

# PHIA AND PIPEDA

## THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

The *Personal Information Protection and Electronic Documents Act (PIPEDA)* is a privacy act under the jurisdiction of Industry Canada, a department of the federal government. The purpose of *PIPEDA* (Part 1) is to establish rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need for organizations to collect, use, and disclose personal information for purposes that a reasonable person would consider appropriate in the same circumstances.

The *Act* came into force in 2001 for federally-regulated industries (e.g. banking), and came into effect for all other commercial activity on January 1, 2004.

*PIPEDA* applies to any “commercial” activity, including the delivery of health services considered to be commercial. In Nova Scotia, this would include any health provider in private practice including physicians, dentists, physiotherapists, occupational therapists, pharmacists, and pharmacies.<sup>1</sup> It also applies to commercial health facilities including nursing homes.

## PIPEDA AWARENESS RAISING TOOLS

In consultation with Health Canada and provincial health departments, Industry Canada developed a document - *PIPEDA Awareness Raising Tools (PARTs)* - to provide information on the application of *PIPEDA* to the health care sector. Although the document does not provide legal advice and is not binding, it may be useful to commercial health care custodians.

PARTs is available on the Industry Canada (Electronic Commerce branch) website at: <http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00235.html> under *PIPEDA* - Health Sector.

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<sup>1</sup> *PIPEDA* would only apply to the records the providers create in their private practice, not in their activities in a publicly funded facility (e.g. hospital). In the latter case, the custodian would be the District Health Authority, and the records would be covered by *PHIA*.

## PHIA AS “SUBSTANTIALLY SIMILAR” LEGISLATION

When *PIPEDA* came into force for commercial health providers, there were some concerns that the commercial aspect of the federal legislation did not reflect the full range of collections, uses, and disclosures that support the provision of health care. Activities which support health care, including research and quality review activities, were not comprehensively covered in *PIPEDA*, and the “circle of care” was not reflected in the legislation (although PARTs does recognize the concept).

Some Canadian jurisdictions explored ways to bring their provincial health sector fully under their provincial health information legislation. *PIPEDA* contains a provision (section 26(2)) which allows the Governor in Council, by order, to exempt organizations or activities (or classes of organization or activities) from the application of Part 1 of *PIPEDA* regarding the collection, use, or disclosure of personal information within that province.

This order would follow an application from the province to Industry Canada outlining why the provincial privacy legislation should be considered “substantially similar” to *PIPEDA*, and Industry Canada’s recommendation that the provincial act meets the criteria published in the Canada Gazette in 2002.<sup>2</sup>

Some provinces that had developed or were developing health information legislation when *PIPEDA* came into force decided to apply for the “substantially similar” exemption order. To date, Quebec, Ontario, New Brunswick, and Newfoundland and Labrador have been exempted. Other provinces, including Manitoba, have chosen not to seek the exemption order; their health care sector operates under both pieces of legislation.

The Nova Scotia Department of Health and Wellness intends to apply for the “substantially similar” exemption order when *PHIA* comes into force as the application cannot be made until that time. Based on what has happened in other jurisdictions, it is estimated that the review of the legislation and the granting of the order could take up to one year from the date of application.

## COMPLYING WITH *PHIA* AND *PIPEDA*

When *PHIA* is in force but has not yet received the exemption order, commercial providers in the health sector will have to comply with both pieces of legislation – *PIPEDA* and *PHIA*. Experience of other jurisdictions is helpful in determining how this would impact commercial providers in Nova Scotia.

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<sup>2</sup> <http://www.gazette.gc.ca/archives/p1/2002/2002-08-03/pdf/g1-13631.pdf>

In Canada, where two pieces of legislation - one federal and one provincial - govern an issue and an individual cannot comply with both laws, the federal law would be “paramount” over the provincial law. This principle would be true with *PHIA* and *PIPEDA* during the time between when *PHIA* comes into force and when the Government of Canada determines that *PHIA* is “substantially similar” to *PIPEDA*.

In most cases, if health professionals are compliant with *PIPEDA*, they will also be compliant with *PHIA*. There are a few exceptions where *PHIA* has additional privacy requirements:

1. *PHIA* requires that a custodian must report a breach of personal health information to an individual if, in the custodian’s opinion, the breach is likely to cause the individual harm or embarrassment.

This is not required under *PIPEDA*.

2. *PHIA* requires that a custodian must be able to produce a record of user activity for any electronic information system the custodian uses to maintain personal health information.

This is not required under *PIPEDA*.

3. *PHIA* requires that a custodian receive approval of a research ethics board for research conducted using personal health information the custodian itself has collected for care purposes.

This is not required under *PIPEDA*.

In those cases, it would generally not be considered a conflict, as an individual custodian can comply with *PIPEDA* and the additional privacy protections in *PHIA*.

#### EXAMPLE

##### ***PHIA* is in force, but has not yet received an exemption order.**

Kelsey is a physiotherapist with a private practice. She has hired a company to manage her records, including shredding records as required in her retention schedule.

One record was dropped in the street behind her office, and is discovered and reported to her by another business operator in the area.

Although reporting the breach to her patient is not required by *PIPEDA*, she is still required by *PHIA* to report the breach to her patient if the circumstances meet the requirements for mandatory breach reporting.

However, there may also be circumstances where *PIPEDA* may be more advantageous to an individual than *PHIA*, and the individual may wish to have his/her issues considered under the federal legislation.

#### EXAMPLE

Dennis wants to request a copy of his health record from his physician. *PHIA* is in force, but has not yet been deemed to be “substantially similar” to *PIPEDA*.

The access fee regulation for *PHIA* allows for a higher maximum access fee than is permitted under *PIPEDA*. *PIPEDA* allows a physician to provide access to a record at “minimal or no cost” to a patient.

It would be more advantageous for Dennis to request that his physician provides access under the access fee rule in *PIPEDA*.