

OFFENCES AND PENALTIES

OFFENCES

The *Personal Health Information Act* includes thirteen offences that a custodian or any other person may be charged with under the legislation (section 106).

Under section 106 of the legislation, a person is guilty of an offence if the person:

- (a) wilfully collects, uses or discloses health information in contravention of this Act or the regulations;*
- (b) wilfully gains or attempts to gain access to health information¹ in contravention of this Act or the regulations;*
- (c) wilfully obtains or attempts to obtain another individual's personal health information by falsely representing that the person is entitled to the information;*
- (d) fails to protect personal health information in a secure manner as required by this Act;*
- (e) in connection with the collection, use or disclosure of personal health information or access to a record of personal health information makes an assertion, knowing that it is untrue, to the effect that the person is a person who is entitled to consent on behalf of another individual;*
- (f) wilfully disposes of a record of personal health information in contravention of the requirements for protection of personal health information required in this Act or the regulations;*
- (g) requires production of or collects or uses another person's health card number in contravention of this Act or the regulations;*

¹ The *PHIA* regulations (Regulation 2(1)) clarify that “health information” has the same meaning as “personal health information”.

- (h) wilfully alters, falsifies, conceals, destroys or erases any record, or directs another person to do so, with the intent to evade a request for access to the record;*
- (i) wilfully obstructs, makes a false statement to or misleads or attempts to mislead the Review Officer or another person in the performance of the duties, powers or functions of the Review Officer under this Act;*
- (j) wilfully obstructs, makes a false statement to or misleads or attempts to mislead another individual or organization in the performance of the duties, powers or functions of that individual or organization under this Act;*
- (k) uses individually identifying health information to market any service for a commercial purpose or to solicit money unless the individual who is the subject of the health information has expressly consented to its use for that purpose;*
- (l) discloses personal health information contrary to this Act with the intent to obtain a monetary or other material benefit or to confer such a benefit on another person; or*
- (m) breaches the terms and conditions of an agreement entered into with a custodian under this Act.*

“WILFULLY”

Seven of the possible offences state that a person is guilty of an offence if they “*wilfully*”² act in a manner that contravenes the legislation. “*Wilful*” has been defined as intending the result which actually comes to pass³. In order to be found guilty of one of the seven “*wilful*” offences, the person would have to have acted with the intent to do or cause what had actually happened.

EXAMPLE

Darnell is a dentist with a small practice. He has hundreds of patients, each with their own personal health record, but does not have an electronic system. Darnell uses a shredding company to dispose of paper records when he no longer needs them for active patients.

² “*Wilfull*” can also be spelled “*willfull*”

³ Black’s Law Dictionary (2nd edition) online at <http://thelawdictionary.org/wilful/>

One day, the shredding company left two open bags of the patient records on their loading dock, and the wind blew the papers on to the street. One of Darnell's patients found out that her deceased mother's dental record was found on the street and made a complaint to Darnell.

In his response, Darnell acknowledged that he should have had stronger practices to ensure that the information was securely destroyed as required by the legislation. But he stated that his actions were not "wilful" – he did not intend to breach the former patient's privacy, and guarantees that he will engage a company who can provide secure destruction for non-active records.

WHO CAN REPORT AN ALLEGED OFFENCE UNDER *PHIA*?

An alleged offence under *PHIA* can be reported by any person to their local law enforcement agency (e.g. RCMP or municipal police) for further investigation. The law enforcement agency would work with the Nova Scotia Public Prosecution Service to advance appropriate charges resulting from their investigation.

PENALTIES

PENALTIES – GENERAL

Penalties under the *Personal Health Information Act* can only be levied when the provincial court finds a person guilty of an offence under the *Act*.

There are two categories of penalty:

1. a penalty for an individual (section 107(a)); and
2. a penalty for a corporation (section 107(b)).

PENALTIES – INDIVIDUAL

The penalty for an individual guilty of an offence under *PHIA* or its regulations is liable on summary conviction to:

- a fine of not more than ten thousand dollars (\$10,000); or
- imprisonment for six months; or
- both.

If the custodian is a solo practitioner (e.g. a physiotherapist) and has not incorporated, the solo practitioner could be the person liable for the fine or imprisonment, even if the offence was the fault of one of the sole practitioner's employees. The individual bringing the complaint could choose to make the complaint against the custodian, the employee who allegedly committed the offence, or both.

EXAMPLE

Jacob is a physiotherapist. He has followed all the requirements of being a custodian under *PHIA*, including appointing a contact person, training his employees on *PHIA*, and creating and maintaining all required policies and materials.

A physiotherapy assistant reads and copies the medical files of one of Jacob's patients without permission or cause to have access to them. The patient finds out, and wants to make a complaint.

In this case, the patient could make a complaint against the assistant. However, since Jacob is the custodian, the patient could decide to make the complaint against Jacob as well; as a custodian under *PHIA*, he is liable for the actions of his employee.

If the patient pursued the complaint to the court, Jacob could be the defendant and a fine could be levied against him.

Note: In this case, Jacob could use his strict adherence to the requirements in *PHIA* as a defense.

PENALTIES – CORPORATION

Some custodians will be corporations, and therefore could be subject to the penalty for corporations. This applies to organizations, but also to individual health professionals or to a group of health professionals who have incorporated.

If a custodian has incorporated, has been found guilty of a corporate offence under *PHIA*, and the court has determined that a penalty is warranted, the court could levy the penalty for corporations against the custodian – a fine of not more than fifty thousand dollars (\$50,000).

However, in section 108, the legislation also provides that any officer, member, employee or other agent of the corporation who "*authorized the offence or who had the authority to prevent*

the offence from being committed but knowingly refrained from doing so” would be considered a party to the offence and would be liable for the penalty for a corporate offence, whether or not the corporation had been prosecuted or convicted.

EXAMPLE

Stella, a physician, has incorporated her medical practice as Physician Practice Inc. She employs three other physicians, two nurses, a dietician and two receptionists.

James, a patient of Kenneth (a physician employed by Physician Practice Inc.), makes a request for his medical records. Kenneth reviews the records and finds reference to lab results that he failed to follow up on. Kenneth takes the sheet with the lab results out of the record and provides a copy of the rest of the record to James.

James recalls having lab tests as ordered by his physician, so he contacts the hospital to request a copy of any lab results. The hospital provides a copy of the lab results to him.

James asks the Review Officer to review the case. The Review Officer determines that the hospital lab did send the results to his physician, but they were not included in the medical records provided to James.

James could make a complaint against Kenneth, as he was the person who allegedly committed the offence. Since the custodian – Physician Practice Inc. - was incorporated, the court could consider the offence a corporate offence. If Kenneth was found guilty, the penalty levied against him could be the corporate penalty, even if James decides not to pursue a complaint against Physician Practice Inc.