

Content of Proposed Regulation

The proposed regulation would make a number of minor housekeeping amendments to the existing regulation under PHIPA, Regulation 329/04, including the following:

- Amendments to s.1 of Regulation 329/04 ('Definitions') to clarify that:
 - the "officer in charge" of a psychiatric facility within the meaning of the *Mental Health Act* may be treated as the health information custodian in respect of the facility, together with the corporation that operates the facility, for the purposes of PHIPA, thus streamlining the interaction of PHIPA with the *Mental Health Act*;
 - destruction of a record of personal health information under PHIPA may only be done in such a manner that the reconstruction of the record is not reasonably foreseeable in the circumstances;
 - the provision of PHIPA [s.36(1)(b)] that allows a health information custodian to collect personal health information indirectly for health care purposes, without patient consent, where it is not otherwise reasonably possible to collect personal health information that can be reasonably relied on as "accurate", applies where the information cannot otherwise be reasonably relied on as being correct and sufficient for the purposes for which the information is reasonably required;
 - a health information custodian may use the name and contact information of a person's substitute decision-maker for the purpose of seeking the person's or substitute decision maker's consent under s.37(1)(g) of the Act;
 - for the purposes of s. 43(1)(f) of PHIPA, a health information custodian is considered to be subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* if the custodian is an institution under one of those Acts or if the custodian acts as part of such an institution; and
 - the PHIPA provision [s. 51(3)] referring access requests regarding a health information custodian that is acting as an agent of an institution under *Freedom of Information and Protection of Privacy Act* or *Municipal Freedom of Information and Protection of Privacy Act* to the institution applies only where the health information custodian is a health care practitioner, (and a related section is proposed to be added to the Regulation 329/04, as section 24.1, to permit the agent to provide the relevant information to the institution to process the request.)
- Amendments to s. 3 of Regulation 329/04 ('Health Information Custodians') to:
 - provide that public health laboratories established under s. 79 of the *Health Protection and Promotion Act*, which are deemed to be a single health information custodian, have the Director of Laboratories Branch as their head;
 - prescribe as a health information custodian with respect to all of its functions the Ontario Air Ambulance Services Corporation;
 - prescribe as a health information custodian a municipality that operates a communications service within the meaning of the *Ambulance Act* with respect to all of its functions in operating the communications service; and
 - prescribe as a health information custodian any person who takes over the complete custody or control of records of personal health information due to the bankruptcy or insolvency of a health information custodian.

Notice of Minister of Health and Long-Term Care

NOTICE OF PROPOSED REGULATION

Personal Health Information Protection Act, 2004

The Minister of Health and Long-Term Care on behalf of the Government of Ontario invites public comments on a regulation proposed to be made under the *Personal Health Information Protection Act, 2004* ("PHIPA").

PHIPA came into force on November 1, 2004. Ontario Regulation 329/04, "General," made under PHIPA also came into force on November 1, 2004.

The Government is proposing a regulation to amend Regulation 329/04. The Act requires that the Minister publish a notice of the proposed regulation and allow 60 days for public comment, after which the Minister reports to the Lieutenant Governor in Council, who may then finalize the regulation with or without changes.

- Amendment to s. 5 of Regulation 329/04 to clarify that:
 - in the event of a conflict between PHIPA and the *Trillium Gift of Life Network Act* the person authorized to make information decisions incidental to a decision about a gift under the provisions of the *Trillium Gift of Life Network Act* has priority over any other PHIPA substitute decision-maker; and
 - in the event of a conflict between PHIPA and s. 44(3) of the *Social Work and Social Service Work Act, 1998*, which prohibits the naming of a client in a report required to be made under that section without the client's consent, s. 44(3) of the *Social Work and Social Service Work Act, 1998* prevails.
- Amendment adding a new section to Regulation 329/04 to require a health information custodian and one or more agents of that custodian who are providing a patient's personal health information to each other for health care purposes to notify each other when not all the personal health information required for the purposes of providing health care is being provided, as a result of a patient's express instruction to limit the provision of such information, consistent with the requirement for disclosures between separate custodians for health care purposes in the Act.
- Amendment to s.10 of Regulation 329/04, regarding the collection, use and disclosure of personal health information for fundraising purposes, allowing a health information custodian to assume an individual's implied consent to use and disclose the individual's name and specified contact information for the purpose of fundraising activities where the health information custodian collected the personal health information before November 1, 2004, unless the custodian is aware that the individual has expressly withheld or withdrawn the consent, and making minor editorial changes to improve the clarity of the provision.
- Amendment to s.11 of Regulation 329/04 to permit a person who conducts health research to collect and use health numbers to the extent that the individual to whom the number was issued has provided a valid consent to the collection and use of the number for that purpose.
- A technical amendment to s. 12[2] of Regulation 329/04 to remove a redundant clause.
- Amendment to s.13 of Regulation 329/04 to remove London Health Sciences Center in respect of the Ontario Joint Replacement Registry from the list of persons prescribed under s. 39(1)(c) and to add North York General Hospital in respect of the Ontario Genetic Screening and Testing Database and the Hospital for Sick Children in respect of the Fetal Alert Network.
- Amendment to s.13 of Regulation 329/04 to provide for the approval of the practices and procedures of persons prescribed under s. 39(1)(c) by the Information and Privacy Commissioner every three years.
- Amendment to Regulation 329/04 adding a section clarifying that a health information custodian must provide a written notice to an individual if an access request is denied on the grounds that the record is excluded from Part V of the Act which deals with access rights.
- Amendment to Regulation 329/04 to prescribe the maximum amount of fees that a health information custodian may charge an individual in making a record of personal health information or part of it available to the individual or providing a copy of it to the individual under Part V of PHIPA.

Invitation to Provide Comments on Proposed Regulations

The public is invited to provide written comments on the proposed regulation over a 60-day period, commencing on March 11, 2006 and ending on May 10, 2006.

In providing comments, please consider whether the proposed amendments to Regulation 329/04 should be made, with or without changes. Furthermore, please consider whether any other amendment

should be made to Regulation 329/04. Please be as specific as possible, and provide a full rationale for any suggested changes or additions.

Written comments may be addressed to:

Ms. Carol Appathurai
 Ministry of Health and Long Term Care
 Strategic Policy Branch
 8th Floor Hepburn Block
 Toronto, Ontario
 M7A 1R3
 Fax: (416) 314-8275

The proposed regulation set out following this notice is provided in English and French. We welcome your input in either English or French.

All comments and submissions received during the comment period will be considered during final preparation of the regulation. The content, structure and form of the proposed regulation is subject to change as a result of the comment process in the discretion of the Lieutenant Governor in Council, who has the final decision on the contents of any regulation.

Information respecting the *Personal Health Information Protection Act, 2004*, Regulation 329/04, and electronic copies of this notice, including the text of the proposed regulation, may be accessed through the Ministry of Health and Long Term Care's web-site at the following address:

http://www.health.gov.on.ca/english/public/legislation/bill_31/priv_legislation.html

Copies of the legislation and Regulation 329/04 are also available from Publications Ontario, 50 Grosvenor St., Toronto, Ontario, M7A 1N8, (416) 326-5300.

Please note that unless requested and agreed otherwise by the Ministry all materials or comments received from organizations in response to this Notice will be considered public information and may be used and disclosed by the Ministry to assist the Ministry in evaluating and revising the proposed regulation. This may involve disclosing materials or comments, or summaries of them, to other interested parties during and after the request for public comment process.

An individual who provides materials or comments and who indicates an affiliation with an organization will be considered to have submitted those comments or materials on behalf of the organization so identified.

Materials or comments received from individuals who do not indicate an affiliation with an organization will not be considered public information unless expressly stated otherwise by the individual. However, materials or comments provided by individuals may be used and disclosed by the Ministry to assist in evaluating and revising the proposed regulation. Personal information of those who do not specify an organizational affiliation, such as an individual's name and contact details, will not be disclosed by the Ministry without the individual's consent unless required by law.

If you have any questions about the collection of this information, you can contact the Freedom of Information and Privacy Coordinator of the Ministry of Health and Long-Term Care at (416) 327-7040.

**The Honourable George Smitherman
 Minister of Health and Long-Term Care**

PROPOSED REGULATION

under the

PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004

Amending O. Reg. 329/04

(General)

Note: Ontario Regulation 329/04 has not previously been amended.

1. Section 1 of Ontario Regulation 329/04 is amended by adding the following subsections:

(3.1) For the purposes of subparagraph 4 i of the definition of “health information custodian” in subsection 3 (1) of the Act, a “person who operates” a psychiatric facility within the meaning of the *Mental Health Act* includes the officer in charge of the facility within the meaning of the *Mental Health Act*.

.....

(5.1) For the purposes of subsection 13 (1) of the Act, “disposed of in a secure manner” does not include destruction of a record of personal health information unless the record is destroyed in such a manner that the reconstruction of the record is not reasonably foreseeable in the circumstances.

.....

(8.1) For the purposes of subclause 36 (1) (b) (i) of the Act, personal health information is “accurate” if it is correct and sufficient for the purposes for which the information is reasonably required.

(8.2) For the purposes of clause 37 (1) (g) of the Act,

- (a) “the individual’s consent” includes the consent of a substitute decision-maker on the individual’s behalf in accordance with the Act; and
- (b) “the individual’s name and contact information” includes the name and contact information of the individual’s substitute decision-maker, if any.

.....

(11) For the purposes of clause 43 (1) (f) of the Act, a health information custodian,

- (a) is subject to the *Freedom of Information and Protection of Privacy Act* if the custodian is an institution under that Act or is acting as part of an institution under that Act; and
- (b) is subject to the *Municipal Freedom of Information and Protection of Privacy Act* if the custodian is an institution under that Act or is acting as part of an institution under that Act.

(12) For the purposes of subsection 51 (3) of the Act, “a health information custodian acting as an agent of an institution” means a health care practitioner who is acting as part of the institution.

2. Subsection 3 (3) of the Regulation is revoked and the following substituted:

(3) With respect to public health laboratory centres established and maintained under section 79 of the *Health Protection and Promotion Act*, the Director of the Laboratories Branch of the Ministry of Health and Long-Term Care,

- (a) is prescribed as a health information custodian;
- (b) is prescribed as a single health information custodian with respect to all the functions of the public health laboratory centres; and
- (c) shall be deemed to be included in the list of types of custodians referred to in subsections 20 (2) and (3) and clause 38 (1) (a) of the Act.

(4) The Ontario Air Ambulance Services Corporation is prescribed as a single health information custodian with respect to all of its functions and shall be deemed to be included in the list of types of custodians referred to in subsections 20 (2) and (3) and clause 38 (1) (a) of the Act.

(5) Every municipality that operates a communications service within the meaning of the *Ambulance Act* is prescribed as a single health

information custodian with respect to all of its functions in operating the communications service.

(6) Where records of personal health information held by a health information custodian come under the complete custody or control of another person as a result of the bankruptcy or insolvency of the health information custodian, that person is prescribed as the health information custodian with respect to those records.

3. (1) Section 5 of the Regulation is amended by adding the following paragraph:

3.1 Subsection 44 (3) of the *Social Work and Social Service Work Act, 1998*.

(2) Section 5 of the Regulation is amended by adding the following subsection:

(2) Section 5 of the *Trillium Gift of Life Network Act* prevails over the Act in the event of a conflict.

4. The Regulation is amended by adding the following section:

Notification if no consent

8.1 For the purposes of subsection 20 (2) and clause 37 (1) (a) of the Act, if a health information custodian described in paragraph 1, 2, 3 or 4 of the definition of “health information custodian” in subsection 3 (1) of the Act provides personal health information about an individual to an agent of the custodian for the purpose of providing health care or assisting in the provision of health care to the individual and if the custodian does not have the consent of the individual to provide all the personal health information about the individual that the custodian considers reasonably necessary for that purpose, the custodian shall notify the agent to whom the custodian provides the information of that fact.

5. (1) Subsection 10 (1) of the Regulation is revoked and the following substituted:

Fundraising

(1) The following types of contact information are prescribed for the purposes of clause 32 (1) (b) of the Act:

- 1. The mailing address of the individual.
- 2. The name and mailing address of the individual’s substitute decision-maker.

(2) Paragraph 2 of subsection 10 (2) of the Regulation is amended by adding “For personal health information collected on or after November 1, 2004,” at the beginning.

(3) Subsection 10 (2) of the Regulation is amended by adding the following paragraph:

2.1 For personal health information collected before November 1, 2004, a health information custodian is entitled to assume that it has the individual’s implied consent to use or disclose the individual’s name and contact information for the purpose of fundraising activities, unless the custodian is aware that the individual has expressly withheld or withdrawn the consent.

(4) Subsection 10 (3) of the Regulation is revoked.

6. Section 11 of the Regulation is amended by adding the following paragraph:

5. A person conducting health research to the extent that the individual to whom the health number was issued has provided a valid consent to the collection or use of his or her health number for that purpose.

7. Paragraph 2 of section 12 of the Regulation is amended by striking out the portion before subparagraph i and substituting the following:

2. A researcher who has custody or control of personal health information, including a health number, by reason of a disclosure authorized under section 44 of the Act may disclose the health number to a person who is a prescribed person for the purposes of clause 39 (1) (c) of the Act, an entity prescribed for the purposes of subsection 45 (1) of the Act or another researcher if,

.....

8. (1) Subsection 13 (1) of the Regulation is amended by striking out the portion before paragraph 1 and substituting the following:

Registries of personal health information

- (1) The following are prescribed persons for the purposes of clause 39 (1) (c) of the Act if the requirements of subsection (2) are satisfied:

.....

(2) Paragraph 3 of subsection 13 (1) of the Regulation is revoked and the following substituted:

3. North York General Hospital in respect of the Ontario Genetic Screening and Testing Database.

(3) Subsection 13 (1) of the Regulation is amended by adding the following paragraph:

5. The Hospital for Sick Children in respect of the Fetal Alert Network.

(4) Subsection 13 (2) of the Regulation is revoked and the following substituted:

- (2) A person who is a prescribed person for the purposes of clause 39 (1) (c) of the Act shall put into place practices and procedures that are approved by the Commissioner every three years and that are to protect the privacy of the individuals whose personal health information it receives and to maintain the confidentiality of the information.

9. The Regulation is amended by adding the following sections:

Permission to disclose

24.1 A health information custodian mentioned in subsection 51 (3) of the Act may disclose the record mentioned in that subsection to an 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.

Notice, Part does not apply

24.2 For the purposes of clause 54 (1) (b) of the Act, written notice shall also be provided if the health information custodian concludes that the record is one to which Part V of the Act does not apply.

.....

Fees for access to records

25.1 (1) For the purposes of subsection 54 (11) of the Act, the amount of the fee that may be charged to an individual shall not exceed \$30 for any or all of the following:

1. Receipt and clarification, if necessary, of a request for a record.
2. Providing an estimate of the fee that will be payable under subsection 54 (10) of the Act in connection with the request.
3. Locating and retrieving the record.
4. Review of the contents of the record for not more than 15 minutes by the health information custodian or an agent of the custodian to determine if the record contains personal health information to which access may be refused.
5. Preparation of a response letter to the individual.

6. Preparation of the record for photocopying, printing or electronic transmission.
7. Photocopying the record to a maximum of the first 20 pages or printing the record, if it is stored in electronic form, to a maximum of the first 20 pages, excluding the printing of photographs from photographs stored in electronic form.
8. Packaging of the photocopied or printed copy of the record for shipping or faxing.
9. If the record is stored in electronic form, electronically transmitting a copy of the electronic record instead of printing a copy of the record and shipping or faxing the printed copy.
10. The cost of faxing a copy of the record to a fax number in Ontario or mailing a copy of the record by ordinary mail to an address in Canada.
11. Supervising the individual's examination of the original record for not more than 15 minutes.

(2) In addition to the fee charged under subsection (1), fees for the services set out in Column 1 of Table 1 shall not, for the purposes of subsection 54 (11) of the Act, exceed the amounts set out opposite the service in Column 2 of the Table.

10. The Regulation is amended by adding the following Table:

TABLE 1

ITEM	COLUMN 1	COLUMN 2
1.	For making and providing photocopies or computer printouts of a record	25 cents for each page after the first 20 pages
2.	For making and providing a paper copy of a record from microfilm or microfiche	50 cents per page
3.	For making and providing a floppy disk or a compact disk containing a copy of a record stored in electronic form	\$10
4.	For making and providing a microfiche copy of a record stored on microfiche	50 cents per sheet
5.	For making and providing a copy of a microfilm of a record stored on microfilm that is,	
	i. 16 mm	\$25 per reel
	ii. 35 mm	\$32 per reel
6.	For printing a photograph from a negative or from a photograph stored in electronic form, per print,	
	i. measuring 4" x 5"	\$10
	ii. measuring 5" x 7"	\$13
	iii. measuring 8" x 10"	\$19
	iv. measuring 11" x 14"	\$26
	v. measuring 18" x 20"	\$32
7.	For making and providing a copy of a 35 mm slide	\$2
8.	For making and providing a copy of an audio cassette	\$5
9.	For making and providing a copy of a ¼", ½" or 8 mm video cassette,	
	i. that is one hour or less in length	\$20
	ii. that is more than one hour but not more than two hours in length	\$25
10.	For making and providing a copy of a ¾" video cassette,	
	i. that is not more than 30 minutes in length	\$18
	ii. that is more than 30 minutes but not more than one hour in length	\$23
11.	For producing a record stored on medical film, including x-ray, CT and MRI films	\$5 per film
12.	For the review by a health information	\$45 for every 15

	custodian or an agent of the custodian of the contents of a record to determine if the record contains personal health information to which access may be refused	minutes after the first 15 minutes
13.	For supervising an individual's examination of original records	\$6.75 for every 15 minutes

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