



*Personal Health Information Act Review*  
Submission

February 13, 2017



## Preamble

With the introduction of health care specific legislation in the province, the guarantee of right of access and accountability for implementation and monitoring of safeguards for protection and integrity of personal health information was established for all public and private custodians entrusted with the custody and control of personal health information. The legislation has functioned to provide a legislative and consequent policy framework to support administration of quality health services for clients in the province. Specifically, the legislation provides a foundation and structure for lifecycle health records management and establishes a number of linkages to health sector specific and other interfacing statutes to support administration of healthcare services according to guiding privacy principles and professional practice standards.

## Strengths & Opportunities

*The Personal Health Information Act* has provided a framework for protection of privacy and has established rights of individuals to direct the management of their personal health information. The legislation is organized around a number of functional areas concerning the administration of health care services. This suggests a framework for management of personal health information as well as quality improvement and accountability indicators concerning fair information practices consistent with the Canadian Standards Association Model Code for the Protection of Personal Information. The legislation has afforded an opportunity to integrate safe information management practices within a quality and safe health care paradigm and culture. The legislation has raised the profile of privacy in the province and provided common language and shared accountabilities between professional practice groups and healthcare stakeholders.

## Challenges

Relative to other jurisdictions, there appears to be an existing gap between the legislative framework proposed by *PHIA* for the collection, use and disclosure of personal health information and that of the *Advance Health Care Directives Act* concerning health care decision making where an individual lacks competency. Increased awareness and education concerning privacy has highlighted other clinical practice issues specific to consent to medical treatment and health services, as well as other practice issues not addressed within the scope of *PHIA*. Other challenges include interpretation of provisions of the Act consistent with the spirit of the Act, awareness and education among professional groups and custodians of private health care enterprises, the interface between custodians and delegation of accountabilities under the Act, and creation of a sustainable knowledge base and integration with professional practice standards.

<b>Definitions under Personal Health Information Act</b>			
Legislative provision	Detail	Identified issue	Action Requested
Subsection 2(1)(a) Intent and use of the definition "agent." This language is prevalent in the Ontario <i>Personal Health Information Protection Act</i> , though it is rarely noted in PHIA beyond its definition.	"Agent", in relation to a custodian, means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent's purposes, whether or not the agent has the authority to bind the custodian, is paid by the custodian or is being remunerated by the custodian;	Current interpretation of this definition includes the analogous term of affiliated health care professional such as a fee for service physician or other affiliated individual acting for or on behalf of the custodian.  This definition is duplicitous and may infer common meaning as health care professional, though with separate definition. Does this term imply global application as in the case of any affiliated individual of a custodian, such as volunteer, clergy, vendor, etc?	Clarification sought concerning intent, utility and application of definition of agent. Is this a redundant definition implied in other definitions contained in the Act?
Subsection 2(1)(h) definition of health care (viii)	Subsection 2(1)(h)(viii) provides as follows: a program or service designated as a health care service in the	The role of spiritual care/clergy is currently omitted in the definition/provision of health care. Currently access to clergy services is by express consent only collected at registration procedures within the RHA at initial point of client contact. Clergy services are not currently considered eligible to	Consideration of spiritual care/clergy for designation as a health care service under section 2(1)(h)(viii) of PHIA.

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	regulations. Accordingly, Newfoundland and Labrador Regulation 38/11 has further designated a service as a health care service.	rely on implied consent within the circle of care.	
Subsection 2(1)(j) definition of health care professional	The <i>Health Professions Act</i> , provides under subsection 2(c) "health profession" means a health profession designated in the Schedule as governed by this Act;	Under the current definition of health care professional pursuant to subsection 2(1)(j) of the <i>Personal Health Information Act</i> , health care professional as designated under subsection 2(c) of the <i>Health Professions Act</i> is excluded from the current definition.	Consider inclusive definition of health care professional to include regulated health care professionals as designated under the <i>Health Professions Act</i>
Subsection 2(1)(aa) definition of use	As defined by <i>PHIA</i> , "use", in relation to personal health information in the custody or control of a custodian, means to handle or deal with the information or to apply the information for a purpose and includes reproducing	The current definition of "use" under the Act is restricted to handling or dealing with information or reproduction thereof and may be conceptualized too narrowly concerning the specific actions associated with use of PHI. Ontario's Bill 119 has proposed an expanded definition of use to include viewing or otherwise dealing with information to capture incidents of unauthorized access to PHI. Bill 119 indicates as follows:  <i>The definition of "use" in section 2 of the Act is amended to clarify that the viewing of personal health</i>	Consider expanded and consistent definition of use as proposed by Bill 119.

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	the information, but does not include disclosing the information.	<i>information, including the viewing of the information by means of the electronic health record, constitutes a use of personal health information under the Act.</i>	
Definition of Custodian, section 4 of PHIA	Home support agencies interface with RHAs, often serving a shared client population, and providing health care services regulated by RHAs in the province.	Section 8 of PHIA, application, applies to custodians and impacts accountabilities for information management under the Act. Currently, home support/care agencies are not included under the definition of custodian though they maintain health care records and are engaged in the provision of health services under the standards and license of the Department of Health, as regulated by RHAs in the province.	Consider role and implications of inclusion of home support agencies under definition of custodian for regulation of PHI in the custody and control of these private enterprises, or specific exclusion under subsection 4(2) of PHIA.
Section 7, representative	Section 7(d) of PHIA contains the language, “by the parent or guardian or a minor”	The language <i>guardian</i> is open to interpretation as it currently exists and has the potential to create conflict between caregivers and natural/birth parents or where custody issues exist in family law or Child, Youth and Family Services matters. As well, as sited in case law, the principle of mature minor is absent from the current provision.	Consider revision or definition of guardian as defined by specific statute. As well, consider inclusion of mature minor principle within PHIA to manage disclosure of information to a minor, consistent with s. 7 the Advance Health Care Directive’s Act which states: <b>7.</b> For the purpose of this section, there shall, in the absence of evidence to the contrary, be a presumption (b) that a person who is 16 years of age or older is competent to make health care decisions; and

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		(c) that a person who is younger than 16 years of age is not competent to make health care decisions.	
Section 7, representative	Section 7(b) of <i>PHIA</i> refers to section 10 of the <i>Advance Health Care Directives Act</i> for determination of substitute decision maker where the individual lacks competence and has not, while competent appointed a SDM. Section 10 of the <i>Act</i> refers to spouse of the individual and precludes other relationship status such as cohabitating partner	PHIA intersects with a number of statutes including the <i>Fatalities Investigations Act</i> and <i>Mental Health Care and Treatment Act</i> as well as others where the definition analogous to representative, specifically spouse or next of kin, is not consistent with PHIA. The <i>Mental Health Care and Treatment Act</i> defines next of kin as follows: (m) "next of kin" means the first named person or a member of the category of person on the following list who has reached the age of 19 years and is mentally competent and available: (i) a spouse or cohabiting partner. Likewise, the <i>Vital Statistics Act</i> 2009 defines "cohabiting partner" as either of 2 persons who have cohabited in a conjugal relationship outside of marriage for at least one year; The <i>Fatalities Investigations Act</i> defines "spouse" with reference to a dead person, as a person to whom the dead person was married or with whom the dead person lived in a conjugal relationship outside marriage immediately prior to that person's death. The practical issue is in relation to authority for access to personal health information under PHIA due to the definition of spouse to exclude cohabitating partner.	Consider clarification of definition of representative to include cohabitating partner

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<b>Correction/Edit Required</b>			
Subsection 2(1)(j) definition of health care professional	(xvi) <i>Social Workers Association Act;</i>	Identified typo in name of act, title should reflect <i>Social Workers Act</i> according to section 1 of the Act as follows: this act may be cited as the <i>Social Workers Act</i> .	Consider revision
Subsection 2(1)(j) definition of health care professional	(xv) <i>Registered Nurses Act ,</i>	Identified typo in name of act, title should reflect <i>Registered Nurses Act, 2008</i> according to section 1 of the Act as follows: This Act may be cited as the <i>Registered Nurses Act, 2008</i> .	Consider revision
Subsection 2(1)(j) definition of health care professional	(i) <i>Chiropractors Act,</i>	Identified typo in name of act, title should reflect <i>Chiropractors Act, 2009</i> , according to section 1 of the Act as follows: This Act may be cited as the <i>Chiropractors Act, 2009</i> .	Consider revision
Subsection 2(1)(j) definition of health care professional	(ii) <i>Dental Act,</i>	Identified typo in name of act, title should reflect <i>Dental Act, 2008</i> , according to section 1 of the Act as follows: This Act may be cited as the <i>Dental Act, 2008</i> .	Consider revision
Section 7, representative	Section 7(f) states, where the individual is a neglected adult within the meaning of the <i>Neglected Adults Welfare Act ,</i> by the Director of Neglected Adults appointed	The <i>Neglected Adults Welfare Act</i> was repealed and replaced with the <i>Adult Protection Act</i>	Correction of sited Act.

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	under that Act;		
<b>Clarification Required due to Potential Conflict with Other Acts</b>			
Interpretation, section 6(2)(c) of PHIA	6(2)(c) A provision of this Act that permits a custodian to disclose personal health information about an individual without the consent of the individual (c) does not prevent the custodian from obtaining the individual's consent to the disclosure.	This provision may imply a conflict with other statutes concerning a duty to report as required by law, where attempts to obtain consent of the individual or representative may pose a flight or other risk to the individual to whom the information relates. Is there concern for interpretation here wherein attempts to garnish consent for disclosure under this section may interfere with a legal duty to report for safety reasons and may unintentionally expose an individual to risk due to knowledge of disclosure, specifically, reporting required under <i>Children and Youth Care and Protection Act</i> or in the case of a police investigation.	Consider qualifying the provision to indicate except where a health or safety risk exists or a criminal investigation is ongoing.
Disclosure to professional bodies for regulation of health care professionals, interpretation of section 41(2) of PHIA	41. (2)(a) A custodian may disclose personal health information without the consent of the individual who is the subject of the information (a) for the	Section 41(1)(a) of PHIA provides mandatory authorization for disclosure of PHI <u>to a body with statutory responsibility</u> for the discipline of a HCP. This is consistent with the language of multiple Acts for the regulation of HCPs. Concerning disclosure to the HCP named in a disciplinary action, section 41(2)(a) of PHIA includes discretionary authority for disclosure of PHI for the purpose of a proceeding or contemplated	Consider further definition of "contemplated proceeding" such that a benchmark is established for timing of disclosure relative to level of professional disciplinary action as consistent across professional regulatory statutes in the province. As well, consider

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	purpose of a proceeding or contemplated proceeding in which the custodian is or is expected to be a party or a witness where the information relates to or is a matter in issue in the proceeding or contemplated proceeding;	proceeding in which the custodian is expected to be a party or witness. Given complaints to regulatory bodies are often resolved through its progressive disciplinary processes and may not reach a hearing or proceeding, this section may not apply to disclosure of PHI to the HCP. Concerning authority for disclosure, it is highly unlikely consent would be provided for disclosure given an allegation is usually brought forward by the client/family. In lieu of consent, the only authority for disclosure is legal provision or other remedy. Barring any legal remedy, where the matter is resolved prior to any proceeding, and in the case of a request premature to any adjudication hearing, I cannot find any authority in the Act for disclosure of client records by the custodian to a HCP named in a disciplinary matter by a professional regulatory body.	qualification to include disclosure to whom and for what purpose?
Section 42 of PHIA, disclosure for enforcement purposes	<b>42.</b> (1) A custodian shall disclose personal health information, including information relating to a person providing health care, without the consent of the individual	The language of the provision as it currently exists implies investigative or authority of law enforcement to compel records/evidence not inherent in the Criminal Code of Canada. As well, this mandatory disclosure provision is reportedly analogous with Ontario privacy legislation, <i>PHIPA</i> which states as follows: <b>43.</b> (1) A health information custodian may disclose personal health information about an individual, (g) subject to the requirements and restrictions, if	Consider intent and language of provision to further qualify and clarify legislative provision to support consistent interpretation.

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	who is the subject of the information to a person carrying out an inspection, investigation or similar procedure that is authorized by or under this Act, the <i>Child, Youth and Family Services Act</i> , another Act or an Act of Canada for the purpose of facilitating the inspection, investigation or similar procedure.	<p>any, that are prescribed, to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under this Act or any other Act of Ontario or an Act of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure;</p> <p>This language is substantially different than the language contained in <i>PHIA</i> however, since this provision of <i>PHIA</i> implies mandatory disclosure pursuant to the <i>NL Interpretation Act</i>, whereas the Ontario provision is discretionary in nature. As well, the provisions differ according to presentation of a warrant, and <i>subject to requirements and restrictions</i>. <i>PHIA</i> makes no reference to this qualification and has the effect of contravening other relevant legislation concerning police investigative powers/power to compel records, with the exception of the <i>Fatalities Investigations Act</i>. This section has supported contradictory interpretation concerning mandatory disclosure to law enforcement. Further, concerning investigations authorized under the <i>Children and Youth Care and Protection Act</i>, the language of section 74 suggests disclosure of PHI concerning a child or youth, while section 42 of <i>PHIA</i> appears to suggest mandatory disclosure of PHI of any individual who is the</p>	

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		<p>subject of the PHI. This implies disclosure of PHI of a parent or other individual, not limited to a child or youth. Section 74(1) of the <i>CYCP Act</i> however states as follows:</p> <p><i>A manager or social worker has the right to information with respect to a child or a youth that is in the custody of or under the control of a public body, as defined in the Access to Information and Protection of Privacy Act, 2015, or a person and that is necessary to enable the manager or social worker to exercise his or her powers or perform his or her duties or functions under this Act.</i></p>	
Section 55 of <i>PHIA</i> , time of response	<b>55.</b> (1) A custodian shall respond to a request under subsection 53(1) without delay and in any event not more than 60 days after receiving the request.	Currently the language of the Act does not define measurement of days as calendar or business days. ATIPP 2015 has defined applicable time limits according to business days, thus reducing the stated time period for processing a request.	Consider revision to qualify days as calendar or business days.

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