

MARCH 29, 2019

Comments of the Information and Privacy Commissioner of Ontario on Bill 74

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The Connecting Care Act, 2019 (the Act), proposed in Schedule 1 of Bill 74, *The People's Health Care Act, 2019*, would allow the Minister of Health and Long-Term Care (the Minister) to integrate the health system in Ontario. The Minister would be able to transfer the functions of certain organizations, such as Cancer Care Ontario and eHealth Ontario, to a designated agency to be named Ontario Health (the Agency). The Act would also allow the Minister to designate persons, entities or groups as integrated care delivery systems.

Given the Act proposes fundamental changes to the way health care is delivered in Ontario, it is of utmost importance that appropriate frameworks and safeguards be put in place to protect the privacy and access rights of Ontarians and to ensure accountability and transparency within the health system. The Information and Privacy Commissioner of Ontario (IPC) makes the following recommendations regarding the Act and its implementation.

1. DESIGNATE THE AGENCY AS AN INSTITUTION UNDER THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Section 6 of the Act identifies that the Agency will be responsible for implementing health system strategies developed by the Ministry of Health and Long-Term Care (the Ministry) and for managing health service needs consistent with the Ministry's strategies. As such, the Agency will be performing the functions of a government institution. As well, organizations whose functions could be transferred to the Agency, such as Cancer Care Ontario, eHealth Ontario and local health integration networks, are currently institutions under the *Freedom of Information and Protection of Privacy Act (FIPPA)*. Given the Agency will be performing government functions, it should be required to follow the same privacy and access to information obligations as other government institutions in Ontario.

The designation of the Agency as an institution under *FIPPA* would ensure that individuals are able to exercise their right to access records in the custody or control of the Agency and that the Agency will be required to follow rules that protect the privacy of individuals whose personal information they collect, use or disclose. As an institution, the Agency would also be accountable to the IPC and to the public for how it handles personal information. Its designation as an institution would further promote transparency by requiring the Agency to publish certain documents about its information practices under *FIPPA*.

The IPC recommends that the Agency be designated as an institution under Schedule 1 of *FIPPA* and understands that the government intends to do so.

2. MAKE APPROPRIATE DESIGNATIONS UNDER THE *PERSONAL HEALTH INFORMATION PROTECTION ACT*

Virtually all individuals and organizations involved in the delivery of health care in Ontario are subject to the *Personal Health Information Protection Act (PHIPA)*. Organizations have different designations depending on the role they play in the health system. An organization's designation under *PHIPA* determines the personal health information it can collect, use and disclose and its obligations with respect to that information. The Agency will have to collect, use and disclose personal health information in order to perform its functions. Making appropriate designations under *PHIPA* will give the Agency the legal authority for these collections, uses and disclosures, while ensuring that the privacy and access to information rights of Ontarians are protected. Designation under *PHIPA* will also give the IPC oversight of the Agency's information practices.

The organizations whose functions could be transferred to the Agency are currently designated in a variety of ways under *PHIPA*, including as a prescribed entity, prescribed person, health information custodian, electronic service provider, agent, and health information network provider. If the Agency takes on the functions of these organizations, it must also have the necessary designations.

To ensure clarity and to allow the Agency to be organized in a way that achieves its objectives while protecting the privacy and access rights of individuals, it should be determined, at an early stage, what designations the Agency will require under *PHIPA* to perform its functions. Designations should be made by an amendment to *PHIPA*, where possible, and otherwise by an amendment to its regulation. For example, a health information custodian can be designated by an amendment to subsection 3(1) of *PHIPA*, while a prescribed entity is designated by an amendment to subsection 18(1) of its regulation.

3. REQUIRE THAT PERSONAL HEALTH INFORMATION COLLECTED, USED OR DISCLOSED FOR DIFFERENT PURPOSES BE RETAINED SEPARATELY

The Agency will likely take on the designations and functions of currently separate organizations. Collecting information from disparate sources for different purposes, and then combining and integrating this information, raises a number of privacy, ethical, and social concerns. Therefore, it is important to ensure that personal health information collected, used or disclosed by the Agency for one purpose is kept administratively and logically separate from information collected, used or disclosed for other purposes, unless a comprehensive framework with appropriate safeguards and oversight is put in place.

The IPC recommends amending the Act to include the following provision:

41(13) If the Minister makes an order under section 40, any personal information or personal health information that is transferred to the transfer recipient or is subsequently collected or received by the transfer recipient after it assumes the operations, activities and affairs of the transferor shall be:

- (a) used and disclosed by the transfer recipient for the purposes for which the transferor or the transfer recipient, as the case may be, was authorized to collect or receive the information and for no other purposes, except as permitted or required by law; and
- (b) retained in a manner that is administratively and logically separate from other personal information or personal health information in the custody or control of the transfer recipient.

The IPC also recommends that only a single unit or branch of the Agency be designated to perform each particular function under *PHIPA*.

4. DESIGNATE INTEGRATED CARE DELIVERY SYSTEMS AS HEALTH INFORMATION CUSTODIANS UNDER *PHIPA*

Section 29 of the Act will allow the Minister to designate a person, entity or group of persons or entities, as an integrated care delivery system if it has the ability to deliver three of the following types of services:

- Hospital services
- Primary care services
- Mental health or addiction services
- Home care or community services
- Long-term care services
- Palliative care services
- Any other prescribed service that supports the provision of health care services.

As these integrated care delivery systems will be delivering health care services, they should be designated as health information custodians under section 3 of *PHIPA*. In order for integrated care delivery systems to be able to effectively integrate services

provided by health service providers who are all health information custodians under *PHIPA*, the integrated care delivery systems must themselves be subject to the same legislative framework as health service providers.

Designating integrated care delivery systems as health information custodians will also assist with integration by ensuring uniform health information policies and procedures are in place. It would further ensure that Ontarians' privacy and access to information rights are protected and that integrated care delivery systems are subject to the IPC's oversight.

The IPC recommends amending *PHIPA* in the consequential amending provisions set out in Schedule 3 of Bill 74 as follows:

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(2) Section 2 of the Act is amended by adding the following definitions:

“Agency” means the corporation continued by section 3 of the *Connecting Care Act, 2019*; (“Agence”)

“integrated care delivery system” means a person or entity or group of persons or entities, designated under subsection 29(1) of the *Connecting Care Act, 2019* (“système intégré de prestation de soins”)

(3) Section 3 of the Act is amended by adding the following paragraph immediately following paragraph 4:

4.1. An integrated care delivery system

5. REQUIRE HEALTH SERVICE PROVIDERS AND INTEGRATED CARE DELIVERY SYSTEMS TO SECURELY TRANSFER INFORMATION AND TO PROVIDE NOTICE TO INDIVIDUALS

Section 33 of the Act permits the Minister to order one or more health service providers or integrated care delivery systems to do anything to integrate the health system, including transferring all or part of a service from one location to another and transferring all or substantially all of its operations to another person or entity. As these integration orders will require the transfer of personal information and personal health information, the Act should require that these transfers be made in a secure manner and that notice be given to the individuals whose personal information or personal health information is transferred.

The IPC recommends amending the Act to include the following provisions:

33(7) A health service provider or integrated care delivery system shall ensure that the records of personal information or personal health information that it has in its custody or under its control are transferred in a secure manner and in accordance with the prescribed requirements, if any.

33(8) A health service provider or integrated care delivery system may transfer records of personal information or personal health information about an individual to another person or entity if the health service provider or integrated care delivery system makes reasonable efforts to give notice to the individual before transferring the records or, if that is not reasonably possible, as soon as possible after transferring the records.

6. REQUIRE ORGANIZATIONS TO SECURELY TRANSFER INFORMATION AND TO PROVIDE NOTICE TO THE PUBLIC AND TO INDIVIDUALS

Section 40 of the Act permits the Minister to make an order transferring all or part of the assets, liabilities, rights and obligations to the Agency, a health service provider, or an integrated care delivery system. As these transfers will require the transfer of personal information and personal health information, the Act should require that these transfers be made in a secure manner and that notice be given to the public and to individuals whose personal information or personal health information is transferred.

The IPC recommends amending the Act to include the following provisions:

40(14) An organization listed in subsection (2) shall ensure that the records of personal information or personal health information that it has in its custody or under its control are transferred in a secure manner and in accordance with the prescribed requirements, if any.

40(15) An organization listed in subsection (2) may transfer records of personal information or personal health information about an individual to another person or entity if the organization,

(a) before transferring the records, gives notice to the public; and

(b) subject to the prescribed requirements, if any, makes reasonable efforts to give notice to the individual before transferring the records or, if that is not reasonably possible, as soon as possible after transferring the records.

7. ENSURE TRANSFER RECIPIENTS BECOME RESPONSIBLE FOR ACCESS AND CORRECTION REQUESTS MADE BEFORE OR AT THE TIME OF TRANSFER AND FOR ANY COMPLAINTS, REVIEWS AND APPEALS BEFORE THE IPC

Section 41 of the Act addresses the assumption of rights and obligations when the Minister makes a transfer order. The section specifies that convictions, rulings, orders or judgments in favour of or against a transferor transfer to the transfer recipient. The transfer recipient is similarly deemed to be the plaintiff or defendant in any civil action commenced by or against a transferor.

Section 41, however, does not similarly account for any access or correction requests made to the transfer recipient before or at the time of the transfer. The section also does not address any complaints, appeals and reviews pending before the IPC at the time of transfer.

The IPC recommends that section 41 of the Act be amended to ensure the transfer recipient becomes responsible for access and correction requests made to the transferor before or at the time of the transfer. The transfer recipient must also be responsible for any complaints, appeals and reviews pending before the IPC at the time of the transfer.

The IPC recommends amending the Act to include the following provisions:

41(14) Where a transfer involves transferring the assets, liabilities, rights and obligations of a transferor to a transfer recipient, the transfer recipient shall be responsible for responding to any request made under subsections 24(1), 48(1) or 47(2) of the *Freedom of Information and Protection of Privacy Act*, subsections 17(1), 37(1) or 36(2) of the *Municipal Freedom of Information and Protection of Privacy Act*, or subsections 53(1) or 55(1) of the *Personal Health Information Protection Act* made to the transferor and to which the transferor had not responded on the day immediately before the transfer date.

41(15) Where a transfer involves transferring the assets, liabilities, rights and obligations of a transferor to a transfer recipient, the transfer recipient will be deemed to be the party responsible for responding to any complaint, appeal, review or other proceeding before the Information and Privacy Commissioner of Ontario pertaining to the transferor before the date of the transfer, if applicable.

8. ENSURE *FIPPA* APPLIES TO ALL RECORDS THAT ARE TRANSFERRED TO THE AGENCY

Section 41(9) of the Act clarifies that *FIPPA* applies to a record that is transferred from a transferor to an institution within the meaning of *FIPPA* unless the record was in the custody or control of a transferor who was not an institution as of the date on which the transfer order was made. However, all transferred records will be used by the Agency to perform its functions under the Act, including making decisions about the provision of publicly funded health care in Ontario. As such, individuals should have a right of access to all the records transferred to the Agency.

The IPC recommends amending section 41(9) of the Act as follows:

41(9) For greater certainty, the *Freedom of Information and Protection of Privacy Act* applies to a record that is transferred from a transferor to an institution within the meaning of that Act, ~~unless the record was in the custody or control of a transferor who was not an institution within the meaning of that Act as of the date on which an order under section 40 in respect of the transferor was issued.~~

9. CORRECTION OF TYPOGRAPHICAL ERROR

The consequential amendments to the *Excellent Care for All Act, 2010* set out in section 7 of Schedule 3 of the Act contain what the IPC believes to be a typographical error. This section provides for the repeal of section 13.0.1 of the *Excellent Care for All Act, 2010*, which contains provisions related to the protection of personal health information. These provisions are to be moved to section 13.6 of the *Excellent Care for All Act, 2010*. However, while the original two clauses in section 13.0.1 refer to “personal health information”, one of the clauses to be moved to section 13.6 refers to “personal information” rather than “personal health information.”

To correct this typographical error, the IPC recommends amending the *Excellent Care for All Act, 2010* in the consequential amending provisions in Schedule 3 of Bill 74 as follows:

Excellent Care for All Act, 2010

7 (...)

(14) Subsection 13.6(3) of the Act is repealed and the following substituted:

Disclosure

[...]

Other Information

(4) In exercising their powers under this Act, the patient ombudsman and the Agency shall not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure.



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March 29, 2019