

# ***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**

**PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004:**

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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).

<b>RULES RESPECTING THE COLLECTION, USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION</b>
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## + **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”.

<b>RIGHT OF CORRECTION</b>
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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.

## 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](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](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](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](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](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](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