

Overview
of
Consent Requirements
in
The Health Information Protection Act

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Introduction

The requirement for consent for the collection, use and disclosure of personal health information exists throughout *The Health Information Protection Act (HIPA)*. In particular sections 26 and 27 regarding use and disclosure contain important requirements for trustees to consider regarding consent.

The following overview of consent in HIPA will provide the user with a basic understanding of how consent works in the Act.

Using the Act

Understanding the order of the Act is important for understanding how to interpret the consent provisions.

Part II – Rights of the Individual - this part identifies the rights that individuals have under the Act in regard to their own personal health information. Sections 5, 6 and 7 all provide important information regarding consent including what is required to make a consent a valid consent.

Part II should be consulted when consent is required in other parts of the Act.

Part IV – Limits on Collection, Use and Disclosure of Personal Health Information by Trustees - this part provides rules regarding the collection, use and disclosure of personal health information by trustees including describing circumstances where consent is required. In particular Section 26 and 27 provide rules regarding use and disclosure of personal health information.

Part IV should be consulted when considering collection, use or disclosure of personal health information or when developing policy for collection, use or disclosure.

N.B.: *The Health Information Protection Act* and this overview deal with consent for collection, use and disclosure of personal health information – not with consent for treatment or service.

Please note that this Overview is provided for reference purposes only. The Overview discusses the intent of specific clauses and should not be considered an interpretation of the law. The Health Information Protection Act should be consulted for interpretations. Trustees should seek the advice of legal council as necessary.

Acting on a Consent collected by others*See Section 6 HIPA*

The Act contemplates situations where a trustee will receive a consent from another trustee and enables that trustee to act on that consent without also seeking to confirm the consent or obtain an additional consent. Subsection 6(6) of the Act states:

6(6) A trustee, other than the trustee who obtained the consent, may act in accordance with an express consent in writing or a record of an express consent having been given without verifying that the consent meets the requirements of subsection (1) unless the trustee who intends to act has reason to believe that the consent does not meet those requirements.

Consent can be Time-limited*See Section 6 of HIPA*

Section 6 provides for the option of making a consent “effective for a limited period.” HIPA does not set a specific time frame for a consent to apply. An appropriate time limit will vary with the type of consent required. The circumstances of the request should be considered if a time limit is set.

Consent by Minors*See Section 56 of HIPA*

HIPAA provides guidance for issues of consent regarding individuals less than 18 years of age. Specifically, the Act states that:

56 Any right or power conferred on an individual by this Act may be exercised:

(c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustee, the individual understands the nature of the right or power and the consequences of exercising the right or power;

(d) where the individual is less than 18 years of age, by the individual’s legal custodian in situations where, in the opinion of the trustee, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;

The intent of subsection 56(c) is to allow a trustee to accept the consent of an individual less than 18 years of age, provided the trustee believes the individual understands the consequences of the decision. This is intended to reflect the common practice of providing certain health services to a minor provided he/she understands the nature of the service, without the consent of a parent or guardian.

Similarly, subsection 56(d) provides guidance for how to respond if a trustee receives consent from the parent or legal guardian for use or disclosure of personal health information of someone under 18 years of age. Specifically the intent of the section is to allow the trustee to disclose the information only if they believe it would not constitute an unreasonable invasion of privacy. In this case, if there is any doubt or uncertainty as to whether the minor would consent, it is probably not reasonable to conclude that it would not be an invasion of privacy. It is probably sensible to seek consent of the minor.

Consent by Others

See Section 56 of HIPA

The Act anticipates that there will be circumstances in which an individual is not able to exercise their own rights and powers conferred by the Act, this includes the right to consent to the collection, use or disclosure of personal health information. In these circumstances, a trustee should be guided by **Section 56 – Exercise of Rights by Other Persons**. The section reads as follows:

56 Any right or power conferred on an individual by this Act may be exercised:

- (a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;*
- (b) where a personal guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;*
- (c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustee, the individual understands the nature of the right or power and the consequences of exercising the right or power;*
- (d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the trustee, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;*
- (e) where the individual does not have the capacity to give consent:*
 - (i) by a person designated by the Minister of Social Services if the individual is receiving services pursuant to The Residential Services Act or The Rehabilitation Act; or*
 - (ii) by a person who, pursuant to The Health Care Directives and Substitute Health Care Decision Makers Act, is entitled to make a health care decision, as defined in that Act, on behalf of the individual; or*

(f) by any person designated in writing by the individual pursuant to section 15.

Deemed Consent

See Sections 26 and 27 of HIPA

The Act states that consent is not required to use or disclose personal health information if it is required to provide a service to an individual. This includes using or disclosing personal health information to:

- arrange for a service;
- assess the need for a service;
- provide a service;
- continue provision of a service; or
- support the provision of a service.

An individual's **consent is deemed to exist** where personal health information is required for these purposes. The service must be one which is requested or required by the individual.

Where an individual's consent is deemed to exist, it must be for the purpose for which the trustee collected the information or for a purpose that is consistent with that purpose. In addition to service delivery, consent can also be deemed to exist for the purpose of disclosing personal health information of an individual to that individual's next of kin or someone with whom the individual has a close personal relationship if the disclosure relates to health services currently being provided to the individual and the individual has not expressly stated that they do not want their information to be disclosed.

In circumstances where a trustee determines that an individual's consent is deemed to exist for service delivery, use or disclosure of the individual's personal health information by the trustee can only take place where:

- the use or disclosure is in accordance with established privacy and security policies and procedures; and
- if the use or disclosure is being made by a health professional, such access, use or disclosure must be in accordance with the ethical guidelines applicable to the health professional.

Specifically, subsections 27(1) to (3) read as follows:

27(1) A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

(2) A subject individual is deemed to consent to the disclosure of personal health information:

- (a) for the purpose for which the information was collected by the trustee or for a purpose that is consistent with that purpose;*
- (b) for the purpose of arranging, assessing the need for, providing, continuing, or supporting the provision of, a service requested or required by the subject individual; or*
- (c) to the subject individual's next of kin or someone with whom the subject individual has a close personal relationship if:

 - (i) the disclosure relates to health services currently being provided to the subject individual; and*
 - (ii) the subject individual has not expressed a contrary intention to a disclosure of that type.**

(3) A trustee shall not disclose personal health information on the basis of a consent pursuant to subsection (2) unless:

- (a) in the case of a trustee other than a health professional, the trustee has established policies and procedures to restrict the disclosure of personal health information to those persons who require the information to carry out a purpose for which the information was collected or to carry out a purpose authorized pursuant to this Act; or*
- (b) in the case of a trustee who is a health professional, the trustee makes the disclosure in accordance with the ethical practices of the trustee's profession.*

Express Consent See Sections 6, 26, 27 & 29 (in particular) of HIPA

Where a consent is required by the Act (not deemed), it may be express or implied. Subsection 6(4) reads as follows:

6(4) Consent may be express or implied unless otherwise provided.

An express consent may be oral or written and must be consistent with the conditions laid out in Section 6.

Section 6 of HIPA places emphasis on the **process** of gaining consent, including the need for an express consent to be an informed consent. A consent form should not be the sole focus of the consent process. A consent form should only serve as a record of a valid consent being given. A signed consent form which results from a process that does not comply with Section 6 will not likely be treated as valid.

Implied Consent

See Section 6 of HIPA

Where a consent is required by the Act (not deemed), it may be express or implied. Subsection 6(4) reads as follows:

6(4) Consent may be express or implied unless otherwise provided.

Where consent is implied, there must be the ability for a trustee to infer the consent of an individual in such circumstances. The intent of an implied consent is to enable a trustee to use or disclose personal health information for the purpose the information is collected without having to specifically ask if it is OK to use or disclose the information for that purpose. Yet consent is still considered. The trustee must be able to form the opinion that the individual **would** consent to the use or disclosure if asked.

Risk Assessment – Trustees will need to consider if there is risk in relying on an implied or inferred consent. If a risk is identified it may be preferable to obtain an express consent.

Informed Consent

See Sections 6 and 9 of HIPA

Consent is informed if “*the individual who gives the consent is provided with the information that a reasonable person in the same circumstances would require in order to make a decision about the collection, use or disclosure of personal health information.*”

An express consent and an implied consent must be an informed consent.

Section 9 of HIPA also requires that trustees take steps to inform individuals of anticipated uses and disclosures of personal health information if collecting from the subject individual. This helps ensure an informed consent.

Revoking Consent*See Section 7 of HIPA*

Section 7 of HIPA ensures the right of individuals to revoke a consent already given. It is important to note that the Section does state that “no revocation shall have retroactive effect.” The intent here is to ensure that a trustee is not in violation of the law if they have acted on a consent received and (for example) disclosed personal health information prior to the consent being revoked.

Valid Consent*See Section 6 of HIPA*

Where consent is required for the collection, use or disclosure of personal health information by the Act, it must be in accordance with Section 6. Specifically, the consent:

- (a) must relate to the purpose for which the information is required;
- (b) must be informed;
- (c) must be given voluntarily; and
- (d) must not be obtained through misrepresentation, fraud or coercion.

Written consent*See Section 6 of HIPA*

Section 6 clarifies that a consent can be express or implied and that a consent need not be in writing.