

Avoiding Abandoned Health
Records: Guidance for Health
Information Custodians
Changing Practice



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A health information custodian's (custodian) practice can change for a variety of reasons including retirement, relocation, leaving the profession, termination of employment, license suspension, bankruptcy, incapacity, and death. Changes often come at a time when they are not expected.

As a custodian under the *Personal Health Information Protection Act, 2004 (PHIPA)*, you have a legal duty to ensure that health records are not:

- stolen
- lost
- used or disclosed without authority
- copied, modified or disposed of without authority

You are responsible for safeguarding health records before, during, and after a change in practice. This duty does not end until the custody or control of the records passes to another legally authorized person.

If you abandon health records, you raise the risk of privacy breaches, individuals not being able to access and correct their health records, and health care providers not having access to information needed to provide health care.

Privacy breaches may have serious consequences for affected individuals, including identity theft, discrimination and stigmatization. They may also lose trust in the health system and avoid future testing and treatment.

Abandoning health records may also lead to investigations and orders issued by the Information and Privacy Commissioner (IPC) in addition to fines, lawsuits, prosecutions, or discipline by an employer or a regulatory body.

In addition to duties under *PHIPA*, health care practitioners may have other obligations to safeguard health records when there is a change in practice. These obligations may be set out in the law governing your profession or in codes of conduct, standards of practice, policies, and guidelines of the regulatory body governing your profession.

You must take your responsibility to protect health records seriously. Proactive planning for a change in practice will reduce the risk of abandoned health records and help you comply with the law.

WHO IS THE CUSTODIAN WHEN THERE IS A CHANGE IN PRACTICE?

Under Ontario's health privacy law, you are responsible for health records until custody or control of the records passes to another legally authorized person. The new custodian must comply with all the duties and obligations of custodians set out in the law.

IN THE CASE OF DEATH

In the case of your death, your estate trustee, or the person who administers your estate, becomes the custodian until custody or control of the health records is passed to another legally authorized person.

IN THE CASE OF BANKRUPTCY

If you become bankrupt or insolvent and custody or control of the health records passes to another person, that person becomes the custodian.

TRANSFERRING RECORDS TO A SUCCESSOR

If you transfer health records to a successor, the successor becomes the custodian. However, you may only transfer records to a successor who is already a custodian, or who will become a custodian after the transfer. For example, when a physician retires, the records may be transferred to another physician.

When you use the services of a record storage company, you are not transferring the health records. Since a record storage company is not a custodian, you continue to be responsible for health records retained by a record storage company on your behalf.

TRANSFERRING TO AN ARCHIVE

You may transfer records to the Archives of Ontario or to a person prescribed under *PHIPA* who is responsible for the collection and preservation of records of historical or archival importance.

WHO IS THE CUSTODIAN IN A GROUP PRACTICE?

Group practices should have formal group practice agreements in place that identify the custodian and obligations of each person when there is a change in practice.

WHAT OBLIGATIONS DO CUSTODIANS HAVE WHEN CHANGING PRACTICE?

When changing practice, you must have appropriate safeguards in place for health records at all times and ensure that you retain, transfer and dispose of health records securely. You must also notify individuals that you are transferring their health records to a successor.

You are also required to take steps that are reasonable in the circumstances to protect health information from privacy breaches. Note that the steps that are reasonable for a large hospital, with many agents sharing multiple health record systems, may differ from what is reasonable for a small community practice with one or two health care practitioners using one electronic medical record system.

DUTY TO RETAIN HEALTH RECORDS SECURELY

You must retain health records securely. For example, health records should be stored in a locked room that is not accessible to the public. You should also refer to any laws governing your profession and relevant codes of conduct, standards of practice, policies, or guidelines of the regulatory body that address secure retention.

Using Record Storage Companies

You may use the services of an agent, such as a record storage company, to retain records securely on your behalf. To meet your legal obligations, enter into a written agreement requiring the record storage company to:

- abide by your information practices
- only collect, use, disclose, retain and dispose of the records on your behalf as you permit
- abide by any conditions or restrictions you impose for the collection, use, disclosure, retention, or disposal of the health records
- only charge fees for access to and disclosure of the health records according to the rules under *PHIPA*
- notify you, at the first reasonable opportunity, if health records are stolen, lost, or used or disclosed without authority

The written agreement should also set out:

- the purposes for which the record storage company may collect, use, disclose, retain and dispose of the records
- the reasonable safeguards required to protect the health records against theft, loss and unauthorized use or disclosure and against unauthorized copying, modification or disposal
- how the health records are to be retained, transferred and disposed of in a secure manner
- how individuals can exercise their rights of access to and correction of their health records according to the rules under *PHIPA*

DUTY TO TRANSFER RECORDS IN A SECURE MANNER

You must transfer health records securely. For example, when transferring health records to a successor electronically, ensure the health records are properly encrypted.

DUTY TO NOTIFY OF A TRANSFER

You must tell individuals when you transfer records to a successor. They must be notified before the transfer or, if that is not reasonably possible, as soon as possible after the transfer.

Providing Notice to Individuals of a Change in Practice

When notifying individuals, you should provide the notification yourself and avoid the notification coming from an unknown agent, such as a record storage company.

You should give notice directly to individuals. For example, you can provide notice in person at a scheduled appointment, by letter, or by a phone call.

When direct notification is impractical or where contact information is inadequate or out of date, you can use indirect notification. This might include a notice posted in your office or on your website, a recorded message on your answering machine, or a notice in newspaper advertisements. To enhance notification, consider using both indirect and direct ways to tell individuals about the change in practice.

The notice should provide the following (at a minimum):

- a description of the change in practice
- contact information for you or your agent
- contact information for the person who has or will have the records as a result of a transfer, if applicable
- the length of time that you will retain the health records
- how individuals may request access to or correction of their health records
- how individuals may request a transfer of their health records to another custodian

DUTY TO DISPOSE OF RECORDS IN A SECURE MANNER

You must securely dispose of health records. For example, you should shred, rather than recycle, health records. When disposing of health records, ensure that it is not reasonably possible to reconstruct them. You also must adhere to any applicable retention periods before secure disposal.

AVOIDING ABANDONED RECORDS

You should think proactively about how you will continue to meet your obligations under Ontario's health privacy law when there is a change in your practice. Having a succession plan in place will help you to prepare for an unforeseen change in your practice and reduce the risk of abandoned health records. This succession plan and any supporting policies and procedures should be reviewed and updated on a regular basis and whenever your practice changes.

SUCCESSION PLANS

A succession plan should identify:

- the custodian of the health records after the change in practice

- the roles and responsibilities of the estate trustee and any agents (such as a record storage company) that will assist with the secure retention, transfer or disposal of health records
- who will be responsible for:
 - protecting the records against theft, loss, and unauthorized use or disclosure, and against unauthorized copying, modification or disposal
 - ensuring health records are securely retained, transferred or disposed of
 - ensuring individuals can request access to and correction of their health records
 - making agreements with agents setting out their duties in respect of the health records
 - ensuring individuals are appropriately notified before the transfer, or if that is not reasonably possible, as soon as possible after the transfer

WHAT TO DO IF YOU DISCOVER ABANDONED RECORDS

If you discover abandoned health records, make efforts to secure them and prevent further unauthorized disclosure.

If you can identify the custodian from the records, contact them and arrange to securely return the records to them.

If you cannot identify the custodian, but you are able to determine that they are a regulated health care practitioner, report the abandoned records to the regulatory body governing the health care practitioner.

You may also contact the IPC to report abandoned records at:

Information and Privacy Commissioner of Ontario

2 Bloor Street East, Suite 1400

Toronto, ON

M4W 1A8

Toronto Area: 416-326-3333

Long distance: 1-800-387-0073

TDD/TTY: 416-325-7539

info@ipc.on.ca

FURTHER GUIDANCE

The IPC has issued the following guidance, orders and decisions related to abandoned health records, including:

- **Fact Sheet #18—The Secure Transfer of Personal Health Information**
- **Responding to a Health Privacy Breach: Guidelines for the Health Sector**
- **Disposing of Your Electronic Media**
- **HO-003:** Order related to records that were abandoned by a medical and rehabilitation clinic
- **PHIPA Decision 23:** Interim order directing landlord to secure abandoned records pending IPC review
- **PHIPA Decision 28:** Conclusion of review into records abandoned in the wake of the bankruptcy of three corporations that operated four clinics providing health services in the Greater Toronto Area
- **PHIPA Decision 29:** Estate trustee of a deceased physician was found to be the health information custodian and a record storage company was found to be an agent of that custodian

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Information and Privacy
Commissioner of Ontario

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