health information custodians. The term “health information custodian” is defined in section 3 of the Act, and includes a list of persons and organizations that have custody or control of personal health information as a result of or in connection to their work, duties or powers. However, certain provisions of the Act refer to a narrower list of health information custodians (i.e., ss. 20(3), 38(1)(a)). It is in connection with this more limited group of custodians that the phrase “circle of care” is often used. Subsection 20(3)

lists those custodians who are authorized to assume, when receiving personal health information directly from a patient or indirectly from another custodian, unless the patient indicates otherwise, that they have the patient's implied consent to collect, use or disclose the information for the purpose of providing health care or assisting in the provision of health care. Clause 38(1)(a) lists the custodians to which any health information custodian can disclose personal health information for health care purposes without the patient's consent where the disclosure is reasonably necessary for the purpose of providing health care and it is not reasonably possible to get consent in a timely manner, subject again to the patient's instructions otherwise. The list of health information custodians in each case is the same and includes those health information custodians listed under paragraphs 1 through 4 of the definition of health information custodian in s. 3(1) of the Act, and essentially includes most direct providers of health care.

The phrase "circle of care" may sometimes be used in connection with the term "health information custodians" more generally and in the policy reflected in s. 18(3) of PHIPA. Subsection 18(3) of PHIPA provides when consent cannot be implied, but must be express. Since the disclosure of personal health information for purposes other than the provision of health care is the focus of s. 18(3), the phrase "circle of care" is sometimes used in reference to health information custodians more generally, as the parties involved in providing or in assisting in the providing of health care.

- Q7.** Can anything override a person's express instructions not to disclose personal health information for health care purposes?
- A7.** The Act provides that specific health information custodians (see above Q7 pertaining to the "circle of care") may assume that they have the patient's implied consent to use the information for the purpose of providing health care or assisting in the provision of care to the individual unless the custodian is aware that the individual has expressly withheld or withdrawn the consent: s. 20(2). In addition, the Act provides that a custodian may disclose personal health information without consent to certain health information custodians, such as physicians, nurses and other health care practitioners, hospitals, nursing homes, and laboratories, if the disclosure is reasonably necessary for the provision of health care and it is not reasonably possible to obtain the individual's consent in a timely manner. A custodian is not able to rely on this provision of the Act if the individual has expressly instructed the custodian not to make the disclosure: s. 38(1)(a). Individuals also have the power to provide similar instructions in the context of; use of personal health information: s. 37(1)(a); and in relation to the disclosure of personal health information outside Ontario: s. 50(1)(e).

In any such situation, however, such an express instruction would not interfere with the ability of a health information custodian to rely on the provisions of the Act that permit custodians to use or disclose, as the case may be, personal health information for other purposes without consent. For example, subsection 40(1) provides that a health information custodian may disclose personal health information about an individual, without consent, if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person. A health information custodian could rely on this provision where the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person, and would not be bound by the individual's instruction not to disclose since those instructions apply only in the context of the provisions in which they are referred to.

- Q8.** I am not a “health information custodian”, but employ health information custodians, such as regulated health professionals. How will the Act affect our operations?
- A8.** To the extent that your employees who are “health care practitioners” within the meaning of the Act, are providing health care, they will be considered health information custodians and therefore, must comply with the provisions of the Act. A “health care practitioner” is defined as a person who provides “health care” and is a member of a regulated health profession, a drugless practitioner (like a naturopath) or a social worker. The Information and Privacy Commissioner could investigate a complaint made against your employees and for that purpose would have a right to enter your business premises, review records, and compel testimony. If the health professional in your organization does not provide “health care” within the meaning of the Act, that health professional is not a health information custodian. Often, there will be health professionals, such as nurses, who will be employed as teachers for example. The nurse as a teacher in a school is not subject to the Act (e.g. physician employed by an insurance company reviewing submitted medical claims for the insurance company; nurse advising employer with respect to back to work requirements for an injured employee, where the nurse is not providing health care to the employee.
- Q9.** Does the Act restrict a member’s ability to report a concern to a health regulatory college that a colleague may be suffering from a physical or mental condition that affects his or her ability to practise the profession?
- A9.** Part of the Colleges’ regulatory activities include inquiring into possible incapacity of a member of the College; that is, where a person may be suffering from a physical or mental condition or disorder that makes it desirable in the interest of the public that the member no longer be permitted to practise or that the member’s practice be restricted. Assuming that the member of the College who wishes to make the report is not treating his or her colleague, the Act would not apply as the individual is not a health information custodian with respect to that information: s. 3(1). Accordingly, the member of a college is permitted to disclose such information about another member to the College and PHIPA does not change that.

**Consent to Disclose Personal Health Information
Pursuant to the Personal Health Information Protection Act, 2004 (PHIPA)**

I, _____, authorize _____
(Print your name) *(Print name of health information custodian)*

to disclose

my personal health information consisting of:

(Describe the personal health information to be disclosed)

or

the personal health information of _____
(Name of person for whom you are the substitute decision-maker)*

consisting of: _____

(Describe the personal health information to be disclosed)

to _____
(Print name and address of person requiring the information)

I understand the purpose for disclosing this personal health information to the person noted above. I understand that I can refuse to sign this consent form.

My Name: _____ **Address:** _____

Home Tel.: _____ **Work Tel.:** _____

Signature: _____ **Date:** _____

Witness Name: _____ **Address:** _____

Home Tel.: _____ **Work Tel.:** _____

Signature: _____ **Date:** _____

***Please note: A substitute decision-maker is a person authorized under PHIPA to consent, on behalf of an individual, to disclose personal health information about the individual.**

PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004

**CHECKLIST FOR
HEALTH INFORMATION CUSTODIANS**

The Personal Health Information Protection Act, 2004 will come into force on November 1, 2004. To be ready for that date, consider whether you have fulfilled these preliminary requirements for health information custodians under the Act.

Health information custodians are required to:

- ❑ put in place information practices, as defined in subsection 2(1), that comply with the Act and regulations [s. 10(1)]
- ❑ prepare and make available a written public statement about the custodian's information practices that fulfills the requirements of the Act [s. 16(1)]
- ❑ prepare a notice to post or make available describing the purposes of the custodian's collections, uses and disclosures of personal health information. This is required where the custodian intends to rely on subsection 18(6) of the Act.
- ❑ designate a contact person to perform the functions set out in the Act. This is unnecessary if the custodian is a "natural person", for example an individual health care practitioner, and is acting as the contact person. [s. 15(2)]
- ❑ ensure that employees and all other agents of the custodian are appropriately informed of their duties under the Act [s. 15(3)(b)]
- ❑ take reasonable steps to ensure personal health information in the custodian's custody or control is protected against theft, loss, and unauthorized use, disclosure, copying, modification and disposal [s. 12(1)]
- ❑ ensure that personal health information records in the custodian's custody or control are retained, transferred and disposed of in a secure manner and in accordance with the regulations, if any [s. 13(1)]

For more details, please refer to the Personal Health Information Protection Act, 2004 and any regulations made under the Act.



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Personal Health Information Protection Act, 2004

S.O. 2004, CHAPTER 3
Schedule A

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PART I

INTERPRETATION AND APPLICATION

Purposes, Definitions and Interpretation

Purposes

1. The purposes of this Act are,

(a) to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care;

(b) to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions set out in this Act;

(c) to provide individuals with a right to require the correction or amendment of personal health information about themselves, subject to limited and specific exceptions set out in this Act;

(d) to provide for independent review and resolution of complaints with respect to personal health information; and

(e) to provide effective remedies for contraventions of this Act. 2004, c. 3, Sched. A, s. 1.

Definitions

2. In this Act,

“agent”, in relation to a health information custodian, means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent’s own purposes, whether or not the agent has the authority to bind the custodian, whether or not the agent is employed by the custodian and whether or not the agent is being remunerated; (“mandataire”)

“Assistant Commissioner” means the Assistant Commissioner for Personal Health Information appointed under the *Freedom of Information and Protection of Privacy Act*; (“commissaire adjoint”)

“attorney for personal care” means an attorney under a power of attorney for personal care made in accordance with the *Substitute Decisions Act, 1992*; (“procureur au soin de la personne”)

“attorney for property” means an attorney under a continuing power of attorney for property made in accordance with the *Substitute Decisions Act, 1992*; (“procureur aux biens”)

“Board” means the Consent and Capacity Board constituted under the *Health Care Consent Act, 1996*; (“Commission”)

“capable” means mentally capable, and “capacity” has a corresponding meaning; (“capable”, “capacité”)

“collect”, in relation to personal health information, means to gather, acquire, receive or obtain the information by any means from any source, and “collection” has a corresponding meaning; (“recueillir”, “collecte”)

“Commissioner” means the Information and Privacy Commissioner appointed under the *Freedom of Information and Protection of Privacy Act*; (“commissaire”)

“disclose”, in relation to personal health information in the custody or under the control of a health information custodian or a person, means to make the information available or to release it to another health information custodian or to another person, but does not include to use the information, and “disclosure” has a corresponding meaning; (“divulguer”, “divulgation”)

“guardian of property” means a guardian of property or a statutory guardian of property under the *Substitute Decisions Act, 1992*; (“tuteur aux biens”)

“guardian of the person” means a guardian of the person appointed under the *Substitute Decisions Act, 1992*; (“tuteur à la personne”)

“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,

(d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for the use of an individual, pursuant to a prescription, and

(e) a community service that is described in subsection 2 (3) of the *Home Care and Community Services Act, 1994* and provided by a service provider within the meaning of that Act; (“soins de santé”)

“health care practitioner” means,

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

(b) a person who is registered as a drugless practitioner under the *Drugless Practitioners Act* and who provides health care,

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) is repealed by the Statutes of Ontario, 2007, chapter 10, Schedule P, section 19. See: 2007, c. 10, Sched. P, ss. 19, 21 (2).

(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; (“praticien de la santé”)

“health information custodian” has the meaning set out in section 3; (“dépositaire de renseignements sur la santé”)

“health number” means the number, the version code or both of them assigned to an insured person within the meaning of the *Health Insurance Act* by the General Manager within the meaning of that Act; (“numéro de la carte Santé”)

“incapable” means mentally incapable, and “incapacity” has a corresponding meaning; (“incapable”, “incapacité”)

“individual”, in relation to personal health information, means the individual, whether living or deceased, with respect to whom the information was or is being collected or created; (“particulier”)

“information practices”, in relation to a health information custodian, means the policy of the custodian for actions in relation to personal health information, including,

(a) when, how and the purposes for which the custodian routinely collects, uses, modifies, discloses, retains or disposes of personal health information, and

(b) the administrative, technical and physical safeguards and practices that the custodian maintains with respect to the information; (“pratiques relatives aux renseignements”)

“local health integration network” means a local health integration network as defined in section 2 of the *Local Health System Integration Act, 2006*; (“réseau local d’intégration des services de santé”)

“Minister” means the Minister of Health and Long-Term Care; (“ministre”)

“partner” means either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons’ lives; (“partenaire”)

“person” includes a partnership, association or other entity; (“personne”)

“personal health information” has the meaning set out in section 4; (“renseignements personnels sur la santé”)

“prescribed” means prescribed by the regulations made under this Act; (“prescrit”)

“proceeding” includes a proceeding held in, before or under the rules of a court, a tribunal, a commission, a justice of the peace, a coroner, a committee of a College within the meaning of the *Regulated Health Professions Act, 1991*, a committee of the Board of Regents continued under the *Drugless Practitioners Act*, a committee of the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Service Work Act, 1998*, an arbitrator or a mediator; (“instance”)

“quality of care information” has the same meaning as in the *Quality of Care Information Protection Act, 2004*; (“renseignements sur la qualité des soins”)

“record” means a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record; (“dossier”)

“relative” means either of two persons who are related to each other by blood, marriage or adoption; (“parent”)

“research” means a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research; (“recherche”)

“researcher” means a person who conducts research; (“chercheur”)

“research ethics board” means a board of persons that is established for the purpose of approving research plans under section 44 and that meets the prescribed requirements; (“commission d’éthique de la recherche”)

“spouse” means either of two persons who,

(a) are married to each other, or

(b) live together in a conjugal relationship outside marriage and,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*,

unless they are living separate and apart as a result of a breakdown of their relationship; (“conjoint”)

“substitute decision-maker” has the meaning set out in section 5; (“mandataire spécial”)

“use”, in relation to personal health information in the custody or under the control of a health information custodian or a person, means to handle or deal with the information, subject to subsection 6 (1), but does not include to disclose the information, and “use”, as a noun, has a corresponding meaning. (“utiliser”, “utilisation”) 2004, c. 3, Sched. A, s. 2; 2006, c. 4, s. 51 (1); 2007, c. 8, s. 224 (1).

Health information custodian

3. (1) In this Act,

“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:

1. A health care practitioner or a person who operates a group practice of health care practitioners.
2. A service provider within the meaning of the *Home Care and Community Services Act, 1994* who provides a community service to which that Act applies.
3. A community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*.
4. A person who operates one of the following facilities, programs or services:
 - i. A hospital within the meaning of the *Public Hospitals Act*, a private hospital within the meaning of the *Private Hospitals Act*, a psychiatric facility within the meaning of the *Mental Health Act* or an independent health facility within the meaning of the *Independent Health Facilities Act*.
 - ii. A long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*, a placement co-ordinator described in subsection 40 (1) of that Act, or a care home within the meaning of the *Residential Tenancies Act, 2006*.
 - ii.1 a retirement home within the meaning of the *Retirement Homes Act, 2010*.
 - iii. A pharmacy within the meaning of Part VI of the *Drug and Pharmacies Regulation Act*.
 - iv. A laboratory or a specimen collection centre as defined in section 5 of the *Laboratory and Specimen Collection Centre Licensing Act*.
 - v. An ambulance service within the meaning of the *Ambulance Act*.
 - vi. A home for special care within the meaning of the *Homes for Special Care Act*.

vii. A centre, program or service for community health or mental health whose primary purpose is the provision of health care.

5. An evaluator within the meaning of the *Health Care Consent Act, 1996* or an assessor within the meaning of the *Substitute Decisions Act, 1992*.

6. A medical officer of health of a board of health within the meaning of the *Health Protection and Promotion Act*.

7. The Minister, together with the Ministry of the Minister if the context so requires.

8. Any other person prescribed as a health information custodian if the person has custody or control of personal health information as a result of or in connection with performing prescribed powers, duties or work or any prescribed class of such persons. 2004, c. 3, Sched. A, s. 3 (1); 2006, c. 17, s. 253; 2007, c. 8, s. 224 (2-4); 2007, c. 10, Sched. H, s. 1; 2009, c. 33, Sched. 18, s. 25 (1); 2010, c. 11, s. 128.

[\(2\)](#) Repealed: 2009, c. 33, Sched. 18, s. 25 (2).

Exceptions

[\(3\)](#) Except as is prescribed, a person described in any of the following paragraphs is not a health information custodian in respect of personal health information that the person collects, uses or discloses while performing the person's powers or duties or the work described in the paragraph, if any:

1. A person described in paragraph 1, 2 or 5 of the definition of "health information custodian" in subsection (1) who is an agent of a health information custodian.

2. A person who is authorized to act for or on behalf of a person that is not a health information custodian, if the scope of duties of the authorized person does not include the provision of health care.

3. The Minister when acting on behalf of an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* that is not a health information custodian. 2004, c. 3, Sched. A, s. 3 (3).

Other exceptions

[\(4\)](#) A health information custodian does not include a person 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 work described in the paragraph:

1. An aboriginal healer who provides traditional healing services to aboriginal persons or members of an aboriginal community.

2. An aboriginal midwife who provides traditional midwifery services to aboriginal persons or members of an aboriginal community.
3. A person who treats another person solely by prayer or spiritual means in accordance with the tenets of the religion of the person giving the treatment. 2004, c. 3, Sched. A, s. 3 (4).

Multiple facilities

(5) Subject to subsection (6) or an order of the Minister under subsection (8), a health information custodian that operates more than one facility described in one of the subparagraphs of paragraph 4 of the definition of “health information custodian” in subsection (1) shall be deemed to be a separate custodian with respect to personal health information of which it has custody or control as a result of or in connection with operating each of the facilities that it operates. 2004, c. 3, Sched. A, s. 3 (5).

Single custodian

(6) Despite subsection (5), the following persons shall be deemed to be a single health information custodian with respect to all the functions described in the applicable paragraph, if any:

1. A person who operates a hospital within the meaning of the *Public Hospitals Act* and any of the facilities, programs or services described in paragraph 4 of the definition of “health information custodian” in subsection (1).
2. A community care access corporation that provides a community service within the meaning of subsection 2 (3) of the *Home Care and Community Services Act, 1994* and acts as a placement co-ordinator as described in subsection 40 (1) of the *Long-Term Care Homes Act, 2007*.
3. Health information custodians or facilities that are prescribed. 2004, c. 3, Sched. A, s. 3 (6); 2007, c. 8, s. 224 (5).

Application to act as one custodian

(7) A health information custodian that operates more than one facility described in one of the subparagraphs of paragraph 4 of the definition of “health information custodian” in subsection (1) or two or more health information custodians may apply to the Minister, in a form approved by the Minister, for an order described in subsection (8). 2004, c. 3, Sched. A, s. 3 (7).

Minister’s order

(8) Upon receiving an application described in subsection (7), the Minister may make an order permitting all or some of the applicants to act as a single health information custodian on behalf of those facilities, powers, duties or work that the Minister specifies, subject to the terms that the Minister considers appropriate and specifies in the order, if the Minister is of the opinion that it is appropriate to make the order in the circumstances, having regard to,

- (a) the public interest;
- (b) the ability of the applicants to provide individuals with reasonable access to their personal health information;
- (c) the ability of the applicants to comply with the requirements of this Act; and
- (d) whether permitting the applicants to act as a single health information custodian is necessary to enable them to effectively provide integrated health care. 2004, c. 3, Sched. A, s. 3 (8).

Scope of order

(9) In an order made under subsection (8), the Minister may order that any class of health information custodians that the Minister considers to be situated similarly to the applicants is permitted to act as a single health information custodian, subject to the terms that the Minister considers appropriate and specifies in the order, if the Minister is of the opinion that it is appropriate to so order, having regard to,

- (a) the public interest;
- (b) the ability of the custodians that are subject to the order made under this subsection to provide individuals with reasonable access to their personal health information;
- (c) the ability of the custodians that are subject to the order made under this subsection to comply with the requirements of this Act; and
- (d) whether permitting the custodians that are subject to the order made under this subsection to act as a single health information custodian is necessary to enable them to effectively provide integrated health care. 2004, c. 3, Sched. A, s. 3 (9).

No hearing required

(10) The Minister is not required to hold a hearing or to afford to any person an opportunity for a hearing before making an order under subsection (8). 2004, c. 3, Sched. A, s. 3 (10).

Duration

(11) Subject to subsection (12), a health information custodian does not cease to be a health information custodian with respect to a record of personal health information until complete custody and control of the record, where applicable, passes to another person who is legally authorized to hold the record. 2004, c. 3, Sched. A, s. 3 (11).

Death of custodian

(12) If a health information custodian dies, the following person shall be deemed to be the health information custodian with respect to records of personal health information held by the

deceased custodian until custody and control of the records, where applicable, passes to another person who is legally authorized to hold the records:

1. The estate trustee of the deceased custodian.
2. The person who has assumed responsibility for the administration of the deceased custodian's estate, if the estate does not have an estate trustee. 2004, c. 3, Sched. A, s. 3 (12).

Personal health information

4. (1) In this Act,

“personal health information”, subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

(c) is a plan of service within the meaning of the *Home Care and Community Services Act, 1994* for the individual,

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual's health number, or

(g) identifies an individual's substitute decision-maker. 2004, c. 3, Sched. A, s. 4 (1); 2007, c. 8, s. 224 (6); 2007, c. 10, Sched. H, s. 2.

Identifying information

(2) In this section,

“identifying information” means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual. 2004, c. 3, Sched. A, s. 4 (2).

Mixed records

[\(3\)](#) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection. 2009, c. 33, Sched. 18, s. 25 (3).

Exception

[\(4\)](#) Personal health information does not include identifying information contained in a record that is in the custody or under the control of a health information custodian if,

(a) the identifying information contained in the record relates primarily to one or more employees or other agents of the custodian; and

(b) the record is maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employees or other agents. 2004, c. 3, Sched. A, s. 4 (4).

Substitute decision-maker

[5. \(1\)](#) In this Act,

“substitute decision-maker”, in relation to an individual, means, unless the context requires otherwise, a person who is authorized under this Act to consent on behalf of the individual to the collection, use or disclosure of personal health information about the individual. 2004, c. 3, Sched. A, s. 5 (1).

Decision about treatment

[\(2\)](#) A substitute decision-maker of an individual within the meaning of section 9 of the *Health Care Consent Act, 1996* shall be deemed to be a substitute decision-maker of the individual in respect of the collection, use or disclosure of personal health information about the individual if the purpose of the collection, use or disclosure is necessary for, or ancillary to, a decision about a treatment under Part II of that Act. 2004, c. 3, Sched. A, s. 5 (2).

Admission to a care facility

[\(3\)](#) A substitute decision-maker of an individual within the meaning of section 39 of the *Health Care Consent Act, 1996* shall be deemed to be a substitute decision-maker of the individual in respect of the collection, use or disclosure of personal health information about the individual if the purpose of the collection, use or disclosure is necessary for, or ancillary to, a decision about admission to a care facility under Part III of that Act. 2004, c. 3, Sched. A, s. 5 (3).

Personal assistance services

[\(4\)](#) A substitute decision-maker of an individual within the meaning of section 56 of the *Health Care Consent Act, 1996* shall be deemed to be a substitute decision-maker of the individual in respect of the collection, use or disclosure of personal health information about the individual if

the purpose of the collection, use or disclosure is necessary for, or ancillary to, a decision about a personal assistance service under Part IV of that Act. 2004, c. 3, Sched. A, s. 5 (4).

Interpretation

[6. \(1\)](#) For the purposes of this Act, the providing of personal health information between a health information custodian and an agent of the custodian is a use by the custodian, and not a disclosure by the person providing the information or a collection by the person to whom the information is provided. 2004, c. 3, Sched. A, s. 6 (1).

Provisions based on consent

[\(2\)](#) A provision of this Act that applies to the collection, use or disclosure of personal health information about an individual by a health information custodian with the consent of the individual, whatever the nature of the consent, does not affect the collection, use or disclosure that this Act permits or requires the health information custodian to make of the information without the consent of the individual. 2004, c. 3, Sched. A, s. 6 (2).

Permissive disclosure

[\(3\)](#) A provision of this Act that permits a health information custodian to disclose personal health information about an individual without the consent of the individual,

- (a) does not require the custodian to disclose it unless required to do so by law;
- (b) does not relieve the custodian from a legal requirement to disclose the information; and
- (c) does not prevent the custodian from obtaining the individual's consent for the disclosure. 2004, c. 3, Sched. A, s. 6 (3).

Application of Act

Application of Act

[7. \(1\)](#) Except if this Act or its regulations specifically provide otherwise, this Act applies to,

- (a) the collection of personal health information by a health information custodian on or after the day this section comes into force;
- (b) the use or disclosure of personal health information, on or after the day this section comes into force, by,
 - (i) a health information custodian, even if the custodian collected the information before that day,
 - or

(ii) a person who is not a health information custodian and to whom a health information custodian disclosed the information, even if the person received the information before that day; and

(c) the collection, use or disclosure of a health number by any person on or after the day this section comes into force. 2004, c. 3, Sched. A, s. 7 (1).

Conflict

[\(2\)](#) In the event of a conflict between a provision of this Act or its regulations and a provision of any other Act or its regulations, this Act and its regulations prevail unless this Act, its regulations or the other Act specifically provide otherwise. 2004, c. 3, Sched. A, s. 7 (2).

Interpretation

[\(3\)](#) For the purpose of this section, there is no conflict unless it is not possible to comply with both this Act and its regulations and any other Act or its regulations. 2004, c. 3, Sched. A, s. 7 (3).

Exception

[\(4\)](#) This Act and its regulations do not prevail in the event of a conflict between a provision of this Act or its regulations and a provision of the *Quality of Care Information Protection Act, 2004* or its regulations. 2004, c. 3, Sched. A, s. 7 (4).

Crown bound

[\(5\)](#) For greater certainty, this Act binds the Crown, including all ministries, agencies and employees of the Crown. 2007, c. 10, Sched. H, s. 3.

Freedom of information legislation

[8. \(1\)](#) Subject to subsection (2), the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise. 2007, c. 10, Sched. H, s. 4.

Exceptions

[\(2\)](#) Sections 11, 12, 15, 16, 17, 33 and 34, subsection 35 (2) and sections 36 and 44 of the *Freedom of Information and Protection of Privacy Act* and sections 5, 9, 10, 25, 26 and 34 of the *Municipal Freedom of Information and Protection of Privacy Act* apply in respect of records of personal health information in the custody or under the control of a health information custodian that is an institution within the meaning of either of those Acts, as the case may be, or that is acting as part of such an institution. 2007, c. 10, Sched. H, s. 4.

Same

[\(3\)](#) A record of personal health information prepared by or in the custody or control of an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* shall be deemed to be a record to which clause 32 (b) of the *Freedom of Information and Protection of Privacy Act* or clause 25 (1) (b) of the *Municipal Freedom of Information and Protection of Privacy Act* applies, as the case may be. 2004, c. 3, Sched. A, s. 8 (3).

Access

[\(4\)](#) This Act does not limit a person's right of access under section 10 of the *Freedom of Information and Protection of Privacy Act* or section 4 of the *Municipal Freedom of Information and Protection of Privacy Act* to a record of personal health information if all the types of information referred to in subsection 4 (1) are reasonably severed from the record. 2004, c. 3, Sched. A, s. 8 (4).

Transition

[\(5\)](#) This Act does not apply to a collection, use or disclosure of personal health information, a request for access or an appeal made under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* before the day this section comes into force, and the applicable Act continues to apply to the collection, use, disclosure, request or appeal. 2004, c. 3, Sched. A, s. 8 (5).

Non-application of Act

[9. \(1\)](#) This Act does not apply to personal health information about an individual after the earlier of 120 years after a record containing the information was created and 50 years after the death of the individual. 2004, c. 3, Sched. A, s. 9 (1).

Other rights and Acts

[\(2\)](#) Nothing in this Act shall be construed to interfere with,

(a) anything in connection with a subrogated claim or a potential subrogated claim;

(b) any legal privilege, including solicitor-client privilege;

(c) the law of evidence or information otherwise available by law to a party or a witness in a proceeding;

(d) the power of a court or a tribunal to compel a witness to testify or to compel the production of a document;

(e) the regulatory activities of a College under the *Regulated Health Professions Act, 1991*, the College under the *Social Work and Social Service Work Act, 1998* or the Board under the *Drugless Practitioners Act*; or

(f) any provision of any Act of Ontario or Canada or any court order, if the provision or order, as the case may be, prohibits a person from making information public or from publishing information. 2004, c. 3, Sched. A, s. 9 (2).

PART II PRACTICES TO PROTECT PERSONAL HEALTH INFORMATION

General

Information practices

10. (1) A health information custodian that has custody or control of personal health information shall have in place information practices that comply with the requirements of this Act and its regulations. 2004, c. 3, Sched. A, s. 10 (1).

Duty to follow practices

(2) A health information custodian shall comply with its information practices. 2004, c. 3, Sched. A, s. 10 (2).

Use of electronic means

(3) A health information custodian that uses electronic means to collect, use, modify, disclose, retain or dispose of personal health information shall comply with the prescribed requirements, if any. 2004, c. 3, Sched. A, s. 10 (3).

Providers to custodians

(4) A person who provides goods or services for the purpose of enabling a health information custodian to use electronic means to collect, use, modify, disclose, retain or dispose of personal health information shall comply with the prescribed requirements, if any. 2004, c. 3, Sched. A, s. 10 (4).

Accuracy

11. (1) A health information custodian that uses personal health information about an individual shall take reasonable steps to ensure that the information is as accurate, complete and up-to-date as is necessary for the purposes for which it uses the information. 2004, c. 3, Sched. A, s. 11 (1).

Same, disclosure

[\(2\)](#) A health information custodian that discloses personal health information about an individual shall,

(a) take reasonable steps to ensure that the information is as accurate, complete and up-to-date as is necessary for the purposes of the disclosure that are known to the custodian at the time of the disclosure; or

(b) clearly set out for the recipient of the disclosure the limitations, if any, on the accuracy, completeness or up-to-date character of the information. 2004, c. 3, Sched. A, s. 11 (2).

Security

[12. \(1\)](#) A health information custodian shall take steps that are reasonable in the circumstances to ensure that personal health information in the custodian's custody or control is protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the information are protected against unauthorized copying, modification or disposal. 2004, c. 3, Sched. A, s. 12 (1).

Notice of loss, etc.

[\(2\)](#) Subject to subsection (3) and subject to the exceptions and additional requirements, if any, that are prescribed, a health information custodian that has custody or control of personal health information about an individual shall notify the individual at the first reasonable opportunity if the information is stolen, lost, or accessed by unauthorized persons. 2004, c. 3, Sched. A, s. 12 (2).

Exception

[\(3\)](#) If the health information custodian is a researcher who has received the personal health information from another health information custodian under subsection 44 (1), the researcher shall not notify the individual that the information is stolen, lost or accessed by unauthorized persons unless the health information custodian under that subsection first obtains the individual's consent to having the researcher contact the individual and informs the researcher that the individual has given the consent. 2004, c. 3, Sched. A, s. 12 (3).

Records

Handling of records

[13. \(1\)](#) A health information custodian shall ensure that the records of personal health information that it has in its custody or under its control are retained, transferred and disposed of in a secure manner and in accordance with the prescribed requirements, if any. 2004, c. 3, Sched. A, s. 13 (1).

Retention of records subject to a request

[\(2\)](#) Despite subsection (1), a health information custodian that has custody or control of personal health information that is the subject of a request for access under section 53 shall retain the information for as long as necessary to allow the individual to exhaust any recourse under this Act that he or she may have with respect to the request. 2004, c. 3, Sched. A, s. 13 (2).

Place where records kept

[14. \(1\)](#) A health information custodian may keep a record of personal health information about an individual in the individual's home in any reasonable manner to which the individual consents, subject to any restrictions set out in a regulation, by-law or published guideline under the *Regulated Health Professions Act, 1991*, an Act referred to in Schedule 1 of that Act, the *Drugless Practitioners Act* or the *Social Work and Social Service Work Act, 1998*. 2004, c. 3, Sched. A, s. 14 (1).

Records kept in other places

[\(2\)](#) A health care practitioner may keep a record of personal health information about an individual in a place other than the individual's home and other than a place in the control of the practitioner if,

(a) the record is kept in a reasonable manner;

(b) the individual consents;

(c) the health care practitioner is permitted to keep the record in the place in accordance with a regulation, by-law or published guideline under the *Regulated Health Professions Act, 1991*, an Act referred to in Schedule 1 to that Act, the *Drugless Practitioners Act* or the *Social Work and Social Service Work Act, 1998*, if the health care practitioner is described in any of clauses (a) to (c) of the definition of "health care practitioner" in section 2; and

(d) the prescribed conditions, if any, are satisfied. 2004, c. 3, Sched. A, s. 14 (2).

Accountability and Openness

Contact person

[15. \(1\)](#) A health information custodian that is a natural person may designate a contact person described in subsection (3). 2004, c. 3, Sched. A, s. 15 (1).

Same

[\(2\)](#) A health information custodian that is not a natural person shall designate a contact person described in subsection (3). 2004, c. 3, Sched. A, s. 15 (2).

Functions of contact person

(3) A contact person is an agent of the health information custodian and is authorized on behalf of the custodian to,

(a) facilitate the custodian's compliance with this Act;

(b) ensure that all agents of the custodian are appropriately informed of their duties under this Act;

(c) respond to inquiries from the public about the custodian's information practices;

(d) respond to requests of an individual for access to or correction of a record of personal health information about the individual that is in the custody or under the control of the custodian; and

(e) receive complaints from the public about the custodian's alleged contravention of this Act or its regulations. 2004, c. 3, Sched. A, s. 15 (3).

If no contact person

(4) A health information custodian that is a natural person and that does not designate a contact person under subsection (1) shall perform on his or her own the functions described in clauses (3) (b), (c), (d) and (e). 2004, c. 3, Sched. A, s. 15 (4).

Written public statement

16. (1) A health information custodian shall, in a manner that is practical in the circumstances, make available to the public a written statement that,

(a) provides a general description of the custodian's information practices;

(b) describes how to contact,

(i) the contact person described in subsection 15 (3), if the custodian has one, or

(ii) the custodian, if the custodian does not have that contact person;

(c) describes how an individual may obtain access to or request correction of a record of personal health information about the individual that is in the custody or control of the custodian; and

(d) describes how to make a complaint to the custodian and to the Commissioner under this Act. 2004, c. 3, Sched. A, s. 16 (1).

Notification

(2) If a health information custodian uses or discloses personal health information about an individual, without the individual's consent, in a manner that is outside the scope of the custodian's description of its information practices under clause (1) (a), the custodian shall,

(a) inform the individual of the uses and disclosures at the first reasonable opportunity unless, under section 52, the individual does not have a right of access to a record of the information;

(b) make a note of the uses and disclosures; and

(c) keep the note as part of the records of personal health information about the individual that it has in its custody or under its control or in a form that is linked to those records. 2004, c. 3, Sched. A, s. 16 (2).

Agents and information

17. (1) A health information custodian is responsible for personal health information in the custody or control of the health information custodian and may permit the custodian's agents to collect, use, disclose, retain or dispose of personal health information on the custodian's behalf only if,

(a) the custodian is permitted or required to collect, use, disclose, retain or dispose of the information, as the case may be;

(b) the collection, use, disclosure, retention or disposition of the information, as the case may be, is in the course of the agent's duties and not contrary to the limits imposed by the custodian, this Act or another law; and

(c) the prescribed requirements, if any, are met. 2004, c. 3, Sched. A, s. 17 (1).

Restriction on agents

(2) Except as permitted or required by law and subject to the exceptions and additional requirements, if any, that are prescribed, an agent of a health information custodian shall not collect, use, disclose, retain or dispose of personal health information on the custodian's behalf unless the custodian permits the agent to do so in accordance with subsection (1). 2004, c. 3, Sched. A, s. 17 (2).

Responsibility of agent

(3) An agent of a health information custodian shall notify the custodian at the first reasonable opportunity if personal health information handled by the agent on behalf of the custodian is stolen, lost or accessed by unauthorized persons. 2004, c. 3, Sched. A, s. 17 (3).

PART III

CONSENT CONCERNING PERSONAL HEALTH INFORMATION

General

Elements of consent

18. (1) If this Act or any other Act requires the consent of an individual for the collection, use or disclosure of personal health information by a health information custodian, the consent,

(a) must be a consent of the individual;

(b) must be knowledgeable;

(c) must relate to the information; and

(d) must not be obtained through deception or coercion. 2004, c. 3, Sched. A, s. 18 (1).

Implied consent

(2) Subject to subsection (3), a consent to the collection, use or disclosure of personal health information about an individual may be express or implied. 2004, c. 3, Sched. A, s. 18 (2).

Exception

(3) A consent to the disclosure of personal health information about an individual must be express, and not implied, if,

(a) a health information custodian makes the disclosure to a person that is not a health information custodian; or

(b) a health information custodian makes the disclosure to another health information custodian and the disclosure is not for the purposes of providing health care or assisting in providing health care. 2004, c. 3, Sched. A, s. 18 (3).

Same

(4) Subsection (3) does not apply to,

(a) a disclosure pursuant to an implied consent described in subsection 20 (4);

(b) a disclosure pursuant to clause 32 (1) (b); or

(c) a prescribed type of disclosure that does not include information about an individual's state of health. 2004, c. 3, Sched. A, s. 18 (4).

Knowledgeable consent

(5) A consent to the collection, use or disclosure of personal health information about an individual is knowledgeable if it is reasonable in the circumstances to believe that the individual knows,

(a) the purposes of the collection, use or disclosure, as the case may be; and

(b) that the individual may give or withhold consent. 2004, c. 3, Sched. A, s. 18 (5).

Notice of purposes

[\(6\)](#) Unless it is not reasonable in the circumstances, it is reasonable to believe that an individual knows the purposes of the collection, use or disclosure of personal health information about the individual by a health information custodian if the custodian posts or makes readily available a notice describing the purposes where it is likely to come to the individual's attention or provides the individual with such a notice. 2004, c. 3, Sched. A, s. 18 (6).

Transition

[\(7\)](#) A consent that an individual gives, before the day that subsection (1) comes into force, to a collection, use or disclosure of information that is personal health information is a valid consent if it meets the requirements of this Act for consent. 2004, c. 3, Sched. A, s. 18 (7).

Withdrawal of consent

[19. \(1\)](#) If an individual consents to have a health information custodian collect, use or disclose personal health information about the individual, the individual may withdraw the consent, whether the consent is express or implied, by providing notice to the health information custodian, but the withdrawal of the consent shall not have retroactive effect. 2004, c. 3, Sched. A, s. 19 (1).

Conditional consent

[\(2\)](#) If an individual places a condition on his or her consent to have a health information custodian collect, use or disclose personal health information about the individual, the condition is not effective to the extent that it purports to prohibit or restrict any recording of personal health information by a health information custodian that is required by law or by established standards of professional practice or institutional practice. 2004, c. 3, Sched. A, s. 19 (2).

Assumption of validity

[20. \(1\)](#) A health information custodian who has obtained an individual's consent to a collection, use or disclosure of personal health information about the individual or who has received a copy of a document purporting to record the individual's consent to the collection, use or disclosure is entitled to assume that the consent fulfils the requirements of this Act and the individual has not withdrawn it, unless it is not reasonable to assume so. 2004, c. 3, Sched. A, s. 20 (1).

Implied consent

[\(2\)](#) A health information custodian described in paragraph 1, 2, 3 or 4 of the definition of "health information custodian" in subsection 3 (1), that receives personal health information about an individual from the individual, the individual's substitute decision-maker or another health information custodian for the purpose of providing health care or assisting in the provision of

health care to the individual, is entitled to assume that it has the individual's implied consent to collect, use or disclose the information for the purposes of providing health care or assisting in providing health care to the individual, unless the custodian that receives the information is aware that the individual has expressly withheld or withdrawn the consent. 2004, c. 3, Sched. A, s. 20 (2).

Limited consent

[\(3\)](#) If a health information custodian discloses, with the consent of an individual, personal health information about the individual to a health information custodian described in paragraph 1, 2, 3 or 4 of the definition of "health information custodian" in subsection 3 (1) for the purpose of the provision of health care to the individual and if the disclosing custodian does not have the consent of the individual to disclose all the personal health information about the individual that it considers reasonably necessary for that purpose, the disclosing custodian shall notify the custodian to whom it disclosed the information of that fact. 2004, c. 3, Sched. A, s. 20 (3).

Implied consent, affiliation

[\(4\)](#) If an individual who is a resident or patient in a facility that is a health information custodian provides to the custodian information about his or her religious or other organizational affiliation, the facility may assume that it has the individual's implied consent to provide his or her name and location in the facility to a representative of the religious or other organization, where the custodian has offered the individual the opportunity to withhold or withdraw the consent and the individual has not done so. 2004, c. 3, Sched. A, s. 20 (4).

Capacity and Substitute Decision-Making

Capacity to consent

[21. \(1\)](#) An individual is capable of consenting to the collection, use or disclosure of personal health information if the individual is able,

(a) to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure, as the case may be; and

(b) to appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent. 2004, c. 3, Sched. A, s. 21 (1).

Different information

[\(2\)](#) An individual may be capable of consenting to the collection, use or disclosure of some parts of personal health information, but incapable of consenting with respect to other parts. 2004, c. 3, Sched. A, s. 21 (2).

Different times

[\(3\)](#) An individual may be capable of consenting to the collection, use or disclosure of personal health information at one time, but incapable of consenting at another time. 2004, c. 3, Sched. A, s. 21 (3).

Presumption of capacity

[\(4\)](#) An individual is presumed to be capable of consenting to the collection, use or disclosure of personal health information. 2004, c. 3, Sched. A, s. 21 (4).

Non-application

[\(5\)](#) A health information custodian may rely on the presumption described in subsection (4) unless the custodian has reasonable grounds to believe that the individual is incapable of consenting to the collection, use or disclosure of personal health information. 2004, c. 3, Sched. A, s. 21 (5).

Determination of incapacity

[22. \(1\)](#) A health information custodian that determines the incapacity of an individual to consent to the collection, use or disclosure of personal health information under this Act shall do so in accordance with the requirements and restrictions, if any, that are prescribed. 2004, c. 3, Sched. A, s. 22 (1).

Information about determination

[\(2\)](#) If it is reasonable in the circumstances, a health information custodian shall provide, to an individual determined incapable of consenting to the collection, use or disclosure of his or her personal health information by the custodian, information about the consequences of the determination of incapacity, including the information, if any, that is prescribed. 2004, c. 3, Sched. A, s. 22 (2).

Review of determination

[\(3\)](#) An individual whom a health information custodian determines is incapable of consenting to the collection, use or disclosure of his or her personal health information by a health information custodian may apply to the Board for a review of the determination unless there is a person who is entitled to act as the substitute decision-maker of the individual under subsection 5 (2), (3) or (4). 2004, c. 3, Sched. A, s. 22 (3).

Parties

[\(4\)](#) The parties to the application are:

1. The individual applying for the review of the determination.

2. The health information custodian that has custody or control of the personal health information.

3. All other persons whom the Board specifies. 2004, c. 3, Sched. A, s. 22 (4).

Powers of Board

(5) The Board may confirm the determination of incapacity or may determine that the individual is capable of consenting to the collection, use or disclosure of personal health information. 2004, c. 3, Sched. A, s. 22 (5).

Restriction on repeated applications

(6) If a determination that an individual is incapable with respect to consenting to the collection, use or disclosure of personal health information is confirmed on the final disposition of an application under this section, the individual shall not make a new application under this section for a determination with respect to the same or a similar issue within six months after the final disposition of the earlier application, unless the Board gives leave in advance. 2004, c. 3, Sched. A, s. 22 (6).

Grounds for leave

(7) The Board may give leave for the new application to be made if it is satisfied that there has been a material change in circumstances that justifies reconsideration of the individual's capacity. 2004, c. 3, Sched. A, s. 22 (7).

Procedure

(8) Sections 73 to 81 of the *Health Care Consent Act, 1996* apply with necessary modifications to an application under this section. 2004, c. 3, Sched. A, s. 22 (8).

Persons who may consent

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:

1. If the individual is capable of consenting to the collection, use or disclosure of the information,

i. the individual, or

ii. if the individual is at least 16 years of age, any person who is capable of consenting, whom the individual has authorized in writing to act on his or her behalf and who, if a natural person, is at least 16 years of age.

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 and Family Services Act*.

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.

4. If the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.

5. A person whom an Act of Ontario or Canada authorizes or requires to act on behalf of the individual. 2004, c. 3, Sched. A, s. 23 (1); 2007, c. 10, Sched. H, s. 5.

Definition

[\(2\)](#) In subsection (1),

“parent” does not include a parent who has only a right of access to the child. 2004, c. 3, Sched. A, s. 23 (2).

Conflict if child capable

[\(3\)](#) 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. 2004, c. 3, Sched. A, s. 23 (3).

Factors to consider for consent

[24. \(1\)](#) A person who consents under this Act or any other Act on behalf of or in the place of an individual to a collection, use or disclosure of personal health information by a health information custodian, who withholds or withdraws such a consent or who provides an express instruction under clause 37 (1) (a), 38 (1) (a) or 50 (1) (e) shall take into consideration,

(a) the wishes, values and beliefs that,

(i) if the individual is capable, the person knows the individual holds and believes the individual would want reflected in decisions made concerning the individual's personal health information, or

(ii) if the individual is incapable or deceased, the person knows the individual held when capable or alive and believes the individual would have wanted reflected in decisions made concerning the individual's personal health information;

(b) whether the benefits that the person expects from the collection, use or disclosure of the information outweigh the risk of negative consequences occurring as a result of the collection, use or disclosure;

(c) whether the purpose for which the collection, use or disclosure is sought can be accomplished without the collection, use or disclosure; and

(d) whether the collection, use or disclosure is necessary to satisfy any legal obligation. 2004, c. 3, Sched. A, s. 24 (1).

Determination of compliance

[\(2\)](#) If a substitute decision-maker, on behalf of an incapable individual, gives, withholds or withdraws a consent to a collection, use or disclosure of personal health information about the individual by a health information custodian or provides an express instruction under clause 37 (1) (a), 38 (1) (a) or 50 (1) (e) and if the custodian is of the opinion that the substitute decision-maker has not complied with subsection (1), the custodian may apply to the Board for a determination as to whether the substitute decision-maker complied with that subsection. 2004, c. 3, Sched. A, s. 24 (2).

Deemed application concerning capacity

[\(2.1\)](#) An application to the Board under subsection (2) shall be deemed to include an application to the Board under subsection 22 (3) with respect to the individual's capacity to consent to the collection, use or disclosure of his or her personal health information, unless the individual's capacity has been determined by the Board within the previous six months. 2007, c. 10, Sched. H, s. 6.

Parties

[\(3\)](#) The parties to the application are:

1. The health information custodian.
2. The incapable individual.
3. The substitute decision-maker.

4. Any other person whom the Board specifies. 2004, c. 3, Sched. A, s. 24 (3).

Power of Board

[\(4\)](#) In determining whether the substitute decision-maker complied with subsection (1), the Board may substitute its opinion for that of the substitute decision-maker. 2004, c. 3, Sched. A, s. 24 (4).

Directions

[\(5\)](#) If the Board determines that the substitute decision-maker did not comply with subsection (1), it may give him or her directions and, in doing so, shall take into consideration the matters set out in clauses (1) (a) to (d). 2004, c. 3, Sched. A, s. 24 (5).

Time for compliance

[\(6\)](#) The Board shall specify the time within which the substitute decision-maker must comply with its directions. 2004, c. 3, Sched. A, s. 24 (6).

Deemed not authorized

[\(7\)](#) If the substitute decision-maker does not comply with the Board's directions within the time specified by the Board, he or she shall be deemed not to meet the requirements of subsection 26 (2). 2004, c. 3, Sched. A, s. 24 (7).

Public Guardian and Trustee

[\(8\)](#) If the substitute decision-maker who is given directions is the Public Guardian and Trustee, he or she is required to comply with the directions and subsection (6) does not apply to him or her. 2004, c. 3, Sched. A, s. 24 (8).

Procedure

[\(9\)](#) Sections 73 to 81 of the *Health Care Consent Act, 1996* apply with necessary modifications to an application under this section. 2004, c. 3, Sched. A, s. 24 (9).

Authority of substitute decision-maker

[25. \(1\)](#) If this Act permits or requires an individual to make a request, give an instruction or take a step and a substitute decision-maker is authorized to consent on behalf of the individual to the collection, use or disclosure of personal health information about the individual, the substitute decision-maker may make the request, give the instruction or take the step on behalf of the individual. 2004, c. 3, Sched. A, s. 25 (1).

Same

[\(2\)](#) If a substitute decision-maker makes a request, gives an instruction or takes a step under subsection (1) on behalf of an individual, references in this Act to the individual with respect to the request made, the instruction given or the step taken by the substitute decision-maker shall be read as references to the substitute decision-maker, and not to the individual. 2004, c. 3, Sched. A, s. 25 (2).

Incapable individual: persons who may consent

[26. \(1\)](#) If an individual is determined to be incapable of consenting to the collection, use or disclosure of personal health information by a health information custodian, a person described in one of the following paragraphs may, on the individual's behalf and in the place of the individual, give, withhold or withdraw the consent:

1. The individual's guardian of the person or guardian of property, if the consent relates to the guardian's authority to make a decision on behalf of the individual.
2. The individual's attorney for personal care or attorney for property, if the consent relates to the attorney's authority to make a decision on behalf of the individual.
3. The individual's representative appointed by the Board under section 27, if the representative has authority to give the consent.
4. The individual's spouse or partner.
5. A child or parent of the individual, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent. This paragraph does not include a parent who has only a right of access to the individual. If a children's aid society or other person is lawfully entitled to consent in the place of the parent, this paragraph does not include the parent.
6. A parent of the individual with only a right of access to the individual.
7. A brother or sister of the individual.
8. Any other relative of the individual. 2004, c. 3, Sched. A, s. 26 (1).

Requirements

[\(2\)](#) A person described in subsection (1) may consent only if the person,

- (a) is capable of consenting to the collection, use or disclosure of personal health information by a health information custodian;
- (b) in the case of an individual, is at least 16 years old or is the parent of the individual to whom the personal health information relates;

(c) is not prohibited by court order or separation agreement from having access to the individual to whom the personal health information relates or from giving or refusing consent on the individual's behalf;

(d) is available; and

(e) is willing to assume the responsibility of making a decision on whether or not to consent. 2004, c. 3, Sched. A, s. 26 (2).

Meaning of “available”

(3) For the purpose of clause (2) (d), a person is available if it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent. 2004, c. 3, Sched. A, s. 26 (3).

Ranking

(4) A person described in a paragraph of subsection (1) may consent only if no person described in an earlier paragraph meets the requirements of subsection (2). 2004, c. 3, Sched. A, s. 26 (4).

Same

(5) Despite subsection (4), a person described in a paragraph of subsection (1) who is present or has otherwise been contacted may consent if the person believes that,

(a) no other person described in an earlier paragraph or the same paragraph exists; or

(b) although such other person exists, the other person is not a person described in paragraph 1, 2 or 3 of subsection (1) and would not object to the person who is present or has otherwise been contacted making the decision. 2004, c. 3, Sched. A, s. 26 (5); 2007, c. 10, Sched. H, s. 7.

Public Guardian and Trustee

(6) If no person described in subsection (1) meets the requirements of subsection (2), the Public Guardian and Trustee may make the decision to consent. 2004, c. 3, Sched. A, s. 26 (6).

Conflict between persons in same paragraph

(7) If two or more persons who are described in the same paragraph of subsection (1) and who meet the requirements of subsection (2) disagree about whether to consent, and if their claims rank ahead of all others, the Public Guardian and Trustee may make the decision in their stead. 2004, c. 3, Sched. A, s. 26 (7).

Transition, representative appointed by individual

[\(8\)](#) Where an individual, to whom personal health information relates, appointed a representative under section 36.1 of the *Mental Health Act* before the day this section comes into force, the representative shall be deemed to have the same authority as a person mentioned in paragraph 2 of subsection (1). 2004, c. 3, Sched. A, s. 26 (8).

Limited authority

[\(9\)](#) The authority conferred on the representative by subsection (8) is limited to the purposes for which the representative was appointed. 2004, c. 3, Sched. A, s. 26 (9).

Revocation

[\(10\)](#) An individual who is capable of consenting with respect to personal health information may revoke the appointment mentioned in subsection (8) in writing. 2004, c. 3, Sched. A, s. 26 (10).

Ranking

[\(11\)](#) A person who is entitled to be the substitute decision-maker of the individual under this section may act as the substitute decision-maker only in circumstances where there is no person who may act as the substitute decision-maker of the individual under subsection 5 (2), (3) or (4). 2004, c. 3, Sched. A, s. 26 (11).

Appointment of representative

[27. \(1\)](#) An individual who is 16 years old or older and who is determined to be incapable of consenting to the collection, use or disclosure of personal health information may apply to the Board for appointment of a representative to consent on the individual's behalf to a collection, use or disclosure of the information by a health information custodian. 2004, c. 3, Sched. A, s. 27 (1).

Application by proposed representative

[\(2\)](#) If an individual is incapable of consenting to the collection, use or disclosure of personal health information, another individual who is 16 years old or older may apply to the Board to be appointed as a representative to consent on behalf of the incapable individual to a collection, use or disclosure of the information. 2004, c. 3, Sched. A, s. 27 (2).

Deemed application concerning capacity

[\(2.1\)](#) An application to the Board under subsection (1) or (2) shall be deemed to include an application to the Board under subsection 22 (3) with respect to the individual's capacity to consent to the collection, use or disclosure of his or her personal health information, unless the individual's capacity has been determined by the Board within the previous six months. 2007, c. 10, Sched. H, s. 8.

Exception

(3) Subsections (1) and (2) do not apply if the individual to whom the personal health information relates has a guardian of the person, a guardian of property, an attorney for personal care, or an attorney for property, who has authority to give or refuse consent to the collection, use or disclosure. 2004, c. 3, Sched. A, s. 27 (3).

Parties

(4) The parties to the application are:

1. The individual to whom the personal health information relates.
2. The proposed representative named in the application.
3. Every person who is described in paragraph 4, 5, 6 or 7 of subsection 26 (1).
4. All other persons whom the Board specifies. 2004, c. 3, Sched. A, s. 27 (4).

Appointment

(5) In an appointment under this section, the Board may authorize the representative to consent, on behalf of the individual to whom the personal health information relates, to,

- (a) a particular collection, use or disclosure at a particular time;
- (b) a collection, use or disclosure of the type specified by the Board in circumstances specified by the Board, if the individual is determined to be incapable of consenting to the collection, use or disclosure of personal health information at the time the consent is sought; or
- (c) any collection, use or disclosure at any time, if the individual is determined to be incapable of consenting to the collection, use or disclosure of personal health information at the time the consent is sought. 2004, c. 3, Sched. A, s. 27 (5).

Criteria for appointment

(6) The Board may make an appointment under this section if it is satisfied that the following requirements are met:

1. The individual to whom the personal health information relates does not object to the appointment.
2. The representative consents to the appointment, is at least 16 years old and is capable of consenting to the collection, use or disclosure of personal health information.
3. The appointment is in the best interests of the individual to whom the personal health information relates. 2004, c. 3, Sched. A, s. 27 (6).

Powers of Board

[\(7\)](#) Unless the individual to whom the personal health information relates objects, the Board may,

- (a) appoint as representative a different individual than the one named in the application;
- (b) limit the duration of the appointment;
- (c) impose any other condition on the appointment; or
- (d) on any person's application, remove, vary or suspend a condition imposed on the appointment or impose an additional condition on the appointment. 2004, c. 3, Sched. A, s. 27 (7).

Termination

[\(8\)](#) The Board may, on any person's application, terminate an appointment made under this section if,

- (a) the individual to whom the personal health information relates or the representative requests the termination;
- (b) the representative is no longer capable of consenting to the collection, use or disclosure of personal health information;
- (c) the appointment is no longer in the best interests of the individual to whom the personal health information relates; or
- (d) the individual to whom the personal health information relates has a guardian of the person, a guardian of property, an attorney for personal care, or an attorney for property, who has authority to give or refuse consent to the types of collections, uses and disclosures for which the appointment was made and in the circumstances to which the appointment applies. 2004, c. 3, Sched. A, s. 27 (8).

Procedure

[\(9\)](#) Sections 73 to 81 of the *Health Care Consent Act, 1996* apply with necessary modifications to an application under this section. 2004, c. 3, Sched. A, s. 27 (9).

Transition, representative appointed by Board

[28. \(1\)](#) This Act applies to a representative whom the Board appointed under section 36.2 of the *Mental Health Act* or who was deemed to be appointed under that section before the day this section comes into force for an individual with respect to the individual's personal health

information, as if the representative were the individual's representative appointed by the Board under section 27. 2004, c. 3, Sched. A, s. 28 (1).

Limited authority

[\(2\)](#) The authority conferred on the representative by subsection (1) is limited to the purposes for which the representative was appointed. 2004, c. 3, Sched. A, s. 28 (2).

PART IV COLLECTION, USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION

General Limitations and Requirements

Requirement for consent

[29.](#) A health information custodian shall not collect, use or disclose personal health information about an individual unless,

(a) it has the individual's consent under this Act and the collection, use or disclosure, as the case may be, to the best of the custodian's knowledge, is necessary for a lawful purpose; or

(b) the collection, use or disclosure, as the case may be, is permitted or required by this Act. 2004, c. 3, Sched. A, s. 29.

Other information

[30. \(1\)](#) A health information custodian shall not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure. 2004, c. 3, Sched. A, s. 30 (1).

Extent of information

[\(2\)](#) A health information custodian shall not collect, use or disclose more personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure, as the case may be. 2004, c. 3, Sched. A, s. 30 (2).

Exception

[\(3\)](#) This section does not apply to personal health information that a health information custodian is required by law to collect, use or disclose. 2004, c. 3, Sched. A, s. 30 (3).

Use and disclosure of personal health information

[31. \(1\)](#) A health information custodian that collects personal health information in contravention of this Act shall not use it or disclose it unless required by law to do so. 2004, c. 3, Sched. A, s. 31 (1).

[\(2\)](#) Repealed: 2004, c. 3, Sched. A, s. 31 (4).

[\(3\)](#) Repealed: 2004, c. 3, Sched. A, s. 31 (4).

[\(4\)](#) Spent: 2004, c. 3, Sched. A, s. 31 (4).

Fundraising

[32. \(1\)](#) Subject to subsection (2), a health information custodian may collect, use or disclose personal health information about an individual for the purpose of fundraising activities only where,

(a) the individual expressly consents; or

(b) the individual consents by way of an implied consent and the information consists only of the individual's name and the prescribed types of contact information. 2004, c. 3, Sched. A, s. 32 (1); 2007, c. 10, Sched. H, s. 9.

Requirements and restrictions

[\(2\)](#) The manner in which consent is obtained under subsection (1) and the resulting collection, use or disclosure of personal health information for the purpose of fundraising activities shall comply with the requirements and restrictions that are prescribed, if any. 2004, c. 3, Sched. A, s. 32 (2).

Marketing

[33.](#) A health information custodian shall not collect, use or disclose personal health information about an individual for the purpose of marketing anything or for the purpose of market research unless the individual expressly consents and the custodian collects, uses or discloses the information, as the case may be, subject to the prescribed requirements and restrictions, if any. 2004, c. 3, Sched. A, s. 33.

Health cards and health numbers

[34. \(1\)](#) In this section,

“health card” means a card provided to an insured person within the meaning of the *Health Insurance Act* by the General Manager of the Ontario Health Insurance Plan; (“carte Santé”)

“provincially funded health resource” means a service, thing, subsidy or other benefit funded, in whole or in part, directly or indirectly by the Government of Ontario, if it is health related or prescribed. (“ressource en matière de santé subventionnée par la province”) 2004, c. 3, Sched. A, s. 34 (1).

Collection or use

(2) Despite subsection 49 (1), a person who is neither a health information custodian nor acting as an agent of a health information custodian shall not collect or use another person's health number except,

(a) for purposes related to the provision of provincially funded health resources to that other person;

(b) for the purposes for which a health information custodian has disclosed the number to the person;

(c) if the person is the governing body of health care practitioners who provide provincially funded health resources and is collecting or using health numbers for purposes related to its duties or powers; or

(d) if the person is prescribed and is collecting or using the health number, as the case may be, for purposes related to health administration, health planning, health research or epidemiological studies. 2007, c. 10, Sched. H, s. 10.

Disclosure

(3) Despite subsection 49 (1) and subject to the exceptions and additional requirements, if any, that are prescribed, a person who is neither a health information custodian nor acting as an agent of a health information custodian shall not disclose a health number except as required by law. 2007, c. 10, Sched. H, s. 10.

Confidentiality of health cards

(4) No person shall require the production of another person's health card, but a person who provides a provincially funded health resource to a person who has a health card may require the production of the health card. 2004, c. 3, Sched. A, s. 34 (4).

Exceptions

(5) Subsections (2) and (3) do not apply to,

(a) a person who collects, uses or discloses a health number for the purposes of a proceeding;

(b) a prescribed entity mentioned in subsection 45 (1) that collects, uses or discloses the health number in the course of carrying out its functions under section 45; or

(c) a health data institute that the Minister approves under subsection 47 (9) and that collects, uses or discloses the health number in the course of carrying out its functions under sections 47 and 48. 2004, c. 3, Sched. A, s. 34 (5).

Fees for personal health information

35. (1) A health information custodian shall not charge a person a fee for collecting or using personal health information except as authorized by the regulations made under this Act. 2004, c. 3, Sched. A, s. 35 (1).

Same, for disclosure

(2) When disclosing personal health information, a health information custodian shall not charge fees to a person that exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed. 2004, c. 3, Sched. A, s. 35 (2).

Collection

Indirect collection

36. (1) A health information custodian may collect personal health information about an individual indirectly if,

- (a) the individual consents to the collection being made indirectly;
- (b) the information to be collected is reasonably necessary for providing health care or assisting in providing health care to the individual and it is not reasonably possible to collect, directly from the individual,
 - (i) personal health information that can reasonably be relied on as accurate and complete, or
 - (ii) personal health information in a timely manner;
- (c) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, or is acting as part of such an institution, and the custodian is collecting the information for a purpose related to,
 - (i) investigating a breach of an agreement or a contravention or an alleged contravention of the laws of Ontario or Canada,
 - (ii) the conduct of a proceeding or a possible proceeding, or
 - (iii) the statutory function of the custodian;
- (d) the custodian collects the information from a person who is not a health information custodian for the purpose of carrying out research conducted in accordance with subsection 37 (3) or research that a research ethics board has approved under section 44 or that meets the criteria set out in clauses 44 (10) (a) to (c), except if the person is prohibited by law from disclosing the information to the custodian;

(e) the custodian is a prescribed entity mentioned in subsection 45 (1) and the custodian is collecting personal health information from a person who is not a health information custodian for the purpose of that subsection;

(f) the Commissioner authorizes that the collection be made in a manner other than directly from the individual;

(g) the custodian collects the information from a person who is permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada to disclose it to the custodian; or

(h) subject to the requirements and restrictions, if any, that are prescribed, the health information custodian is permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada to collect the information indirectly. 2004, c. 3, Sched. A, s. 36 (1); 2007, c. 10, Sched. H, s. 11.

Direct collection without consent

[\(2\)](#) A health information custodian may collect personal health information about an individual directly from the individual, even if the individual is incapable of consenting, if the collection is reasonably necessary for the provision of health care and it is not reasonably possible to obtain consent in a timely manner. 2004, c. 3, Sched. A, s. 36 (2).

Use

Permitted use

[37. \(1\)](#) A health information custodian may use personal health information about an individual,

(a) for the purpose for which the information was collected or created and for all the functions reasonably necessary for carrying out that purpose, but not if the information was collected with the consent of the individual or under clause 36 (1) (b) and the individual expressly instructs otherwise;

(b) for a purpose for which this Act, another Act or an Act of Canada permits or requires a person to disclose it to the custodian;

(c) for planning or delivering programs or services that the custodian provides or that the custodian funds in whole or in part, allocating resources to any of them, evaluating or monitoring any of them or detecting, monitoring or preventing fraud or any unauthorized receipt of services or benefits related to any of them;

(d) for the purpose of risk management, error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of any related programs or services of the custodian;

(e) for educating agents to provide health care;

(f) in a manner consistent with Part II, for the purpose of disposing of the information or modifying the information in order to conceal the identity of the individual;

(g) for the purpose of seeking the individual's consent, or the consent of the individual's substitute decision-maker, when the personal health information used by the custodian for this purpose is limited to the name and contact information of the individual and the name and contact information of the substitute decision-maker, where applicable;

(h) for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;

(i) for the purpose of obtaining payment or processing, monitoring, verifying or reimbursing claims for payment for the provision of health care or related goods and services;

(j) for research conducted by the custodian, subject to subsection (3), unless another clause of this subsection applies; or

(k) subject to the requirements and restrictions, if any, that are prescribed, if permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada. 2004, c. 3, Sched. A, s. 37 (1); 2007, c. 10, Sched. H, s. 12.

Agents

[\(2\)](#) If subsection (1) authorizes a health information custodian to use personal health information for a purpose, the custodian may provide the information to an agent of the custodian who may use it for that purpose on behalf of the custodian. 2004, c. 3, Sched. A, s. 37 (2).

Research

[\(3\)](#) Under clause (1) (j), a health information custodian may use personal health information about an individual only if the custodian prepares a research plan and has a research ethics board approve it and for that purpose subsections 44 (2) to (4) and clauses 44 (6) (a) to (f) apply to the use as if it were a disclosure. 2004, c. 3, Sched. A, s. 37 (3).

Mixed uses

[\(4\)](#) If a research plan mentioned in subsection (3) proposes that a health information custodian that is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or that is acting as part of such an institution use personal health information, together with personal information within the meaning of those two Acts that is not personal health information, those two Acts do not apply to the use and this section applies to the use. 2004, c. 3, Sched. A, s. 37 (4).

Disclosure

Disclosures related to providing health care

38. (1) A health information custodian may disclose personal health information about an individual,

(a) to a health information custodian described in paragraph 1, 2, 3 or 4 of the definition of “health information custodian” in subsection 3 (1), if the disclosure is reasonably necessary for the provision of health care and it is not reasonably possible to obtain the individual’s consent in a timely manner, but not if the individual has expressly instructed the custodian not to make the disclosure;

(b) in order for the Minister, another health information custodian or a local health integration network to determine or provide funding or payment to the custodian for the provision of health care; or

(c) for the purpose of contacting a relative, friend or potential substitute decision-maker of the individual, if the individual is injured, incapacitated or ill and unable to give consent personally. 2004, c. 3, Sched. A, s. 38 (1); 2006, c. 4, s. 51 (2); 2007, c. 10, Sched. H, s. 13.

Notice of instruction

(2) If a health information custodian discloses personal health information about an individual under clause (1) (a) and if an instruction of the individual made under that clause prevents the custodian from disclosing all the personal health information that the custodian considers reasonably necessary to disclose for the provision of health care or assisting in the provision of health care to the individual, the custodian shall notify the person to whom it makes the disclosure of that fact. 2004, c. 3, Sched. A, s. 38 (2).

Facility that provides health care

(3) A health information custodian that is a facility that provides health care may disclose to a person the following personal health information relating to an individual who is a patient or a resident in the facility if the custodian offers the individual the option, at the first reasonable opportunity after admission to the facility, to object to such disclosures and if the individual does not do so:

1. The fact that the individual is a patient or resident in the facility.
2. The individual’s general health status described as critical, poor, fair, stable or satisfactory, or in similar terms.
3. The location of the individual in the facility. 2004, c. 3, Sched. A, s. 38 (3).

Deceased individual

(4) A health information custodian may disclose personal health information about an individual who is deceased, or is reasonably suspected to be deceased,

(a) for the purpose of identifying the individual;

(b) for the purpose of informing any person whom it is reasonable to inform in the circumstances of,

(i) the fact that the individual is deceased or reasonably suspected to be deceased, and

(ii) the circumstances of death, where appropriate; or

(c) to the spouse, partner, sibling or child of the individual if the recipients of the information reasonably require the information to make decisions about their own health care or their children's health care. 2004, c. 3, Sched. A, s. 38 (4).

Disclosures for health or other programs

39. (1) Subject to the requirements and restrictions, if any, that are prescribed, a health information custodian may disclose personal health information about an individual,

(a) for the purpose of determining or verifying the eligibility of the individual to receive health care or related goods, services or benefits provided under an Act of Ontario or Canada and funded in whole or in part by the Government of Ontario or Canada, by a local health integration network or by a municipality, or to receive coverage with respect to such health care, goods, services or benefits;

(b) to a person conducting an audit or reviewing an application for accreditation or reviewing an accreditation, if the audit or review relates to services provided by the custodian and the person does not remove any records of personal health information from the custodian's premises;

(c) to a prescribed person who compiles or maintains a registry of personal health information for purposes of facilitating or improving the provision of health care or that relates to the storage or donation of body parts or bodily substances; or

(d) where,

(i) the disclosure is to another custodian described in paragraph 1, 2, 3 or 4 of the definition of "health information custodian" in subsection 3 (1),

(ii) the individual to whom the information relates is one to whom both the disclosing custodian and recipient custodian provide health care or assist in the provision of health care or have previously provided health care or assisted in the provision of health care, and

(iii) the disclosure is for the purpose of activities to improve or maintain the quality of care provided by the receiving custodian to the individual to whom the information relates or

individuals provided with similar health care. 2004, c. 3, Sched. A, s. 39 (1); 2006, c. 4, s. 51 (3); 2007, c. 10, Sched. H, s. 14; 2009, c. 33, Sched. 18, s. 25 (4).

Same

(2) A health information custodian may disclose personal health information about an individual,

(a) to the Chief Medical Officer of Health or a medical officer of health within the meaning of the *Health Protection and Promotion Act* if the disclosure is made for a purpose of that Act;

(a.1) to the Ontario Agency for Health Protection and Promotion if the disclosure is made for a purpose of the *Ontario Agency for Health Protection and Promotion Act, 2007*; or

(b) to a public health authority that is similar to the persons described in clause (a) and that is established under the laws of Canada, another province or a territory of Canada or other jurisdiction, if the disclosure is made for a purpose that is substantially similar to a purpose of the *Health Protection and Promotion Act*. 2004, c. 3, Sched. A, s. 39 (2); 2007, c. 10, Sched. K, s. 32.

Removal allowed

(3) Despite clause (1) (b), the person described in that clause may remove records of personal health information from the custodian's premises if,

(a) the removal is authorized by or under an Act of Ontario or Canada; or

(b) an agreement between the custodian and the person authorizes the removal and provides that the records will be held in a secure and confidential manner and will be returned when the audit or review is completed. 2004, c. 3, Sched. A, s. 39 (3).

Authorization to collect

(4) A person who is not a health information custodian is authorized to collect the personal health information that a health information custodian may disclose to the person under clause (1) (c). 2004, c. 3, Sched. A, s. 39 (4).

Disclosures related to risks

40. (1) A health information custodian may disclose personal health information about an individual if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons. 2004, c. 3, Sched. A, s. 40 (1).

Disclosures related to care or custody

[\(2\)](#) A health information custodian may disclose personal health information about an individual to the head of a penal or other custodial institution in which the individual is being lawfully detained or to the officer in charge of a psychiatric facility within the meaning of the *Mental Health Act* in which the individual is being lawfully detained for the purposes described in subsection (3). 2004, c. 3, Sched. A, s. 40 (2).

Same

[\(3\)](#) A health information custodian may disclose personal health information about an individual under subsection (2) to assist an institution or a facility in making a decision concerning,

(a) arrangements for the provision of health care to the individual; or

(b) the placement of the individual into custody, detention, release, conditional release, discharge or conditional discharge under Part IV of the *Child and Family Services Act*, the *Mental Health Act*, the *Ministry of Correctional Services Act*, the *Corrections and Conditional Release Act* (Canada), Part XX.1 of the *Criminal Code* (Canada), the *Prisons and Reformatories Act* (Canada) or the *Youth Criminal Justice Act* (Canada). 2004, c. 3, Sched. A, s. 40 (3).

Disclosures for proceedings

[41. \(1\)](#) A health information custodian may disclose personal health information about an individual,

(a) subject to the requirements and restrictions, if any, that are prescribed, for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;

(b) to a proposed litigation guardian or legal representative of the individual for the purpose of having the person appointed as such;

(c) to a litigation guardian or legal representative who is authorized under the Rules of Civil Procedure, or by a court order, to commence, defend or continue a proceeding on behalf of the individual or to represent the individual in a proceeding; or

(d) for the purpose of complying with,

(i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or

(ii) a procedural rule that relates to the production of information in a proceeding. 2004, c. 3, Sched. A, s. 41 (1).

Disclosure by agent or former agent

[\(2\)](#) An agent or former agent who receives personal health information under subsection (1) or under subsection 37 (2) for purposes of a proceeding or contemplated proceeding may disclose the information to the agent's or former agent's professional advisor for the purpose of providing advice or representation to the agent or former agent, if the advisor is under a professional duty of confidentiality. 2004, c. 3, Sched. A, s. 41 (2).

Disclosure to successor

[42. \(1\)](#) A health information custodian may disclose personal health information about an individual to a potential successor of the custodian, for the purpose of allowing the potential successor to assess and evaluate the operations of the custodian, if the potential successor first enters into an agreement with the custodian to keep the information confidential and secure and not to retain any of the information longer than is necessary for the purpose of the assessment or evaluation. 2004, c. 3, Sched. A, s. 42 (1).

Transfer to successor

[\(2\)](#) A health information custodian may transfer records of personal health information about an individual to the custodian's successor if the custodian makes reasonable efforts to give notice to the individual before transferring the records or, if that is not reasonably possible, as soon as possible after transferring the records. 2004, c. 3, Sched. A, s. 42 (2).

Transfer to archives

[\(3\)](#) Subject to the agreement of the person who is to receive the transfer, a health information custodian may transfer records of personal health information about an individual to,

(a) the Archives of Ontario; or

(b) in the prescribed circumstances, a prescribed person whose functions include the collection and preservation of records of historical or archival importance, if the disclosure is made for the purpose of that function. 2004, c. 3, Sched. A, s. 42 (3).

Disclosures related to this or other Acts

[43. \(1\)](#) A health information custodian may disclose personal health information about an individual,

(a) for the purpose of determining, assessing or confirming capacity under the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992* or this Act;

(b) to a College within the meaning of the *Regulated Health Professions Act, 1991* for the purpose of the administration or enforcement of the *Drug and Pharmacies Regulation Act*, the *Regulated Health Professions Act, 1991* or an Act named in Schedule 1 to that Act;

(c) to the Board of Regents continued under the *Drugless Practitioners Act* for the purpose of the administration or enforcement of that Act;

(d) to the Ontario College of Social Workers and Social Service Workers for the purpose of the administration or enforcement of the *Social Work and Social Service Work Act, 1998*;

(e) to the Public Guardian and Trustee, the Children's Lawyer, a children's aid society, a Residential Placement Advisory Committee established under subsection 34 (2) of the *Child and Family Services Act* or a designated custodian under section 162.1 of that Act so that they can carry out their statutory functions;

(f) in the circumstances described in clause 42 (1) (c), (g) or (n) of the *Freedom of Information and Protection of Privacy Act* or clause 32 (c), (g) or (l) of the *Municipal Freedom of Information and Protection of Privacy Act*, if the custodian is an institution within the meaning of whichever of those Acts applies, or is acting as part of such an institution;

(g) subject to the requirements and restrictions, if any, that are prescribed, to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under this Act or any other Act of Ontario or an Act of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure;

(h) subject to the requirements and restrictions, if any, that are prescribed, if permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada. 2004, c. 3, Sched. A, s. 43 (1); 2005, c. 25, s. 35; 2006, c. 34, Sched. C, s. 26; 2007, c. 10, Sched. H, s. 15.

Interpretation

[\(2\)](#) For the purposes of clause (1) (h) and subject to the regulations made under this Act, if an Act, an Act of Canada or a regulation made under any of those Acts specifically provides that information is exempt, under stated circumstances, from a confidentiality or secrecy requirement, that provision shall be deemed to permit the disclosure of the information in the stated circumstances. 2004, c. 3, Sched. A, s. 43 (2).

Disclosure for research

[44. \(1\)](#) A health information custodian may disclose personal health information about an individual to a researcher if the researcher,

(a) submits to the custodian,

(i) an application in writing,

(ii) a research plan that meets the requirements of subsection (2), and

- (iii) a copy of the decision of a research ethics board that approves the research plan; and
- (b) enters into the agreement required by subsection (5). 2004, c. 3, Sched. A, s. 44 (1).

Research plan

(2) A research plan must be in writing and must set out,

- (a) the affiliation of each person involved in the research;
- (b) the nature and objectives of the research and the public or scientific benefit of the research that the researcher anticipates; and
- (c) all other prescribed matters related to the research. 2004, c. 3, Sched. A, s. 44 (2).

Consideration by board

(3) When deciding whether to approve a research plan that a researcher submits to it, a research ethics board shall consider the matters that it considers relevant, including,

- (a) whether the objectives of the research can reasonably be accomplished without using the personal health information that is to be disclosed;
- (b) whether, at the time the research is conducted, adequate safeguards will be in place to protect the privacy of the individuals whose personal health information is being disclosed and to preserve the confidentiality of the information;
- (c) the public interest in conducting the research and the public interest in protecting the privacy of the individuals whose personal health information is being disclosed; and
- (d) whether obtaining the consent of the individuals whose personal health information is being disclosed would be impractical. 2004, c. 3, Sched. A, s. 44 (3).

Decision of board

(4) After reviewing a research plan that a researcher has submitted to it, the research ethics board shall provide to the researcher a decision in writing, with reasons, setting out whether the board approves the plan, and whether the approval is subject to any conditions, which must be specified in the decision. 2004, c. 3, Sched. A, s. 44 (4).

Agreement respecting disclosure

(5) Before a health information custodian discloses personal health information to a researcher under subsection (1), the researcher shall enter into an agreement with the custodian in which the researcher agrees to comply with the conditions and restrictions, if any, that the custodian

imposes relating to the use, security, disclosure, return or disposal of the information. 2004, c. 3, Sched. A, s. 44 (5).

Compliance by researcher

(6) A researcher who receives personal health information about an individual from a health information custodian under subsection (1) shall,

(a) comply with the conditions, if any, specified by the research ethics board in respect of the research plan;

(b) use the information only for the purposes set out in the research plan as approved by the research ethics board;

(c) not publish the information in a form that could reasonably enable a person to ascertain the identity of the individual;

(d) despite subsection 49 (1), not disclose the information except as required by law and subject to the exceptions and additional requirements, if any, that are prescribed;

(e) not make contact or attempt to make contact with the individual, directly or indirectly, unless the custodian first obtains the individual's consent to being contacted;

(f) notify the custodian immediately in writing if the researcher becomes aware of any breach of this subsection or the agreement described in subsection (5); and

(g) comply with the agreement described in subsection (5). 2004, c. 3, Sched. A, s. 44 (6).

Mixed disclosures

(7) If a researcher submits a research plan under subsection (1) that proposes that a health information custodian that is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or that is acting as part of such an institution disclose to the researcher personal health information, together with personal information within the meaning of those two Acts that is not personal health information, those two Acts do not apply to the disclosure and this section applies to the disclosure. 2004, c. 3, Sched. A, s. 44 (7).

Transition

(8) Despite subsection (7), nothing in this section prevents a health information custodian that is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or that is acting as part of such an institution from disclosing to a researcher personal health information, that is personal information within the meaning of those two Acts, if, before November 1, 2004, the researcher entered into an agreement with the custodian under subclause 21 (1) (e) (iii) of the *Freedom of*

Information and Protection of Privacy Act or subclause 14 (1) (e) (iii) of the *Municipal Freedom of Information and Protection of Privacy Act* and the disclosure is within the scope of the agreement. 2007, c. 10, Sched. H, s. 16.

Disclosure under other Acts

[\(9\)](#) Despite any other Act that permits a health information custodian to disclose personal health information to a researcher for the purpose of conducting research, this section applies to the disclosure as if it were a disclosure for research under this section unless the regulations made under this Act provide otherwise. 2004, c. 3, Sched. A, s. 44 (9).

Research approved outside Ontario

[\(10\)](#) Subject to subsection (11), a health information custodian may disclose personal health information to a researcher or may use the information to conduct research if,

(a) the research involves the use of personal health information originating wholly or in part outside Ontario;

(b) the research has received the prescribed approval from a body outside Ontario that has the function of approving research; and

(c) the prescribed requirements are met. 2004, c. 3, Sched. A, s. 44 (10).

Same

[\(11\)](#) Subsections (1) to (4) and clauses (6) (a) and (b) do not apply to a disclosure or use made under subsection (10) and references in the rest of this section to subsection (1) shall be read as references to this subsection with respect to that disclosure or use. 2004, c. 3, Sched. A, s. 44 (11).

[\(12\)](#), (13) Repealed: 2004, c. 3, Sched. A, s. 44 (14).

[\(14\)](#) Spent: 2004, c. 3, Sched. A, s. 44 (14).

Disclosure for planning and management of health system

45. (1) A health information custodian may disclose to a prescribed entity personal health information for the purpose of analysis or compiling statistical information with respect to the management of, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system, including the delivery of services, if the entity meets the requirements under subsection (3). 2004, c. 3, Sched. A, s. 45 (1).

Exception

[\(2\)](#) Subsection (1) does not apply to,

(a) notes of personal health information about an individual that are recorded by a health information custodian and that document the contents of conversations during a private counselling session or a group, joint or family counselling session; or

(b) prescribed information in circumstances that are prescribed. 2004, c. 3, Sched. A, s. 45 (2).

Approval

(3) A health information custodian may disclose personal health information to a prescribed entity under subsection (1) if,

(a) the entity has in place practices and procedures to protect the privacy of the individuals whose personal health information it receives and to maintain the confidentiality of the information; and

(b) the Commissioner has approved the practices and procedures, if the custodian makes the disclosure on or after the first anniversary of the day this section comes into force. 2004, c. 3, Sched. A, s. 45 (3).

Review by Commissioner

(4) The Commissioner shall review the practices and procedures of each prescribed entity every three years from the date of its approval and advise the health information custodian whether the entity continues to meet the requirements of subsection (3). 2004, c. 3, Sched. A, s. 45 (4).

Authorization to collect

(5) An entity that is not a health information custodian is authorized to collect the personal health information that a health information custodian may disclose to the entity under subsection (1). 2004, c. 3, Sched. A, s. 45 (5).

Use and disclosure

(6) Subject to the exceptions and additional requirements, if any, that are prescribed and despite subsection 49 (1), an entity that receives personal health information under subsection (1) shall not use the information except for the purposes for which it received the information and shall not disclose the information except as required by law. 2004, c. 3, Sched. A, s. 45 (6).

Monitoring health care payments

46. (1) A health information custodian shall, upon the request of the Minister, disclose to the Minister personal health information about an individual for the purpose of monitoring or verifying claims for payment for health care funded wholly or in part by the Ministry of Health and Long-Term Care or a local health integration network or for goods used for health care funded wholly or in part by the Ministry of Health and Long-Term Care or a local health integration network. 2006, c. 4, s. 51 (4).

Disclosure by Minister

[\(2\)](#) The Minister may disclose information collected under subsection (1) to any person for a purpose set out in that subsection if the disclosure is reasonably necessary for that purpose. 2004, c. 3, Sched. A, s. 46 (2).

Disclosure for analysis of health system

[47. \(1\)](#) In this section,

“de-identify”, in relation to the personal health information of an individual, means to remove any information that identifies the individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify the individual, and “de-identification” has a corresponding meaning. 2004, c. 3, Sched. A, s. 47 (1).

Same

[\(2\)](#) Subject to the restrictions, if any, that are prescribed, a health information custodian shall, upon the request of the Minister, disclose personal health information to a health data institute that the Minister approves under subsection (9) for analysis with respect to the management of, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system, including the delivery of services, if the requirements of this section are met. 2004, c. 3, Sched. A, s. 47 (2).

Form, manner and time of disclosure

[\(3\)](#) The Minister may specify the form and manner in which and the time at which the health information custodian is required to disclose the personal health information under subsection (2). 2004, c. 3, Sched. A, s. 47 (3).

Requirements for Minister

[\(4\)](#) Before requesting the disclosure of personal health information under subsection (2), the Minister shall submit a proposal to the Commissioner and, in accordance with this section, allow the Commissioner to review and comment on the proposal. 2004, c. 3, Sched. A, s. 47 (4).

Contents of proposal

[\(5\)](#) The proposal must identify a health data institute to which the personal health information would be disclosed under this section and must set out the prescribed matters. 2004, c. 3, Sched. A, s. 47 (5).

Review by Commissioner

[\(6\)](#) Within 30 days after the Commissioner receives the proposal, the Commissioner shall review the proposal and may comment in writing on the proposal. 2004, c. 3, Sched. A, s. 47 (6).

Consideration by Commissioner

[\(7\)](#) In reviewing the proposal, the Commissioner shall consider the public interest in conducting the analysis and the privacy interest of the individuals to whom the personal health information relates in the circumstances. 2004, c. 3, Sched. A, s. 47 (7).

Consideration by Minister

[\(8\)](#) The Minister shall consider the comments, if any, made by the Commissioner within the time specified in subsection (6), and may amend the proposal if the Minister considers it appropriate. 2004, c. 3, Sched. A, s. 47 (8).

Approval of health data institute

[\(9\)](#) The Minister may approve a health data institute for the purposes of a disclosure made under this section if,

(a) the corporate objects of the institute include performing data analysis of personal health information, linking the information with other information and de-identifying the information for the Minister; and

(b) the institute has in place practices and procedures to protect the privacy of the individuals whose personal health information it receives and to maintain the confidentiality of the information and the Commissioner has approved those practices and procedures. 2004, c. 3, Sched. A, s. 47 (9).

Review by Commissioner

[\(10\)](#) The Commissioner shall review the practices and procedures of each health data institute every three years from the date of its approval and advise the Minister whether the institute continues to meet the requirements of clauses (9) (a) and (b). 2004, c. 3, Sched. A, s. 47 (10).

Withdrawal of approval

[\(11\)](#) The Minister shall withdraw the approval of a health data institute that ceases to meet the requirements of clauses (9) (a) and (b) or to carry out its objects mentioned in clause (9) (a), unless the Minister requires the institute to take immediate steps to satisfy the Minister that it will meet the requirements or that it will carry out the objects. 2004, c. 3, Sched. A, s. 47 (11).

Effect of withdrawal of approval

[\(12\)](#) If the Minister withdraws the approval of a health data institute, the institute shall,

(a) make no further use or disclosure of any personal health information that a health information custodian has disclosed to it under subsection (2) or any information derived from that personal health information; and

(b) comply with the written directions of the Minister that the Commissioner has approved in writing with respect to information described in clause (a). 2004, c. 3, Sched. A, s. 47 (12).

If institute ceases to exist

[\(13\)](#) If a health data institute ceases to exist, the persons holding the personal health information that the institute received under subsection (2) and held when it ceased to exist shall comply with the written directions of the Minister that the Commissioner has approved in writing with respect to the information. 2004, c. 3, Sched. A, s. 47 (13).

Disclosure by Minister

[\(14\)](#) The Minister may disclose to the health data institute that receives personal health information under subsection (2) other personal health information for the purposes of the analysis and linking that the Minister requires if the disclosure is included in the Minister's proposal, as amended under subsection (8), if applicable. 2004, c. 3, Sched. A, s. 47 (14).

Duties of health data institute

[\(15\)](#) A health data institute that receives personal health information under subsection (2) or (14) shall,

(a) follow the practices and procedures described in clause (9) (b) that the Commissioner has approved;

(b) perform the analysis and linking with other data that the Minister requires;

(c) de-identify the information;

(d) provide the results of the analysis and linking, using only de-identified information, to the Minister or to the persons that the Minister approves;

(e) not disclose the information to the Minister or to the persons that the Minister approves except in a de-identified form; and

(f) subject to clauses (d) and (e), not disclose to any persons the information, even in a de-identified form, or any information derived from the information. 2004, c. 3, Sched. A, s. 47 (15).

Transition

[\(16\)](#) If the Minister has lawfully required the disclosure of personal health information for a purpose described in subsection (2) in the 18 months before this section comes into force, this section does not apply with respect to a disclosure the Minister requires for a substantially similar purpose after this section comes into force until the first anniversary of the coming into force of this section. 2004, c. 3, Sched. A, s. 47 (16).

Notification

[\(17\)](#) If the Minister requires a disclosure for a substantially similar purpose under subsection (16) after this section comes into force, the Minister shall notify the Commissioner within the later of the time of requiring the disclosure and 90 days after this section comes into force. 2004, c. 3, Sched. A, s. 47 (17).

No hearing required

[\(18\)](#) The Minister is not required to hold a hearing or to afford to any person an opportunity for a hearing before making a decision under this section. 2004, c. 3, Sched. A, s. 47 (18).

Disclosure with Commissioner's approval

[48. \(1\)](#) A health data institute to which a health information custodian has disclosed personal health information under section 47, shall, upon the request of the Minister and in accordance with the Commissioner's approval given under this section, disclose the information to the Minister or another person approved by the Minister if the Minister is of the opinion that it is in the public interest to request the disclosure and the requirements of this section have been met. 2004, c. 3, Sched. A, s. 48 (1).

Non-application of section

[\(2\)](#) The personal health information mentioned in subsection (1) is not,

(a) notes of personal health information about an individual that are recorded by a health information custodian and that document the contents of conversations during a private counselling session or a group, joint or family counselling session; or

(b) information that is prescribed. 2004, c. 3, Sched. A, s. 48 (2).

Commissioner's approval required

[\(3\)](#) The Minister shall not request the disclosure of personal health information under subsection (1) unless the Minister has submitted to the Commissioner a proposal for the disclosure and the Commissioner has approved the proposal. 2004, c. 3, Sched. A, s. 48 (3).

Contents of proposal

[\(4\)](#) The proposal must include,

(a) a statement as to why the disclosure is reasonably required in the public interest and why the disclosure under section 47 was insufficient to meet the public interest;

(b) the extent of the identifiers that the Minister proposes be part of the information disclosed and a statement as to why the use of those identifiers is reasonably required for the purpose of the disclosure;

(c) a copy of all proposals and comments previously made or received under section 47 in respect of the information, if any; and

(d) all other information that the Commissioner requires. 2004, c. 3, Sched. A, s. 48 (4).

Terms of approval

(5) If the Commissioner approves the proposal, the Commissioner may specify terms, conditions or limitations for the disclosure. 2004, c. 3, Sched. A, s. 48 (5).

Restrictions on recipients

49. (1) Except as permitted or required by law and subject to the exceptions and additional requirements, if any, that are prescribed, a person who is not a health information custodian and to whom a health information custodian discloses personal health information, shall not use or disclose the information for any purpose other than,

(a) the purpose for which the custodian was authorized to disclose the information under this Act; or

(b) the purpose of carrying out a statutory or legal duty. 2004, c. 3, Sched. A, s. 49 (1).

Extent of use or disclosure

(2) Subject to the exceptions and additional requirements, if any, that are prescribed, a person who is not a health information custodian, and to whom a health information custodian discloses personal health information, shall not use or disclose more of the information than is reasonably necessary to meet the purpose of the use or disclosure, as the case may be, unless the use or disclosure is required by law. 2004, c. 3, Sched. A, s. 49 (2).

Employee or agent information

(3) Except as permitted or required by law and subject to the exceptions and additional requirements, if any, that are prescribed, if a health information custodian discloses information to another health information custodian and the information is identifying information of the type described in subsection 4 (4) in the custody or under the control of the receiving custodian, the receiving custodian shall not,

(a) use or disclose the information for any purpose other than,

(i) the purpose for which the disclosing custodian was authorized to disclose the information under this Act, or

(ii) the purpose of carrying out a statutory or legal duty; or

(b) use or disclose more of the information than is reasonably necessary to meet the purpose of the use or disclosure, as the case may be. 2004, c. 3, Sched. A, s. 49 (3).

Same

[\(4\)](#) The restrictions set out in clauses (3) (a) and (b) apply to a health information custodian that receives the identifying information described in subsection (3) even if the custodian receives the information before the day that subsection comes into force. 2004, c. 3, Sched. A, s. 49 (4).

Freedom of information legislation

[\(5\)](#) Except as prescribed, subsections (1) to (4) do not apply to an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* that is not a health information custodian or to a person employed by or acting for such an institution when the person is acting in that capacity. 2007, c. 10, Sched. H, s. 17.

Same

[\(6\)](#) Where this Act permits or requires a health information custodian to disclose personal health information to an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* that is not a health information custodian, the institution may collect the information from the custodian. 2007, c. 10, Sched. H, s. 17.

Disclosure outside Ontario

[50. \(1\)](#) A health information custodian may disclose personal health information about an individual collected in Ontario to a person outside Ontario only if,

(a) the individual consents to the disclosure;

(b) this Act permits the disclosure;

(c) the person receiving the information performs functions comparable to the functions performed by a person to whom this Act would permit the custodian to disclose the information in Ontario under subsection 40 (2) or clause 43 (1) (b), (c), (d) or (e);

(d) the following conditions are met:

(i) the custodian is a prescribed entity mentioned in subsection 45 (1) and is prescribed for the purpose of this clause,

(ii) the disclosure is for the purpose of health planning or health administration,

(iii) the information relates to health care provided in Ontario to a person who is resident of another province or territory of Canada, and

(iv) the disclosure is made to the government of that province or territory;

(e) the disclosure is reasonably necessary for the provision of health care to the individual, but not if the individual has expressly instructed the custodian not to make the disclosure; or

(f) the disclosure is reasonably necessary for the administration of payments in connection with the provision of health care to the individual or for contractual or legal requirements in that connection. 2004, c. 3, Sched. A, s. 50 (1).

Notice of instruction

(2) If a health information custodian discloses personal health information about an individual under clause (1) (e) and if an instruction of the individual made under that clause prevents the custodian from disclosing all the personal health information that the custodian considers reasonably necessary to disclose for the provision of health care to the individual, the custodian shall notify the person to whom it makes the disclosure of that fact. 2004, c. 3, Sched. A, s. 50 (2).

PART V ACCESS TO RECORDS OF PERSONAL HEALTH INFORMATION AND CORRECTION

Access

Application of Part

51. (1) This Part does not apply to a record that contains,

(a) quality of care information;

(b) personal health information collected or created for the purpose of complying with the requirements of a quality assurance program within the meaning of the Health Professions Procedural Code that is Schedule 2 to the *Regulated Health Professions Act, 1991*;

(c) raw data from standardized psychological tests or assessments; or

(d) personal health information of the prescribed type in the custody or under the control of a prescribed class or classes of health information custodians. 2004, c. 3, Sched. A, s. 51 (1).

Severable record

(2) Despite subsection (1), this Part applies to that part of a record of personal health information that can reasonably be severed from the part of the record that contains the information described in clauses (1) (a) to (d). 2004, c. 3, Sched. A, s. 51 (2).

Health care practitioner acting for an institution

(3) This Part does not apply to a record in the custody or under the control of a health care practitioner who is employed by or acting for an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* that is not a health information custodian if the individual has the right to request access to the record under one of those Acts. 2007, c. 10, Sched. H, s. 18.

Permission to disclose

(4) When subsection (3) applies to a record, the health care practitioner may disclose the record to the institution to enable the institution to process the individual's request under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, as the case may be, for access to the record. 2007, c. 10, Sched. H, s. 18.

Individual's right of access

52. (1) Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

- (a) the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual;
- (b) another Act, an Act of Canada or a court order prohibits disclosure to the individual of the record or the information in the record in the circumstances;
- (c) the information in the record was collected or created primarily in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;
- (d) the following conditions are met:
 - (i) the information was collected or created in the course of an inspection, investigation or similar procedure authorized by law, or undertaken for the purpose of the detection, monitoring or prevention of a person's receiving or attempting to receive a service or benefit, to which the person is not entitled under an Act or a program operated by the Minister, or a payment for such a service or benefit, and
 - (ii) the inspection, investigation, or similar procedure, together with all proceedings, appeals or processes resulting from them, have not been concluded;

(e) granting the access could reasonably be expected to,

(i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,

(ii) lead to the identification of a person who was required by law to provide information in the record to the custodian, or

(iii) lead to the identification of a person who provided information in the record to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the identity of the person be kept confidential; or

(f) the following conditions are met:

(i) the custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or is acting as part of such an institution, and

(ii) the custodian would refuse to grant access to the part of the record,

(A) under clause 49 (a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record, or

(B) under clause 38 (a) or (c) of the *Municipal Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record. 2004, c. 3, Sched. A, s. 52 (1); 2007, c. 10, Sched. H, s. 19; 2009, c. 33, Sched. 18, s. 25 (5).

Severable record

[\(2\)](#) Despite subsection (1), an individual has a right of access to that part of a record of personal health information about the individual that can reasonably be severed from the part of the record to which the individual does not have a right of access as a result of clauses (1) (a) to (f). 2004, c. 3, Sched. A, s. 52 (2).

Same

[\(3\)](#) Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access. 2004, c. 3, Sched. A, s. 52 (3).

Individual's plan of service

[\(4\)](#) Despite subsection (1), a health information custodian shall not refuse to grant the individual access to his or her plan of service within the meaning of the *Home Care and Community Services Act, 1994*. 2004, c. 3, Sched. A, s. 52 (4); 2007, c. 8, s. 224 (7).

Consultation regarding harm

[\(5\)](#) Before deciding to refuse to grant an individual access to a record of personal health information under subclause (1) (e) (i), a health information custodian may consult with a member of the College of Physicians and Surgeons of Ontario or a member of the College of Psychologists of Ontario. 2004, c. 3, Sched. A, s. 52 (5).

Informal access

[\(6\)](#) Nothing in this Act prevents a health information custodian from,

(a) granting an individual access to a record of personal health information, to which the individual has a right of access, if the individual makes an oral request for access or does not make any request for access under section 53; or

(b) with respect to a record of personal health information to which an individual has a right of access, communicating with the individual or his or her substitute decision-maker who is authorized to consent on behalf of the individual to the collection, use or disclosure of personal health information about the individual. 2004, c. 3, Sched. A, s. 52 (6).

Duty of health information custodian

[\(7\)](#) Nothing in this Part relieves a health information custodian from a legal duty to provide, in a manner that is not inconsistent with this Act, personal health information as expeditiously as is necessary for the provision of health care to the individual. 2004, c. 3, Sched. A, s. 52 (7).

Request for access

[53. \(1\)](#) An individual may exercise a right of access to a record of personal health information by making a written request for access to the health information custodian that has custody or control of the information. 2004, c. 3, Sched. A, s. 53 (1).

Detail in request

[\(2\)](#) The request must contain sufficient detail to enable the health information custodian to identify and locate the record with reasonable efforts. 2004, c. 3, Sched. A, s. 53 (2).

Assistance

[\(3\)](#) If the request does not contain sufficient detail to enable the health information custodian to identify and locate the record with reasonable efforts, the custodian shall offer assistance to the person requesting access in reformulating the request to comply with subsection (2). 2004, c. 3, Sched. A, s. 53 (3).

Response of health information custodian

54. (1) A health information custodian that receives a request from an individual for access to a record of personal health information shall,

(a) make the record available to the individual for examination and, at the request of the individual, provide a copy of the record to the individual and if reasonably practical, an explanation of any term, code or abbreviation used in the record;

(b) give a written notice to the individual stating that, after a reasonable search, the custodian has concluded that the record does not exist, cannot be found, or is not a record to which this Part applies, if that is the case;

(c) if the custodian is entitled to refuse the request, in whole or in part, under any provision of this Part other than clause 52 (1) (c), (d) or (e), give a written notice to the individual stating that the custodian is refusing the request, in whole or in part, providing a reason for the refusal and stating that the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI; or

(d) subject to subsection (1.1), if the custodian is entitled to refuse the request, in whole or in part, under clause 52 (1) (c), (d) or (e), give a written notice to the individual stating that the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI, and that the custodian is refusing,

(i) the request, in whole or in part, while citing which of clauses 52 (1) (c), (d) and (e) apply,

(ii) the request, in whole or in part, under one or more of clauses 52 (1) (c), (d) and (e), while not citing which of those provisions apply, or

(iii) to confirm or deny the existence of any record subject to clauses 52 (1) (c), (d) and (e). 2004, c. 3, Sched. A, s. 54 (1); 2007, c. 10, Sched. H, s. 20 (1, 2).

Providing reasons

(1.1) A custodian acting under clause (1) (d) shall not act under subclause (1) (d) (i) where doing so would reasonably be expected in the circumstances known to the person making the decision on behalf of the custodian to reveal to the individual, directly or indirectly, information to which the individual does not have a right of access. 2007, c. 10, Sched. H, s. 20 (3).

Time for response

(2) Subject to subsection (3), the health information custodian shall give the response required by clause (1) (a), (b), (c) or (d) as soon as possible in the circumstances but no later than 30 days after receiving the request. 2004, c. 3, Sched. A, s. 54 (2).

Extension of time for response

[\(3\)](#) Within 30 days after receiving the request for access, the health information custodian may extend the time limit set out in subsection (2) for a further period of time of not more than 30 days if,

(a) meeting the time limit would unreasonably interfere with the operations of the custodian because the information consists of numerous pieces of information or locating the information would necessitate a lengthy search; or

(b) the time required to undertake the consultations necessary to reply to the request within 30 days after receiving it would make it not reasonably practical to reply within that time. 2004, c. 3, Sched. A, s. 54 (3).

Notice of extension

[\(4\)](#) Upon extending the time limit under subsection (3), the health information custodian shall give the individual written notice of the extension setting out the length of the extension and the reason for the extension. 2004, c. 3, Sched. A, s. 54 (4).

Expedited access

[\(5\)](#) Despite subsection (2), the health information custodian shall give the response required by clause (1) (a), (b), (c) or (d) within the time period that the individual specifies if,

(a) the individual provides the custodian with evidence satisfactory to the custodian, acting on a reasonable basis, that the individual requires access to the requested record of personal health information on an urgent basis within that time period; and

(b) the custodian is reasonably able to give the required response within that time period. 2004, c. 3, Sched. A, s. 54 (5).

Frivolous or vexatious requests

[\(6\)](#) A health information custodian that believes on reasonable grounds that a request for access to a record of personal health information is frivolous or vexatious or is made in bad faith may refuse to grant the individual access to the requested record. 2004, c. 3, Sched. A, s. 54 (6).

Effect of non-compliance

[\(7\)](#) If the health information custodian does not respond to the request within the time limit or before the extension, if any, expires, the custodian shall be deemed to have refused the individual's request for access. 2004, c. 3, Sched. A, s. 54 (7).

Right to complain

[\(8\)](#) If the health information custodian refuses or is deemed to have refused the request, in whole or in part,

(a) the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI; and

(b) in the complaint, the burden of proof in respect of the refusal lies on the health information custodian. 2004, c. 3, Sched. A, s. 54 (8).

Identity of individual

(9) A health information custodian shall not make a record of personal health information or a part of it available to an individual under this Part or provide a copy of it to an individual under clause (1) (a) without first taking reasonable steps to be satisfied as to the individual's identity. 2004, c. 3, Sched. A, s. 54 (9).

Fee for access

(10) A health information custodian that makes a record of personal health information or a part of it available to an individual under this Part or provides a copy of it to an individual under clause (1) (a) may charge the individual a fee for that purpose if the custodian first gives the individual an estimate of the fee. 2004, c. 3, Sched. A, s. 54 (10).

Amount of fee

(11) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed. 2004, c. 3, Sched. A, s. 54 (11).

Waiver of fee

(12) A health information custodian mentioned in subsection (10) may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so. 2004, c. 3, Sched. A, s. 54 (12).

Correction

Correction

55. (1) If a health information custodian has granted an individual access to a record of his or her personal health information and if the individual believes that the record is inaccurate or incomplete for the purposes for which the custodian has collected, uses or has used the information, the individual may request in writing that the custodian correct the record. 2004, c. 3, Sched. A, s. 55 (1); 2007, c. 10, Sched. H, s. 21.

Informal request

(2) If the individual makes an oral request that the health information custodian correct the record, nothing in this Part prevents the custodian from making the requested correction. 2004, c. 3, Sched. A, s. 55 (2).

Reply

[\(3\)](#) As soon as possible in the circumstances but no later than 30 days after receiving a request for a correction under subsection (1), the health information custodian shall, by written notice to the individual, grant or refuse the individual's request or extend the deadline for replying for a period of not more than 30 days if,

(a) replying to the request within 30 days would unreasonably interfere with the activities of the custodian; or

(b) the time required to undertake the consultations necessary to reply to the request within 30 days would make it not reasonably practical to reply within that time. 2004, c. 3, Sched. A, s. 55 (3).

Extension of time for reply

[\(4\)](#) A health information custodian that extends the time limit under subsection (3) shall,

(a) give the individual written notice of the extension setting out the length of the extension and the reason for the extension; and

(b) grant or refuse the individual's request as soon as possible in the circumstances but no later than the expiry of the time limit as extended. 2004, c. 3, Sched. A, s. 55 (4).

Deemed refusal

[\(5\)](#) A health information custodian that does not grant a request for a correction under subsection (1) within the time required shall be deemed to have refused the request. 2004, c. 3, Sched. A, s. 55 (5).

Frivolous or vexatious requests

[\(6\)](#) A health information custodian that believes on reasonable grounds that a request for a correction under subsection (1) is frivolous or vexatious or is made in bad faith may refuse to grant the request and, in that case, shall provide the individual with a notice that sets out the reasons for the refusal and that states that the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI. 2004, c. 3, Sched. A, s. 55 (6).

Right to complain

[\(7\)](#) The individual is entitled to make a complaint to the Commissioner under Part VI about a refusal made under subsection (6). 2004, c. 3, Sched. A, s. 55 (7).

Duty to correct

[\(8\)](#) The health information custodian shall grant a request for a correction under subsection (1) if the individual demonstrates, to the satisfaction of the custodian, that the record is incomplete or inaccurate for the purposes for which the custodian uses the information and gives the custodian the information necessary to enable the custodian to correct the record. 2004, c. 3, Sched. A, s. 55 (8).

Exceptions

[\(9\)](#) Despite subsection (8), a health information custodian is not required to correct a record of personal health information if,

(a) it consists of a record that was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise and authority to correct the record; or

(b) it consists of a professional opinion or observation that a custodian has made in good faith about the individual. 2004, c. 3, Sched. A, s. 55 (9).

Duties upon correction

[\(10\)](#) Upon granting a request for a correction under subsection (1), the health information custodian shall,

(a) make the requested correction by,

(i) recording the correct information in the record and,

(A) striking out the incorrect information in a manner that does not obliterate the record, or

(B) if that is not possible, labelling the information as incorrect, severing the incorrect information from the record, storing it separately from the record and maintaining a link in the record that enables a person to trace the incorrect information, or

(ii) if it is not possible to record the correct information in the record, ensuring that there is a practical system in place to inform a person who accesses the record that the information in the record is incorrect and to direct the person to the correct information;

(b) give notice to the individual of what it has done under clause (a);

(c) at the request of the individual, give written notice of the requested correction, to the extent reasonably possible, to the persons to whom the custodian has disclosed the information with respect to which the individual requested the correction of the record, except if the correction cannot reasonably be expected to have an effect on the ongoing provision of health care or other benefits to the individual. 2004, c. 3, Sched. A, s. 55 (10).

Notice of refusal

[\(11\)](#) A notice of refusal under subsection (3) or (4) must give the reasons for the refusal and inform the individual that the individual is entitled to,

(a) prepare a concise statement of disagreement that sets out the correction that the health information custodian has refused to make;

(b) require that the health information custodian attach the statement of disagreement as part of the records that it holds of the individual's personal health information and disclose the statement of disagreement whenever the custodian discloses information to which the statement relates;

(c) require that the health information custodian make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified under clause (10) (c) if the custodian had granted the requested correction; and

(d) make a complaint about the refusal to the Commissioner under Part VI. 2004, c. 3, Sched. A, s. 55 (11).

Rights of individual

[\(12\)](#) If a health information custodian, under subsection (3) or (4), refuses a request for a correction under subsection (1), in whole or in part, or is deemed to have refused the request, the individual is entitled to take the actions described in any of clauses (11) (a), (b), (c) and (d). 2004, c. 3, Sched. A, s. 55 (12).

Custodian's duty

[\(13\)](#) If the individual takes an action described in clause (11) (b) or (c), the health information custodian shall comply with the requirements described in the applicable clause. 2004, c. 3, Sched. A, s. 55 (13).

PART VI ADMINISTRATION AND ENFORCEMENT

Complaints, Reviews and Inspections

Complaint to Commissioner

[56. \(1\)](#) A person who has reasonable grounds to believe that another person has contravened or is about to contravene a provision of this Act or its regulations may make a complaint to the Commissioner. 2004, c. 3, Sched. A, s. 56 (1).

Time for complaint

[\(2\)](#) A complaint that a person makes under subsection (1) must be in writing and must be filed within,

(a) one year after the subject-matter of the complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant, whichever is the shorter; or

(b) whatever longer period of time that the Commissioner permits if the Commissioner is satisfied that it does not result in any prejudice to any person. 2004, c. 3, Sched. A, s. 56 (2); 2009, c. 33, Sched. 18, s. 25 (6).

Same, refusal of request

(3) A complaint that an individual makes under subsection 54 (8) or 55 (7) or (12) shall be in writing and shall be filed within six months from the time at which the health information custodian refuses or is deemed to have refused the individual's request mentioned in the applicable subsection. 2004, c. 3, Sched. A, s. 56 (3).

Non-application

(4) The *Ombudsman Act* does not apply to any matter in respect of which a complaint may be made to the Commissioner under this Act or to the Commissioner or his or her employees or delegates acting under this Act. 2004, c. 3, Sched. A, s. 56 (4).

Response of Commissioner

57. (1) Upon receiving a complaint made under this Act, the Commissioner may inform the person about whom the complaint is made of the nature of the complaint and,

(a) inquire as to what means, other than the complaint, that the complainant is using or has used to resolve the subject-matter of the complaint;

(b) require the complainant to try to effect a settlement, within the time period that the Commissioner specifies, with the person about which the complaint is made; or

(c) authorize a mediator to review the complaint and to try to effect a settlement, within the time period that the Commissioner specifies, between the complainant and the person about which the complaint is made. 2004, c. 3, Sched. A, s. 57 (1).

Dealings without prejudice

(2) If the Commissioner takes an action described in clause (1) (b) or (c) but no settlement is effected within the time period specified,

(a) none of the dealings between the parties to the attempted settlement shall prejudice the rights and duties of the parties under this Act;

(b) none of the information disclosed in the course of trying to effect a settlement shall prejudice the rights and duties of the parties under this Act; and

(c) none of the information disclosed in the course of trying to effect a settlement and that is subject to mediation privilege shall be used or disclosed outside the attempted settlement, including in a review of a complaint under this section or in an inspection under section 60, unless all parties expressly consent. 2004, c. 3, Sched. A, s. 57 (2).

Commissioner's review

(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. 2004, c. 3, Sched. A, s. 57 (3).

No review

(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;

(c) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date the complaint was made is such that a review under this section would likely result in undue prejudice to any person;

(d) the complainant does not have a sufficient personal interest in the subject-matter of the complaint; or

(e) the complaint is frivolous or vexatious or is made in bad faith. 2004, c. 3, Sched. A, s. 57 (4).

Notice

(5) Upon deciding not to review the subject-matter of a complaint, the Commissioner shall give notice of the decision to the complainant and shall specify in the notice the reason for the decision. 2004, c. 3, Sched. A, s. 57 (5).

Same

(6) Upon deciding to review the subject-matter of a complaint, the Commissioner shall give notice of the decision to the person about whom the complaint is made. 2004, c. 3, Sched. A, s. 57 (6).

Commissioner's self-initiated review

58. (1) The Commissioner may, on his or her own initiative, conduct a review of any matter if the Commissioner has reasonable grounds to believe that a person has contravened or is about to contravene a provision of this Act or its regulations and that the subject-matter of the review relates to the contravention. 2004, c. 3, Sched. A, s. 58 (1).

Notice

(2) Upon deciding to conduct a review under this section, the Commissioner shall give notice of the decision to every person whose activities are being reviewed. 2004, c. 3, Sched. A, s. 58 (2).

Conduct of Commissioner's review

59. (1) In conducting a review under section 57 or 58, the Commissioner may make the rules of procedure that the Commissioner considers necessary and the *Statutory Powers Procedure Act* does not apply to the review. 2004, c. 3, Sched. A, s. 59 (1).

Evidence

(2) In conducting a review under section 57 or 58, the Commissioner may receive and accept any evidence and other information that the Commissioner sees fit, whether on oath or by affidavit or otherwise and whether or not it is or would be admissible in a court of law. 2004, c. 3, Sched. A, s. 59 (2).

Inspection powers

60. (1) In conducting a review under section 57 or 58, the Commissioner may, without a warrant or court order, enter and inspect any premises in accordance with this section if,

(a) the Commissioner has reasonable grounds to believe that,

(i) the person about whom the complaint was made or the person whose activities are being reviewed is using the premises for a purpose related to the subject-matter of the complaint or the review, as the case may be, and

(ii) the premises contains books, records or other documents relevant to the subject-matter of the complaint or the review, as the case may be;

(b) the Commissioner is conducting the inspection for the purpose of determining whether the person has contravened or is about to contravene a provision of this Act or its regulations; and

(c) the Commissioner does not have reasonable grounds to believe that a person has committed an offence. 2004, c. 3, Sched. A, s. 60 (1).

Review powers

(2) In conducting a review under section 57 or 58, the Commissioner may,

- (a) demand the production of any books, records or other documents relevant to the subject-matter of the review or copies of extracts from the books, records or other documents;
- (b) inquire into all information, records, information practices of a health information custodian and other matters that are relevant to the subject-matter of the review;
- (c) demand the production for inspection of anything described in clause (b);
- (d) use any data storage, processing or retrieval device or system belonging to the person being investigated in order to produce a record in readable form of any books, records or other documents relevant to the subject-matter of the review; or
- (e) on the premises that the Commissioner has entered, review or copy any books, records or documents that a person produces to the Commissioner, if the Commissioner pays the reasonable cost recovery fee that the health information custodian or person being reviewed may charge. 2004, c. 3, Sched. A, s. 60 (2).

Entry to dwellings

[\(3\)](#) The Commissioner shall not, without the consent of the occupier, exercise a power to enter a place that is being used as a dwelling, except under the authority of a search warrant issued under subsection (4). 2004, c. 3, Sched. A, s. 60 (3).

Search warrants

[\(4\)](#) Where a justice of the peace is satisfied by evidence upon oath or affirmation that there is reasonable ground to believe it is necessary to enter a place that is being used as a dwelling to investigate a complaint that is the subject of a review under section 57, he or she may issue a warrant authorizing the entry by a person named in the warrant. 2004, c. 3, Sched. A, s. 60 (4).

Time and manner for entry

[\(5\)](#) The Commissioner shall exercise the power to enter premises under this section only during reasonable hours for the premises and only in such a manner so as not to interfere with health care that is being provided to any person on the premises at the time of entry. 2004, c. 3, Sched. A, s. 60 (5).

No obstruction

[\(6\)](#) No person shall obstruct the Commissioner who is exercising powers under this section or provide the Commissioner with false or misleading information. 2004, c. 3, Sched. A, s. 60 (6).

Written demand

(7) A demand for books, records or documents or copies of extracts from them under subsection (2) must be in writing and must include a statement of the nature of the things that are required to be produced. 2004, c. 3, Sched. A, s. 60 (7).

Obligation to assist

(8) If the Commissioner makes a demand for any thing under subsection (2), the person having custody of the thing shall produce it to the Commissioner and, at the request of the Commissioner, shall provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device or system to produce a record in readable form, if the demand is for a document. 2004, c. 3, Sched. A, s. 60 (8).

Removal of documents

(9) If a person produces books, records and other documents to the Commissioner, other than those needed for the current health care of any person, the Commissioner may, on issuing a written receipt, remove them and may review or copy any of them if the Commissioner is not able to review and copy them on the premises that the Commissioner has entered. 2004, c. 3, Sched. A, s. 60 (9).

Return of documents

(10) The Commissioner shall carry out any reviewing or copying of documents with reasonable dispatch, and shall forthwith after the reviewing or copying return the documents to the person who produced them. 2004, c. 3, Sched. A, s. 60 (10).

Admissibility of copies

(11) A copy certified by the Commissioner as a copy is admissible in evidence to the same extent, and has the same evidentiary value, as the thing copied. 2004, c. 3, Sched. A, s. 60 (11).

Answers under oath

(12) In conducting a review under section 57 or 58, the Commissioner may, by summons, in the same manner and to the same extent as a superior court of record, require the appearance of any person before the Commissioner and compel them to give oral or written evidence on oath or affirmation. 2004, c. 3, Sched. A, s. 60 (12).

Inspection of record without consent

(13) Despite subsections (2) and (12), the Commissioner shall not inspect a record of, require evidence of, or inquire into, personal health information without the consent of the individual to whom it relates, unless,

(a) the Commissioner first determines that it is reasonably necessary to do so, subject to any conditions or restrictions that the Commissioner specifies, which shall include a time limitation,

in order to carry out the review and that the public interest in carrying out the review justifies dispensing with obtaining the individual's consent in the circumstances; and

(b) the Commissioner provides a statement to the person who has custody or control of the record to be inspected, or the evidence or information to be inquired into, setting out the Commissioner's determination under clause (a) together with brief written reasons and any restrictions and conditions that the Commissioner has specified. 2004, c. 3, Sched. A, s. 60 (13).

Limitation on delegation

[\(14\)](#) Despite subsection 67 (1), the power to make a determination under clause (13) (a) and to approve the brief written reasons under clause (13) (b) may not be delegated except to the Assistant Commissioner. 2004, c. 3, Sched. A, s. 60 (14).

Document privileged

[\(15\)](#) A document or thing produced by a person in the course of a review is privileged in the same manner as if the review were a proceeding in a court. 2007, c. 10, Sched. H, s. 22.

Protection

[\(16\)](#) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of a review by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person. 2004, c. 3, Sched. A, s. 60 (16).

Protection under federal Act

[\(17\)](#) The Commissioner shall inform a person giving a statement or answer in the course of a review by the Commissioner of the person's right to object to answer any question under section 5 of the *Canada Evidence Act*. 2004, c. 3, Sched. A, s. 60 (17).

Representations

[\(18\)](#) The Commissioner shall give the person who made the complaint, the person about whom the complaint is made and any other affected person an opportunity to make representations to the Commissioner. 2004, c. 3, Sched. A, s. 60 (18).

Representative

[\(19\)](#) A person who is given an opportunity to make representations to the Commissioner may be represented by counsel or another person. 2004, c. 3, Sched. A, s. 60 (19).

Access to representations

[\(20\)](#) The Commissioner may permit a person to be present during the representations that another person makes to the Commissioner or to have access to them unless doing so would reveal,

(a) the substance of a record of personal health information, for which a health information custodian claims to be entitled to refuse a request for access made under section 53; or

(b) personal health information to which an individual is not entitled to request access under section 53. 2004, c. 3, Sched. A, s. 60 (20).

Proof of appointment

[\(21\)](#) If the Commissioner or Assistant Commissioner has delegated his or her powers under this section to an officer or employee of the Commissioner, the officer or employee who exercises the powers shall, upon request, produce the certificate of delegation signed by the Commissioner or Assistant Commissioner, as the case may be. 2004, c. 3, Sched. A, s. 60 (21).

Powers of Commissioner

[61. \(1\)](#) After conducting a review under section 57 or 58, the Commissioner may,

(a) if the review relates to a complaint into a request by an individual under subsection 53 (1) for access to a record of personal health information, make an order directing the health information custodian about whom the complaint was made to grant the individual access to the requested record;

(b) if the review relates to a complaint into a request by an individual under subsection 55 (1) for correction of a record of personal health information, make an order directing the health information custodian about whom a complaint was made to make the requested correction;

(c) make an order directing any person whose activities the Commissioner reviewed to perform a duty imposed by this Act or its regulations;

(d) make an order directing any person whose activities the Commissioner reviewed to cease collecting, using or disclosing personal health information if the Commissioner determines that the person is collecting, using or disclosing the information, as the case may be, or is about to do so in contravention of this Act, its regulations or an agreement entered into under this Act;

(e) make an order directing any person whose activities the Commissioner reviewed to dispose of records of personal health information that the Commissioner determines the person collected, used or disclosed in contravention of this Act, its regulations or an agreement entered into under this Act but only if the disposal of the records is not reasonably expected to adversely affect the provision of health care to an individual;

(f) make an order directing any health information custodian whose activities the Commissioner reviewed to change, cease or not commence an information practice specified by the

Commissioner, if the Commissioner determines that the information practice contravenes this Act or its regulations;

(g) make an order directing any health information custodian whose activities the Commissioner reviewed to implement an information practice specified by the Commissioner, if the Commissioner determines that the information practice is reasonably necessary in order to achieve compliance with this Act and its regulations;

(h) make an order directing any person who is an agent of a health information custodian, whose activities the Commissioner reviewed and that an order made under any of clauses (a) to (g) directs to take any action or to refrain from taking any action, to take the action or to refrain from taking the action if the Commissioner considers that it is necessary to make the order against the agent to ensure that the custodian will comply with the order made against the custodian; or

(i) make comments and recommendations on the privacy implications of any matter that is the subject of the review. 2004, c. 3, Sched. A, s. 61 (1).

Terms of order

[\(2\)](#) An order that the Commissioner makes under subsection (1) may contain the terms that the Commissioner considers appropriate. 2004, c. 3, Sched. A, s. 61 (2).

Copy of order, etc.

[\(3\)](#) Upon making comments, recommendations or an order under subsection (1), the Commissioner shall provide a copy of them, including reasons for any order made, to,

(a) the complainant and the person about whom the complaint was made, if the Commissioner made the comments, recommendations or order after conducting a review under section 57 of a complaint;

(b) the person whose activities the Commissioner reviewed, if the Commissioner made the comments, recommendations or order after conducting a review under section 58;

(c) all other persons to whom the order is directed;

(d) the body or bodies that are legally entitled to regulate or review the activities of a health information custodian directed in the order or to whom the comments or recommendations relate; and

(e) any other person whom the Commissioner considers appropriate. 2004, c. 3, Sched. A, s. 61 (3).

No order

[\(4\)](#) If, after conducting a review under section 57 or 58, the Commissioner does not make an order under subsection (1), the Commissioner shall give the complainant, if any, and the person whose activities the Commissioner reviewed a notice that sets out the Commissioner's reasons for not making an order. 2004, c. 3, Sched. A, s. 61 (4).

Appeal of order

[62. \(1\)](#) A person affected by an order of the Commissioner made under any of clauses 61 (1) (c) to (h) may appeal the order to the Divisional Court on a question of law in accordance with the rules of court by filing a notice of appeal within 30 days after receiving the copy of the order. 2004, c. 3, Sched. A, s. 62 (1).

Certificate of Commissioner

[\(2\)](#) In an appeal under this section, the Commissioner shall certify to the Divisional Court,

(a) the order and a statement of the Commissioner's reasons for making the order;

(b) the record of all hearings that the Commissioner has held in conducting the review on which the order is based;

(c) all written representations that the Commissioner received before making the order; and

(d) all other material that the Commissioner considers is relevant to the appeal. 2004, c. 3, Sched. A, s. 62 (2).

Confidentiality of information

[\(3\)](#) In an appeal under this section, the court may take precautions to avoid the disclosure by the court or any person of any personal health information about an individual, including, where appropriate, receiving representations without notice, conducting hearings in private or sealing the court files. 2004, c. 3, Sched. A, s. 62 (3).

Court order

[\(4\)](#) On hearing an appeal under this section, the court may, by order,

(a) direct the Commissioner to make the decisions and to do the acts that the Commissioner is authorized to do under this Act and that the court considers proper; and

(b) if necessary, vary or set aside the Commissioner's order. 2004, c. 3, Sched. A, s. 62 (4).

Compliance by Commissioner

[\(5\)](#) The Commissioner shall comply with the court's order. 2004, c. 3, Sched. A, s. 62 (5).

Enforcement of order

63. An order made by the Commissioner under this Act that has become final as a result of there being no further right of appeal may be filed with the Superior Court of Justice and on filing becomes and is enforceable as a judgment or order of the Superior Court of Justice to the same effect. 2004, c. 3, Sched. A, s. 63.

Further order of Commissioner

64. (1) After conducting a review under section 57 or 58 and making an order under subsection 61 (1), the Commissioner may rescind or vary the order or may make a further order under that subsection if new facts relating to the subject-matter of the review come to the Commissioner's attention or if there is a material change in the circumstances relating to the subject-matter of the review. 2004, c. 3, Sched. A, s. 64 (1).

Circumstances

(2) The Commissioner may exercise the powers described in subsection (1) even if the order that the Commissioner rescinds or varies has been filed with the Superior Court of Justice under section 63. 2004, c. 3, Sched. A, s. 64 (2).

Copy of order, etc.

(3) Upon making a further order under subsection (1), the Commissioner shall provide a copy of it to the persons described in clauses 61 (3) (a) to (e) and shall include with the copy a notice setting out,

(a) the Commissioner's reasons for making the order; and

(b) if the order was made under any of clauses 61 (1) (c) to (h), a statement that the persons affected by the order have the right to appeal described in subsection (4). 2004, c. 3, Sched. A, s. 64 (3).

Appeal

(4) A person affected by an order that the Commissioner rescinds, varies or makes under any of clauses 61 (1) (c) to (h) may appeal the order to the Divisional Court on a question of law in accordance with the rules of court by filing a notice of appeal within 30 days after receiving the copy of the order and subsections 62 (2) to (5) apply to the appeal. 2004, c. 3, Sched. A, s. 64 (4).

Damages for breach of privacy

65. (1) If the Commissioner has made an order under this Act that has become final as the result of there being no further right of appeal, a person affected by the order may commence a proceeding in the Superior Court of Justice for damages for actual harm that the person has

suffered as a result of a contravention of this Act or its regulations. 2004, c. 3, Sched. A, s. 65 (1).

Same

[\(2\)](#) If a person has been convicted of an offence under this Act and the conviction has become final as a result of there being no further right of appeal, a person affected by the conduct that gave rise to the offence may commence a proceeding in the Superior Court of Justice for damages for actual harm that the person has suffered as a result of the conduct. 2004, c. 3, Sched. A, s. 65 (2).

Damages for mental anguish

[\(3\)](#) If, in a proceeding described in subsection (1) or (2), the Superior Court of Justice determines that the harm suffered by the plaintiff was caused by a contravention or offence, as the case may be, that the defendants engaged in wilfully or recklessly, the court may include in its award of damages an award, not exceeding \$10,000, for mental anguish. 2004, c. 3, Sched. A, s. 65 (3).

Commissioner

General powers

[66.](#) The Commissioner may,

- (a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
- (b) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities;
- (c) receive representations from the public concerning the operation of this Act;
- (d) on the request of a health information custodian, offer comments on the custodian's actual or proposed information practices;
- (e) assist in investigations and similar procedures conducted by a person who performs similar functions to the Commissioner under the laws of Canada, except that in providing assistance, the Commissioner shall not use or disclose information collected by or for the Commissioner under this Act;
- (f) in appropriate circumstances, authorize the collection of personal health information about an individual in a manner other than directly from the individual. 2004, c. 3, Sched. A, s. 66.

Delegation

67. (1) The Commissioner may in writing delegate any of the Commissioner's powers, duties or functions under this Act, including the power to make orders, to the Assistant Commissioner or to an officer or employee of the Commissioner. 2004, c. 3, Sched. A, s. 67 (1).

Subdelegation by Assistant Commissioner

(2) The Assistant Commissioner may in writing delegate any of the powers, duties or functions delegated to him or her under subsection (1) to any other officers or employees of the Commissioner, subject to the conditions and restrictions that the Assistant Commissioner specifies in the delegation. 2004, c. 3, Sched. A, s. 67 (2).

Limitations re personal health information

68. (1) The Commissioner and any person acting under his or her authority may collect, use or retain personal health information in the course of carrying out any functions under this Part solely if no other information will serve the purpose of the collection, use or retention of the personal health information and in no other circumstances. 2004, c. 3, Sched. A, s. 68 (1).

Extent of information

(2) The Commissioner and any person acting under his or her authority shall not in the course of carrying out any functions under this Part collect, use or retain more personal health information than is reasonably necessary to enable the Commissioner to perform his or her functions relating to the administration of this Act or for a proceeding under it. 2004, c. 3, Sched. A, s. 68 (2).

Confidentiality

(3) The Commissioner, the Assistant Commissioner and persons acting on behalf of or under the direction of either of them shall not disclose any information that comes to their knowledge in the course of exercising their functions under this Act unless,

(a) the disclosure is required for the purpose of exercising those functions;

(b) the information relates to a health information custodian, the disclosure is made to a body that is legally entitled to regulate or review the activities of the custodian and the Commissioner or the Assistant Commissioner is of the opinion that the disclosure is justified;

(c) the Commissioner obtained the information under subsection 60 (12) and the disclosure is required in a prosecution for an offence under section 131 of the *Criminal Code* (Canada) in respect of sworn testimony; or

(d) the disclosure is made to the Attorney General, the information relates to the commission of an offence against an Act or an Act of Canada and the Commissioner is of the view that there is evidence of such an offence. 2004, c. 3, Sched. A, s. 68 (3).

Same

[\(4\)](#) Despite anything in subsection (3), the Commissioner, the Assistant Commissioner and persons acting on behalf of or under the direction of either of them shall not disclose,

(a) any quality of care information that comes to their knowledge in the course of exercising their functions under this Act; or

(b) the identity of a person, other than a complainant under subsection 56 (1), who has provided information to the Commissioner and who has requested the Commissioner to keep the person's identity confidential. 2004, c. 3, Sched. A, s. 68 (4).

Information in review or proceeding

[\(5\)](#) The Commissioner in a review under section 57 or 58 and a court, tribunal or other person, including the Commissioner, in a proceeding mentioned in section 65 or this section shall take every reasonable precaution, including, when appropriate, receiving representations without notice and conducting hearings that are closed to the public, to avoid the disclosure of any information for which a health information custodian is entitled to refuse a request for access made under section 53. 2004, c. 3, Sched. A, s. 68 (5).

Not compellable witness

[\(6\)](#) The Commissioner, the Assistant Commissioner and persons acting on behalf of or under the direction of either of them shall not be required to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise of their functions under this Act that they are prohibited from disclosing under subsection (3) or (4). 2004, c. 3, Sched. A, s. 68 (6).

Immunity

[69.](#) No action or other proceeding for damages may be instituted against the Commissioner, the Assistant Commissioner or any person acting on behalf of or under the direction of either of them for,

(a) anything done, reported or said in good faith and in the exercise or intended exercise of any of their powers or duties under this Act; or

(b) any alleged neglect or default in the exercise in good faith of any of their powers or duties under this Act. 2004, c. 3, Sched. A, s. 69.

PART VII GENERAL

Non-retaliation

[70.](#) No one shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person by reason that,

(a) the person, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that any other person has contravened or is about to contravene a provision of this Act or its regulations;

(b) the person, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order to avoid having any person contravene a provision of this Act or its regulations;

(c) the person, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention of refusing to do anything that is in contravention of a provision of this Act or its regulations; or

(d) any person believes that the person will do anything described in clause (a), (b) or (c). 2004, c. 3, Sched. A, s. 70.

Immunity

71. (1) No action or other proceeding for damages may be instituted against a health information custodian or any other person for,

(a) anything done, reported or said, both in good faith and reasonably in the circumstances, in the exercise or intended exercise of any of their powers or duties under this Act; or

(b) any alleged neglect or default that was reasonable in the circumstances in the exercise in good faith of any of their powers or duties under this Act. 2004, c. 3, Sched. A, s. 71 (1).

Crown liability

(2) Despite subsections 5 (2) and (4) of the *Proceedings Against the Crown Act*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which it would otherwise be subject. 2004, c. 3, Sched. A, s. 71 (2).

Substitute decision-maker

(3) A person who, on behalf of or in the place of an individual, gives or refuses consent to a collection, use or disclosure of personal health information about the individual, makes a request, gives an instruction or takes a step is not liable for damages for doing so if the person acts reasonably in the circumstances, in good faith and in accordance with this Act and its regulations. 2004, c. 3, Sched. A, s. 71 (3).

Reliance on assertion

(4) Unless it is not reasonable to do so in the circumstances, a person is entitled to rely on the accuracy of an assertion made by another person, in connection with a collection, use or disclosure of, or access to, the information under this Act, to the effect that the other person,

(a) is a person who is authorized to request access to a record of personal health information under section 53;

(b) is a person who is entitled under section 5 or 23 or subsection 26 (1) to consent to the collection, use or disclosure of personal health information about another individual;

(c) meets the requirement of clauses 26 (2) (b) and (c); or

(d) holds the beliefs described in subsection 26 (5). 2004, c. 3, Sched. A, s. 71 (4).

Offences

72. (1) A person is guilty of an offence if the person,

(a) wilfully collects, uses or discloses personal health information in contravention of this Act or its regulations;

(b) makes a request under this Act, under false pretences, for access to or correction of a record of personal health information;

(c) in connection with the collection, use or disclosure of personal health information or access to a record of personal health information, makes an assertion, knowing that it is untrue, to the effect that the person,

(i) is a person who is entitled to consent to the collection, use or disclosure of personal health information about another individual,

(ii) meets the requirement of clauses 26 (2) (b) and (c),

(iii) holds the beliefs described in subsection 26 (5), or

(iv) is a person entitled to access to a record of personal health information under section 52;

(d) disposes of a record of personal health information in the custody or under the control of the custodian with an intent to evade a request for access to the record that the custodian has received under subsection 53 (1);

(e) wilfully disposes of a record of personal health information in contravention of section 13;

(f) contravenes subsection 34 (2), (3) or (4) or clause 47 (15) (a), (e) or (f);

(g) wilfully obstructs the Commissioner or a person known to be acting under the authority of the Commissioner in the performance of his or her functions under this Act;

(h) wilfully makes a false statement to mislead or attempt to mislead the Commissioner or a person known to be acting under the authority of the Commissioner in the performance of his or her functions under this Act;

(i) wilfully fails to comply with an order made by the Commissioner or a person known to be acting under the authority of the Commissioner under this Act; or

(j) contravenes section 70. 2004, c. 3, Sched. A, s. 72 (1).

Penalty

(2) A person who is guilty of an offence under subsection (1) is liable, on conviction,

(a) if the person is a natural person, to a fine of not more than \$50,000; and

(b) if the person is not a natural person, to a fine of not more than \$250,000. 2004, c. 3, Sched. A, s. 72 (2).

Officers, etc.

(3) If a corporation commits an offence under this Act, every officer, member, employee or other agent of the corporation who authorized the offence, or who had the authority to prevent the offence from being committed but knowingly refrained from doing so, is a party to and guilty of the offence and is liable, on conviction, to the penalty for the offence, whether or not the corporation has been prosecuted or convicted. 2004, c. 3, Sched. A, s. 72 (3).

No prosecution

(4) No person is liable to prosecution for an offence against this or any other Act by reason of complying with a requirement of the Commissioner under this Act. 2004, c. 3, Sched. A, s. 72 (4).

Commencing a prosecution

(5) No person other than the Attorney General or an agent for the Attorney General may commence a prosecution for an offence under subsection (1). 2004, c. 3, Sched. A, s. 72 (5); 2006, c. 21, Sched. C, s. 128.

Regulations

73. (1) Subject to section 74, the Lieutenant Governor in Council may make regulations,

(a) prescribing or specifying anything that this Act describes as being prescribed, specified, described, provided for, authorized or required in the regulations made under this Act;

(b) exempting persons or classes of persons from the persons described in clause (d) of the definition of “health care practitioner” in section 2;

(c) specifying persons or classes of persons who shall not be included in the definition of “health information custodian” in subsection 3 (1);

(d) specifying that certain types of information shall or shall not be included in the definition of “personal health information” in subsection 4 (1);

(e) defining, for the purposes of this Act and its regulations, any word or expression used in this Act that has not already been expressly defined in this Act;

(f) making any provision of this Act or its regulations, that applies to some but not all health information custodians, applicable to a prescribed person mentioned in paragraph 8 of the definition of “health information custodian” in subsection 3 (1) or a member of a prescribed class of persons mentioned in that paragraph;

(g) specifying requirements with respect to information practices for the purposes of subsection 10 (1), including conditions that a health information custodian is required to comply with when collecting, using or disclosing personal health information or classes of personal health information, or specifying procedural processes or requirements for setting requirements with respect to information practices for the purposes of that subsection;

(h) specifying requirements, or a process for setting requirements, for the purposes of subsection 10 (3) with which a health information custodian is required to comply when using electronic means to collect, use, modify, disclose, retain or dispose of personal health information, including standards for transactions, data elements for transactions, code sets for data elements and procedures for the transmission and authentication of electronic signatures;

(i) specifying requirements for the purposes of subsection 17 (1), including requiring that a health information custodian and its agent enter into an agreement that complies with the regulations made under clause (k) before the custodian provides personal health information to the agent;

(j) specifying requirements that an agreement entered into under this Act or its regulations must contain;

(k) specifying requirements, restrictions or prohibitions with respect to the collection, use or disclosure of any class of personal health information by any person in addition to the requirements, restrictions or prohibitions set out in this Act;

(l) specifying requirements that an express instruction mentioned in clause 37 (1) (a), 38 (1) (a) or 50 (1) (e) must meet;

(m) permitting notices, statements or any other things, that under this Act are required to be provided in writing, to be provided in electronic or other form instead, subject to the conditions or restrictions that are specified by the regulations made under this Act;

(n) prescribing under what circumstances the Canadian Blood Services may collect, use and disclose personal health information, the conditions that apply to the collection, use and disclosure of personal health information by the Canadian Blood Services and disclosures that may be made by a health information custodian to the Canadian Blood Services;

(o) specifying information relating to the administration or enforcement of this Act that is required to be contained in a report made under subsection 58 (1) of the *Freedom of Information and Protection of Privacy Act*;

(p) respecting any matter necessary or advisable to carry out effectively the purposes of this Act. 2004, c. 3, Sched. A, s. 73 (1).

General or specific application

(2) A regulation made under this Act may be of general application or specific to any person or persons or class or classes in its application. 2004, c. 3, Sched. A, s. 73 (2).

Classes

(3) A class described in the regulations made under this Act may be described according to any characteristic or combination of characteristics and may be described to include or exclude any specified member, whether or not with the same characteristics. 2004, c. 3, Sched. A, s. 73 (3).

Public consultation before making regulations

74. (1) Subject to subsection (7), the Lieutenant Governor in Council shall not make any regulation under section 73 unless,

(a) the Minister has published a notice of the proposed regulation in *The Ontario Gazette* and given notice of the proposed regulation by all other means that the Minister considers appropriate for the purpose of providing notice to the persons who may be affected by the proposed regulation;

(b) the notice complies with the requirements of this section;

(c) the time periods specified in the notice, during which members of the public may exercise a right described in clause (2) (b) or (c), have expired; and

(d) the Minister has considered whatever comments and submissions that members of the public have made on the proposed regulation in accordance with clause (2) (b) or (c) and has reported to the Lieutenant Governor in Council on what, if any, changes to the proposed regulation the Minister considers appropriate. 2004, c. 3, Sched. A, s. 74 (1).

Contents of notice

(2) The notice mentioned in clause (1) (a) shall contain,

- (a) a description of the proposed regulation and the text of it;
- (b) a statement of the time period during which members of the public may submit written comments on the proposed regulation to the Minister and the manner in which and the address to which the comments must be submitted;
- (c) a description of whatever other rights, in addition to the right described in clause (b), that members of the public have to make submissions on the proposed regulation and the manner in which and the time period during which those rights must be exercised;
- (d) a statement of where and when members of the public may review written information about the proposed regulation;
- (e) all prescribed information; and
- (f) all other information that the Minister considers appropriate. 2004, c. 3, Sched. A, s. 74 (2).

Time period for comments

(3) The time period mentioned in clauses (2) (b) and (c) shall be at least 60 days after the Minister gives the notice mentioned in clause (1) (a) unless the Minister shortens the time period in accordance with subsection (4). 2004, c. 3, Sched. A, s. 74 (3).

Shorter time period for comments

(4) The Minister may shorten the time period if, in the Minister's opinion,

- (a) the urgency of the situation requires it;
- (b) the proposed regulation clarifies the intent or operation of this Act or the regulations; or
- (c) the proposed regulation is of a minor or technical nature. 2004, c. 3, Sched. A, s. 74 (4).

Discretion to make regulations

(5) Upon receiving the Minister's report mentioned in clause (1) (d), the Lieutenant Governor in Council, without further notice under subsection (1), may make the proposed regulation with the changes that the Lieutenant Governor in Council considers appropriate, whether or not those changes are mentioned in the Minister's report. 2004, c. 3, Sched. A, s. 74 (5).

No public consultation

[\(6\)](#) The Minister may decide that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under section 73 if, in the Minister's opinion,

- (a) the urgency of the situation requires it;
- (b) the proposed regulation clarifies the intent or operation of this Act or the regulations; or
- (c) the proposed regulation is of a minor or technical nature. 2004, c. 3, Sched. A, s. 74 (6).

Same

[\(7\)](#) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under section 73,

- (a) those subsections do not apply to the power of the Lieutenant Governor in Council to make the regulation; and
- (b) the Minister shall give notice of the decision to the public and to the Commissioner as soon as is reasonably possible after making the decision. 2004, c. 3, Sched. A, s. 74 (7).

Contents of notice

[\(8\)](#) The notice mentioned in clause (7) (b) shall include a statement of the Minister's reasons for making the decision and all other information that the Minister considers appropriate. 2004, c. 3, Sched. A, s. 74 (8).

Publication of notice

[\(9\)](#) The Minister shall publish the notice mentioned in clause (7) (b) in *The Ontario Gazette* and give the notice by all other means that the Minister considers appropriate. 2004, c. 3, Sched. A, s. 74 (9).

Temporary regulation

[\(10\)](#) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under section 73 because the Minister is of the opinion that the urgency of the situation requires it, the regulation shall,

- (a) be identified as a temporary regulation in the text of the regulation; and
- (b) unless it is revoked before its expiry, expire at a time specified in the regulation, which shall not be after the second anniversary of the day on which the regulation comes into force. 2004, c. 3, Sched. A, s. 74 (10).

No review

[\(11\)](#) Subject to subsection (12), neither a court, nor the Commissioner shall review any action, decision, failure to take action or failure to make a decision by the Lieutenant Governor in Council or the Minister under this section. 2004, c. 3, Sched. A, s. 74 (11).

Exception

[\(12\)](#) Any person resident in Ontario may make an application for judicial review under the *Judicial Review Procedure Act* on the grounds that the Minister has not taken a step required by this section. 2004, c. 3, Sched. A, s. 74 (12).

Time for application

[\(13\)](#) No person shall make an application under subsection (12) with respect to a regulation later than 21 days after the day on which,

(a) the Minister publishes a notice with respect to the regulation under clause (1) (a) or subsection (9), where applicable; or

(b) the regulation is filed, if it is a regulation described in subsection (10). 2004, c. 3, Sched. A, s. 74 (13).

Review of Act

[75.](#) A committee of the Legislative Assembly shall,

(a) begin a comprehensive review of this Act not later than the third anniversary of the day on which this section comes into force; and

(b) within one year after beginning that review, make recommendations to the Assembly concerning amendments to this Act. 2004, c. 3, Sched. A, s. 75.

[76.-98.](#) Omitted (amends or repeals other Acts). 2004, c. 3, Sched. A, ss. 76-98.

[99.](#) Omitted (provides for coming into force of provisions of this Act). 2004, c. 3, Sched. A, s. 99.

[100.](#) Omitted (enacts short title of this Act). 2004, c. 3, Sched. A, s. 100.

[Français](#)

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WOULD YOU LIKE MORE INFORMATION?

Text of the *Personal Health Information Protection Act, 2004*:

http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/04p03_e.htm

or

http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b031ra.pdf

Text of the Minister's notice of the proposed regulations for public consultation:

[http://www.ontariogazette.gov.on.ca/mbs/Gazette/Gazette.nsf/Main/C55931AF70373F0085256EC5006931F3/\\$FILE/137-27.pdf](http://www.ontariogazette.gov.on.ca/mbs/Gazette/Gazette.nsf/Main/C55931AF70373F0085256EC5006931F3/$FILE/137-27.pdf)

or

http://www.health.gov.on.ca/english/public/updates/archives/hu_03/priv_legislation.html

Legislative history of *Personal Health Information Protection Act, 2004*:

http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/index.htm#P288_21637

Related Ministry of Health and Long-Term Care documents:

http://www.health.gov.on.ca/english/public/updates/archives/hu_03/priv_legislation.html

or

http://www.health.gov.on.ca/english/providers/project/priv_legislation/priv_legislation.html

Office of the Information and Privacy Commissioner/Ontario:

<http://www.ipc.on.ca>

For questions about the *Personal Health Information Protection Act, 2004*, call the ministry INFOLine at

1-800-461-2036 (Toll-free in Ontario)

TTY 1-800-387-5559

Hours of operation are 8:30am - 5:00pm