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Information and Privacy Commissioner of Ontario

Fact Sheet

Applying PHIPA and FIPPA/MFIPPA to Personal Health Information

The purpose of this Fact Sheet is to provide organizations that are defined as both health information custodians under the *Personal Health Information Protection Act (PHIPA)* and institutions under public sector privacy and access to information legislation, namely the provincial *Freedom of Information and Protection of Privacy Act (FIPPA)* or its municipal counterpart the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, with guidance about the application of these statutes to personal health information.

Organizations that are both health information custodians and institutions include hospitals (as of January 1, 2012), the Ontario Agency for Health Protection and Promotion, the Ministry of Health and Long-Term Care, the Ministry of Health Promotion, medical officers of health and municipally operated long-term care homes and ambulance services.

This Fact Sheet does not specifically address health information custodians working for institutions that are not health information custodians. For guidance on this issue, please refer to *Fact Sheet 11: Health Information Custodians Working for Non-Health Information Custodians*.

General Rule

Subject to certain exceptions, health information custodians that are also institutions or acting as part of an institution within the meaning of public sector privacy and access to information legislation are governed by *PHIPA*, not *FIPPA* or *MFIPPA*, with respect to personal health information in their custody or under their control.

Personal health information is defined in *PHIPA* as identifying information about an individual that:

- relates to the physical or mental health of the individual;
- relates to the provision of health care to the individual;
- is a plan of service under the *Home Care and Community Services Act, 1994*;
- relates to payments or eligibility for health care or eligibility for coverage for health care;
- relates to the donation of any body part or bodily substance of the individual or that is derived from the testing or examination of any such body part or bodily substance;



- is the individual's health number; or
- identifies an individual's substitute decision-maker.

Personal health information also includes identifying information about an individual that is not health-related but that is contained in a record that includes personal health information about the individual. Such records are referred to as "mixed records."

All other recorded information about an individual that is not personal health information and that is in the custody or under the control of an organization that is both a health information custodian and an institution or part of an institution is subject to *FIPPA* or *MFIPPA*, as the case may be.¹

Exceptions to General Rule

Although personal health information in the custody or control of a health information custodian that is also an institution or acting as part of an institution is generally governed by *PHIPA*, sections 8, 43(1)(f) and 52(1)(f) of *PHIPA* specify that certain provisions in *FIPPA/MFIPPA* also apply to personal health information. The provisions in *FIPPA/MFIPPA* that apply to personal health information are described in detail below. In this context, a reference to a record would include a record of personal health information and a reference to personal information would include personal health information. In addition, a reference to a health information custodian that is also an institution includes a health information custodian that is acting as part of an institution.

Required Disclosures

Section 11 of *FIPPA* and section 5 of *MFIPPA* require the head of an institution to disclose any record if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public, subject to notice being given to any person to whom the information in the record relates if it is practicable to do so.

Permitted Disclosures

Health information custodians under *PHIPA* are permitted to disclose personal health information without consent in a number of circumstances. In addition to those available to all health information custodians, health information custodians that are also institutions under *FIPPA/MFIPPA* may rely on the disclosures without consent that are permitted in subsections 42(1)(c), (g) and (n) of *FIPPA* and subsections 32(c), (g) and (l) of *MFIPPA*.

Subsection 42(1)(c) of *FIPPA* and subsection 32(c) of *MFIPPA* permit the disclosure of personal information, including personal health information, for the purpose for which it was obtained or compiled or for a consistent purpose.

Subsection 42(1)(g) of *FIPPA* and subsection 32(g) of *MFIPPA* permit the disclosure of personal information, including personal health information, where the disclosure is to an institution or law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.



Subsection 42(1)(n) of *FIPPA* and subsection 32(l) of *MFIPPA* permit the disclosure of personal information, including personal health information, to the Government of Canada and, in the case of municipal institutions, to the Government of Canada or the government of Ontario, to facilitate the auditing of shared cost programs.

Mandatory Exemptions from Disclosure

Section 12 of *FIPPA* requires the head of a provincial institution to refuse to disclose certain cabinet records, including records that would reveal the substance of deliberations of cabinet or its committees, subject to enumerated exceptions, for example, where the record is more than 20 years old.

Section 9 of *MFIPPA* requires the head of a municipal institution to refuse to disclose a record if its disclosure could reasonably be expected to reveal information the institution received in confidence from other governments, government agencies, international organizations of states or bodies of such international organizations. However, where the government, government agency, organization or body from which the information was received consents to the disclosure, the disclosure of the record is mandatory in response to a request under *MFIPPA*.

Section 17 of *FIPPA* and section 10 of *MFIPPA* require the head of an institution to refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information supplied in confidence by a third party where disclosure could reasonably be expected to result in one

or more enumerated harms, unless the third party consents to the disclosure. Before the head of an institution discloses a record that might contain such information, the head must give written notice to the third party and provide the third party with an opportunity to make representations as to why the record or a portion of the record should not be disclosed pursuant to section 28 of *FIPPA* and section 21 of *MFIPPA*.

Discretionary Exemptions from Disclosure

Section 15 of *FIPPA* permits the head of a provincial institution to refuse to disclose a record where disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations by the government of Ontario or an institution or reveal information received in confidence from other governments, government agencies or international organizations of states or bodies of such international organizations. Section 16 of *FIPPA* also permits the head of a provincial institution to refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or an allied foreign state or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism. Before such disclosures may be made, cabinet approval is required.

Access Rights under FIPPA or MFIPPA

Subject to limited exceptions, *PHIPA* does not limit a person's right of access to a record of personal health information under section 10 of *FIPPA* or section 4 of *MFIPPA* if all personal health information is reasonably severed from the record.



Access Rights to One's Own Personal Health Information under PHIPA

An individual has a right of access to a record of his or her own personal health information in the custody or under the control of a health information custodian under *PHIPA*, subject to limited exceptions. In addition to the exceptions available to all health information custodians, a health information custodian that is also an institution under *FIPPA* or *MFIPPA* may rely on the exemptions in subsections 49(a), (c) and (e) of *FIPPA* and subsections 38(a) or (c) of *MFIPPA*.

Section 49(a) of *FIPPA* and section 38(a) of *MFIPPA* permit a health information custodian that is also an institution to refuse to provide access to a record where sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 of *FIPPA* or sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 of *MFIPPA* would apply. These exemptions relate to records that:

- would reveal advice or recommendations of employees and consultants of an institution;
- could reasonably be expected to interfere with a law enforcement matter;
- could reasonably be expected to prejudice the economic interests of the institution;
- could reasonably be expected to reveal information received in confidence from other governments or government agencies;
- reveal trade secrets or scientific, technical, commercial, financial or labour relations information supplied in confidence by a third party where disclosure could reasonably be expected to result in one or more enumerated harms;

- are subject to solicitor-client privilege; or
- could reasonably be expected to seriously threaten the health and safety of an individual.

Subsection 49(c) of *FIPPA* and subsection 38(c) of *MFIPPA* permit a health information custodian that is also an institution to refuse to provide access to a record that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

Subsection 49(e) of *FIPPA* permits a health information custodian that is also a provincial institution to refuse to provide access to a record that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence.

Reporting Requirements to the Information and Privacy Commissioner of Ontario

Section 34 of *FIPPA* and section 26 of *MFIPPA* require an institution that is also a health information custodian to make an annual report to the Information and Privacy Commissioner of Ontario (IPC). The IPC has an online reporting tool available on its website at www.ipc.on.ca

The annual report is required to specify:

- the number of requests for access under *FIPPA/MFIPPA* as well as *PHIPA*;



- the number of refusals under *FIPPA*/*MFIPPA* and *PHIPA*, the provisions under which the refusal was made and the number of occasions on which each provision was invoked;
- the number of uses or purposes for which personal information, including personal health information, is disclosed where the use or purpose is not included in the personal information bank index required under *FIPPA*/*MFIPPA* or the written public statements required under *PHIPA*;
- the amount of fees collected; and
- any other information indicating an effort to put into practice the purposes of these statutes.

Annual statistical reports are due by March 1 of the following year. An institution within the meaning of *FIPPA* must also make this annual report available to the public on the Internet or in a reading room, library or office designated for this purpose.

Information Required to be Made Available

Section 33 of *FIPPA* requires the head of a provincial institution to make available to the public certain manuals, directives or guidelines prepared by the institution that interpret statutes or schemes administered by the institution where the interpretations are used in making determinations that affect the rights, privileges, benefits, obligations and liabilities of individuals. It also requires the head of a provincial institution to make publicly available any instructions and guidelines on the administration or enforcement of statutes or schemes administered by the institution that affect the public. These must be

made available to the public on the Internet or in a designated reading room, library or office pursuant to subsection 35(2) of *FIPPA*.

Section 36 of *FIPPA* also requires the head of a provincial institution to provide the minister who is designated as being responsible for *FIPPA* with the information needed to prepare an index of all personal information banks; an annual compilation of all institutions, including where a request for access should be made; and an annual indexed compilation that contains information such as a description of the responsibilities of each institution and a list of the general classes or types of records in the custody or control of each institution.

Section 44 of *FIPPA* requires the head of a provincial institution to ensure that all personal information organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual, is included in a personal information bank.

Similarly, pursuant to section 25 of *MFIPPA*, the head of a municipal institution must make certain information publicly available, including a description of the responsibilities of the institution, a list of the general classes or types of records in its custody or control and the address to which a request for access should be made. The head of a municipal institution is also required, pursuant to section 34 of *MFIPPA*, to make available to the public an index of all personal information banks in the custody or under the control of the institution.



Provisions in *PHIPA* Specific to Health Information Custodians that are Institutions

Permitted Collection

Health information custodians under *PHIPA* are generally only permitted to collect personal health information directly from the individual to whom the personal health information relates. Section 36 of *PHIPA* provides a number of exceptions to this general rule.

In addition to the exceptions available to all health information custodians, a health information custodian that is also an institution under *FIPPA* or *MFIPPA*, may collect personal health information indirectly for certain additional purposes. Specifically, subsection 36(1)(c) of *PHIPA* permits the indirect collection of personal health information for a purpose related to investigating a breach of an agreement or a contravention or alleged contravention of the laws of Ontario or Canada, the conduct of a proceeding or possible proceeding or the statutory function of the health information custodian.

Permitted Use or Disclosure

Health information custodians under *PHIPA* are permitted to use or disclose personal health information without consent for research purposes provided certain requirements are satisfied, including the preparation of a research

plan that must be approved by a research ethics board. If a health information custodian that is an institution under *FIPPA* or *MFIPPA* proposes to use or disclose personal health information, together with personal information that is not personal health information, for research purposes, *PHIPA* rather than *FIPPA* or *MFIPPA* applies to the use or disclosure of that information pursuant to subsections 37(4) and 44(7) of *PHIPA*.

Agent Information

In general, under *PHIPA*, if a health information custodian receives from another health information custodian identifying information contained in a record that relates primarily to one or more of its employees or agents that will be maintained primarily for a purpose other than the provision of health care, then the receiving health information custodian is subject to certain restrictions on the use and disclosure of that information. However, pursuant to subsection 23(2) of Regulation 329/04 to *PHIPA*, these restrictions are not applicable to health information custodians that are also institutions under *FIPPA* or *MFIPPA*.

1. Subject to any records excluded from the application of *FIPPA/MFIPPA*, including those records identified in section 65 of *FIPPA* and section 52 of *MFIPPA*.

Fact Sheet

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If you have any questions, please contact us at info@ipc.on.ca

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